



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

May 17, 2024

Report on the Investigation into the Death of Osiris Mercado

SUMMARY

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

This is OSI's report of its investigation into the death of Osiris Mercado, who died on September 23, 2021, after an encounter with members of the Suffolk County Police Department (SCPD).

On September 23, 2021, in Port Jefferson Station, Suffolk County, C.P.¹ called 911 to report a man bleeding from the head. When police arrived at the scene, Osiris Mercado was bleeding from the head, screaming incoherently, and pacing the street in the rain with no shoes. Officers approached Mr. Mercado to render aid but Mr. Mercado ran away, yelled, and would not permit officers to help. Officers tried to speak to Mr. Mercado, but he seemed unaware of their presence as he continued to scream and aimlessly pace in the street. An ambulance arrived shortly after the police officers, but the paramedics were unable to assess Mr. Mercado or render treatment because they needed the officers to restrain Mr. Mercado first. The police officers brought Mr. Mercado to the ground and handcuffed him so the paramedics could treat him, but he suddenly went quiet and limp and his vital signs dropped. The paramedics began life-saving measures and placed Mr. Mercado in the ambulance, but Mr. Mercado went into cardiac arrest and was declared dead at the hospital.

The Suffolk County medical examiner determined the cause of Mr. Mercado's death to be "agitation" due to "acute drug intoxication (cocaine and fentanyl) in [a] setting of cardiomegaly² and physical restraint." A second expert, retained independently by OSI, determined the cause of death to be acute drug intoxication (cocaine and fentanyl), with physical restraint having played little if any role.

Having thoroughly investigated the matter and analyzed the law, OSI will not seek charges against the SCPD police officers because OSI concludes that the evidence is insufficient to prove beyond a reasonable doubt that the officers caused the death or committed a crime.

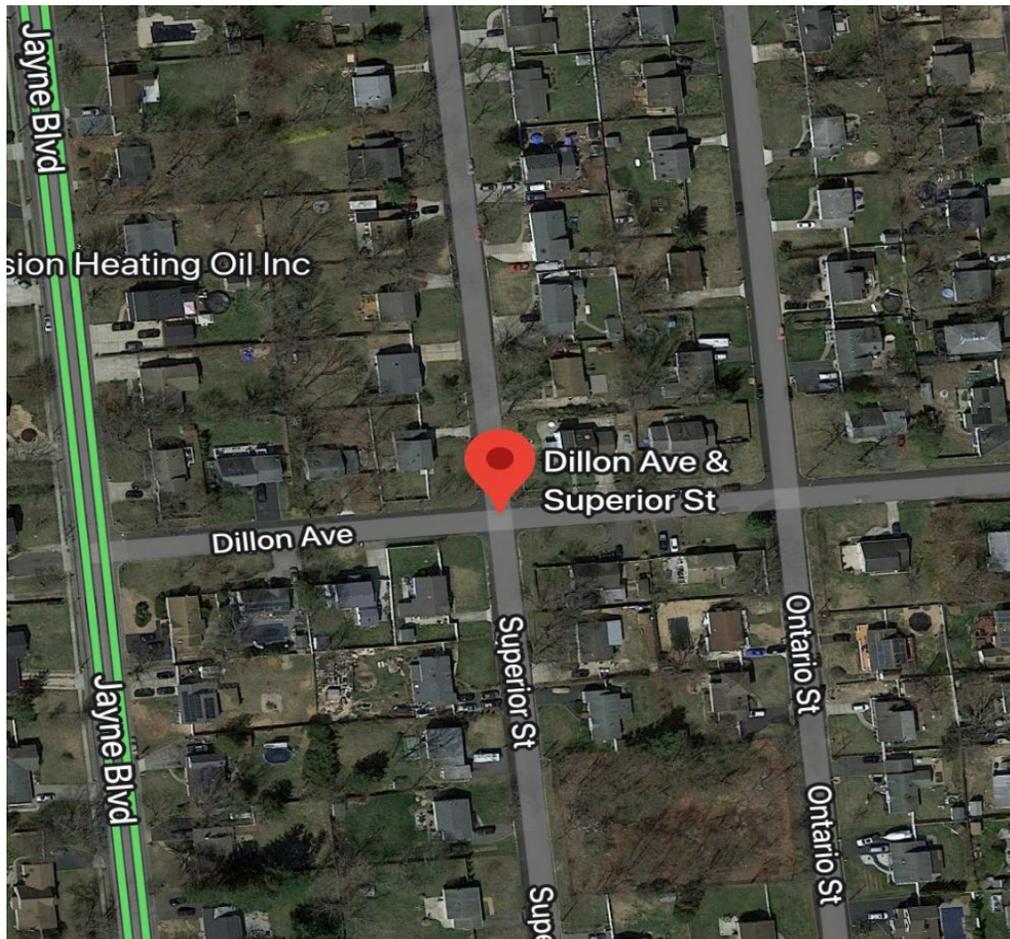
¹ Initials are used to protect the identities of civilian witnesses.

² According to the Mayo Clinic website, "The term 'cardiomegaly' refers to an enlarged heart seen on any imaging test, including a chest X-ray. Other tests are then needed to diagnose the condition that's causing the enlarged heart. Heart damage and certain types of heart disease can cause an enlarged heart. Sometimes short-term stress on the body, such as pregnancy, can cause the heart to get larger. Depending on the condition, an enlarged heart may be temporary or permanent. Treatment for an enlarged heart may include medications, medical procedures or surgery."

FACTS

A. The Scene

The incident occurred in Suffolk County, in a residential neighborhood around Dillon Avenue and Superior Street, Port Jefferson Station.



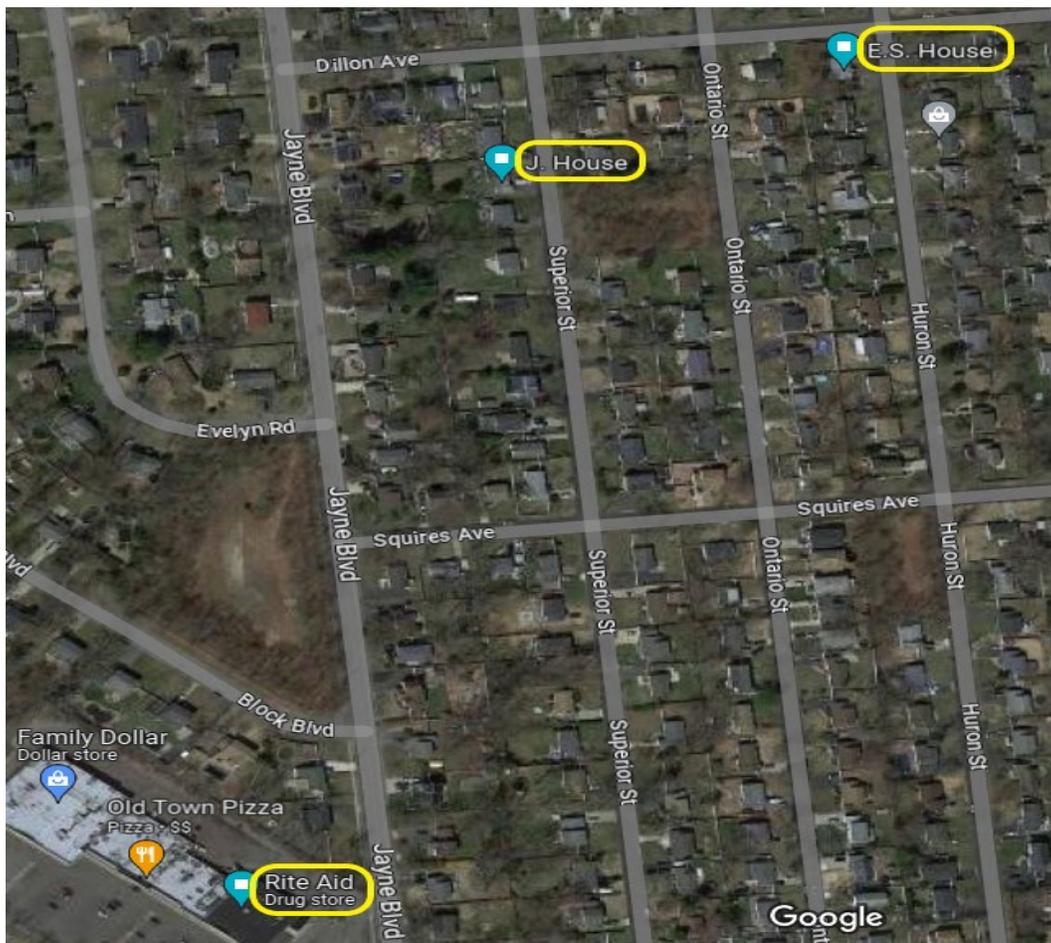
Map of the incident location in Port Jefferson Station, Suffolk County.

B. Events Leading to Police Arrival

E.S. told SCPD Detective David Gelsomino³ that on September 23, 2021, at about 7:00 pm, he met his friend Osiris Mercado at the Rite Aid in Port Jefferson Station. He said Mr. Mercado went to an ATM and gave E.S. \$40 to buy crack. E.S. said he did not give Mr. Mercado crack at that time but went home and met his dealer to get crack for Mr. Mercado. E.S. ordered a pizza and then heard someone outside “screaming and making noises, like an animal.” E.S. said he

³ Detective Gelsomino interviewed E.S. and took a sworn written statement from him, which was reviewed by OSI. OSI was not able to locate E.S. after the incident and therefore did not interview him.

went outside and saw Mr. Mercado in his bushes. E.S. asked Mr. Mercado what he took, and Mr. Mercado did not answer. E.S. said Mr. Mercado “was acting like a different person” and “he made no sense.” E.S. said he “couldn’t control him.” E.S. said he and Mr. Mercado ended up on Superior Street where Mr. Mercado “walk[ed] into a street sign on Dillon Ave and cut his head open.” E.S. said his phone could not make a call, so he went to his friend’s (J.’s) house at 21 Superior Street, knocked on the front door, and asked her to call 911.⁴



Map showing the residences of E.S. and J., and the Rite Aid drug store.

OSI interviewed C.P. who said on Friday, September 23, 2021, at about 9:00 pm, he was at his friend J.’s house at 21 Superior Street. C.P. said he heard “loud psychotic screaming” outside, in front of the house, and loud banging at the front door. C.P. and J. opened the door and he saw E.S. in the doorway. C.P. said E.S. asked them to call 911 because his phone was dead. E.S. told C.P. there was a guy on J.’s front lawn going crazy and bleeding from his head. C.P. said he looked outside and saw Mr. Mercado screaming in the bushes. He said he knew Mr.

⁴ While E.S. did not indicate precise times in his statement. Video from the Rite Aid showed Mr. Mercado entering the store at 6:15 pm and leaving the store at 6:16 pm. E.S.’s friend called 911 to get help for Mr. Mercado at 9:12 pm.

Mercado because they went to high school together. He saw Mr. Mercado hitting himself, rolling around on the ground, and hitting the ground. C.P. tried to keep Mr. Mercado calm but did not succeed. C.P. said he believed Mr. Mercado was behaving like he had taken methamphetamine but had no direct evidence of that.

OSI reviewed C.P.'s call to 911, in which he said a man was bleeding heavily outside the house and there was blood everywhere.⁵ C.P. told OSI that a few minutes after the 911 call, an ambulance and police car arrived. C.P. said Mr. Mercado was acting "violent and belligerent" and it took "a few cops and ambulance workers to control him." C.P. said Mr. Mercado was "really out of control, like he had extra strength." C.P. said the officers were kneeling on Mr. Mercado's arms and legs, trying to control him, but they never put their weight on his back, chest, or neck, and never struck Mr. Mercado. He said while Mr. Mercado was on the ground with police officers, he suddenly stopped screaming and went lifeless. C.P. said even though he was close, he could not see exactly what was happening because the officers and paramedics surrounded Mr. Mercado; he could not see whether the officers handcuffed Mr. Mercado. When OSI asked whether and for how long Mr. Mercado was on his stomach, C.P. said he could not see Mr. Mercado clearly but believes Mr. Mercado was on his stomach for five to six minutes.

In a second interview, C.P. told OSI he had not seen E.S. since that night. He heard E.S. went to rehab and then left town. C.P. told OSI that J. did not come outside at any point after E.S. knocked on the door and said he believes, therefore, she would not have seen the interaction between Mr. Mercado and law enforcement. C.P. would not provide contact information for J. On the night of the incident, J. informed Suffolk County Police that she did not know Mr. Mercado and she did not see anything and otherwise refused to be interviewed. OSI has been unable to locate and interview J.

C. Police Arrival

OSI interviewed SCPD Officers Kristen Magliola, Douglas Goldman, and Brian Christopher, and paramedics Amit Patel and Eric Nazinitsky. Officer Magliola had been a police officer for two and a half years and said she was the first to arrive at Superior Street. She said when she arrived, she saw Mr. Mercado on the ground bleeding and two men who seemed to be his friends. She saw the two friends walk over to Mr. Mercado and saw Mr. Mercado jump up screaming. Officer Magliola described Mr. Mercado as six feet tall and heavy set. She did not approach Mr. Mercado because she was nervous for her physical safety, so she requested backup. Officer Magliola announced herself and gave him some commands from a safe distance, but Mr. Mercado did not acknowledge her. Mr. Mercado was running in the street

⁵ OSI reviewed the 911 call and SCPD printout summarizing the 911 call and radio transmissions of the police response.

and screaming incoherently. She said Mr. Mercado was sweating profusely, had no shoes on, and his socks were soaked because it was raining.

Officer Magliola said when Officer Goldman arrived they tried to get Mr. Mercado down on the grass instead of the hard pavement of the street. Officer Goldman told OSI they guided Mr. Mercado to the grassy area lining the street. Officer Goldman said Mr. Mercado flailed his arms and screamed, and Officer Magliola described Mr. Mercado's demeanor in the same way. Officer Magliola said they slowly leaned on Mr. Mercado to bring him to the ground in order to handcuff him so the paramedics could treat his head injury and medically assess the cause of his behavior. Officer Magliola said Mr. Mercado was flailing his arms as they leaned him down to the ground, but he was not striking out at them. Officer Goldman said Mr. Mercado was a danger to himself and others because he was suffering from a head injury of unknown severity and refused to be treated, and was walking through the street, where cars travel, in dark and rainy conditions, while screaming and seemingly unaware of his surroundings.

D. Placing Mr. Mercado in Restraints

Officer Magliola said once Mr. Mercado was on the ground, she was able to get one handcuff on one of his wrists. Officer Magliola said they could not fully handcuff Mr. Mercado until he was placed on his stomach. Officer Magliola held Mr. Mercado's left arm and left leg so that he could be fully handcuffed. Officer Magliola said she and Officer Goldman were able to double-handcuff Mr. Mercado behind his back⁶ once Mr. Mercado was on the ground and on his stomach. Officer Magliola said Mr. Mercado was on his stomach for a short period to complete the handcuffing. She said Mr. Mercado suddenly went lifeless after he was fully handcuffed and while he was on his stomach.

Officer Goldman told OSI that he was able to place one handcuff on Mr. Mercado's wrist when he was still standing and as he and Officer Magliola were guiding him to the grassy area. Once on the ground, Officer Goldman tried to control Mr. Mercado's right arm and right leg while he and the other officers double handcuffed Mr. Mercado behind his back. Officer Goldman said Mr. Mercado was on his stomach for a short period. He said he and the other officers only held Mr. Mercado's limbs and did not apply weight or pressure to any other body part, including Mr. Mercado's back, chest, neck, and head. Officer Goldman said Mr. Mercado went lifeless while he was on his stomach.

Officer Christopher said he arrived after Mr. Mercado was already on the ground. Mr. Mercado was sweating and screaming incoherently. Officer Christopher told OSI that Officer Magliola held Mr. Mercado's legs, and Officer Goldman held Mr. Mercado's right arm and right leg. Officer Christopher held Mr. Mercado's left shoulder. Officer Christopher said he placed his

⁶ Double handcuffing means using two sets of handcuffs linked together, end to end.

knee on Mr. Mercado's left shoulder for a few moments as he put gloves on his hands, and then he held Mr. Mercado's shoulder with his hands and removed his knee. Officer Christopher could not remember what position Mr. Mercado was in when he stopped moving and screaming but remembered performing a sternum rub on Mr. Mercado when he saw Mr. Mercado was not breathing. He recalled Mr. Mercado went lifeless while the paramedics were getting things from the ambulance. When the EMTs returned and administered Narcan, Mr. Mercado opened his eyes and his pupils were pinpoint. When Mr. Mercado was placed on the ambulance stretcher, he was handcuffed to the stretcher.

EMT Eric Nazinitsky told OSI that the officers brought Mr. Mercado to the ground and tried to have Mr. Mercado sit up but he was flailing his arms and kicking his legs. EMT Nazinitsky said he and his partner could not render aid with Mr. Mercado flailing. EMT Nazinitsky helped control Mr. Mercado's legs so the officers could handcuff him. After Mr. Mercado was handcuffed, EMT Nazinitsky said the officers rolled Mr. Mercado onto his side, and he and his partner were able to take vitals and begin medical assistance – but when Mr. Mercado was turned onto his side he became unresponsive. He said he and his partner administered Narcan and placed Mr. Mercado in the ambulance. During the ride to the hospital, Mr. Mercado went into cardiac arrest. Despite life-saving measures, Mr. Mercado never regained a pulse. EMT Nazinitsky said the officers never punched or struck Mr. Mercado or leaned on his back, chest, or neck.

According to EMT Patel, Officers Magliola and Goldman were on the scene when he and EMT Nazinitsky arrived. He said he saw Mr. Mercado swinging at the officers. EMT Patel told OSI the officers had to position Mr. Mercado on his stomach in order to fully handcuff him behind the back. He said once the officers handcuffed Mr. Mercado, they were able to turn him onto his back so he and his partner could take his vitals and treat him. He said after they turned him over, Mr. Mercado suddenly went still; his pulse was low and his respiration was poor. EMT Patel said he and his partner administered Narcan and performed advanced life support.⁷

OSI estimates that seven minutes passed between the first police interaction with Mr. Mercado and the moment Mr. Mercado became unresponsive. According to the scene logbook, Officer Magliola arrived at the scene at 9:16 pm. Officer Magliola told OSI she did not approach Mr. Mercado until Officer Goldman arrived, which, according to the logbook and the radio transmission summary printout, was at 9:18 p.m. EMTs Nazinitsky and Patel told OSI they administered Narcan after Mr. Mercado became unresponsive and his vitals dropped, which, according to the radio transmission printout, they did at 9:25 pm.

⁷ Advanced life support can include intravenous medication, intubation or other techniques to open and assist airways, cardiac monitors, glucose testing, and forms of cardiac life support requiring special training.

Video Evidence

OSI reviewed video from the Rite Aid in Port Jefferson Station. There were two camera angles that showed Mr. Mercado entering and leaving the store. At 6:15:23 pm, according to the video time stamp, Mr. Mercado walked into the store, placed a covid-style mask over his mouth and nose, walked to the back of the store, and went off camera. He wore a white t-shirt, dark shorts, white socks, and sandals and did not seem to act in any abnormal, erratic, or unusual way. Mr. Mercado walked out of the store at 6:16:53 p.m., having been inside for about ninety seconds.

The SCPD officers who responded to Superior Street were not equipped with body worn cameras (BWCs).⁸

OSI reviewed C.P.'s cell phone video, which is not time-stamped ([C.P.'s cell phone video](#)). The start of the video shows Mr. Mercado on the ground in the grassy area and two police officers kneeling on both sides of him. There was also an ambulance in the video frame, but the paramedics were not yet physically engaged with Mr. Mercado. Mr. Mercado screamed without words, but occasionally repeated "Oh my god." At the start of the video, a female officer repeated, "We're going to get you help." For the first eight seconds of the video, Mr. Mercado was on his stomach, but his chest was off the ground. It appears the officers were trying to gain control of Mr. Mercado's arms. Ten seconds later, Mr. Mercado was on his side, still screaming, and a male officer said, "I got one cuff." At that time, a paramedic and another uniformed person kneeled on the ground. The paramedic held Mr. Mercado's leg with one hand and the remaining three individuals attempted to gain control of Mr. Mercado's arms. After thirty-five seconds into the video, it is difficult to see Mr. Mercado's position because he is visually blocked by the police officers and paramedics who surrounded him. There were no visible strikes or kicks from the officers or paramedics at any time. The officers and paramedics could not be heard saying anything to Mr. Mercado. Fifty-three seconds later (eighty-eight seconds into the video), the paramedics stood up, walked to the ambulance, and removed the stretcher from the ambulance. Mr. Mercado was still screaming at the time. In the background of the video, C.P. and another man can be heard discussing Mr. Mercado's behavior and what he could have taken to make him act like that. About one minute and forty-five seconds into the video, the stretcher was laid down next to Mr. Mercado and he suddenly stopped screaming.

⁸ At the time of the incident involving Mr. Mercado SCPD did not have a BWC program, having only begun to equip officers with BWCs in July 2022. OSI has previously recommended that SCPD expedite the implementation of the program [See the Bonsignore report here: <https://ag.ny.gov/press-release/2022/attorney-general-james-office-special-investigation-releases-report-death-jesse>. See the McClure report here: <https://ag.ny.gov/press-release/2022/attorney-general-james-office-special-investigation-releases-report-death-jeffrey>]. For the present report, OSI spoke with the SCPD Police Commissioner's Office about the progress of the BWC program. They said SCPD completed BWC distribution on May 1, 2023 and that all patrol officers are now trained on and outfitted with body cameras.

The video lasts about three minutes, and Mr. Mercado was silent after one minute and forty-five seconds. If Mr. Mercado stopped screaming at around 9:25 pm, when Narcan was administered, and that occurred one minute and forty-five seconds into the video, that means the video began around 9:23 pm, which is about five minutes after Officer Goldman arrived and he and Officer Magliola approached Mr. Mercado.

Medical Examination

Dr. Paul Mellen, of the Suffolk County Office of the Medical Examiner, conducted the autopsy of Mr. Mercado and issued an autopsy report. OSI reviewed the report and interviewed Dr. Mellen. Dr. Mellen determined Mr. Mercado's cause of death to be "agitation" due to "acute drug intoxication (cocaine and fentanyl) in [a] setting of cardiomegaly⁹ and physical restraint," and the manner of death as "homicide (abused illicit cocaine and non-prescribed opioid, route unknown, in setting of chronic substance abuse; physical restraint by other persons [law enforcement])."

According to the autopsy report, Mr. Mercado did not sustain any fractures to his body but had multiple abrasions to his extremities and torso. Mr. Mercado sustained a blunt impact injury to his head with a forehead laceration, but no skull fracture, no brain injury, and no neck injury. Dr. Mellen said none of the injuries caused or contributed to Mr. Mercado's death. The report noted that there were no petechial hemorrhages of the eye.¹⁰ The report noted that the airways were clear, meaning there was no vomit or other substance that could have caused asphyxiation. There was no damage to the spine or neck. There was no damage to the chest wall, rib cage, or internal organs. There was no internal bleeding. The report does not note any ligature marks around the neck. The toxicology report showed femoral blood concentrations of fentanyl at 17.2 mcg/L and cocaine at 275 mcg/L.

When asked by OSI to clarify his diagnosis of "agitation" as the cause of death, Dr. Mellen said Mr. Mercado was in an altered state due to the ingestion of drugs, and the drug intoxication combined with the physical struggle with the officers and the restraint led to a state of agitation that caused cardiac arrest. He said there is no way to quantify the proportion that each factor contributed to Mr. Mercado's death. Dr. Mellen said there is no way to conclude whether Mr. Mercado would have died from drug intoxication alone because that would depend on Mr.

⁹ According to the Mayo Clinic website, "The term 'cardiomegaly' refers to an enlarged heart seen on any imaging test, including a chest X-ray. Other tests are then needed to diagnose the condition that's causing the enlarged heart. Heart damage and certain types of heart disease can cause an enlarged heart. Sometimes short-term stress on the body, such as pregnancy, can cause the heart to get larger. Depending on the condition, an enlarged heart may be temporary or permanent. Treatment for an enlarged heart may include medications, medical procedures or surgery."

¹⁰ Petechial hemorrhages are pinpoint hemorrhages of the capillaries in the eye and, according to many medical examiners, can be an indication of asphyxia, but their presence is not conclusive evidence of asphyxia and their absence is not conclusive evidence of the absence of asphyxia. See, for example, <https://www.ophtalmologytimes.com/view/tell-tale-conjunctival-hemorrhages>.

Mercado's general health and individual tolerance for drugs at the time.¹¹ OSI asked Dr. Mellen what his findings would have been if, hypothetically, the autopsy had resulted in the same physical examination and toxicology, but he had not been told of the confrontation with police officers. Dr. Mellen said he would have determined the cause of death to be acute drug intoxication in a setting of cardiomegaly. He explained that in the hypothetical scenario, the toxicology findings would be sufficient to establish that the death resulted from drug intoxication and cardiomegaly.¹² When asked whether the restraint alone would have killed Mr. Mercado, Dr. Mellen did not answer directly; he said it was the combination of factors that together contributed to Mr. Mercado's death and that he could not pick apart the individual contributions of each factor. Dr. Mellen said there is no sign that Mr. Mercado died of asphyxiation. Dr. Mellen said his findings were not a comment on whether the police officers acted properly, but only the various factors that contributed to Mr. Mercado's death.

At OSI's request, Dr. Christopher Milroy performed an independent analysis of the cause of Mr. Mercado's death. Dr. Milroy is a professor in the Department of Pathology and Laboratory Medicine at the University of Ottawa and a Forensic Pathologist at the Eastern Ontario Regional Forensic Pathology Unit. Dr. Milroy has been a forensic pathologist since 1990, giving him over thirty years of experience in the field. Dr. Milroy has contributed chapters to 29 books in the field, including chapters specifically focusing on drug and alcohol intoxication and asphyxiation. The Attorney General's office paid Dr. Milroy a fee for his work and expert evaluation.

Dr. Milroy concluded that the cause of Mr. Mercado's death was acute drug intoxication (cocaine and fentanyl). Dr. Milroy explained that according to the World Health Organization, official causes of death can only be disease or injury. Agitation, he explained, is a "symptom" and not a cause of death. Dr. Milroy said Mr. Mercado's death was more a product of cocaine ingestion than of fentanyl ingestion. Dr. Milroy explained that the interplay between cocaine and fentanyl toxicity is still being researched, but medical examiners can use behavior at the time of death to assist in evaluating whether one drug had a primary causal relationship to death. Dr. Milroy explained that fentanyl, an opioid, causes sedation and respiratory depression. Cocaine, a stimulant, causes the type of behavior that Mr. Mercado exhibited, such as aggressive agitation, excessive energy, and combative confrontation. Dr. Milroy explained that Narcan only reverses the effects of opioids, not cocaine. Therefore, while the paramedics appropriately administered Narcan, that medication would have had no impact on Mr. Mercado's cocaine toxicity. This led Dr. Milroy to conclude that cocaine intoxication had the primary role in Mr. Mercado's death.

¹¹ According to OSI's research, the amount of Fentanyl found in Mr. Mercado's femoral blood is within the range of blood concentrations isolated during autopsies of fentanyl-related deaths. Similarly, the amount of cocaine found in Mr. Mercado's femoral blood is within the range of blood concentrations isolated during autopsies of drug-related deaths. However, it cannot be said that these amounts of Fentanyl and cocaine in combination will always lead to death.

¹² Dr. Mellen said there is no internal sign that uniquely indicates a drug overdose. He said enlarged hearts can occur from some types of drug overdoses, but an enlarged heart can also be the result of many other factors.

Moreover, Dr. Milroy said that while there was physical restraint in the overall incident leading to Mr. Mercado's death, he cannot say that physical restraint was a causal factor in Mr. Mercado's death. Dr. Milroy elaborated that he "cannot say the person would not have died absent the restraint," and therefore, the physical restraint was a "small part" overall of Mr. Mercado's health crisis. In fact, Dr. Milroy stated that the only thing that could have saved Mr. Mercado was restraining Mr. Mercado so that medical professionals could provide treatment: "The only thing that could have saved him was fast medical intervention. They had to restrain him to provide medical treatment to save his life." Dr. Milroy explained that, although Mr. Mercado went silent before he was in the ambulance, he went into cardiac arrest only once he was in the ambulance. At that point, the physical struggle with police officers was over and the brief physical restraint in the prone position was over. Therefore, his body would have been in recovery from the struggle and physical restraint at the time of the cardiac arrest, leading Dr. Milroy to conclude that physical restraint was not a factor in the death.

LEGAL ANALYSIS

Having analyzed the evidence in this case and the law, OSI concludes there is insufficient evidence to prove beyond a reasonable doubt that the involved officers caused Mr. Mercado's death or committed a crime.

Responding officers restrained Mr. Mercado because they believed he was a danger to himself and others. Mr. Mercado had already injured himself prior to police arrival, and his actions were a potential danger to motorists in streets of the neighborhood where he was found. Mr. Mercado did not respond to civilians' or officers' attempts at communication and did not appear to know where he was or what he was doing; officers were unable to verbally de-escalate the situation.

Federal and State caselaw recognize a police officer's authority to detain a person who is an immediate danger to themselves or others, or when the person's behavior demonstrates the need for urgent action. In evaluating whether police unlawfully detained a person in cases of medical emergency Courts have applied a three-prong test:

1. Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
2. Was some degree of force reasonably necessary to ameliorate the immediate threat?
3. Was the force used more than reasonably necessary under the circumstances?

Estate of Corey Hill v. Miracle, 853 F3d 306 (6th Cir 2017). See also Verponi v. City of New York, 31 Misc3d 1230(A) (Supreme Court, Kings County, 2011) (concluding the primary

question to determine unlawful detention during a medical emergency is “whether the officers had a reasonable objective basis to believe that [the person] was a danger to herself or others”).

Under these cases, the evidence supports the conclusion that the officers had a reasonable basis to restrain Mr. Mercado. Mr. Mercado reasonably appeared to be experiencing a medical emergency, to be behaving irrationally, and to be a danger to himself and others. As attempts to talk to him were unavailing, some degree of force was necessary to restrain him so that he could get medical attention. Although the officers used force to place Mr. Mercado in handcuffs while he was prone, they then rolled him on his side to ease respiration. There is no evidence that the officers caused asphyxiation or injury Mr. Mercado during this encounter. The physical examination in the autopsy, statements of the EMTs, civilian witnesses, and the involved officers, and the video are consistent that the officers did not kick, punch, choke, or strike Mr. Mercado, or compress his chest, abdomen, back or neck. As soon as the officers had restrained Mr. Mercado the paramedics took over.

The evidence does not support charging the officers with a homicide offense under New York Law. There are several statutes in the Penal Code that pertain to homicide, including Criminally Negligent Homicide, under Penal Law Section 125.10, and Manslaughter in the Second Degree under Penal Law section 125.15(1).

Criminally Negligent Homicide requires proof beyond a reasonable doubt that a person caused the death of another and did so with criminal negligence. For purposes of this crime, criminal negligence is the defendant’s failure to perceive a substantial and unjustifiable risk of death, when “the risk is of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.”¹³ Manslaughter in the Second Degree, Penal Law Section 125.15(1), requires proof beyond a reasonable doubt that a person recklessly caused the death of another by engaging in conduct which “creates or contributes to a substantial and unjustifiable risk that another person’s death will occur ... when he or she is aware of and consciously disregards that risk, and when that risk is of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”¹⁴

To prove either crime, a prosecutor would need, first, to prove that the officers caused a death. Because of the expert opinions of the medical examiner and the independent expert, described above, OSI concludes that a prosecutor could not prove causation beyond a reasonable doubt.

¹³ See New York Criminal Jury Instruction for Criminally Negligent Homicide: <https://www.nycourts.gov/judges/cji/2-PenalLaw/125/125-10.pdf>

¹⁴ See New York State Criminal Jury Instructions for Manslaughter 2nd Degree: <https://www.nycourts.gov/judges/cji/2-PenalLaw/125/125-15.pdf>

The medical examiner said that the cause of death was fentanyl and cocaine intoxication, in the setting of an enlarged heart and physical restraint. Although the medical examiner's opinion indicates that the officers' actions in physically restraining Mr. Mercado may have contributed to his death, that opinion is less than definitive with regard to the officers' actions and, OSI believes, would not suffice to prove causation beyond a reasonable doubt. Moreover, the independent expert retained by OSI, Dr. Milroy, was clear that the officers' actions played little, if any, role in causing Mr. Mercado's death. In light of these two opinions, OSI concludes that causation could not be proved beyond a reasonable doubt.

Even if causation could be proved, Criminally Negligent Homicide and Manslaughter in the Second Degree require proof that the person engaged in conduct which created a *substantial and unjustifiable risk of death*. In this case, the evidence does not support charging the officers with either kind of homicide: the restraint of Mr. Mercado on his stomach was brief and a reasonable person would not anticipate that such restraint created a *substantial* risk of death; and the officers restrained Mr. Mercado because he was a danger to himself and others and needed to be restrained and treated, which a reasonable person would not have viewed as *unjustifiable*.

The other potentially relevant homicide statutes, Manslaughter in the First Degree under Penal Law Section 125.20(1)¹⁵ and Murder in the Second Degree under Penal Law Section 125.25(1),¹⁶ could not support a prosecution in this case as there is no evidence that the responding officers intended to cause serious physical injury (Manslaughter in the First Degree) or death (Murder in the Second Degree).

For these reasons, OSI concludes that the evidence does not support charging the responding officers with a crime and will close this matter with the issuance of this report.

Dated May 17, 2024.

¹⁵ New York Criminal Jury Instructions for Manslaughter in the First Degree, PL Section 125.20(1): <https://www.nycourts.gov/judges/cji/2-PenalLaw/125/125-20%281%29.pdf>

¹⁶ New York Criminal Jury Instruction for Murder in the Second Degree, PL Section 125.25(1): <https://www.nycourts.gov/judges/cji/2-PenalLaw/125/125-25%281%29.pdf>