



Office of the New York State Attorney General Letitia James

Office of Special Investigation

July 21, 2023

Report on the Investigation into the Death of David Litts

SUMMARY

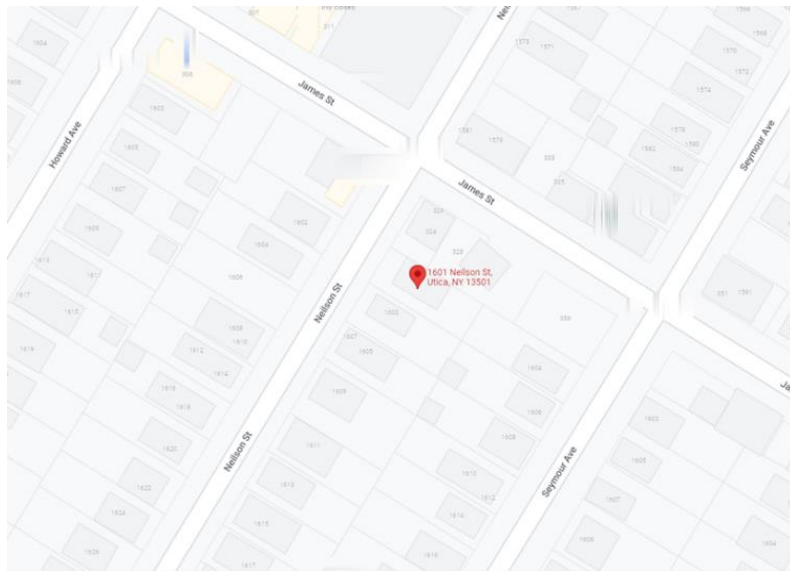
New York Executive Law Section 70-b directs the Attorney General's Office of Special Investigation (OSI) to investigate and, if warranted, to prosecute offenses arising from any incident in which the death of a person is caused by a police officer or a peace officer. When OSI does not seek charges against the officer, Section 70-b requires OSI to issue a public report describing its investigation.

On September 12, 2022, Utica Police Department (UPD) Sergeant Tyler Mowers and Police Officer Brian Gil shot David Litts, causing his death. This is OSI's report concerning that incident. After a thorough investigation of the facts and review of the law, OSI concludes that a prosecutor would not be able to disprove beyond a reasonable doubt that Sgt. Mowers and PO Gil were justified when they shot Mr. Litts, and, therefore, OSI will not seek charges against them.

FACTS

Preliminary Information

The incident took place on a residential street in the city of Utica, near Mr. Litts's house, which is shown on the map below:



The shooting was captured on police body worn cameras (BWCs) and was preceded by a long 911 call, which partly overlapped with police arrival at Mr. Litts's house. OSI has created a single, synchronized audio-video presentation from the BWC footage of Sgts. Charles Goldstein, Joshua Skibinski, and Mowers, and POs Gil and Leby Gonzalez, and from portions

of the 911 recording, which may be accessed at the link in the footnote.¹

Pre-Police Arrival

Based on review of the Oneida County Emergency 911 Center's audio recordings, on September 12, 2022, at 7:49 p.m., David Litts called 911 and said he wished to die, was tired of living, and suffered long-term symptoms from the COVID-19 virus. Mr. Litts said he had threatened his wife with a gun and slapped her around. Mr. Litts said he had a .22 caliber gun and a shotgun and would kill any officers who came to his home.

Police Arrival

The 911 Center dispatched members of UPD to Mr. Litts's home. At 7:52 p.m.² Sgt. Skibinski arrived, followed by POs Gonzalez, Gil, and Michael Flo, as well as Sgts. Mowers and Goldstein. Events at the scene were captured by the BWCs of Sgts. Skibinski, Mowers, and Goldstein, and POs Gil and Gonzalez. Unless otherwise noted, the following facts are taken from BWC footage.

Between 7:51 p.m. and 7:55 p.m. the 911 dispatcher advised officers that Mr. Litts said: he had a .22 pistol in the backyard; "if he comes outside it will be with a shotgun"; he had an M-16; and "he is taking pills." At 7:55 p.m. Sgt. Skibinski's BWC captured Mr. Litts yelling from inside his home. At 7:57 p.m. Sgt. Mowers positioned himself next to Sgt. Skibinski with a rifle. At 7:58 p.m. PO Flo, using a loudspeaker from one of the patrol vehicles, told Mr. Litts to come outside with his hands up; Mr. Litts yelled from inside the home. At 8:01 p.m. Mr. Litts walked outside with a butcher or kitchen knife in his right hand and yelled threats of harm to the officers on scene while pacing on the sidewalk, including, "I will kill everybody. I have an M-16 in the house. I have a fucking grenade." Sgt. Skibinski suggested using "less than lethal"³ weapons to officers at the scene, with no audible response from other officers.

At 8:02 p.m. Investigator Jessica Dodge began to talk to⁴ Mr. Litts over a loudspeaker, telling Mr. Litts to drop the knife and asking him how she could help him and what had happened that had made him upset. Around the same time, Sgt. Goldstein arrived on scene and asked officers whether any of them had "less than lethal"; there were no audible responses. PO Flo

¹ The evidence reviewed in this matter included: video footage from BWCs; civilian cell phone footage; third-party surveillance footage; dispatch recordings and associated records (911 calls, radio runs, and city dispatches); photographs (of the scene, autopsy, and physical evidence); interviews conducted by OSI; and UPD incident reports. A compilation video of the event can be found here: [Compilation Video](#)

² All times in this report are approximate. There are micro-variations among the timestamps on the BWC footage and the dispatch recordings, which is not uncommon, because the media are not synchronized.

³ Per UPD policy and OSI's meeting with UPD Chief Williams, the less than lethal weapons available to UPD personnel are conducted energy devices (Tasers), shotguns that propel rubber bullets, and bola wrap.

⁴ Inv. Dodge was trained in Crisis Negotiation and Advanced Crisis Negotiation on November 2016 and April 2022.

and Sgt. Goldstein unholstered their Tasers, and Sgt. Mowers and Inv. Joshua Femia held patrol rifles. At 8:04 p.m., while pacing on the sidewalk in front of his house, Mr. Litts yelled for the lights being shined on him to be turned off. At 8:06 p.m. Sgt. Goldstein instructed other officers to retrieve “less than lethal” from one of the patrol vehicles on the scene. At the same time PO Amanda Maciol informed Sgt. Goldstein that Mr. Litts’s wife⁵ had just arrived, and Sgt. Goldstein provided this information to Inv. Dodge.

At 8:08 p.m., as Inv. Dodge continued to encourage Mr. Litts to put the knife down and talk, Mr. Litts advanced with the knife raised toward officers at the intersection of James Street and Neilson Street. Mr. Litts then stopped advancing and walked back toward his house. At 8:08:52 p.m. Sgt. Goldstein ordered PO Drew Putrello, who was at the intersection of James Street and Neilson Street, near stationed patrol units, to retrieve a “less than lethal” shotgun.⁶ At 8:08:54 p.m., as Mr. Litts walked toward his house, Inv. Dodge told Mr. Litts that his wife was present and wanted to speak with him. Mr. Litts walked south on Neilson Street, where POs Gil and Gonzalez were positioned behind a patrol car. Officers repeatedly shouted at Mr. Litts to “drop the knife” and “put your hands in the air,” but Mr. Litts did not comply. Mr. Litts then raised the knife in his hand, stepped off the sidewalk, and advanced towards POs Gil and Gonzalez.



Still image from PO Gil’s BWC, at time stamp 8:08:38 pm, showing Mr. Litts holding a knife.

⁵ See Mrs. Litts’s interview summary.

⁶ Despite the multiple supervisor requests for the less than lethal shotgun, no officer retrieved the weapon in the course of the incident.



Still image from PO Gil's BWC, at time stamp 8:08:47 pm, showing Mr. Litts advancing toward POs Gil and Gonzalez (the knife is not visible in this image).

At 8:09 p.m., as Mr. Litts moved quickly towards POs Gil and Gonzalez with the knife raised, Sgt. Mowers and PO Gil fired at Mr. Litts, striking him seven times. Mr. Litts fell.

At 8:14 p.m. ambulance personnel, who had been summoned to the scene by Officer Flo, arrived. Based on medical records, they transported Mr. Litts to St. Elizabeth's Medical Center where, despite live-saving measures, he was pronounced dead at 8:33 p.m.

Post-Shooting Investigation

Crime Scene and Search Warrant

Lt. Keith Phillips secured a UPD-issued AX-15 tactical AR-15 rifle, which uses .223 caliber ammunition, from Sgt. Mowers and a UPD-issued Smith & Wesson .45 caliber handgun from PO Gil. At UPD headquarters, Lt. Phillips turned over the weapons to Crime Scene Unit (CSU) member Police Officer (PO) Silas Frye.

At 9:24 p.m. Invs. Joshua Grande and Daniel Gymburch, and POs Raymond Kellogg, Silas Frye, Tyler Shepard, and Stanley Rejrat, of CSU, arrived at the scene.

According to Inv. Gymburch's report, he found five .223 casings on the sidewalk near the east side of the 1600 block of Neilson Street, the area where Sgt. Mowers fired at Mr. Litts. Also, just south of the driveway of 1601 Neilson Street, Sgt. Gymburch recovered a .45 projectile from a parked 2013 Nissan Altima. On the sidewalk and grassy area just south of

1604 Neilson Street, on the west side of the street, CSU members found three .45 spent casings, in the area where PO Gil fired at Mr. Litts. CSU members also found a kitchen knife with blood on the blade on the sidewalk in front of 1604 Neilson Street. The blood on the knife was not tested, but, according to CSU reports and OSI interviews of on scene UPD officers (which are summarized below), the knife fell in the grass next to Mr. Litts, who was bleeding, and, upon securing Mr. Litts after he fell, the knife was kicked away from him.



A CSU photo of the knife Mr. Litts was holding.

On September 12, 2022, Inv. Gymburch and OSI Detective Christopher Reidy executed a search warrant at the Litts home. They found no guns.

Officer Interviews

In December 2022, OSI interviewed members of UPD who were at the scene: POs Gonzalez, Flo, and Putrello; Sgts. Skibinski, Michael Curley, and Goldstein; and Invs. Femia and Dodge. OSI asked to interview the officers who fired shots at Mr. Litts, Sgt. Mowers and PO Gil, but

they refused.⁷

Sgt. Skibinski

Sgt. Skibinski said he responded to a call to the 1600 block of Neilson Street for an emotionally disturbed person with firearms threatening self-harm and harm to responding officers. Sgt. Skibinski was the first officer to arrive and parked his patrol vehicle at the corner of James and Neilson Streets. He asked dispatch to ask the caller, later determined to be Mr. Litts, to come outside with his hands raised. Dispatch said Mr. Litts said he would come out with a gun; Sgt. Skibinski told dispatch to tell Mr. Litts not to do that. Sgt. Skibinski got out of his patrol vehicle, armed himself with a shield and handgun, and positioned himself on the passenger side of his patrol vehicle. Sgt. Skibinski saw POs Gonzalez and Gil arrive separately, ordered them to position themselves near the front of Mr. Litts's house and to shine their patrol lights on the house. Sgt. Skibinski said Sgt. Mowers arrived next and positioned himself to the right of Sgt. Skibinski, holding a rifle and shield. Sgt. Skibinski said Sgt. Mowers said he saw someone on the porch of 1601 Neilson Street, but Sgt. Skibinski did not see anyone until Mr. Litts came out of his house with a knife in his right hand. Sgt. Skibinski saw Mr. Litts pace in his driveway, agitated and screaming, slurring his words, about his love for the Marine Corps. Mr. Litts walked in and out of his house and said he would get an M-16. PO Flo used Sgt. Skibinski's loudspeaker to attempt a dialogue with Mr. Litts, but Mr. Litts did not engage and continued to yell. Mr. Litts came out of his home with a knife and walked toward officers at the corner of James and Neilson Streets. Sgt. Skibinski said Mr. Litts was closing the distance and thought the officers would have to shoot, but Mr. Litts stopped, turned around, and walked back to his house. Inv. Dodge, a trained crisis negotiator, used the loudspeaker in an effort to develop a dialogue with Mr. Litts. It was brought to Sgt. Skibinski's attention that Mr. Litts's wife arrived, and Inv. Dodge advised Mr. Litts of her arrival; Mr. Litts did not respond to this information. Sgt. Skibinski had a conversation with officers about using the less than lethal shotgun but decided that the distance between officers and Mr. Litts was too great for the shotgun to achieve the desired effect. Sgt. Skibinski saw Mr. Litts come out of the driveway and walk across the street with a knife in his hand toward POs Gil and Gonzalez. Sgt. Skibinski said the officers yelled to Mr. Litts to stop, stay where he was, and to drop the knife, but Mr. Litts continued to walk toward them. Then Sgt. Skibinski heard shots fired to his right from Sgt. Mowers and from the direction of PO Gonzalez or PO Gil. Sgt. Skibinski saw Mr. Litts fall to the ground and saw officers render aid to him.

PO Gonzalez

PO Gonzalez said he was the second officer to arrive after Sgt. Skibinski. He said he parked

⁷ Three sergeants were on scene. OSI asked each UPD member interviewed which sergeant was the incident commander, but no member would say which sergeant was the incident commander.

his patrol vehicle on the west side of the street near Mr. Litts's house and took cover behind his patrol vehicle due to Mr. Litts's threats. PO Gonzalez heard Mr. Litts "screaming and yelling" and threatening to kill a police officer. PO Gonzalez said that other officers arrived, including PO Gil, who positioned himself to the left of PO Gonzalez. After PO Gil's arrival, PO Gonzalez saw Mr. Litts walk back and forth in front of his house in an "aggressive manner" with a knife in his hand, yelling that he would die that night. PO Gonzalez said he heard officers telling Mr. Litts to "drop the weapon" and "put your hands up in the air," but Mr. Litts did not comply. PO Gonzalez saw Mr. Litts walk toward the officers at the corner of James and Neilson Streets with the knife raised but changed direction and focused on PO Gil's and PO Gonzalez's position across the street. PO Gonzalez said that he shined his patrol vehicle light on Mr. Litts, and Mr. Litts yelled for the light to be removed from him. PO Gonzalez said that Mr. Litts aggressively walked across the street toward POs Gonzalez and Gil with the knife raised in his hand. POs Gonzalez and Gil gave Mr. Litts commands to drop the knife, but he did not comply. POs Gil and Gonzalez stepped back to provide distance, but Mr. Litts continued to come toward them with the knife raised and continued to ignore their commands to drop the knife and back off. PO Gonzalez said that Mr. Litts went around the front of his patrol vehicle, coming within a few feet of them, and he and PO Gil took more steps back to create distance. POs Gonzalez and Gil continued to give Mr. Litts commands to drop the knife, Mr. Litts continued to close the distance between them, and POs Gonzalez and Gil raised their service weapons. PO Gonzalez said he heard shots fired from PO Gil's direction, but PO Gonzalez did not fire his service weapon. After shots were fired, he went back behind his patrol vehicle.

Sgt. Goldstein

Sgt. Goldstein said he responded to a call for an emotionally disturbed person armed with weapons, possibly taking pills, and making threats of harm to himself, police, and others. After he arrived and parked, he heard PO Flo and then Inv. Dodge attempting to talk to Mr. Litts. Sgt. Goldstein said he did not initially see Mr. Litts but saw a shadow on the porch of 1601 Neilson Street and heard yelling. After ordering officers to tape off James Street to keep bystanders away, Sgt. Goldstein saw Mr. Litts come outside, waving a knife and making threats. Sgt. Goldstein ordered POs Putrello and Maciol to retrieve a less than lethal shotgun from Sgt. Skibinski's vehicle. Sgt. Goldstein thought the shotgun would be effective if Mr. Litts closed the distance between them but believed the distance between Mr. Litts and the officers was too great for it to be effective. POs Putrello and Maciol left to retrieve the less than lethal shotgun but learned that Mr. Litts's wife had arrived; they informed Sgt. Goldstein, who informed Inv. Dodge, who was using a patrol vehicle loudspeaker to engage with Mr. Litts. Sgt. Goldstein saw Mr. Litts come in their direction with the knife in his hand, stop, and retreat to his house. Sgt. Goldstein heard Mr. Litts making threats to get a rifle. Sgt. Goldstein asked again for the less than lethal shotgun, but the officers were unable to get it before shots were fired minutes later. Sgt. Goldstein said he and other officers gave verbal

commands for Mr. Litts to stop and not go back into his house. Mr. Litts left his line of sight and re-emerged without a gun but still holding the knife. Sgt. Goldstein observed that Mr. Litts was acting erratically, stumbling as he walked, and making threats to kill a police officer and his wife. Sgt. Goldstein was armed with a Taser and a shield and saw that Sgt. Mowers and Inv. Femia held patrol rifles. Sgt. Goldstein saw Mr. Litts quickly walk, almost running, in an aggressive manner, waving the knife, toward POs Gil and Gonzalez. Sgt. Goldstein saw POs Gil and Gonzalez stumble backward, almost losing their footing, to create distance between themselves and Mr. Litts as he approached. Then Sgt. Goldstein heard several rounds fired and saw Mr. Litts fall to the ground. Inv. Femia ran to him and began to render aid.

Inv. Femia

Inv. Femia, a plain clothes officer with the countywide Special Weapons and Tactics (SWAT) team, said he responded to a call for an emotionally disturbed male who was armed and making threats toward law enforcement. Inv. Femia parked about a block from the scene, got his ballistic vest and rifle from the trunk, and proceeded to Neilson Street. Inv. Femia recognized Mr. Litts from a 2018 call for an emotionally disturbed person who was making threats to others and law enforcement; no force was used during that call. Inv. Femia said there was not enough time to relate this prior experience to other officers at the scene. When Inv. Femia arrived at James and Neilson Streets, he heard Inv. Dodge trying to create a dialogue with Mr. Litts from a patrol vehicle loudspeaker. Inv. Femia saw Mr. Litts outside with a large knife in his hand and screaming very illogical statements. Inv. Femia saw Mr. Litts raise the knife above his head and cross the street toward POs Gil and Gonzalez. As Mr. Litts closed the distance to the officers, with the knife raised over his head, Inv. Femia saw Sgt. Mowers and PO Gil discharge their weapons. Inv. Femia saw Mr. Litts fall into the grass and then he approached Mr. Litts to render aid.

Inv. Dodge

Inv. Dodge, a trained crisis negotiator, responded to a suicidal person call in the 1600 block of Neilson Street. Inv. Dodge said she responded because she believed her training could be used in this type of call. Upon arriving and parking, Inv. Dodge said she saw Mr. Litts standing in the driveway of his house, yelling and holding a knife in his hand. Inv. Dodge attempted to engage Mr. Litts in a conversation, mainly giving him commands to drop the knife, by using the loudspeaker in Sgt. Skibinski's patrol vehicle. Mr. Litts did not respond to Inv. Dodge's commands to drop the knife or engage in dialogue with her. Inv. Dodge heard Mr. Litts yell while she continued to give him commands to drop the knife he held. Inv. Dodge does not recall Mr. Litts walking toward her and the other officers at the corner of James and Neilson Streets. Inv. Dodge recalled seeing Mr. Litts pacing back and forth in front of his house and then move closer to the sidewalk in front of his house. Inv. Dodge said PO Maciol told her that Mr. Litts's wife arrived, and Inv. Dodge asked PO Maciol to gather any

information that would assist Inv. Dodge with the development of a dialogue with Mr. Litts. Inv. Dodge was told that Mr. Litts had been drinking, suffered from post-traumatic stress disorder, and was alone in the house with a dog. With this information, Inv. Dodge continued to attempt to engage Mr. Litts in conversation. Inv. Dodge described Mr. Litts's demeanor as agitated and said he would not engage in conversation with her. Inv. Dodge did not see any officers positioned across from Mr. Litts's house, but saw Mr. Litts move toward the middle of the street, in front of his house, at a faster pace than previously, and heard shots fired. Inv. Dodge saw a knife in Mr. Litts's hand but did not see the knife in a raised position. After Inv. Dodge heard shots, she ran to the area where Mr. Litts lay and observed officers rendering aid.

PO Curley

PO Curley responded to a call for an emotionally disturbed individual, possibly armed with a weapon, and with suicidal and homicidal ideation, on the 1600 block of Neilson Street. PO Curley arrived and parked, saw five or six officers engaged with Mr. Litts, and saw Mr. Litts outside his house, brandishing a large knife in his right hand. PO Curley heard Inv. Dodge on the loudspeaker attempting to communicate with Mr. Litts. PO Curley was given a piece of paper with information that Mr. Litts's wife was present, and PO Curley gave the paper to Inv. Dodge. PO Curley saw Mr. Litts raise and lower the knife as he walked back and forth between the officers at the corner of James and Neilson Streets and his house. PO Curley heard Mr. Litts yelling in an irrational manner. PO Curley heard Sgt. Goldstein ask PO Putrello to retrieve the less than lethal shotgun from Sgt. Skibinski's vehicle, but PO Putrello was unable to retrieve it before the shots were fired. PO Curley saw Mr. Litts walk at a fast pace, knife raised in an aggressive manner, and yelling as he crossed the street toward POs Gonzalez and Gil. PO Curley heard two types of shots fired: the shots from Sgt. Mowers and from PO Gil. PO Curley saw Mr. Litts fall to the ground face down in the grass in front of POs Gonzalez and Gil. PO Curley assisted with placing handcuffs on Mr. Litts prior to officers rendering aid.

PO Flo

PO Flo responded to an emotionally disturbed person call on the 1600 block of Neilson Street. Upon arrival, he positioned himself by Sgt. Skibinski and Sgt. Mowers. PO Flo initially had his handgun out, but he holstered it and took out his Taser because he saw other officers had guns drawn. PO Flo saw a shadow of Mr. Litts on the porch of 1601 Neilson Street and heard him yelling and screaming. PO Flo was ordered to engage Mr. Litts by using the loudspeaker in Sgt. Skibinski's patrol vehicle. PO Flo told Mr. Litts that they were UPD, told him to come out with his hands up, that they just wanted to speak with him, and nobody was there to hurt him. PO Flo heard Mr. Litts say he was a veteran, and PO Flo thanked him for his service. PO Flo said he continued to ask Mr. Litts to come out of his home. Shortly, Inv. Dodge arrived, and PO Flo turned over the loudspeaker to her. PO Flo saw Mr. Litts come out

of his house with a large knife in his right hand. PO Flo heard Inv. Dodge give Mr. Litts a command to put down the knife. PO Flo saw Mr. Litts swinging the knife around while threatening to kill himself and others; Mr. Litts refused to put down the knife. PO Flo saw Mr. Litts pace on the sidewalk in front of his house while screaming. PO Flo said that Mr. Litts walked towards the officers at the corner of James and Neilson Streets but did not get closer to them than about fifty to seventy feet. PO Flo said he heard Mr. Litts say he was going inside his house to get an M-16. PO Flo continued to see Mr. Litts pace in front of his house with the knife raised while yelling in an aggressive manner. PO Flo, led by Sgt. Mowers, moved toward the west side of the street, the same side as POs Gonzalez and Gil, as Mr. Litts moved swiftly across the street toward POs Gonzalez and Gil with the knife raised in his hand. As PO Flo and other officers moved to the west side sidewalk, Mr. Litts's back was to the officers. PO Flo heard Sgt. Goldstein ask for the less than lethal shotgun, but he did not attempt to retrieve it because of his position. PO Flo saw Mr. Litts raise the knife in the air and then he heard Sgt. Mowers fire shots toward Mr. Litts and saw Mr. Litts fall in the grass near POs Gonzalez and Gil. PO Flo said that officers immediately ran to Mr. Litts, took the knife from him, placed handcuffs on him, and began to render aid.

PO Putrello

PO Putrello responded to an emotionally disturbed person call on the 1600 block of Neilson Street. PO Putrello parked and saw Sgts. Skibinski, Mowers, and Goldstein, and PO Flo at a patrol vehicle near the intersection at James Street and joined them. PO Putrello saw PO Flo using the loudspeaker to get Mr. Litts to come out of the house and speak to them. PO Putrello saw Mr. Litts come out of his house with a large silver knife in his right hand, yelling that the officers were going to die. Mr. Litts started pacing on the sidewalk in front of his house. PO Putrello said that officers told Mr. Litts they did not want to hurt him but talk to him; Mr. Litts became more agitated. Inv. Dodge arrived and tried to engage with Mr. Litts, but Mr. Litts became more agitated. PO Putrello saw Mr. Litts walk towards the officers at the corner of James and Neilson Streets, but he did not come close. PO Putrello heard Mr. Litts cursing and saying that the officers were going to die or would have to kill him. Based on his observations, PO Putrello believed Mr. Litts was under the influence of alcohol or drugs; he walked in an off-balance manner. PO Putrello heard officers tell Mr. Litts to drop the knife and to back up every time Mr. Litts moved toward the patrol vehicles at the corner of James and Neilson Streets. Sgt. Goldstein asked PO Putrello for a less than lethal shotgun, but he did not retrieve it because PO Putrello saw Mr. Litts sprint across the street toward POs Gil and Gonzalez who were positioned behind patrol vehicles. PO Putrello saw officers moving toward the west side of the street, where POs Gonzalez and Gil were, in an effort to intercept Mr. Litts. PO Putrello said as Mr. Litts reached the patrol vehicles, he heard shots from two types of firearms and saw Mr. Litts fall to the ground. PO Putrello said he and other officers ran to Mr. Litts; PO Putrello kicked the knife out of Mr. Litts's hand. PO Putrello said officers immediately began to render aid.

Other Witness Interview: Mrs. Litts

On November 10, 2022, OSI interviewed Mrs. Litts. Mrs. Litts said that she and Mr. Litts were married for thirty years and lived on Neilson Street for twelve years. Mrs. Litts said Mr. Litts was a former member of the United States Marine Corps and former Trooper with the New York State Police. She said Mr. Litts suffered from many health conditions, which were exacerbated by contracting the COVID-19 virus three times. Mrs. Litts said Mr. Litts had been depressed recently. On the date of the incident, Mrs. Litts said she came home from work at 3 p.m. and saw that Mr. Litts had been drinking beer. At 7:30 p.m. Mrs. Litts said she heard Mr. Litts arguing with a neighbor. Mrs. Litts said that after the argument Mr. Litts came back into the house upset and would not tell her the nature of the argument; he became angrier and threatened to kill her, so she left the residence to allow him to “cool down.” Mrs. Litts said she drove around to burn time and when she arrived back to her street it was blocked off. She heard UPD officers calling her husband’s name and asking him to come outside. Mrs. Litts said she stood on the corner of James and Neilson Streets and saw Mr. Litts come out of the house holding and swinging a butcher knife. Mrs. Litts said she told a male UPD officer that Mr. Litts was her husband, but she never had the chance to speak with Mr. Litts. She said she saw Mr. Litts walking down the sidewalk, heard UPD officers yelling for Mr. Litts to put the knife down, and then she heard gunshots. Mrs. Litts said that after the incident, UPD officers asked her if there were guns in the house and she said there were not. Mrs. Litts thought that UPD officers overreacted and could have used a Taser, bean bags or something else non-lethal to stop her husband.

Medical Examiner and Ballistics Reports

On September 15, 2022, Dr. Dianne Vertes, of the Onondaga Medical Examiner’s Office, conducted an autopsy of Mr. Litts. OSI Detective Christopher Reidy and UPD Invs. David Singe and John Scarmuzzino attended the autopsy.

Dr. Vertes concluded that the cause of death was multiple gunshot wounds, and that the manner of death was homicide. Dr. Vertes concluded that shots to Mr. Litts’s chest and abdomen contributed to his death; no one shot was determined to be the fatal shot(s).

Toxicological analysis of Mr. Litts’s blood showed that he had a blood alcohol content of 0.20%. Although Mr. Litts was not driving, for comparison, the legal limit of blood alcohol content for drivers in New York is 0.08%.

During the autopsy, Dr. Vertes identified seven bullet wounds and retrieved six projectiles, which were submitted to the New York State Police Forensic Investigation Center (NYSPFIC) for analysis. OSI obtained and reviewed the NYSPFIC ballistics report. Following microscopic comparison, the NYSPFIC determined that three projectiles – from the two left neck wounds

and the left forearm wound⁸ – came from PO Gil’s handgun, and that four projectiles – from the two right abdomen wounds, the right back wound, and the right shoulder wound – came from Sgt. Mower’s rifle.

LEGAL ANALYSIS

Article 35 of the New York Penal Law defines the circumstances under which a person may be justified in using deadly force against another. Justification is a defense, Penal Law Section 35.00, not an affirmative defense. To obtain a conviction at trial, a prosecutor must disprove a defense beyond a reasonable doubt, Penal Law Section 25.00(1). As detailed below, based on the evidence in this investigation, a prosecutor would be unable to disprove beyond a reasonable doubt that PO Gil’s and Sgt. Mowers’ use of deadly physical force was justified.

Penal Law Section 35.30 defines justification when a police officer uses deadly force while effecting or attempting to effect an arrest for an offense, as follows:

“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 ... or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force; except that deadly physical force may be used for such purposes only when he or she reasonably believes that ... (c) regardless of the particular offense which is the subject of the arrest ... the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.”

Police officers using deadly physical force pursuant to Penal Law Section 35.30(1) are under no duty to retreat (Penal Law Section 35.15[2][a][iii]).

Separately, Penal Law Section 35.15 provides that any person, not only a police officer, can use deadly force if that person reasonably believes that deadly force is being used or about to be used against him or her. However, unlike Section 35.30 governing police use of deadly force, Section 35.15(2)(a) mandates that a person may not use deadly physical force “if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of doing so by retreating.”

The Court of Appeals, in *People v. Goetz*, 68 N.Y.2d 96 (1986), said that “reasonable belief” has both subjective and objective components: the subjective component is satisfied if the

⁸ NYSPFIC determined that the projectile found in the 2013 Nissan Altima went through Mr. Litts’s forearm before it lodged in the car.

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

Here, officers encountered Mr. Litts holding a knife and screaming threats to kill himself and others. When Mr. Litts advanced toward POs Gil and Gonzalez with the knife raised, they could have reasonably concluded that he was committing the crime of menacing a police officer under Penal Law Section 120.18, a class D violent felony,⁹ and could have reasonably concluded that Mr. Litts would imminently use deadly physical force against them. Under those circumstances, the officers did not have a duty to retreat before using deadly physical force.

Although PO Gil and Sgt. Mowers refused OSI’s request for an interview, the evidence in the investigation, including interviews of other officers present and review of 911 recordings and body worn camera footage, supports the conclusion that PO Gil and Sgt. Mowers could have believed in good faith that “deadly force was about to be used against” them and that deadly force was necessary to prevent the danger. Further, the evidence in the investigation supports a conclusion that such a belief would have been reasonable.

Even if Mr. Litts were not committing a crime and the officers were not attempting to arrest him, the evidence supports the conclusion Sgt. Mowers’ and PO Gil’s use of deadly physical force was reasonable and that persons in their position would not “know” they could retreat “with complete personal safety” to themselves and others. PO Gonzalez told OSI that he and PO Gil stepped back from an advancing Mr. Litts to create distance, but that Mr. Litts continued toward them with the knife and came within a few feet of them. The BWC footage is consistent with PO Gonzalez’s account. Therefore, as Mr. Litts continued to come after POs Gonzalez and Gil as they were moving away from him, it would have been reasonable for them to conclude they could not have continued to retreat with complete safety to themselves and the other officers present.

In sum, the evidence in the investigation is insufficient to disprove beyond a reasonable doubt that PO Gil and Sgt. Mowers were justified under New York law in using deadly physical force. Therefore, OSI will not seek charges in the matter.

⁹ Penal Law Section 120.18 reads “[a] person is guilty of menacing a police officer...when he or she intentionally places or attempts to place a police officer...in reasonable fear of physical injury, serious physical injury, or death by displaying a... knife...where such officer was in the course of performing his or her official duties and the defendant knew or reasonably should have known that such victim was a police officer or peace officer.”

RECOMMENDATION

OSI recommends that UPD provide annual training for all patrol officers and supervisors on the use of the less than lethal shotgun, including on its effective range and the proper circumstances for its deployment.

UPD Policy 303 provides guidelines for the use and maintenance of “control devices.” These include kinetic energy projectiles (rubber bullets) and the 12-gauge shotgun that shoots them, as well as batons, CS gas (tear gas), OC spray (pepper spray), and OC powder projectiles. Subsection 303.9 says that the circumstances for using kinetic energy projectiles include interaction with an armed suspect or a suspect who makes “credible threats to harm him/herself or others” and cautions that circumstances should allow for the “safe application” of the projectiles. Subsection 303.9.2 says that the factors to consider before using kinetic energy projectiles include distance and angle to the target, “type and thickness of subject’s clothing,” “the subject’s proximity to others,” and the need for immediate response; the subsection says officers should “keep in mind the manufacturer’s recommendations and their training regarding effective distances and target areas,” and to consider, in addition, the totality of the circumstances. Subsection 303.9.3 states that when not in use the shotgun should be secured, unloaded, in a supervisor’s patrol vehicle. Subsection 303.10 states that annual training will be conducted at firearms training for use of kinetic energy projectiles.

During the incident, there were less than lethal shotguns in Sgt. Goldstein’s and Sgt. Skibinski’s patrol vehicles’ trunks. A supervisor made a number of requests to officers to retrieve a less than lethal shotgun, but none of these requests was carried out. In interviews, Sgts. Goldstein, Skibinski, and Curley said they had been trained in the use of a less than lethal shotgun several years before but did not have yearly training on it, despite yearly training on other less than lethal weapons, like Tasers. Inv. Femia said he had yearly training on the less than lethal shotgun because he was with a specialized unit within the department. In an interview with OSI, the UPD training director confirmed UPD did not train officers on the less than lethal shotgun annually, despite UPD Policy 303.

According to UPD, the kinetic energy projectiles used by the department are 12-gauge Fin Stabilizer rounds manufactured by Defense Technology and the shotgun used to fire these projectiles is a Remington 870 12-gauge. According to the manufacturers’ specifications, the effective range of the 12-gauge Fin Stabilizer round is 15 feet to 35 feet. In interviews with OSI all four UPD members who had been trained in the less than lethal shotgun said that it would have been effective in the incident involving Mr. Litts if the officers had been close enough to use it. However, the four officers gave varying answers about the shotgun’s effective range.

It appears likely that the absence of annual training on the shotgun made the three supervisors present in the Litts incident less than confident about whether and when to direct that it be used. Annual training would have made it more likely that the supervisors would have known whether the shotgun could have been used safely and effectively and more likely that they would have more quickly formed a plan whether to use it or not.

Dated: July 21, 2023