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

February 5, 2025

Report on the Investigation into the Death of Ervin Zacarias Antonio Agustin

SUMMARY

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 or a peace officer. When OSI does not seek charges against the officer, as in this case, Section 70-b requires OSI to issue a public report describing its investigation. This is the public report of OSI's investigation of the death of Ervin Zacarias Antonio Agustin, who was struck and killed by a car driven by an officer of the New York City Police Department (NYPD) in Queens County on May 19, 2024.

In summary, on May 19, 2024, a uniformed NYPD Officer assigned to Highway Unit 3 was directed to respond to a collision investigation. As the officer was travelling on the Van Wyck Expressway, a limited access highway with no pedestrian traffic, with lights and sirens activated, Mr. Agustin attempted to cross the highway on foot and was struck by the police car. Mr. Agustin was pronounced dead shortly after he arrived at Jamaica Hospital.

Having thoroughly investigated the facts, including review of body worn camera (BWC) video and dashboard camera video, and analyzed the law, OSI concludes a prosecutor would not be able to prove beyond a reasonable doubt that the officer driving the car that struck Mr. Agustin committed a crime. As a result, OSI will not seek charges and closes the matter with this report.

FACTS

The Scene

The collision occurred on the Van Wyck Expressway in the vicinity of Archer Avenue in Queens County. The Van Wyck Expressway is a multi-lane highway. At the collision location, it runs north-south with three lanes in each direction, separated by a concrete divider. The collision occurred in the southbound lanes near a construction site, with construction equipment parked behind concrete barriers lining both sides of the southbound lanes.

Map and photo generated by the NYPD's Force Investigation Division showing the collision site.

Background of the Officer-Driver

OSI interviewed Officer Carlos Rivera, who drove the car that struck Mr. Agustin. Officer Rivera became an NYPD officer in 2008. Beginning in 2013, Officer Rivera was assigned to the Highway District. Officer Rivera was involved in two on-duty car accidents; the first in 2020 and the second in 2022. After internal NYPD reviews, he was found not to be at fault in the 2020 accident and to be at fault in the 2022 accident.

Events Leading to the Collision

According to Officer Rivera and NYPD documents, on May 19, 2024, Officer Rivera was on duty and assigned to Highway Unit 3. He started work at 10:15 p.m. on the 18th and was scheduled to work until 6:50 a.m. on the 19th.

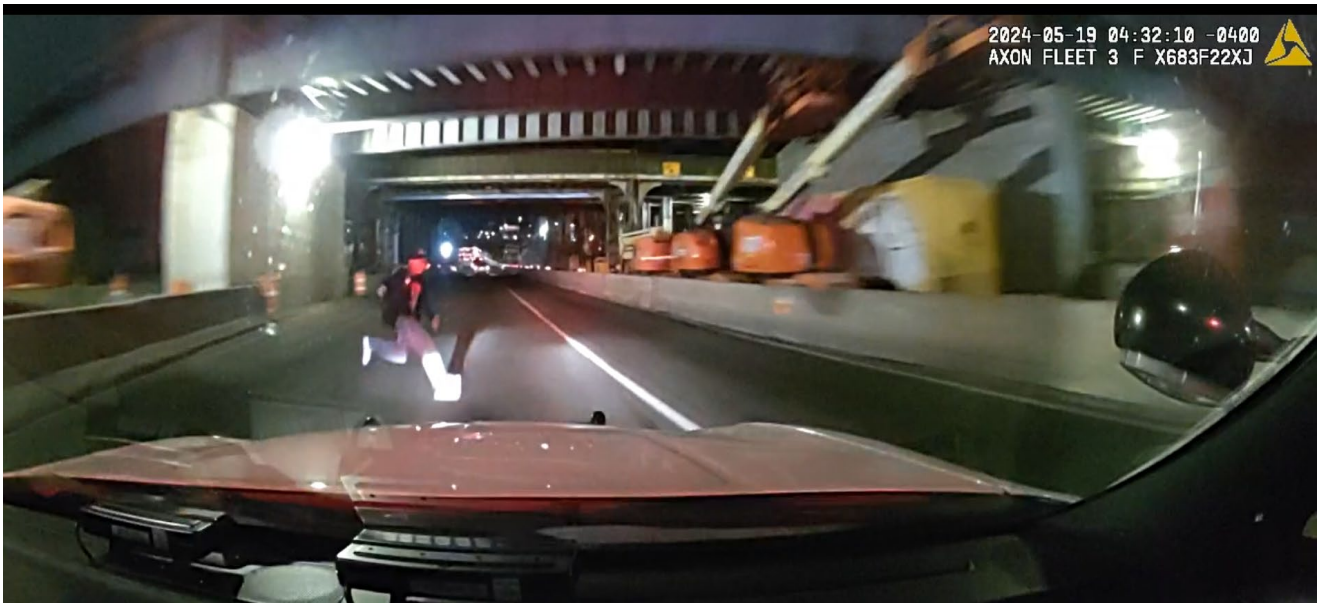
At 4:00 a.m. on the 19th, Officer Rivera and his partner, Officer Russell Lurch, were at the 112th Precinct stationhouse in Queens to assist in determining if an arrested person was intoxicated while operating a motor vehicle. Officers Rivera and Lurch were contacted by their supervisor and told that there was a motor vehicle accident on the Belt Parkway in Queens that had resulted in death. Officer Rivera was told to report to the accident location to assist with the collision investigation.

Officer Rivera left the stationhouse and drove to the accident location. Officer Rivera activated the lights and sirens on his police car and drove onto the Van Wyck Expressway. The police

car was equipped with a dashboard camera, which was activated when Officer Rivera activated the car's lights and sirens.

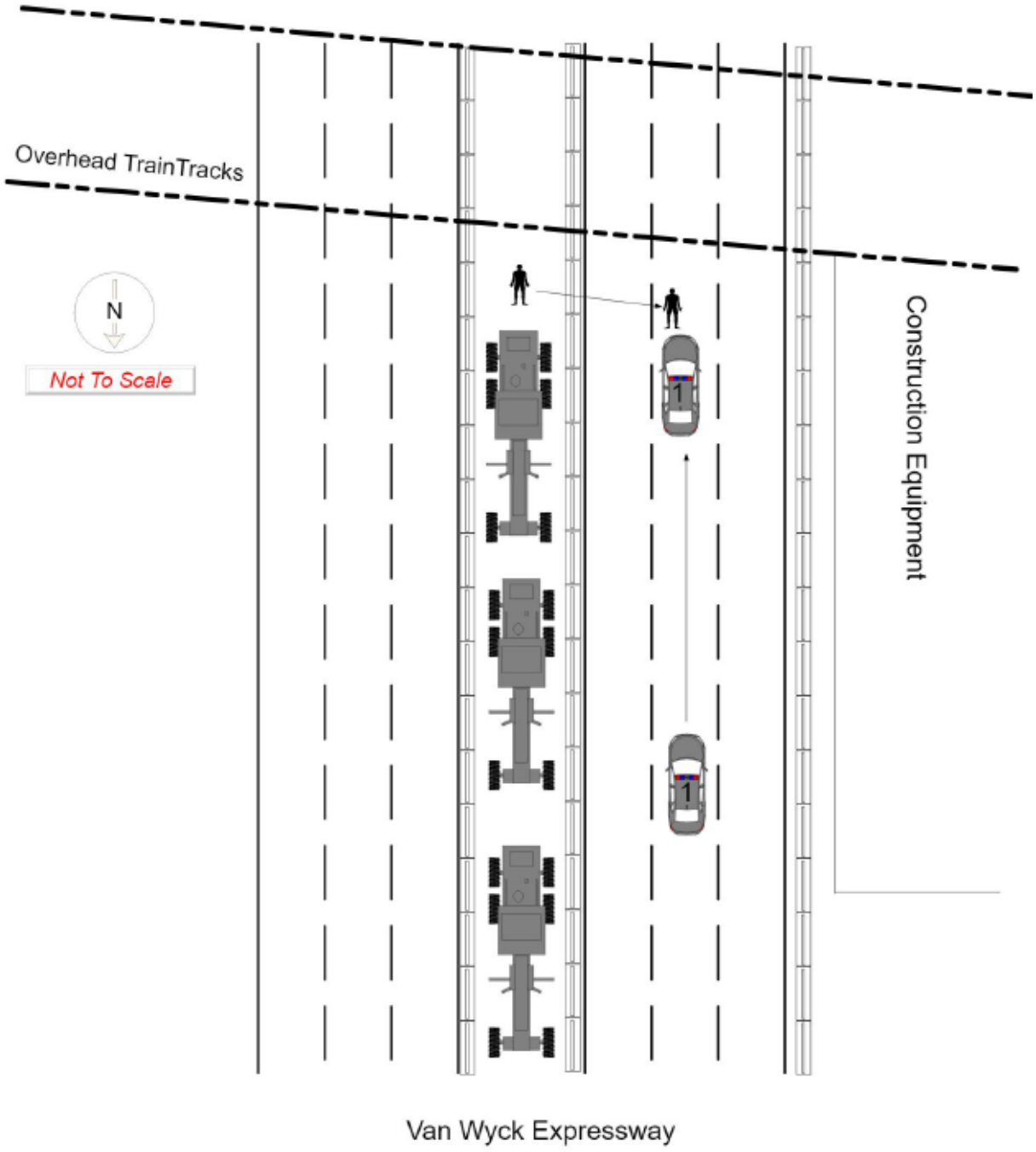
The Collision

As shown by dashboard camera,[1] at 4:32 a.m. Officer Rivera, driving southbound, approached the vicinity of Archer Avenue on the Van Wyck Expressway. Mr. Agustin attempted to run across the highway from left to right. Officer Rivera struck Mr. Agustin.



Still from the dashboard camera in Officer Rivera's car showing the moment before the car struck Mr. Agustin.

[1] Dash Camera Video.mp4



Accident reconstruction rendering by NYPD's Highway unit.

OSI obtained the Automated Vehicle Location (AVL) report for Officer Rivera's car. (NYPD's AVL system tracks NYPD vehicles, including speed, at 10-second intervals, based on GPS signals.) The AVL showed that, just before impact, Officer Rivera's car was travelling 63 mph and struck Mr. Agustin at 60 mph. The speed limit on the Van Wyck Expressway is generally 50 mph and is 40 mph in construction zones.

After the Collision

The collision impelled Mr. Agustin to the right side of the highway. Officer Rivera positioned his car in front of Mr. Agustin to block oncoming traffic. According to Officer Rivera's BWC, an off-duty EMT pulled over to the side of the expressway and assisted with life saving measures. At 4:33 a.m., less than two minutes after the collision, an ambulance arrived and took Mr. Agustin to Jamaica Hospital, arriving at 4:47 a.m. He was pronounced dead at 4:54 a.m.

According to BWC, at 5:30 a.m., Officer Rivera was given a field sobriety test by responding officers while still at the collision site. At the direction of Highway Officer Joseph Vitale, Officer Rivera followed a pen with his eyes, performed a walk and turn test, and balanced on one leg. These tests did not indicate that Officer Rivera was impaired. At 5:41 a.m. Officer Vitale administered a portable breath test to Officer Rivera which indicated no alcohol detected.

Autopsy

OSI reviewed the autopsy report prepared by Dr. Gina Prochilo of the City of New York Office of Chief Medical Examiner. Dr. Prochilo determined that the cause of Mr. Agustin's death was "blunt trauma of head, neck, and torso" and that the manner of death was "accident (pedestrian stuck while crossing highway by on duty police vehicle while responding to a call)." A post-mortem blood sample from Mr. Agustin showed that his blood alcohol concentration (BAC) at the time of death was 0.209. (For comparison, the legal limit of BAC under the Vehicle & Traffic Law is 0.08.) THC, the principal psychoactive ingredient of marijuana, was also detected in Mr. Agustin's blood sample.

LAW

Based on the law and the evidence, OSI concludes a prosecutor would not be able to charge Officer Rivera with a crime. As a result, OSI will not seek charges and closes the matter with this report. The evidence does not indicate that Officer Rivera was intoxicated or distracted when he approached the collision site. And although Officer Rivera was driving above the speed limit, the evidence does not indicate that he drove recklessly.

To convict an officer for causing a death while responding to an emergency in his police car, OSI would need to prove beyond a reasonable doubt that the officer's actions were not protected by Vehicle & Traffic Law Section 1104 (VTL 1104), and that the officer was guilty of a crime that requires the mental state of recklessness. A crime requiring only the mental state of criminal negligence would not be chargeable against an officer responding to an emergency.

Under VTL 1104, "the driver of an authorized emergency vehicle, when involved in an emergency operation" (defined by VTL 114-B to include "responding to … the scene of an accident") may "exceed the maximum speed limits so long as he does not endanger life or property." VTL 1104(e) states that "the foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless

disregard for the safety of others." See *Anderson v Commack Fire Dist*, 39 NY3d 495, 498 (2023) (police officers responding to an emergency may disregard specific traffic laws "as long as specified safety precautions are observed and they do not act recklessly").

In *Saarinen v Kerr*, 84 NY2d 494 (1994), the Court of Appeals interpreted VTL 1104 to protect an officer even from civil liability in cases of negligence.

> "[A] police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others. This standard demands more than a showing of a lack of 'due care under the circumstances' – the showing typically associated with ordinary negligence claims. It requires evidence that 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome." *Saarinen* at 501.

The court pointed to the "grim calculus" of VTL 1104, permitting officers to go through red lights and to exceed speed limits, stating that these actions "will inevitably increase the risk of harm to innocent motorists and pedestrians." The court said limiting liability to cases of recklessness would be consistent with the legislative intent, as it would reduce "judicial second-guessing of the many split-second decisions that are made in the field under highly pressured conditions" and would reduce the risk that the threat of liability could "deter emergency personnel from acting decisively and taking calculated risks in order to save life or property." *Saarinen* at 502.

VTL 1104 by its terms is not stated to be a defense to crimes under the Penal Law, but OSI believes that courts would apply VTL 1104 to criminal cases, and that it would protect officers from liability in cases of criminal negligence. *See People v Emmi*, 146 Misc2d 399 (Cayuga Co Ct 1990).

Here, Officer Rivera was responding to an emergency within the definition of VTL 114-B in that he was called to assist at the scene of an accident. The lights and sirens of Officer Rivera's car were activated. Although Officer Rivera was travelling above the speed limit on the Van Wyck Expressway, he did not operate the car in a reckless manner. The Van Wyck Expressway is a highway closed to pedestrians. Officer Rivera would have no reason to believe that a person would be attempting to cross the highway on foot as Mr. Agustin did on May 19, 2024. Given these factors, OSI would not be able to prove beyond a reasonable doubt that Officer Rivera committed a crime when the car he drove struck Mr. Agustin.

Therefore, OSI will not seek criminal charges and closes the matter with the issuance of this report.

Dated: February 5, 2025