Office of the New York State Attorney General Letitia James

Office of Special Investigation

September 24, 2024

Report on the Investigation into the Death of Azer Ben Zitun

AZER BEN ZITUN - REPORT

OVERVIEW

New York Executive Law Section 70-b (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. When OSI does not seek charges, Section 70-b requires OSI to issue a public report describing its investigation. This is the public report of OSI's investigation into the death of Azer Ben Zitun, who was shot and killed on August 4, 2023, by members of the New York City Police Department (NYPD) in the County of New York.

On August 4, 2023, in five 911 calls from 11:30 p.m. to 11:50 p.m., Mr. Ben Zitun's family members requested that police come to the apartment building at 540 Main Street, on Roosevelt Island, saying he was mentally unstable and threatening people with a knife. The police arrived at the address at 11:52 p.m. and, outside the building, spoke to Mr. Ben Zitun's father and brother, who repeated that Mr. Ben Zitun had threatened them with a knife. They told the officers Mr. Ben Zitun was still in the apartment and gave them the keys.

At 11:58 p.m. Officers Daniel Mehr, Daniel Mazza, and Annie Virella-Abreu got into an elevator to go up to the apartment, and Officer Edward Britch stayed in the lobby, outside the elevator. At the same time, Mr. Ben Zitun was riding an elevator down to the lobby of the building, holding a kitchen knife in his right hand. Before the officers' elevator door had closed, Mr. Ben Zitun came out of his elevator and swung the knife at Officer Britch in the lobby, who blocked the blow with his arm. Then Mr. Ben Zitun, holding the knife in his right hand, turned and walked into the elevator occupied by the other officers. Officer Virella-Abreu attempted to fire her Taser, which did not deploy, and tried to push him back, and Officers Mehr and Mazza fired their guns, striking Mr. Ben Zitun, who died of his wounds.

Having thoroughly investigated the facts and analyzed the law, OSI concludes a prosecutor would not be able to disprove beyond a reasonable doubt that the officers' use of deadly physical force against Mr. Ben Zitun was justified under New York law and will not seek charges against them.

FACTS

The Scene

540 Main Street, on Roosevelt Island, is a multi-story residential apartment building. A vestibule leads to a lobby. There are two elevators on the right side of the lobby as you walk in.

Background of the Officers Involved

The four responding officers were assigned to the 114th Precinct, in Queens County, which is responsible for the patrol of Roosevelt Island.[1] None of the officers had fired their guns on duty before this incident, other than in training, and none of them had encountered Mr. Ben Zitun before this incident.

Officer Mehr became a member of NYPD in 2018 and was assigned to the 114th Precinct in 2019. Officer Mazza became a member of NYPD in 2020 and was assigned to the 114th Precinct in 2021. Officer Virella-Abreu became a member of NYPD in 2018 and was assigned to the 114th Precinct in 2019. Officer Britch became a member of NYPD in 2012 and was assigned to the 114th Precinct in 2013.

Events Leading to the Shooting

911 Calls

On August 4, 2023, at 11:30 p.m.[2] a man later identified as the brother of Mr. Ben Zitun called 911 and asked for police to come to 540 Main Street, Roosevelt Island, saying his brother was "mentally unstable," was threatening him and his father, and was trying to hold a knife. The 911 recording can be heard here.

At 11:31 p.m. a woman later identified as the sister of Mr. Ben Zitun called 911 and asked for medical help at 540 Main Street because her brother was schizophrenic and freaking out and had a knife and she didn't know if anyone was hurt. The 911 recording can be heard here.

At 11:34 p.m. Mr. Ben Zitun's brother called 911 again and asked police to come to 540 Main Street to get his brother out of the house; his brother was "unstable," didn't take his medication, and has a knife. He said they left the house and his brother was in the house, wearing a white shirt, green hat, and black shorts. He said his brother was trying to kill him and his father and had made his father go down on his knees to make him bow down. The 911 recording can be heard here.

At 11:35 p.m. Mr. Ben Zitun's sister called 911 again and said her brother had a knife and was being violent; she said she thought he was under the influence of marijuana and hadn't taken his medication. She said her other brother was 16 and is in danger in the house. She said they tried to take him to a doctor but he wouldn't go. She said her mother was on vacation

[1] Although Roosevelt Island is in New York County (Manhattan), the only vehicular bridge to the island is from Queens.

[2] Times referencing 911 calls are based on the time stamps in the Intergraph Computer Aided Dispatch System Reports of the 911 calls.

and told her to call the police, that this is not the first time, and that he needs mental assistance because he is "crazy." The 911 recording can be heard here.

At 11:50 p.m. Mr. Ben Zitun's brother called 911 again and said he is still waiting for the ambulance and they are still in danger. The 911 recording can be heard here.

Body Worn Camera (BWC) Video and Security Video

At 11:52 p.m., Officers Mehr, Mazza, Virella-Abreu, and Britch arrived at 540 Main Street and activated their BWCs.[3] Each officer was equipped with a gun and a Taser, and Officer Mazza was equipped with a polycarbonate shield.[4]

As shown on BWC, the officers met with Mr. Ben Zitun's brother and father outside the building. Mr. Ben Zitun's brother said his brother, Azer, was "mentally unstable" and had threatened to stab him and his father. He said Azer told him to get the knife and told him he was going to stab them both. He said Azer had not taken his medication, and their mother was usually the only person who could keep him calm, but she was out of town. He said Azer was acting violent and might attack the officers and that Azer was about to get the knife in the kitchen. He said Azer took their father hostage and started beating him. He said he and his father escaped the apartment, but Azer should still be in the apartment. He gave the officers the keys to the apartment.

Security video from the left elevator shows that Mr. Ben Zitun entered that elevator at 11:58:00 p.m. on the floor where his apartment was and, at 11:58:49 p.m., left the elevator and entered the lobby, where he encountered the police officers.[5]

The Shooting

Review of the officers' BWC video shows the following:

Officers Mehr, Mazza, Virella-Abreu, and Britch entered the lobby of 540 Main Street. The lobby has two elevators to the right upon entering the lobby. Officers Mehr, Mazza, and Virella-Abreu entered one of the elevators – the one on the right, as a person faces the two elevators.

---

[3] Times stated in this section and the next section are based on the time stamps in the BWC video footage, except those stated to be from the building's security video. The time stamps from the building's video were not synchronized with those from the BWCs.

[4] The BWC videos can be viewed here: Officer Mehr, Officer Mazza, Officer Virella-Abreu, and Officer Britch. Also present with the NYPD officers were two Roosevelt Island Operating Corporation (RIOC) Public Safety Officers. The public safety officers were not equipped with firearms or BWCs.

[5] The composite security video, from cameras in the vestibule, lobby, and left elevator of the building can be seen here; the right elevator's camera was not working at the time. This video did not capture audio.

Officer Britch was in the lobby, near the entry door. Mr. Ben Zitun, with a kitchen knife in his right hand, came out of the left elevator into the lobby, walked quickly to Officer Britch, and swung the knife at Officer Britch's face. Officer Britch deflected the blow with his left arm. Mr. Ben Zitun walked toward the open door of the right elevator with the knife in his right hand. Officer Mehr fired his gun once at Mr. Ben Zitun. Mr. Ben Zitun continued to walk toward the officers in the elevator. Officer Virella-Abreu unsuccessfully attempted to push Mr. Ben Zitun back with the Taser she was holding in her right hand. As Mr. Ben Zitun entered the elevator, Officer Mehr fired his gun 11 times and Officer Mazza fired his gun four times, and Mr. Ben Zitun fell to the floor.

Additional police officers responded to the scene after the shooting. Officer Thomas Abruscati placed Mr. Ben Zitun in handcuffs and officers began to perform cardiopulmonary resuscitation (CPR). Emergency medical services arrived seven minutes after the shooting.

Still image from Officer Mehr's BWC as Mr. Ben Zitun entered the elevator, showing the knife in his hand (circled)

Officer Interviews

OSI interviewed the four officers.

Officer Mehr

Officer Mehr said he received a radio run for an emotionally disturbed person with a knife. He said he and his partners met with Mr. Ben Zitun's brother and father outside 540 Main Street,

Roosevelt Island, and, after speaking to them, went into the building and into an elevator because they were told Mr. Ben Zitun was still in the apartment, on an upper floor. Officer Mazza was equipped with a shield. The officers made a tactical decision to ensure Mr. Ben Zitun's safety by keeping him in his apartment until NYPD Emergency Services Unit arrived. They waited in the elevator for Officer Britch, who was trying to prop open the door connecting the vestibule and lobby. Officer Mehr then saw a man later identified as Azer Ben Zitun walk up to Officer Britch and swing what he thought was a closed fist toward Officer Britch. Then Mr. Ben Zitun started to walk toward the elevator, and Officer Mehr realized he had a knife in his right hand and feared for his and his partners' physical safety. Officer Mehr took out his gun and fired one shot at Mr. Ben Zitun. Mr. Ben Zitun continued to advance toward the officers in the elevator with the knife. Officer Mehr said he did not know whether his shot had hit Mr. Ben Zitun, but then fired additional shots at Mr. Ben Zitun because he thought Mr. Ben Zitun was going to stab him and his partners. Officer Mehr said he did not know how many times he fired, but stopped when he thought Mr. Ben Zitun was no longer a threat. Officer Mehr said after he stopped firing Mr. Ben Zitun still had the knife in his hand and was moving his hand. Officer Mehr gave numerous commands to Mr. Ben Zitun to put the knife down.

Officer Mazza

Officer Mazza said that he took his NYPD-issued shield from the trunk of the car because he knew the call involved an emotionally disturbed person who was armed with a knife. The officers' plan was to go up to the apartment where Mr. Ben Zitun was, to keep him inside, and wait for Emergency Services. When he and Officers Mehr and Virella-Abreu were in the elevator, Officer Mazza saw Mr. Ben-Zitun approach Officer Britch in the lobby and swing what appeared to be a closed fist toward Officer Britch. Mr. Ben Zitun then walked toward the elevator and Officer Mazza saw that he had a knife in his hand and realized he had just swung that knife at Officer Britch. Officer Mazza said he feared for his and his partners' physical safety. Officer Mazza took out his gun. He saw that Officer Mehr fired his gun once at Mr. Ben-Zitun, but that the shot did not cause Mr. Ben Zitun to stop or retreat. Officer Mazza then fired his gun multiple times and stopped shooting as soon as he thought Mr. Ben Zitun could no longer stab him or his partners. Officer Mazza said Mr. Ben Zitun still had the knife in his right hand after the shooting, and was moving it around, and did not drop it despite multiple commands to do so.

Officer Virella-Abreu

Officer Virella-Abreu said the officers received a radio run for an emotionally disturbed person armed with a knife, with family members requesting the police and an ambulance. After she and her partners met with Mr. Ben Zitun's brother and father outside the building, she and Officers Mazza and Mehr went into the building and into an elevator. Officer Britch was trying to prop open the door connecting the vestibule and lobby. Officer Virella-Abreu saw Mr. Ben

Zitun appear in the lobby and swing what she thought was a closed fist at Officer Britch. Mr. Ben Zitun then turned and walked toward her with a knife in his hand. Officer Virella-Abreu had her Taser in her hand and thought she pulled the trigger, but the Taser did not discharge. As Mr. Ben Zitun continued to approach her in the elevator, she attempted to push him away by pushing the Taser into his chest. She then dropped the Taser and unholstered her gun but did not fire because Officers Mazza and Officer Mehr had already fired. After the shooting, Officer Virella-Abreu still perceived Mr. Ben Zitun as a threat because he continued to hold onto the knife and move his arms.

Officer Britch

Officer Britch said he and his partners were responding to the location after receiving a radio run for an emotionally disturbed person with a knife. He arrived with Officers Mazza, Mehr, and Virella-Abreu and they were met by Mr. Ben Zitun's brother and father who told them what had happened and said they were the ones who called 911. Officer Britch said he and the other officers went into the building and the other officers went into an elevator while Officer Britch tried to prop open the lobby door. Officer Britch said Mr. Ben Zitun appeared out of nowhere and swung what he thought was a closed fist at him, but then noticed that he had a knife in his hand and thought he was going to get stabbed. Officer Britch deflected the stab with his left arm and ran back to the vestibule to create space between himself and Mr. Ben Zitun. Officer Britch said he had a bruise on his left forearm for a couple of days as a result. Officer Britch said he saw that Mr. Ben Zitun had been shot and was on the floor; Officer Britch took out his own firearm and gave numerous commands for Mr. Ben Zitun to drop the knife because he still had the knife in his right hand and his arm was still moving.

The Aftermath

According to BWC, NYPD Officers Brian Bayley and Thomas Abruscati responded to 540 Main Street shortly after the shooting. Officer Bayley removed the knife from Mr. Ben Zitun's hand and placed it by a wall in the lobby; Officer Abruscati handcuffed Mr. Ben Zitun and started to administer CPR; Officer Mazza also administered CPR. EMS entered the apartment building at 12:05 a.m. and tended to Mr. Ben Zitun. They placed him on a stretcher and transported him to Weill Cornell Medical Center while they continued to perform CPR. According to Weill Cornell Medical Center medical records, Mr. Ben Zitun was pronounced dead on August 5, 2023, at 12:28 a.m.

Evidence Collection and Analysis

The NYPD Crime Scene Unit (CSU) processed the lobby and the right elevator. In the lobby, CSU recovered a deformed fired bullet and bullet fragments from the east wall, the knife that

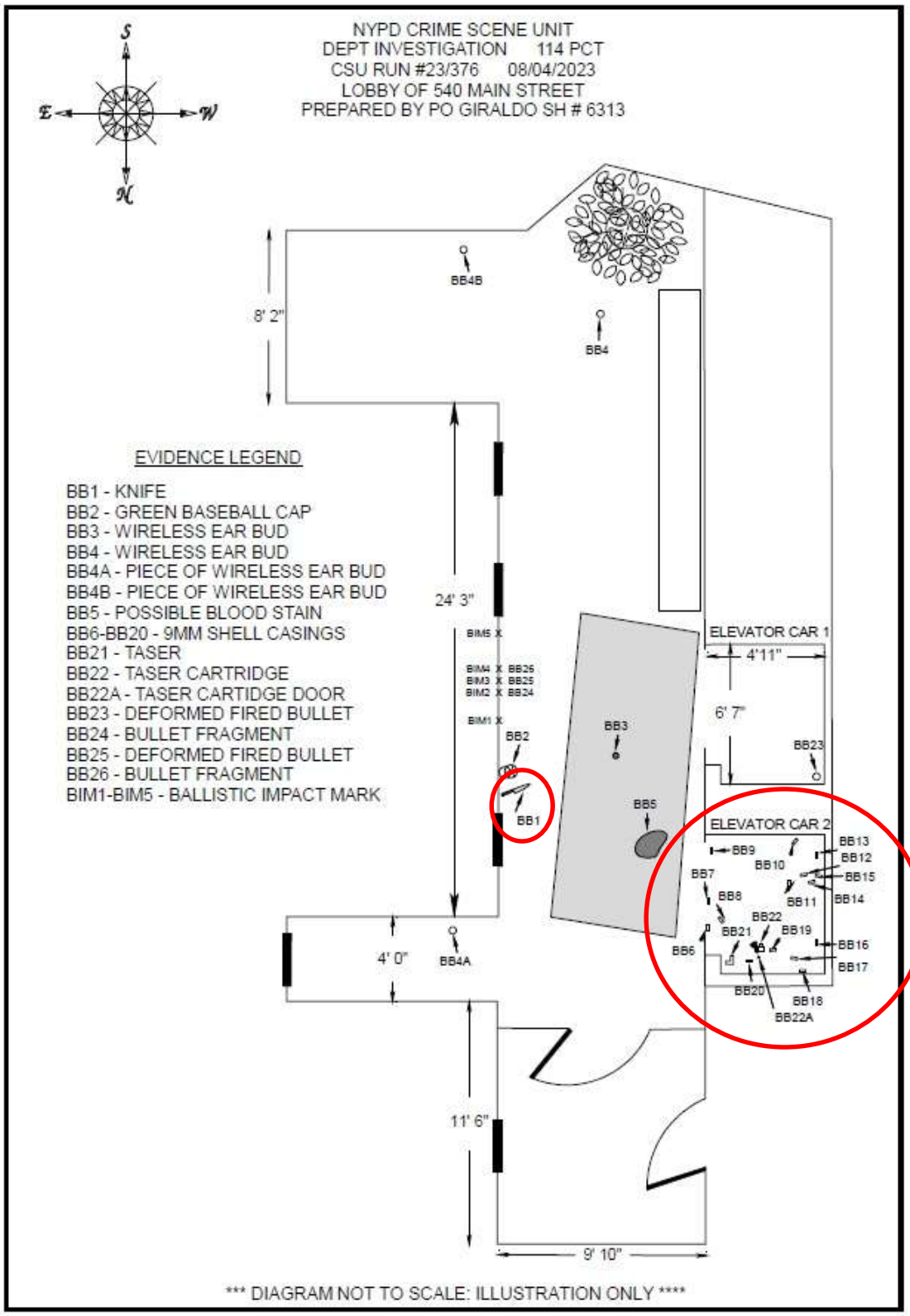
an officer took from Mr. Ben Zitun's hand, and the hat worn by Mr. Ben Zitun, among other items.

CSU photograph of the recovered knife.

From the right elevator, CSU recovered 15 spent shell casings, a deformed fired bullet, a Taser, a Taser cartridge, and a Taser-cartridge door.

CSU photograph of inside the right elevator.

CSU prepared the diagram below, showing the evidence they recovered:



CSU map showing locations of recovered evidence. OSI added red circles to show where the knife was recovered, and the elevator area where the shooting took place.

CSU took possession of Officers Mazza's and Mehr's firearms, which were each an NYPD-issued 9 mm Glock 17 pistol with a 15-round magazine, for a total capacity of 16 rounds, if one round is in the firing chamber. Upon examination, Officer Mazza's firearm had one round in the chamber, and 11 rounds in the magazine, which is consistent with his having fired four shots. Officer Mehr's firearm had one round in the chamber and four rounds the magazine, which is consistent with Officer Mehr's having fired 11 shots.

Medical Examination and Autopsy

The autopsy of Mr. Ben Zitun was performed by Dr. Anne Hoffa, of the City of New York Office of Chief Medical Examiner, and she prepared a written report. Dr. Hoffa determined that the cause of death was "gunshot wounds of torso" and that the manner of death was "homicide (shot by police)." The autopsy found that Mr. Ben Zitun was struck by gunfire 15 times, including wounds that were not to the torso.

LEGAL ANALYSIS

Article 35 of the New York Penal Law defines the circumstances under which a person may be justified in using deadly physical 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). As detailed below, based on the evidence in this investigation, OSI concludes that a prosecutor would be unable to disprove beyond a reasonable doubt that the use of deadly physical force by the discharging officers was justified.

In this case, Officers Mehr and Mazza 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."

PL 35.30 is the provision defining justification when a police officer or peace officer uses force in the course of an arrest. PL 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 force pursuant to PL 35.30(1) are under no duty to retreat when threatened with deadly physical force, PL 35.15(2)(a)(ii).

Under Article 35, "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, and that a "reasonable person" under the same "circumstances" could have believed the same. *People v. Goetz*, 68 NY2d 96 (1986); *People v. Wesley*, 76 NY2d 555 (1990). Therefore, before using deadly physical force in self-defense, a person must honestly and in good faith believe deadly physical force was about to be used against them, deadly physical force was necessary for self-defense, and a reasonable person under the same circumstances could have believed the same.

Under PL 35.30, Officer Mehr and Officer Mazza could use the physical force they reasonably believed to be necessary to effectuate the arrest of Mr. Ben Zitun, after observing him attack Officer Britch, and they could use deadly physical force if they reasonably believed it was necessary to defend themselves or a fellow officer against Mr. Ben Zitun's use or imminent use of deadly physical force. Officers Mehr and Mazza saw Mr. Ben Zitun swing at Officer Britch and then come into the elevator with a knife in his hand. At this point, Officers Mehr and Mazza were an arms-length away from Mr. Ben Zitun. Officer Mehr fired once, but Mr. Ben Zitun continued to advance. Officers Mehr and Mazza then fired multiple times until they thought it would be safe to stop shooting.

Based on the law and the evidence, OSI concludes a prosecutor would not be able to disprove beyond a reasonable doubt that the discharging officers' use of deadly physical force against Mr. Ben Zitun was justified under New York law. As a result, OSI will not seek charges and closes the matter with the issuance of this report.

Dated: September 24, 2024