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

August 1, 2024

Report on the Investigation into the Death of Benjamin Rivers

DEATH OF BENJAMIN RIVERS

NIAGARA COUNTY, AUGUST 3, 2023

New York Executive Law Section 70-b (Section 70-b) authorizes 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 peace officer. When OSI does not seek charges, Section 70-b requires issuance of a public report. This is the public report of OSI's investigation of the death of Benjamin Rivers, who was shot and killed on August 3, 2023, by Niagara Falls Police Department (NFPD) Officers.

OVERVIEW

On August 3, 2023, at 9:35 p.m., a caller to Niagara Falls 911 reported hearing a gunshot fired outside the apartments at 942 Niagara Avenue and hearing people yelling for others to call the police. That address is in the City of Niagara Falls, in Niagara County. NFPD Dispatch radioed for officers to respond to a "shots heard; possible shots fired" call. NFPD Officers Kayla Richards and Ian Sitek, separately, answered that they would respond. They were both equipped with body worn cameras (BWCs) and activated them when they arrived at the scene.

Officer Richards was the first officer to arrive at 942 Niagara Avenue. As she got out of the police car, a woman pointed toward a man, later identified as Benjamin Rivers, sitting in front of the building, and said, "He shot in my car." As Officer Richards walked toward the man, she repeatedly told him to show his hands; when she saw a gun in Mr. Rivers's right hand she pointed her gun at him and yelled, "Put the gun down." Mr. Rivers stood up and began walking toward Officer Richards, who was stepping backward and continuing to yell, "Put the gun down." As this was happening, Officer Sitek arrived, got out of his car, pointed his handgun at Mr. Rivers, and also repeatedly yelled, "Put the gun down."

As Mr. Rivers stepped toward Officer Richards, he spread his arms out from his body and then quickly brought his right arm inward, pointed and fired a shot at Officer Richards. Officer Richards and Officer Sitek then fired at Mr. Rivers until he fell down. The officers radioed shots fired and moved toward Mr. Rivers, who was lying on the sidewalk, his gun, a revolver, next to his feet. When it was recovered the gun was found to have three live rounds and three spent casings in the cylinder.

Other NFPD officers arrived and rendered aid to Mr. Rivers; soon EMTs from the fire department arrived, rendered aid, and took Mr. Rivers to the hospital, where he was pronounced dead at 10:20 p.m. According to the Medical Examiner, Mr. Rivers died as a result of multiple gunshot wounds.

Having thoroughly investigated the matter and analyzed the law, OSI concludes that a prosecutor would not be able to prove beyond a reasonable doubt at trial that Officer Richards's or Officer Sitek's use of deadly force against Mr. Rivers was not justified under New York Law and will not seek charges in this case.

FACTS

Background

The incident occurred on the sidewalk and street in front of the Estella Apartments building, at 942 Niagara Avenue, which is less than two blocks from the NFPD building.

On August 3, 2023, Officer Richards had been with NFPD for 26 months and Officer Sitek had been with NFPD for 23 months. Both were on duty on August 3, 2023, wearing their standard police uniforms and driving NFPD cars that were clearly identified with official police labels. They arrived at 942 Niagara Avenue with the emergency lights on their police cars activated.

At 9:33 p.m.,[1] Niagara Falls 911 received a call, which was recorded and which OSI reviewed, from a person who said that she "just heard a gunshot, outside of 942 Niagara Avenue," and that people "were screaming call the police."

In recorded radio transmissions OSI has reviewed, the police dispatcher, at 9:34 p.m.,[2] asked for any available officers to respond to a "shots heard, possible shots fired" call, at 942 Niagara Avenue; Officers Richards and Sitek said they would respond. Officer Richards was a few blocks away from 942 Niagara Avenue and was the first to arrive; Officer Sitek was in the Police Station and arrived soon after.

[1] This time taken from the recording of the call and the Call Data Report (CDR), from Niagara Falls 911. CDR is the system used by emergency response operators and dispatchers to communicate with 911 callers and first responders. The CDR system documents these communications through recordings, data entered by the operators, and computer-generated reports.

[2] This time taken from the recording of the radio call/dispatch and the Call Data Report (CDR).

Map showing the Estella Apartments building, 942 Niagara Avenue (yellow arrow) and the Niagara Falls Police Department Office (blue arrow).

Video

As recorded on Officer Richards's BWC video, as she got out of the police car, she was met in the street by a woman who was pointing at Mr. Rivers and who twice said, "He shot in my car." Security video from a camera on the outside of the Estella Apartment Building shows that Mr. Rivers was sitting on a short wall in front of the building when Officer Richards arrived. Security video and BWC show that Mr. Rivers stood and began to walk toward Officer Richards.[3]

Officer Richards's BWC shows that as she stepped forward toward Mr. Rivers, she repeatedly told Mr. Rivers to show his hands. BWC shows that she drew and pointed her handgun at Mr. Rivers and repeated yelled, "Put the gun down." Mr. Rivers stood up and began walking toward

[3] The BWC in this case has audio, but the security video does not. OSI reviewed video from multiple security cameras on the apartment building, including two labeled "Front" and "Cam 15."

Officer Richards, who stepped backward and continued to yell, “Put the gun down.” At that time, BWC shows that Officer Sitek arrived and got out of his police car. BWC shows that Officer Sitek pointed his gun at Mr. Rivers and repeatedly yelled, “Put the gun down.”

BWC and security video show that Mr. Rivers spread his arms out from his body as he stepped toward Officer Richards and then quickly brought his right arm inward and pointed his gun at Officer Richards. BWC and security video show a muzzle flash from Mr. Rivers’s gun. BWC shows that Officer Richards and Officer Sitek immediately fired at Mr. Rivers; he dropped his gun as they fired and then fell down. Officer Richards and Officer Sitek radioed that shots were fired and moved toward Mr. Rivers.[4] The handgun Mr. Rivers dropped was later recovered by NFPD next to his feet. The gun, a revolver, had three live rounds and three spent casings in the cylinder.

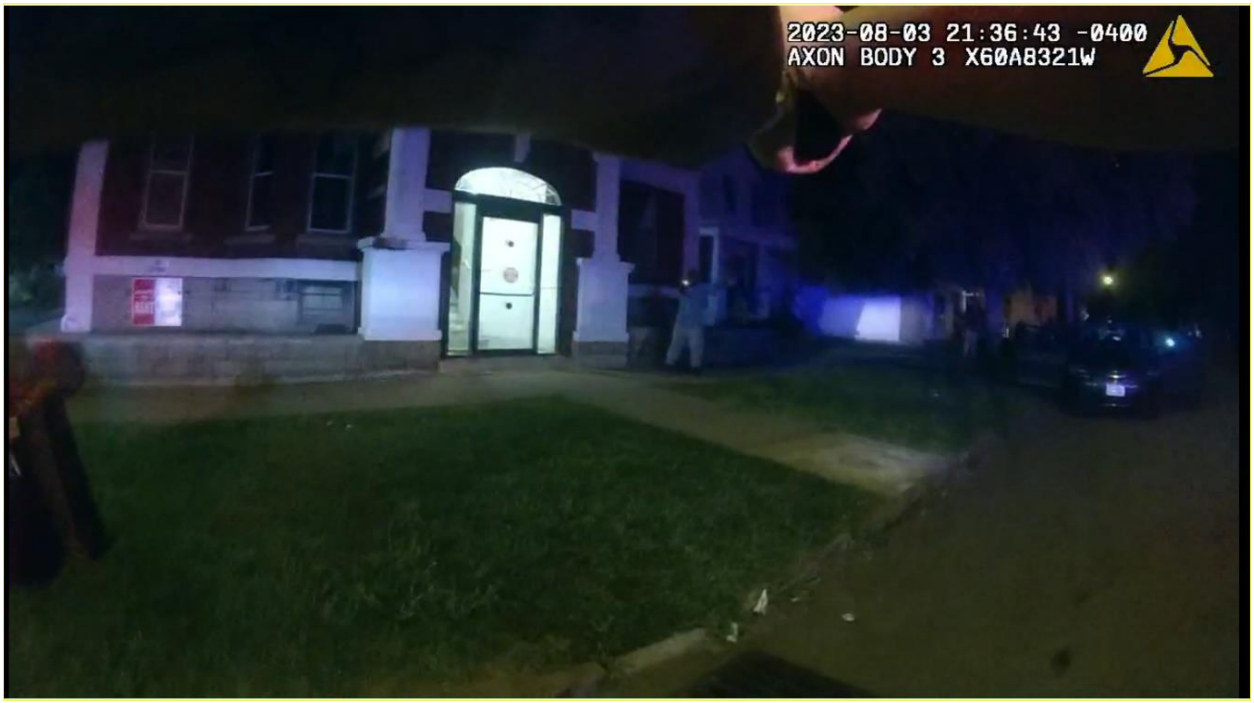
BWC shows that other NFPD officers and EMTs arrived shortly after the shooting and rendered aid to Mr. Rivers. Mr. Rivers was transported to the Niagara Falls Memorial Medical Center; hospital records show he arrived at 9:59 p.m. At 10:20 p.m. Dr. Perez-Brache pronounced him dead. Mr. Rivers was 53 years old.

Still from Estella Apartments security video (“Front” camera) showing the muzzle flash from Mr. Rivers’s gun. Officer Richards is to the right in the image.[5]

[4] Officer Sitek’s radio transmission actually went through; Officer Richards’s did not.

[5] Time stamp on the “Front” camera was and hour behind the actual time.

Still from Estella Apartment security video ("Cam 15" camera) showing the muzzle flash from Mr. Rivers's gun. Officers Richards is not in the frame.



Still from Officer Richards's BWC showing the muzzle flash from Mr. Rivers's gun.

Still from Officer Sitek's BWC showing Mr. River's handgun dropped on the sidewalk.

OSI assembled portions of the security videos from the Estella Apartments and the officers' BWCs into a compilation video.

Interviews

Officer Richards

OSI interviewed Officer Richards. Officer Richards also provided a sworn statement to NFPD. She said that on the evening of August 3, 2023, she was working in the north end of the City of Niagara Falls when she responded to a call of "shots fired" at 942 Niagara Avenue. Officer Richards said that as she pulled up in the police car, she saw a person in the street waving their hands next to a car parked in front of the Estella Apartments.

Officer Richards said that she turned on the marked police car's emergency lights and parked in front of 942 Niagara Ave. Officer Richards said that as she was getting out of the car, the person in the street was yelling that their car was just shot. Officer Richards said that she asked the person who shot, and the person pointed to a man sitting on a cement barrier outside the apartment building. Officer Richards said she saw the man, and his hands appeared to be in his pockets, so Officer Richards asked to see his hands several times, but he just ignored her.

Officer Richards said she kept yelling and, after a couple more commands for him to show his hands, he pulled his hands from his pockets, and she saw what looked like a small gun in his right hand.

Officer Richards said she asked Dispatch to clear the air by saying "10-65" and started yelling for him to please drop the gun, screaming at him half a dozen times, but he stood up and

started walking toward her. Officer Richards said she heard and recognized Officer Sitek's voice, also yelling at the man to drop the gun. Officer Richards said that because the man refused to drop the gun and advanced toward her, she felt the man posed a threat to her life.

Officer Richards said when she was still screaming at the man, he raised arms with the gun in his right hand and she saw him take a shot at her, and she knew he was trying to kill her. Officer Richards said she then fired her weapon until she knew she was safe, and that the man was no longer a threat.

Officer Sitek

OSI interviewed Officer Sitek. Officer Sitek also provided a sworn statement to NFPD. Officer Sitek said that on August 3, 2023, he was working in the north end of the City of Niagara Falls, and that he was in the police station, when he heard a call come in for "shots fired" at 942 Niagara Ave. Officer Sitek said the police station is just around the corner and he arrived within minutes. Officer Sitek said that, as he pulled up, he saw a person in the street waving their hands and yelling that someone had a gun, and he then heard Officer Richards screaming at someone to show her their hands. Officer Sitek said that as he was getting out of the patrol car the person who was in the street yelling said that someone had a gun and just shot at their car. Officer Sitek said that as he went toward the building, he used a utility pole for cover and could hear Officer Richards yelling at someone.

Officer Sitek said that Officer Richards was yelling at a man and when the man started to walk toward Officer Richards Officer Sitek noticed what appeared to be a gun in his right hand. Officer Sitek said he started shouting "drop the gun." Officer Sitek said the man fired at Officer Richards, so he fired his weapon until he felt the man was no longer a threat. Officer Sitek said he immediately used his radio to notify Dispatch that shots were fired. Officer Sitek said he approached the man, who was now lying on the sidewalk, and made sure the gun near the man on the sidewalk was secured. Officer Sitek said he then assisted other officers with medical aid.

Civilian Witness A [6]

Witness A, who was interviewed by OSI and provided a sworn statement to NFPD, was present at 942 Niagara Avenue on August 3, 2023, at the time of the incident. Witness A said they knew Mr. Rivers as "Ben." They were sitting in their car, parked in front of the apartment building when Mr. Rivers shot his gun into their car; they started yelling for other people to call the police. Witness A said, "I was across the street still mad at Ben when the cops finally got there. The first cop truck got there and there was a female cop that got out. I told the female cop that Ben has a gun right now and that he just shot into my car. The cops saw Ben with the

[6] OSI does not publish the names of civilian witnesses. The witnesses' sworn statements to NFPD were made from interviews of the witnesses which NFPD typed up and the witnesses reviewed and then signed with a declaration that the statements were true. The sworn statements were consistent with OSI's own interviews. Quotes in the text are from the sworn statements.

gun and started yelling at Ben multiple times to drop the gun. They were yelling for him to drop the gun a lot."

Civilian Witness B

Witness B, who was interviewed by OSI and provided a sworn statement to NFPD, was present at 942 Niagara Avenue on August 3, 2023, at the time of the incident. Witness B said they knew Benjamin Rivers and were with Witness A, sitting in a car, parked in front of the apartment building. Witness B said, "out of nowhere I heard a pop, and I knew it was a gunshot. I looked over and saw Benjamin holding black pistol. We had all jumped out of the car and I yelled at him." Witness B said Mr. Rivers "sat back down and the cops were pulling up." Witness B said another person (identified in this report as Witness D) "told Benjamin not to do anything stupid and Benjamin told [Witness D] to move away from him. As the cops were getting out, Benjamin stood up and was still holding the gun. I heard the cops yelling for Benjamin to put the gun down. I'm pretty sure Benjamin shot and then there were a lot of shots."

Civilian Witness C

Witness C, who was interviewed by OSI and provided a sworn statement to NFPD, was present at 942 Niagara Avenue on August 3, 2023, at the time of the incident. Witness C said he knew Mr. Rivers by the nickname "Bim." Witness C said he and the persons identified in this report as Witnesses A and B were in a "car in front of the Estella Apartment building" and that "a guy who I know as Bim, who I have known for about 6 to 7 months," walked up to car and opened up the back passenger seat door "where I was sitting" and displayed a gun and "told me to move out of the way. Bim was pointing the gun at the person sitting next to me. When I tried to get out of the car, Bim shot across my face, at the person sitting next to me." Witness C said that shortly after that shooting, he "saw Bim sitting on the stoop and he was holding a gun in his hands. I then saw a Police car come up Niagara Ave from Main Street and another Police car coming up from 11th Street come to the scene. I saw the officers get out of the car and that's when Bim stood up and began walking towards the officers with the gun in his hand. The officers asked Bim at least 3 or 4 times to drop the gun and they asked him nicely to drop it." Witness C also stated that he saw that when Rivers "did not drop the gun and kept walking towards them, the officers shot him" and "I saw officers try to revive him, and then the ambulance came to the scene."

Civilian Witness D

Witness D, who provided a sworn statement to NFPD, was present at 942 Niagara Avenue on August 3, 2023, at the time of the incident. Witness D said that while at the "Estella Apartment building, I saw a guy that I know, named Benjamin Rivers. He was sitting on the stoop right next to the main entrance to my building. I have known him for about two years or so and I would say that we were friends." Witness D said, "I saw Benjamin walk up to that vehicle. He was at the car for about two or three minutes when all of a sudden, I heard the [people who

were] in the car start yelling 'call the cops, he just shot into the car.' Benjamin walked back over to the stoop and sat back down. I didn't hear a shot or anything, but I wasn't paying attention. He didn't say a thing and just sat there." Witness D continued, "about three to five minutes later I saw the cops show up and I began walking away, towards 10th Street. I wasn't far away when I heard the cops tell him to drop the gun over and over again. I heard the lady cop pleading with him to drop the gun."

Civilian Witness E

Witness E, who was interviewed by OSI and provided a sworn statement to NFPD, was present at 942 Niagara Avenue on August 3, 2023, at the time of the incident. Witness E said, "I heard a gunshot and looked outside" and "I saw a man out front carrying what looked like a gun and he was arguing with" another person. Witness E said, "after that the police showed up and they confronted him. I was about to move away from the window, and I saw the police shooting. I saw the man fall to the ground."

Evidence Collected from the Scene

The NFPD Crime Scene Unit (CSU) collected evidence and took photographs. A 22-caliber revolver handgun was collected on the ground near where Mr. Rivers fell after he was shot. The revolver had a six-shot cylinder, which contained three live rounds and three spent casings.[7] BWC shows that Officer Sitek picked up the gun from the ground and placed it back on the ground, and that the gun was guarded by other officers until collected by NFPD evidence technicians.

[7] The handgun, an RG Industries Model RG23 22LR caliber double-action revolver, was forensically examined at the Niagara County Sheriff's Office Forensic Laboratory and was determined to be operable with the ammunition that was in the handgun when it was collected.

CSU photograph of Officer Richards's police car showing where the bullet fired by Mr. Rivers hit the car.

CSU photograph of Mr. Rivers's handgun at the scene.

CSU photograph of bullets in the cylinder of Mr. Rivers's gun at the scene.

Medical Examiner

An autopsy of Mr. Rivers's body was ordered by the Niagara County Coroner, Gary Strassburg. On August 4, 2023, Dr. Tara Mahar, of the Erie County Office of the Medical Examiner, performed the examination, and concluded that the cause of Mr. Rivers's death was multiple gunshot wounds, and deemed the manner of death to be "homicide," in that Mr. Rivers was "shot multiple times by two officers that returned fire." The examination "revealed nine gunshot wounds of the body that injured major blood vessels and organs, including the left lung, kidneys, spleen, large intestine, and spinal cord."

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 (PL) 35.00, not an affirmative defense. To obtain a conviction at trial, a prosecutor must disprove a defense beyond a reasonable doubt, PL 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, *Jackson v Edwards*, 404 F3d 612 (2d Cir 2005); *People v. Padgett*, 60 NY2d 142 (1983); *People v Steel*, 26 NY2d 526 (1970).

As detailed below, based on the evidence in this investigation, OSI concludes that a prosecutor would be unable to prove beyond a reasonable doubt that Officer Richards's and/or Officer Sitek's use of deadly physical force was not justified.

PL 35.30 is the provision defining justification when a police officer or peace officer uses force to make an arrest and provides, in part:

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

In this case, Officer Richards and Officer Sitek, each used deadly physical force. Under PL 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 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."

Under PL 35.30, the officer who uses deadly physical force is justified when the officer reasonably believes deadly force is necessary to defend the officer 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) the officer 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 officer under the same circumstances could believe the same.

In this case, OSI concludes that a prosecutor would not be able to disprove beyond a reasonable doubt that it was reasonable for Officer Richards and Officer Sitek to believe that deadly physical force was necessary to defend herself / himself, or another person, from what she or he believed to be the use or imminent use of deadly physical force by Mr. Rivers, and that the officers' use of deadly physical force was justified under the law.

Officer Richards said she saw Mr. Rivers holding a gun and that she repeatedly ordered him to drop it. Officer Richards said she was afraid that Mr. Rivers was going to kill her. Mr. Rivers did not drop the handgun, but instead pointed the handgun and fired a shot at her, causing Officer Richards to return shots until she felt he was no longer a threat. Officer Sitek said he also told Mr. Rivers to drop the gun and that Mr. Rivers shot at Officer Richards before he shot at Mr. Rivers. Five separate civilian witnesses, and the BWC, surveillance video from the *Estella Apartments*, photographs, and firearm evidence, corroborate each other and establish that Mr. Rivers had a handgun and fired at the police and that they responded to his actions by shooting him.

In sum, OSI concludes that a prosecutor would not be able to prove beyond a reasonable doubt that Officer Richards's and/or Officer Sitek's actions were not justified under New York law in using deadly physical force. Therefore, OSI will not seek charges and closes this matter with the issuance of this report.

Dated: August 1, 2024