April 3, 2025

Report on the Investigation into the Death of David Clements

OVERVIEW

New York Executive Law 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 a peace officer, as defined. When OSI, as in this case, does not seek charges, Section 70-b requires OSI to issue a public report. This is the public report of OSI's investigation of the death of David Clements, who was shot and killed on February 2, 2024, by Nassau County Police Department (NCPD) Officer Michael Graham. Having thoroughly investigated the matter and analyzed the law, OSI will not seek charges against Officer Graham because it would not be able to disprove beyond a reasonable doubt that his use of deadly force against Mr. Clements was justified under New York law.

On February 2, 2024, at 8:00 p.m., Mr. Clements left his home and walked to a neighbor's house, arriving as Witness 1 was pulling into the driveway (OSI does not publish the names of civilian witnesses). Mr. Clements approached her car, said he wanted to kill himself, and lifted his sweatshirt to show the handle of a gun tucked into his waistband. Witness 1 called 911 and drove away. Mr. Clements ran home and called his aunt and then his mother and said he had a gun and was going to shoot himself. Mr. Clements's mother called 911 and drove home.

Several cars from NCPD responded to Mr. Clements's house. Officers surrounded the house but retreated to the street when one officer heard what he believed was someone racking a firearm in the house. Mr. Clements came out of the house through the front door and started pointing two objects that appeared to be pistols toward the officers and against his head. Mr. Clements briefly went back inside and then came out with a third object that appeared to be a pistol, which had a mounted flashlight. Mr. Clements pointed the object at officers and did not follow their commands to drop it. Mr. Clements walked down the driveway toward three officers who were taking cover behind a parked police car. Mr. Clements was pointing the object at the officers. Officer Michael Graham shot him three times when he reached the end of the driveway. Mr. Clements was declared dead at the scene. Police recovered three BB guns, all of which appeared to be real firearms.

FACTS

Background

The incident occurred in front of a single-family house in a residential neighborhood in Massapequa.

The shooting officer was Michael Graham, who graduated from the NCPD Academy in 2018. At the time of the shooting, Officer Graham was a member of NCPD's Emergency Service Unit, to which was assigned in 2022.

Mr. Clements was 19 years old at the time of the shooting and was on family court probation for a 2020 arrest regarding a stolen vehicle. In 2021, his mother called the police when she found a BB gun in his room, which she believed was a real gun. A family court case worker met with Mr. Clements to

discuss the incident and the dangers of having a realistic looking BB gun in public. Mr. Clements was diagnosed with certain mental health issues for which he was prescribed medication.

Events prior to the shooting

OSI Detective Sanrit Booncome interviewed several witnesses about the events leading up to the shooting.

Mr. Clements's mother said that in the weeks leading up to the incident she was having problems with her son's behavior and was upset after finding what she believed was a real gun and two BB guns in his bedroom. Mr. Clements's mother said she had confronted him earlier in the evening of the shooting and had told him he was not allowed to have weapons in the house. Mr. Clements's mother then left to have dinner with a friend while her son stayed home with his girlfriend.

While she was out to dinner, Mr. Clements called her and said he had a gun and was going to shoot himself. Mr. Clements's mother immediately called 911 and drove home. While driving home, she called her son and tried to calm him down, but he kept saying nobody loved him and that he wanted to die. When she arrived at her street officers were already there.

Witness 2 said she had been dating Mr. Clements for three months. On the night of the incident, she took an Uber to his home and arrived at 5:30 p.m. When she arrived, Mr. Clements was having a conversation with his mother about following the house rules and that he was not allowed to have any weapons, including BB guns, in the house. After his mother left, Mr. Clements became very upset and started smoking marihuana. He told Witness 2 to leave because he did not want her there; Witness 2 left between 8:00 and 8:15 p.m. About 15 minutes after leaving, Mr. Clements called her and said, Please tell my mother I love her. Witness 2 said she had seen Mr. Clements playing with BB guns in the past, and he had told her he had a real gun, but she had not seen it.

Witness 3 said she had known Mr. Clements since he was a baby, and he referred to her as his aunt. Mr. Clements called her at 8:15 p.m. and said he had a gun and couldn't take it anymore and asked her to tell his mom he loved her. Witness 3 told him to put the gun in the bathtub and attempted to add his mother to the call. Mr. Clements told her the police were outside and that he would not go back to jail and hung up. Witness 3 eventually spoke with Mr. Clements's mother and said the police were at her house and that her son had a gun.

Witness 4 is Witness 1's son. Witness 4 said he was a close friend of Mr. Clements and that they had known each other since they were children. Witness 1 called him and said Mr. Clements had just been in their driveway and had a gun. Witness 4 called Mr. Clements on video Snapchat and could see that he was returning to his house. During the call, Mr. Clements was crying and said he had a gun and was going to kill himself. Witness 4 tried to talk with him, but Mr. Clements continued to cry and repeatedly said he loved his mother. The police arrived while they were on the phone and Mr. Clements said he was going to shoot them if they did not shoot him first.

911 Calls

At 8:29 p.m. Witness 1 called 911 and said she had known Mr. Clements since he was a child. She said she was pulling into her driveway when Mr. Clements approached her and said he was going to kill himself and then showed her the butt end of a gun before running away. (Witness 1's 911 call is here.)

At 8:32 p.m. Mr. Clements's mother called 911 and said her son had just called her and said he was going to shoot himself. She said her son had a real gun and two BB guns. She confirmed to the operator that her son had a real gun and was threatening to shoot himself. (Mr. Clements's mother's 911 call is here.)

The information from both 911 calls was put over the police radio. Recordings show that officers were informed that Mr. Clements was in his house with a real gun and threating to shoot himself. No information that the weapons were possibly BB guns was put over the radio. (The radio communications are here.)

Body Worn Camera Videos

Officers arrived at the scene at 8:34 p.m. and surrounded the house. NCPD Officer Timothy Rowe's body camera showed him in the back yard with another officer attempting to locate Mr. Clements. Officer Rowe radioed other officers that he heard somebody in the house racking a gun. The radio dispatcher instructed officers to put on heavier vests. Officers moved away from the house and took cover behind their cars. (Officer Rowe's body camera footage is here and here.)

At the same time Officer Rowe was in the backyard, Mr. Clements's mother (driving) and Witness 5 (passenger) were arriving at the house. They parked a few lots away from the house. Mr. Clements's mother was on speaker phone with her son when NCPD Officer Robert Scott approached her car. Officer Scott's body camera footage captured Mr. Clements yelling and crying on the phone, and repeatedly telling his mother he loved her and that he had three loaded guns and was going to shoot himself. Officer Scott stepped away from the car and radioed that Mr. Clements had three loaded guns and was threatening to shoot himself. Officer Rowe then spoke separately with Witness 5 and asked if she had ever seen Mr. Clements with a gun. Witness 5 said she had never seen him with a gun and believed they were only BB guns, but could not say for sure because she had never seen them. Officer Scott's body camera footage is here.

Body camera footage from several officers showed, from a distance, that Mr. Clements came out of the front door of the house, stood on the front steps, and pointed what appeared to be a firearm toward the officers. Many of the officers were positioned behind their cars and yelled at him to drop the weapon. Mr. Clements briefly went back into the house and came back outside holding a weapon equipped with a flashlight. Mr. Clements paced in the front yard and pointed the weapon toward the officers, with the weapon's flashlight shining on the officers and their cars. The officers continued to yell for him to drop the weapon.

Mr. Clements walked down the driveway toward three officers, including Officer Michael Graham, who were taking cover behind a police car parked near the end of the driveway, in the street. Mr. Clements pointed the weapon at the officers as he walked toward them. When he reached the end of the driveway, Officer Graham shot him three times.

A review of Officer Scott's and NCPD Officer Robert Shutowich's body cameras showed Officer Graham standing between them as they took cover behind a police car. (Portions of the images were obscured by the tactical positions they took to shield themselves from possible gunfire.) Throughout the videos, several officers yelled at Mr. Clements to drop the weapon. The videos showed the weapon's flashlight shining on the officers and their car as Mr. Clements walked toward them. As Mr. Clements neared the end of the driveway Officer Shutowich said the weapon might be a BB gun. Officer Graham shot him when he was a few feet from the officers. The officers surrounded Mr. Clements as he lay motionless on the ground, and Officer Graham kicked the weapon he was holding away from his body. (Officer Shutowich's body camera video is here.)

Interview of Officer Graham

OSI interviewed Officer Michael Graham, who said he responded to the address given in the dispatch after hearing a radio transmission for a suicidal male with a gun. Officers already on scene told him Mr. Clements was inside the house and had multiple guns. Officer Graham returned to his car to get a long rifle and to put on a helmet and a heavier bullet proof vest. He said that, while getting his equipment, he heard several officers yelling that Mr. Clements had left the house and was holding a gun. Officer Graham said he immediately ran toward the house and took cover with two other officers behind a police car parked at the end of the driveway. From there Officer Graham said he could see Mr. Clements pacing in the front yard and pointing a gun equipped with a flashlight at himself and at officers. Officer Graham said he believed that the gun was pointed at him or other officers when the gun's flashlight shined on them.

Officer Graham said Mr. Clements walked down the driveway toward the officers and continued to point the gun toward them, and that he shot Mr. Clements when he reached the end of the driveway and was within feet of him and the other officers. Officer Graham said he had not heard Officer Shutowich say the weapon was possibly a BB gun, and said he believed Mr. Clements was holding a real Glock firearm.

Officer Graham was not wearing his body camera during the incident. He said that when he went to his car to put on the heavier vest and to get the helmet and long rifle, he removed his body camera while switching vests and that, when he heard officers yelling that Mr. Clements had left the house and had a weapon, he immediately ran to assist them and did not have time to put his body camera back on.

Weapons Recovered

After the incident, Detective Katy Kalender from NCPD's evidence collection team recovered the items described below at the scene.

Glock 17 BB Gun

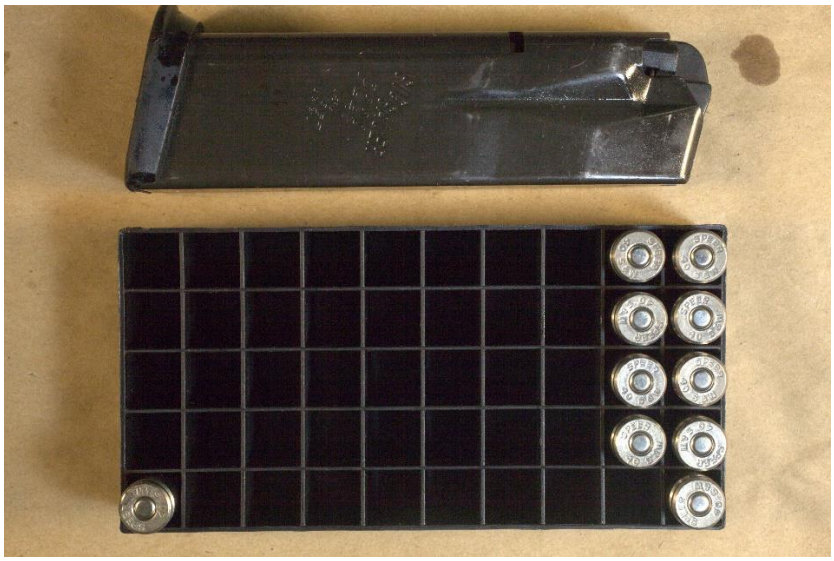
Immediately after the shooting, officers removed a Glock 17 BB gun from next to Mr. Clements. According to the crime scene paperwork, Detective Kalender believed the weapon was a real 9-millimeter Glock 17 firearm and did not realize it was a BB gun until after it was recovered and broken down.

Glock 17 BB gun recovered near Mr. Clements's body

The BB gun is a licensed Glock product sold by weapons vendors and advertised as being built to look, handle, and function like a Glock 17 firearm. The BB gun was equipped with features having an identical appearance to the Glock firearm, including enhanced grips, a drop out magazine, metal sides, fixed sights, and a Glock logo on the left grip and on both sides of the slide. (A vendor website is here.)

Magazines with Ammunition

A magazine loaded with ten rounds of live .40 caliber ammunition was recovered from under Mr. Clements's body. The magazine and the ammunition were not functional in the Glock 17 BB gun.



Magazine and ammunition recovered from under Mr. Clements's body

A second magazine, loaded with ten live rounds of .40 caliber ammunition, was recovered in the house, under Mr. Clements's bed.

Magazine and ammunition recovered from under Mr. Clements's bed

Sig Sauer P365 BB Gun

A Sig Sauer P365 BB gun was recovered from the front lawn where Mr. Clements was standing prior to the shooting.

Sig Sauer BB gun recovered from front lawn

The BB gun is manufactured and sold by Sig Sauer and is advertised as a scale replica of the real firearm with recoil that mimics the operation and trigger pull of the semiautomatic firearm. The BB gun is equipped with a polymer frame, a metal full blowback slide, and a replica 20 round CO2 drop magazine. (Sig Sauer website is here.)

Pietro Beretta M92A1 BB Gun

A Pietro Beretta BB gun was recovered in the front lawn next to the Sig Sauer P365.

Beretta BB gun recovered from front lawn

The BB gun is marketed as a replica of the firearm. It is equipped with a drop out magazine and is capable of firing 18 pellets with one trigger pull. (A vendor website is here.)

Loose Cartridge

A loose single round of .45 caliber ammunition was recovered from the front lawn near the Sig Sauer and Pietro Beretta BB guns.

Loose round of ammunition found in the front lawn

Nassau County Medical Examiner's Office

Investigator Philip Ninivaggi responded to the scene and examined the body of Mr. Clements. According to his report, Investigator Ninivaggi conducted an external review and observed three gunshot wounds, including two gunshot wounds of the head, and a gunshot wound to the lower right side of the back. During the examination, a black ammunition magazine was found under Mr. Clements's lower back and was recovered by crime scene detectives.

On February 3, 2024, Dr. Tamara Bloom performed the autopsy of Mr. Clements and concluded that the cause of Mr. Clements's death was gunshot wounds of the head and torso. The final autopsy report said Mr. Clements was shot three times, twice in the face, and once in the back.

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 the Court of Appeals recently stated in *People v Castillo*, Slip Opinion, November 21, 2024:

> "The defense of justification provides that a person may use physical force to defend himself against an assailant's 'imminent use of unlawful physical force,' but does not authorize the use of 'deadly physical force . . . unless . . . [the person] reasonably believes that [the assailant] . . . is using or about to use deadly physical force' (Penal Law § 35.15). When considering a request for a justification charge, courts examine the evidence in the light most favorable to the defendant, and must provide the instruction if there is any reasonable view of the evidence that defendant was justified in his actions (see *People v Heiserman*, 39 NY3d 988, 990 [2022]). Justification has both a subjective requirement, that 'defendant . . . actually believed . . . he [was] . . . threatened with the imminent use of deadly physical force,' and an objective requirement, that defendant's 'reactions were . . . those of a reasonable man acting in self-defense' (*People v Collice*, 41 NY2d 906, 907 [1977])."

Castillo, Slip Opinion at 3 (square brackets and ellipses in the original).

In this case, Officer Graham 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 to effect or attempt to effect an arrest for an offense. 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 deadly physical 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).

Based on the evidence in this investigation, OSI concludes that a prosecutor would not be able to disprove beyond a reasonable doubt that Officer Graham's use of deadly physical force was justified under the law. Under PL 35.30, Officer Graham could use the physical force he reasonably believed to be necessary to effectuate the arrest of Mr. Clements and could use deadly force if he reasonably believed it was necessary to defend himself or another against Mr. Clements's imminent use of deadly force. When Mr. Clements pointed what appeared to be firearms at police officers, the officers present had reasonable cause to believe that Mr. Clements was committing the crime of Criminal Possession of a Weapon in the Second Degree with the intent to use unlawfully against another, PL 265.03(1).

Officer Graham responded to the address provided after receiving information of a suicidal man with a gun. Officers already on scene had received information from witnesses that Mr. Clements had a gun and was threatening to kill himself. Based on recordings OSI reviewed, no information about the weapons possibly being BB guns was communicated over the police radio. In the course of the incident, officers saw Mr. Clements holding three realistic looking BB guns, which were designed and marketed to be identical in appearance to real firearms. Mr. Clements pointed those weapons toward several officers and did not obey repeated commands to drop them. Officer Graham did not use deadly physical force until Mr. Clements was walking toward him, pointing one of the weapons at him and other officers, and had reached a point only a few feet away from the officers.

Under these circumstances, OSI concludes a prosecutor would not be able to disprove beyond a reasonable doubt that Officer Graham was justified in shooting Mr. Clements. Therefore, OSI will not seek charges and closes the matter with this report.

Dated: April 3, 2025