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Office of Special Investigation

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Report on the Investigation into the Death of Brian Astarita

INTRODUCTION

New York Executive Law Section 70-b authorizes the Office of the Attorney General, acting through its 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, as defined. When OSI does not seek charges, Section 70-b requires OSI to issue a public report.

This is the report of OSI’s investigation of the death of Brian Astarita, who was shot and killed on November 11, 2021, by New York City Police Department (NYPD) Officers Theresa Haley and Matthew Mellas. Having thoroughly investigated the matter and analyzed the law, OSI will not seek charges against Officer Haley or Officer Mellas because it would not be able to disprove beyond a reasonable doubt that their use of deadly force against Mr. Astarita was justified under New York law.

OVERVIEW

On November 11, 2021, NYPD Officer Theresa Haley, of Highway 2, was conducting radar enforcement on the eastbound side of the Belt Parkway, in Brooklyn, in an unmarked police car. Using a radar scanner, Officer Haley clocked a Jeep Grand Cherokee driven by Brian Astarita at 71 miles per hour (MPH), 21 MPH over the posted speed limit. Officer Haley pursued the Jeep, turned on the lights and sirens of her police car and directed Mr. Astarita to pull over. Mr. Astarita initially complied, stopping his Jeep in a rest area west of the Verrazano Bridge. Officer Haley approached Mr. Astarita’s vehicle and asked for his license and registration. Mr. Astarita replied that he did not have a license and that his license was suspended. Mr. Astarita then sped off in his Jeep. Officer Haley ran back to her police car and pursued Mr. Astarita. Officer Haley pulled her car in front of Mr. Astarita’s Jeep several times in an attempt to slow him down and force him to stop. Mr. Astarita repeatedly pulled around Officer Haley’s car and continued to travel at high speed eastbound on the Belt Parkway. Between the Bay Parkway and Cropsey Avenue exits, Officer Haley positioned her car in front of Mr. Astarita’s Jeep and forced him to stop. Officer Matthew Mellas, of Highway 2, responding to Officer Haley’s radio calls for assistance, pulled his marked police car in front of Officer Haley. Both officers got out of their cars. Mr. Astarita got out of his Jeep and retrieved a BB gun, which resembled a black, semi-automatic firearm, from the back seat area of the Jeep. Mr. Astarita then briefly got back into the driver’s seat of the Jeep before getting out again and pointing the BB gun at the officers. Both officers repeatedly directed Mr. Astarita to drop the gun. Mr. Astarita continued to point the gun at the officers and yelled at the officers that they were going to let him go. The officers fired at Mr. Astarita. Officer Haley fired sixteen times and Officer Mellas fired eleven times, striking Mr. Astarita in his legs and shoulders. The officers began medical aid to Mr. Astarita and called for an ambulance. Mr. Astarita was taken to Lutheran Medical Center where he was pronounced dead.

STATEMENT OF FACTS

The shooting occurred in Kings County, on the eastbound side of the Belt Parkway between Exit 5, Bay Parkway, and Exit 6, Cropsey Avenue. The Belt Parkway in this area is a six-lane highway with three eastbound lanes and three westbound lanes separated by a metal divider. There is a grassy hill and shoulder to the right of the eastbound lanes.

In an interview with OSI, Officer Haley said she has been an NYPD officer for eighteen years and has been a Highway Officer with Highway 2 since 2014. Prior to this incident she said she had never discharged her firearm, except in training, and had never met the decedent.

In an interview with OSI Officer Mellas said he has been an NYPD officer for nine years and with Highway 2 for over four years. Prior to this incident, he said he had never discharged his firearm, except in training, and had never met the decedent.

a. Events Leading to the shooting

This section and the next section incorporate the accounts of the encounter with Mr. Astarita given by Officers Haley and Mellas in interviews with OSI as well as the events as recorded on Officer Haley's dashboard camera,¹ Officer Haley's body worn camera,² Officer Mellas's body worn camera,³ civilian cell phone video, and interviews with civilian witnesses.

Officer Haley told OSI that on November 11, 2021, she was scheduled to work from 12:00 p.m. to 8:30 p.m. She was working alone, in uniform, in an unmarked police car. Officer Haley was stationed on the eastbound side of the Belt Parkway between Exit 1 and Exit 2. There is no shoulder in that portion of the eastbound Belt Parkway except for one area just large enough for a single car. At about 4:00 p.m. Officer Haley pulled into that area and began using her radar gun to detect the speed of passing motorists.⁴ The speed limit on the Belt Parkway is 50 MPH.

Officer Haley told OSI her radar recorded the Jeep Grand Cherokee driven by Mr. Astarita travelling at 71 MPH, which was 21 MPH over the speed limit. Officer Haley pulled out from the shoulder and activated her lights and sirens behind Mr. Astarita's Jeep.⁵ She used her loudspeaker to order Mr. Astarita to get into the right lane and proceed to the rest area west of the Verrazano Bridge, just before Exit 2. Mr. Astarita complied and pulled into the rest area.⁶

¹ Video from PO Haley's Dash Camera located [here](#).

² PO Haley's Body Worn Camera located [here](#).

³ PO Mellas's Body Worn Camera located [here](#).

⁴ PO Haley's Dash Camera at 00:44

⁵ Id. at 00:55

⁶ Id. at 02:10

Officer Haley got out of her car, approached Mr. Astarita's Jeep, informed him that he was being recorded and was traveling over the speed limit, and asked for his license and registration.⁷ Officer Haley said Mr. Astarita responded that he did not have a license and his license was suspended. He also appeared to be covering his face.⁸ Officer Haley said she thought he was doing this because he did not wish his face to be on camera. Mr. Astarita then pulled out of the rest area and onto the highway.⁹ Officer Haley ran back to her car, put on her lights and sirens, and pursued Mr. Astarita past Exit 2.

Officer Haley said she caught up to Mr. Astarita, who refused to pull over. Officer Haley said she positioned her car in front of Mr. Astarita's Jeep to slow him down and force him to stop.¹⁰ Officer Haley told OSI she learned this weaving maneuver in Highway Officer training. Mr. Astarita went around Officer Haley's car a number of times. Each time, Officer Haley said she would position her car in front of Mr. Astarita.¹¹ Between Exit 3 and Exit 4, Officer Haley again positioned her car in front of Mr. Astarita in an attempt to slow him down.¹² Officer Haley told OSI that, at this point, Mr. Astarita's Jeep hit the back bumper of Officer Haley's car. She said she did not believe it was intentional. She exited her police car and ordered Mr. Astarita to stop.¹³ He did not comply, pulled around Officer Haley's car and continued eastbound on the Belt Parkway.¹⁴ At this time, Officer Haley put her location and pursuit of Mr. Astarita over the police radio and asked for backup.¹⁵

When interviewed, Officer Matthew Mellas told OSI he heard Officer Haley's call for assistance. He had just begun his shift and was heading westbound on the Belt Parkway in a marked police car. He got off the Belt Parkway at Exit 4, Bay 8th Street, and re-entered the highway on the eastbound side. Officer Mellas made his way through traffic that had slowed down as a result of Officer Haley's weaving maneuver.

Officer Haley said she finally stopped Mr. Astarita between Exit 4 and Exit 5. She got out of her car but forgot to put the car in park. She re-entered her car, backed it up close to Mr. Astarita's Jeep and put her car in park.¹⁶ Officer Mellas drove onto the right shoulder and back onto the highway stopping in front of Officer Haley's car. He positioned his car horizontally, blocking a portion of the right lane of the highway, and got out of his car.¹⁷

⁷ PO Haley's Body Worn Camera at 00:56

⁸ Id. at 01:12

⁹ PO Haley's Body Worn Camera at 01:12; PO Haley's Dash Camera at 03:13

¹⁰ PO Haley's Dash Camera at 04:06

¹¹ Id. at 04:12; Cell Phone Video of Civilian P.S.

¹² PO Haley's Dash Camera at 06:05

¹³ PO Haley's Body Worn Camera at 03:48

¹⁴ PO Haley's Dash Camera at 06:17

¹⁵ Id. at 06:28; PO Haley's Body Worn Camera at 04:06

¹⁶ PO Haley's Body Worn Camera at 07:50; PO Haley's Dash Camera at 10:00; Cell Phone Video of Civilian A.B.

¹⁷ PO Haley's Dash Camera at 10:20

Officer Haley said Mr. Astarita got out of his Jeep, entered the back driver's side of the Jeep and then briefly got back into the driver's seat.¹⁸ He then got out of the Jeep with a black BB gun that resembled a semi-automatic firearm.¹⁹ Officer Haley said that when she saw Mr. Astarita enter the back of his vehicle, she knew he would re-emerge with a firearm.

b. The Shooting

Officer Haley said Mr. Astarita pointed the gun at her.²⁰ She said she yelled, "He's got a gun."²¹ Officers Haley and Mellas said they stood by the hood of Officer's Haley's car, pointed their service weapons at Mr. Astarita and repeatedly ordered him to drop his weapon.²² Officers Haley and Mellas told OSI they believed Mr. Astarita's weapon to be a real firearm. Mr. Astarita yelled, "You're going to let me go."²³ Mr. Astarita moved from next to his Jeep across the middle lane of traffic pointing the gun at the officers.²⁴ Officers Haley and Mellas said they used Officer Haley's car as cover and moved around the car to the right lane of traffic.²⁵ Officer Mellas fired at Mr. Astarita.²⁶ Officer Haley fired repeatedly as she and Officer Mellas moved to the front of Officer Haley's car.²⁷ Mr. Astarita fell to the ground with the gun in his right hand.²⁸ While on the ground, Mr. Astarita pointed the gun at Officer Haley and she fired her service weapon.²⁹ Officer Haley took cover behind the front bumper of her car as she and Officer Mellas yelled, "Shots fired."³⁰ Officer Haley said she came out from cover, and Mr. Astarita was pointing the gun in her direction.³¹ She fired again and took cover.³² Officer Haley emerged from cover as Mr. Astarita was still moving on the ground with the gun in his hand.³³ She fired again.³⁴ Officer Mellas reloaded his firearm and fired two more rounds.³⁵ He approached Mr. Astarita as he was on the ground and kicked the BB gun, which had fallen to Mr. Astarita's side, down the highway.³⁶

¹⁸ Cell Phone Video of Civilian A.B.; Cell Phone Video of Civilian M.C.

¹⁹ Id.

²⁰ Id.

²¹ PO Haley Dash Camera at 10:23

²² Cell Phone Video of A.B.; Cell Phone Video of M.C.; PO Haley Body Worn Camera at 08:13; PO Mellas Body Worn Camera at 00:46; PO Haley Dash Camera at 10:27

²³ Id.

²⁴ Cell Phone Video of A.B.; Cell Phone Video of M.C.

²⁵ PO Haley Dash Camera at 10:36

²⁶ PO Haley Dash Camera at 10:38; PO Mellas Body Worn Camera at 1:00

²⁷ PO Haley Dash Camera at 10:38; PO Haley Body Worn Camera at 08:28; Cell Phone Video of A.B.

²⁸ Cell Phone Video of A.B.; PO Haley Body Worn Camera at 8:33

²⁹ PO Haley Body Worn Camera at 8:34

³⁰ Id. at 8:40

³¹ Cell Phone Video of A.B.; PO Haley Body Worn Camera at 8:46

³² Id.

³³ PO Haley Body Worn Camera at 8:58

³⁴ Id.

³⁵ PO Mellas Body Worn Camera at 01:24

³⁶ Id. at 01:30

Based on an analysis by FID and recovered ballistic evidence, Officer Haley fired sixteen rounds from her firearm and Officer Mellas fired eleven rounds.

OSI and NYPD interviewed over two dozen civilian witnesses; two interviews are described in the following paragraphs.

A.B.³⁷ told OSI he used a cell phone to record video of the shooting from his car, which was in the left lane of the eastbound Belt Parkway ahead of Officer Haley's and Mr. Astarita's cars.³⁸ A.B. said he saw Mr. Astarita emerge from the Jeep with a black gun, which he pointed at the officers. A.B. heard the officers repeatedly order Mr. Astarita to drop the gun and heard Mr. Astarita shout at the officers to let him go. A.B. said Mr. Astarita continued to point the firearm in the direction of the officers after he was shot and lying on the ground.

M.C. told OSI he used a cell phone to record video of the shooting.³⁹ M.C.'s car was in the left lane of the eastbound Belt Parkway almost parallel to the officers' and Mr. Astarita's cars when the shooting occurred. M.C. told OSI he saw the entire pursuit from the rest area under the Verrazano Bridge where Mr. Astarita initially fled from Officer Haley to the time of the shooting. M.C. saw Officer Haley position her car in front of Mr. Astarita's car and Mr. Astarita repeatedly attempt to get around Officer Haley. M.C. followed Officer Haley and Mr. Astarita to the scene of the shooting. M.C. saw Mr. Astarita get out of his car with what appeared to be a gun and point it at Officer Haley. M.C. got out of his car and took cover before the shooting began.

VIDEOS REVIEWED

OSI reviewed 51 videos related to the shooting of Mr. Astarita, consisting of twenty-three body worn camera videos, from Officers Haley and Mellas and NYPD Officers and New York State Police troopers who responded to scene of the shooting; one video from the dashboard camera of PO Haley's police car; three videos from the dashboard camera of a civilian's car; seventeen cell phone videos shot by civilian bystanders; and five videos obtained from surveillance cameras.

EVIDENCE COLLECTED FROM SCENE

NYPD's Crime Scene Unit (CSU) recovered twenty-six 9mm shell casings, one live 9mm cartridge, three deformed fired bullets, one fired bullet, and one bullet fragment from the

³⁷ OSI does not disclose the names of civilian witnesses.

³⁸ [Video.](#)

³⁹ [Video.](#)

scene.⁴⁰ NYPD's Force Investigation Division (FID) secured and vouchered a Smith & Wesson 9mm firearm from Officer Haley and a Sig Sauer 9mm firearm from Officer Mellas.⁴¹

Mr. Astarita's BB gun, a Daisy Power Line Model 415, CO2 air pistol (pictured below), was recovered by responding officers from the roadway, where Officer Mellas had kicked it, and was then processed by CSU. The gun was loaded with twelve BBs.⁴² According to the manufacturing specifications, a BB fired from the gun has a maximum velocity of four hundred ninety-five (495) feet per second.⁴³



MEDICAL EXAMINATION AND AUTOPSY

OSI interviewed Dr. Kunil Raval, of the Office of Chief Medical Examiner, who performed the autopsy of Mr. Astarita, and reviewed the autopsy report he prepared. Dr. Raval said Mr. Astarita sustained four gunshot wounds to his right leg, six to his left leg, one gunshot wound to his left shoulder and two gunshot wounds to his right shoulder. Mr. Astarita also sustained graze wounds to his face, abdomen, left leg, left hand and right forearm. Seven bullets were recovered from Mr. Astarita's body during the autopsy. Dr. Raval determined that Mr. Astarita's

⁴⁰ Force Investigation Division Preliminary Investigation Worksheet

⁴¹ NYPD Invoice Numbers 6000034453 and 6000034454

⁴² NYPD Invoice Number 600003449

⁴³ This is less than half the velocity of the average 9mm handgun and a BB has a much smaller mass than a 9mm bullet. See Lord, Carter K., Maximum Range of Ammunition, National Law Enforcement & Corrections Technology Center (January, 1998).

cause of death was gunshot wounds of the torso and extremities, with perforation of the heart and aorta, and his manner of death was homicide.⁴⁴ The shot that caused the most damage entered Mr. Astarita's left thigh and perforated his abdomen, intestines, stomach, diaphragm, aorta, and the left atrium of his heart.⁴⁵

Toxicology results were negative for controlled substances and alcohol save for methadone, for which Mr. Astarita had a prescription.⁴⁶

OTHER INFORMATION

According to records of the New York State Department of Motor Vehicles, Mr. Astarita's New York driver's license was revoked in 2018 for failure to pay fines. At the time of the shooting, Mr. Astarita did not have a valid New York driver's license. The Jeep he was operating was not registered and had a temporary license plate from Florida, which did not match the car's vehicle identification number. However, the car does not appear to have been stolen; the last valid registration was to a relative of Mr. Astarita's partner.

LEGAL ANALYSIS

New York Penal Law ("PL") Article 35 sets forth the defense of justification to crimes involving the use of physical force. Justification is a defense, not an affirmative defense, PL Section 35.00. If a defense is raised at trial, the burden is on the prosecutor to disprove it beyond a reasonable doubt, PL Section 25.00(1). The defendant is entitled to have the jury instructed on the defense of justification even if the defendant does not offer evidence, as long as the defense is implied by the prosecutor's evidence, People v. Steele, 26 N.Y.2d 526 (1970).

In this case, Officer Haley and Officer Mellas used deadly physical force. Under PL Section 10.00(1) "deadly physical force" is "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." Under PL Section 10.00(10) "serious physical injury" is "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

PL Section 35.15 is the general provision defining justification when a person uses force in self-defense or defense of another person. Regarding deadly physical force, Subdivision (2)(a) of PL Section 35.15 states a person may use deadly force upon another person when: "the actor reasonably believes that such other person is using or about to use deadly physical force," but that "the actor may not use deadly physical force if he or she knows that with

⁴⁴ Autopsy Report K-21-036718

⁴⁵ Id.

⁴⁶ Id.; Interview with Mr. Astarita's partner V.A.

complete safety, to oneself and others he or she may avoid the necessity of so doing by retreating."

PL Section 35.30 is the provision defining justification when a police officer or peace officer uses force to effect or attempt to effect an arrest.

PL Section 35.30(1) provides:

"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 PL Section 35.30(1) are under no duty to retreat when threatened with deadly physical force, according to PL Section 35.15(2)(a)(ii).

In both the general self-defense provision (PL Section 35.15) and the officer-specific provision (PL Section 35.30), the person who uses deadly physical force is justified when the person reasonably believes deadly force is necessary to defend the person or another against the imminent use of deadly physical force. "Reasonable belief" means that a person actually believed, "honestly and in good faith," that physical force was about to be used against him and that physical force was necessary for self-defense (subjective component), and it means that a "reasonable person" under the same "circumstances" could have believed the same (objective component). People v. Goetz, 68 N.Y.2d 96 (1986); People v. Wesley, 76 N.Y.2d 555 (1990). Therefore, before using deadly force in self-defense, (a) a person must honestly and in good faith believe deadly force was about to be used against them and that deadly force is necessary for self-defense, and (b) a reasonable person under the same circumstances could believe the same.

Based on the evidence in this investigation, a prosecutor would not be able to disprove beyond a reasonable doubt that the officers' use of deadly physical force was justified under the law.

First, under PL Section 35.30, Officer Haley and Officer Mellas could use the physical force they reasonably believed to be necessary to effectuate the arrest of Mr. Astarita and could

use deadly force if they reasonably believed it was necessary to defend themselves or another against Mr. Astarita's imminent use of deadly force.

Here, Officer Haley was attempting to pull over Mr. Astarita for speeding – a violation of the New York Vehicle and Traffic Law (VTL). After approaching Mr. Astarita, Mr. Astarita informed Officer Haley that his license was suspended, another violation of the VTL. Further, in attempting to evade the police, exceeding the speed limit, and driving on the shoulder to get around vehicles, Mr. Astarita may have committed the crimes of reckless endangerment under PL Section 120.20 and reckless driving under VTL Section 1212, both misdemeanors.

Finally, when Mr. Astarita pointed what appeared to be a gun at Officers Haley and Mellas, they had reason to believe he was committing the crimes of Criminal Possession of a Weapon in the Second Degree under PL Section 265.03 and Menacing a Police Officer under PL Section 120.18, both felonies. As the BB gun Mr. Astarita held and pointed at the officers looked like a real firearm capable of discharging a bullet, OSI would not be able to disprove beyond a reasonable doubt that Officers Haley and Mellas were justified in shooting Mr. Astarita when he repeatedly refused to drop the weapon.

Further, the presence of multiple bystanders did not make the use of force by Officers Haley and Mellas objectively unreasonable in this instance. The United States Supreme Court has held that in considering whether an officer's use of force is reasonable, courts must consider that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." Graham v. Connor, 490 U.S. 386, 397 (1989). Courts must determine whether the use of force was "objectively reasonable in light of the facts and circumstances confronting [the officers] [...]." Id (internal citations and quotations omitted). When assessing the permissibility of officers using deadly force or firing their weapons in the presence of innocent civilians, courts have often harkened back to this principle by granting deference to officers' professional judgment. See e.g., Owens v. City of New York, 183 A.D.3d 903, 907 (2d Dep't 2020); James v. City of New York, 181 A.D.3d 500, 501 (1st Dep't 2020). Mr. Astarita possessed what appeared to the officers and to civilian bystanders to be a firearm capable of firing bullets. Mr. Astarita ignored repeated commands to drop the weapon, pointed the weapon at the officers and moved closer to the cars of bystanders. The actions of Officers Haley and Mellas in firing their service weapons cannot be deemed objectively unreasonable given New York and Federal precedent.

Even if Officer Haley was not attempting to arrest Mr. Astarita for an offense, pursuant to PL Section 35.30 (the justification provision relating to police officers making an arrest), the prosecution would not be able to disprove beyond a reasonable doubt that Officer Haley and Officer Mellas were justified under PL Section 35.15, the general provision justifying use of force. For purposes of this case, the difference between the officer-specific provision and the

general provision, as mentioned above, is that under that general provision "the actor may not use deadly physical force if he or she knows that with complete safety, to oneself and others he or she may avoid the necessity of so doing by retreating."

At the final encounter, Mr. Astarita retrieved a BB gun from his car which realistically resembled a black semi-automatic pistol. Mr. Astarita pointed the gun at Officer Haley and Officer Mellas and ignored their repeated commands to drop the gun. Mr. Astarita continued to point the gun at the officers and told them to let him go. Applying the analysis in Goetz, a prosecutor would not be able to disprove beyond a reasonable doubt that the officers reasonably believed it was necessary to use deadly force to defend themselves and the civilians on the Belt Parkway, nor that they could have retreated in complete safety to themselves and others present. Each officer could reasonably believe that if he or she retreated, Mr. Astarita would continue to pose an imminent threat of deadly physical force to the other officer and to civilians on the Parkway.

Officer Haley fired sixteen rounds, and Office Mellas fired eleven rounds. Video footage from civilian cell phones and Officer Haley's body worn camera show that, while Mr. Astarita is on the ground after being shot, he repeatedly raised the gun and pointed it in Officer Haley's direction. A prosecutor would not be able to disprove beyond a reasonable doubt that a reasonable person in Officer Haley's position would believe that Mr. Astarita was still capable of firing rounds from his gun.

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

Dated: February 24, 2023