Office of the New York State Attorney General Letitia James

Office of Special Investigation

September 17, 2024

Report on the Investigation into the Death of Joel Capellan

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SUMMARY

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 Joel Francisco Capellan, who was shot and killed on October 16, 2022, by New York City Police Department (NYPD) Lieutenant Cesar Gomez and Officers Derek Rivera, Anthony Stabile, and Stephen Tomaszewski.

OVERVIEW

During the early morning hours of October 16, 2022, Lieutenant Gomez and Officers Rivera, Stabile, and Tomaszewski, from the 34th Precinct Neighborhood Safety Team (NST),[1] drove, in an unmarked car, to Dyckman Street and Nagle Avenue in the Washington Heights-Inwood section of New York County to patrol the area nightclubs at closing time. Shortly before the officers' arrival, video footage from a residential building and several commercial establishments on Dyckman Street and on Nagle Avenue showed that Mr. Capellan and his uncle, E.G.,[2] fought with several people near the corner of Dyckman Street and Nagle Avenue.

According to the videos and witness interviews, a man named L.P. struck E.G. in the face and Mr. Capellan took a gun from his waist with his left hand and struck L.P. in the head with his left hand while holding the gun. Witnesses saw, and videos showed, L.P. bleeding from the head after Mr. Capellan struck him; medical records showed L.P. sustained a graze wound from a bullet.

The fight among Mr. Capellan, E.G., and others spilled into the street at the corner of Dyckman Street and Nagle Avenue as the officers arrived in their car at the intersection. L.P.'s brother, H.A., was wrestling with Mr. Capellan in the street, on the ground, as other people dispersed. Body-worn camera (BWC) footage showed that the officers got out of their car and approached Mr. Capellan and H.A. BWC showed that Mr. Capellan had a gun in his left hand and that the officers made repeated verbal commands for him drop the gun as he was wrestling with H.A. Mr. Capellan began to lift himself up from the ground with the gun in his left hand and Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski fired 34 rounds at Mr. Capellan. Mr. Capellan was struck by 32 rounds and pronounced dead at a local hospital.

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[1] The Neighborhood Safety Team was a police unit created to combat gun violence in New York City. Members of the Neighborhood Safety Team drove unmarked NYPD cars, wore modified uniforms, and were given training on use of force, constitutional law, and community interactions. See N.Y.P.D. Rolls Out New Version of Anti-Gun Unit With Violent Past - The New York Times.

[2] OSI does not publish names of civilians other than the decedent.

Officer Stabile's BWC showed a gun on the ground next to Mr. Capellan's body after he was shot. Officer Stabile recovered the gun and NYPD testing later determined it to be operable. The recovered gun had a live round in the firing chamber and three rounds in the inserted magazine. Ballistics testing of the recovered gun and a recovered shell casing indicates the recovered gun was discharged once. DNA testing of the recovered gun was positive for the presence of Mr. Capellan's DNA.

Having thoroughly investigated the matter and analyzed the law, OSI concludes that a prosecutor would not be able to disprove beyond a reasonable doubt at trial that the use of deadly physical force against Mr. Capellan by Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski was justified under New York Law, and will not seek charges in this case.

FACTS

Background

Lt. Gomez has been a police officer with NYPD since January 31, 2006, and a lieutenant since October 18, 2021. Officer Rivera has been a police officer with NYPD since October 24, 2018. Officer Stabile has been a police officer with NYPD since January 6, 2016. Officer Tomaszewski has been a police officer since October 18, 2017. On October 16, 2022, the four officers were members of the 34th Precinct NST. Prior to October 16, 2022, none of the officers had discharged his gun in the line of duty, apart from training.

On October 16, 2022, the officers wore their modified NYPD NST uniforms, as evidenced in the BWC videos attached in the "Body Worn Camera (BWC) Video" section of this report.

This incident occurred in the pedestrian crosswalk at the northwest corner of the Dyckman Street and Nagle Avenue intersection. The surrounding area consists of residential, retail, and commercial space, including entertainment venues and several restaurants.

Figure 1. Aerial view of the intersection at Dyckman Street and Nagle Avenue. Red pin drop indicates the general area of the shooting.

Figure 2. Dyckman Street and Nagle Avenue intersection. Symbol indicates approximately where Mr. Capellan was when he was shot.

Security Videos

OSI reviewed security videos from residential and commercial buildings near the intersection of Dyckman Street and Nagle Avenue. The following narrative is based on OSI's review.[3]

On October 16, 2022, at 2:56 am, Mr. Capellan, his uncle, E.G., and a female companion,[4] stood in front of 102 Dyckman Street. A man wearing a green jacket, later identified as L.P., was in front of 102 Dyckman Street; a group of people, including an unidentified man wearing a backwards cap, were also near the entrance to 102 Dyckman Street. The man in the backwards cap walked south on Dyckman Street, toward Nagle Avenue, directly past Mr. Capellan. Mr. Capellan and the man in the backwards cap exchanged aggressive looks, turned around, and faced each other. Mr. Capellan, E.G., and the man appeared to engage in a hostile exchange as the man walked backward and waved his hand and head, gesturing "no." L.P. approached the men and separated Mr. Capellan and E.G. from the man in the backwards hat as the man attempted to walk away and Mr. Capellan's female companion held him back by his right arm. E.G. continued to advance on the man in the backwards cap as the man continued walking backwards towards Nagle Avenue, with his arm outstretched, holding E.G. back. L.P. stood between E.G. and the man with the backwards cap and punched E.G. in the face. Mr. Capellan reached toward the left side of his waist with his left hand, removed what appeared to be a gun from his left waist area, broke free of his female companion's hold, and ran to E.G. and L.P. Mr. Capellan, while holding what appeared to be a gun in his left hand, struck L.P. in the head with his left hand and a physical fight ensued between Mr. Capellan, E.G., L.P., and several unidentified people. At the corner of Dyckman Street and Nagle Avenue, Mr. Capellan separated from the group and fought with L.P.'s brother, H.A., in the street. The police officers arrived in an unmarked police car and several people ran away. Mr. Capellan and H.A. were on the ground when the officers approached the intersection. Mr. Capellan rose up and fell back down to the ground. The police officers approached Mr. Capellan as he was on the ground and handcuffed him. L.P. walked toward 168 Nagle Avenue and touched the back of his head; blood was visible on his hand.

[3] Time references are from the videos' timestamps. Video footage was obtained from 101 Dyckman Street, a mixed residential and commercial building; PreGame Dyckman, a sports bar at 104 Dyckman Street; Puff Zone, a smoke shop at 102 Dyckman Street; and PLS Check Cashers, a 24hr financial services chain at 168 Nagle Avenue. The videos did not capture audio. Additional videos were collected and reviewed and were either duplicative or did not capture relevant events.

[4] NYPD and OSI were not able to identify Mr. Capellan's female companion; people who were with Mr. Capellan and the woman said that they did not know her name.

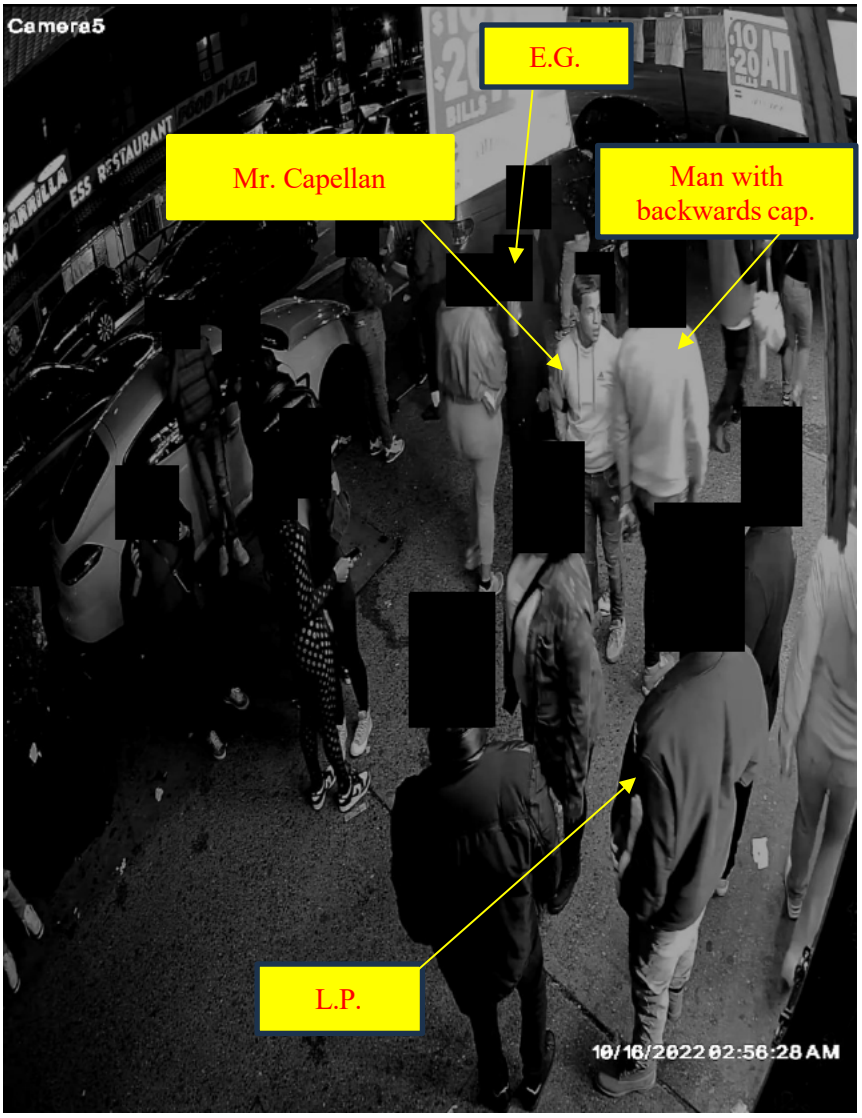

Figure 3. Still from security video showing interaction between Mr. Capellan and the man with the backwards cap in front of 102 Dyckman Street.

Figure 4. Still from security video showing Mr. Capellan, holding what appears to be a gun in his left hand, as he was about to strike L.P. in the head.

OSI created a compilation from the security videos, which may be viewed here.

Body Worn Camera (BWC) Video

Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski were all equipped with body-worn cameras on October 16, 2022.

Police Officer Stabile

Officer Stabile activated his BWC at 2:57:01 am; the BWC pre-event buffer preserved video without audio for 60 seconds prior to activation. At 2:56:02 am the BWC showed Officer Stabile seated in the front passenger seat of a moving police car. At 2:56:56 am Officer Stabile got out of the car with his gun drawn and pointed it toward a crowd of people fighting at the corner of Dyckman Street and Nagle Avenue. As Officer Stabile approached most of the people dispersed; the video showed that Mr. Capellan and H.A. continued to wrestle on the ground. At 2:57:02 am according to the BWC audio, Officer Stabile yelled, "Put it down! Put it down! Put it down!" At 2:57:03 am Officer Stabile's BWC showed H.A. and Mr. Capellan on the ground, with H.A. above Mr. Capellan and Mr. Capellan with a gun in his left hand (see Figure 5 below). At 2:57:04 am Mr. Capellan, holding the gun in his left hand, began to lift himself up from the ground and the officers fired at Mr. Capellan. H.A. rolled away and Mr. Capellan fell to the ground. At 2:57:09 am BWC audio captured multiple male voices yelling, "Cease fire!" Lt. Gomez and Officer Stabile approached Mr. Capellan and handcuffed him. At 2:57:13 am Officer Stabile said, "I got the gun,

I got the gun," and the BWC showed that Officer Stabile recovered a black gun on the ground next to Mr. Capellan's body (see Figure 6 below). At 2:58:13 am BWC audio captured the sound of a few loud bangs in the distance, and Officer Stabile said, "No, we got the gun. He was shooting." At 2:58:25 am Officer Stabile directed another officer to commence CPR on Mr. Capellan and, at 2:58:53 am, Officer Stabile called central dispatch requesting a rush on the "bus."[5] At 3:02:07 am Officer Tomaszewski approached Officer Stabile and asked, "He shot at him?" Officer Stabile responded, "A round went off when we were pulling up and he was picking up the gun when his boy tackled him and then he got his gun up and raised it." At 3:06:25 am the BWC showed that Officer Stabile placed the recovered gun in a plastic bag. At 3:07:03 am Officer Stabile said to other officers who had arrived, "The one person, the gun shot went out, one guy tackled him to the ground, he postured up, raised it with his hand [inaudible] and then it was, fell to his right and, um [inaudible]." At 3:13:40 am the BWC showed that Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski were taken away in an ambulance. Officer Stabile's BWC footage can be accessed here.[6]

Figure 5. Still frame from Officer Stabile's BWC.

[5] NYPD jargon for ambulance.

[6] All BWC footage linked to this report begins at the beginning of the 60-second pre-activation buffer and runs through the time 2:59:32 am, just after Lt. Gomez directed the officers to give him their guns. Also, the BWC footage is redacted pursuant to the Attorney General's published video release policy for reasons including protecting civilians' privacy.

Police Officer Rivera

Officer Rivera, the driver, activated his BWC at 2:57:02 am; the BWC pre-event buffer preserved video without audio for 60 seconds prior to activation. At 2:57:01 am the BWC showed that Officer Rivera stopped the car, got out with his gun drawn, and approached a crowd of people fighting at the corner of Dyckman Street and Nagle Avenue. At 2:57:03 am the crowd dispersed and the BWC showed Mr. Capellan and H.A. on the ground, wrestling. At 2:57:04 am the BWC audio captured someone shouting, "Put it down," and showed that H.A. moved away from Mr. Capellan as Mr. Capellan rose up from the ground. At 2:57:05 am the BWC showed that Mr. Capellan had a gun in his left hand and that the officers fired. At 2:57:09 am Lt. Gomez raised his arms toward the other officers and BWC audio captured someone yelling, "Cease fire!" At 2:57:13 am Lt. Gomez and Officer Stabile approached Mr. Capellan, and at 2:57:15 am Officer Rivera approached H.A. and handcuffed him as H.A. repeatedly said he did not have a gun. At 2:57:40 am Officer Rivera's BWC audio captured Officer Rivera's call to central dispatch for an ambulance and additional police units. At 2:58:35 am L.P. approached officer Rivera; L.P. had what appeared to be blood on his neck and on his shirt. Officer Rivera asked L.P. if he was shot, L.P. said he didn't know and asked why his brother was being arrested. At 2:59:30 am Lt. Gomez directed Officers Rivera, Stabile, and Tomaszewski to secure their guns and said, "I need everyone's fucking gun, we all fucking shot." At 3:00:33 am and at 3:10:10 am the BWC audio captured Officer Rivera telling other officers on scene that Mr. Capellan shot L.P. At 3:13:40 am the BWC showed that Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski left the scene in an ambulance. Officer Rivera's BWC footage can be accessed here.

Lieutenant Cesar Gomez

Lt. Gomez activated his BWC at 2:58.06 am; the BWC pre-event buffer preserved video without audio for 60 seconds prior to activation. At 2:57:06 am the BWC showed Mr. Capellan on the ground and Officers Rivera, Stabile, and Tomaszewski pointing their guns at him. Lt. Gomez raised his left hand toward the officers and approached Mr. Capellan and handcuffed him. At 2:58:12 Lt. Gomez told other officers who arrived on scene, "He was shooting, he was shooting." At 2:58:47 am Lt. Gomez used his handheld radio and called for a "bus" as another officer performed chest compressions on Mr. Capellan. At 2:59:30 am Lt. Gomez directed Officers Rivera, Stabile, and Tomaszewski to secure their guns, as above. At 3:03 am, the video showed that an ambulance arrived and removed Mr. Capellan. At 3:09:25 am, Lt. Gomez answered a call on his cellular phone and said, "We got a MOS involved shooting.[7] Yeah, my guys and me. A guy with a gun, took it out and shot at somebody." At 3:14:02 am, Lt. Gomez told another officer on scene, "He let a round go." Lt. Gomez's BWC footage can be accessed here.

[7] MOS is NYPD jargon for member of the service, i.e., a police officer.

Police Officer Tomaszewski

Officer Tomaszewski activated his BWC at 2:58:10 am; the BWC pre-event buffer preserved video without audio for 60 seconds prior to activation. At 2:57:10 am the BWC showed Mr. Capellan on the ground after he was shot and showed that Lt. Gomez and Officer Stabile approached him and handcuffed him while he was on the ground. At 2:57:22 am the BWC showed that Officer Tomaszewski and Officer Rivera approached H.A. at the corner of Dyckman Street and Nagle Avenue and handcuffed him as he lay on his stomach. At 2:57:51 am the BWC showed Officer Stabile on the ground next to Mr. Capellan and that Officer Stabile held Mr. Capellan down with one hand while he held a black gun in his other hand. At 2:58:33 am the BWC showed L.P. as he stood over H.A. who was still on the ground. L.P.'s hands and shirt appeared to be stained with blood and officers looked at the back of his head. At 3:00:30 am Officer Tomaszewski told another officer, "I don't know, man. I saw'em, this guy is bleeding over there, he's shot." At 3:06:18 am Officer Tomaszewski retrieved a plastic bag from the trunk of the officers' car and Officer Stabile placed the recovered gun in the plastic bag. At 3:11:32 am the BWC showed that Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski stood together next to an ambulance when an unknown officer asked, "Did he shot?" Officer Tomaszewski responded, "He let a round off." At 3:13:40 am the BWC showed that Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski left the scene in an ambulance. Officer Tomaszewski's BWC footage can be accessed here.

Mr. Capellan was transported to Harlem Hospital Center; at 3:19 am Dr. Christina Eng pronounced him dead.

ShotSpotter

ShotSpotter is the brand name for a technology that uses acoustic sensors to detect gunshots. ShotSpotter reports indicate the number of rounds fired and the time and location of the shooting.[8] On October 16, 2022, ShotSpotter generated a report that one shot was fired at 02:56:58 am at 1799 Fort George Hill, an address at the intersection of Fort George Hill with Dyckman Street and Nagle Avenue (see, Figure 1), and a report that fourteen shots were fired between 02:57:05 am and 02:57:08 am at 1799 Fort George Hill.

911 Calls

In a 911 call at 2:57:44 am, a woman inside PLS Check Cashers (which is at 168 Nagle Avenue, near the intersection with Dyckman Street) said people were hiding in the store, someone was shooting, and that a person was shot. The caller was still on the line with the 911 operator when the police arrived. In a 911 call at 2:58:22 am, a man said there was a shooting at Dyckman and Nagle, but that he did not see the shooter because he was inside his building. The police

[8] New York City Comptroller Brad Lander's office audited the NYPD's ShotSpotter system and concluded it reports an "extremely high rate of unfounded and unconfirmed shootings." See NYC Comptroller's press release and audit of the NYPD ShotSpotter system.

arrived as the caller was on the line with the 911 operator.

Interviews

Lieutenant Gomez

OSI interviewed Lt. Gomez, who said that during the early morning hours of October 16, 2022, he was patrolling near Nagle Avenue and Dyckman Street in an unmarked NYPD car with Officers Rivera, Stabile, and Tomaszewski. Lt. Gomez said the area consists of commercial establishments, clubs, and restaurants and that the area was a "focus area," prone to violent crimes, drugs, and drunkenness, and therefore regularly patrolled by the 34th Precinct. Lt. Gomez said when they arrived at Nagle Avenue and Dyckman Street he saw a large crowd that appeared to be involved in a dispute at the corner. Lt. Gomez said he and the officers got out of their car and approached the crowd. According to Lt. Gomez, most of the people in the crowd dispersed but two continued to fight in the street, Mr. Capellan and a Black man. Lt. Gomez said Mr. Capellan was under the Black man, on the ground. Lt. Gomez saw Mr. Capellan getting up and holding a gun in his hand. Lt Gomez directed him to drop it; Mr. Capellan did not drop the gun and continued to fight with the Black man. Lt. Gomez said he heard a shot go off and saw the other officers fire; he fired one round and told the officers to cease fire. After the shooting, Lt. Gomez saw that Mr. Capellan still had the gun in his hand and he saw Officer Stabile take the gun from him. Lt. Gomez said the Black man appeared to be shot and was arrested. Lt. Gomez said he did not hear any shots fired before he arrived at Nagle Avenue and Dyckman Street

Officer Rivera

OSI interviewed Officer Rivera who said Nagle Avenue and Dyckman Street is a busy intersection with several commercial establishments and nightlife venues. According to Officer Rivera, the area is a high crime area known for narcotics, robberies, shootings, car accidents, and fights, particularly when "the clubs let out." Officer Rivera said on October 16, 2022, he was driving north on Nagle Avenue toward Dyckman Street and was going to make a left turn on Dyckman Street when he saw a fight among twenty to thirty people on the northwest corner of Nagle Avenue near the Dyckman Street intersection. He saw Mr. Capellan and a Black man fighting in the street and saw a garbage can fall down. As Officer Rivera got out of the car he heard a gunshot and saw Mr. Capellan with a gun. Officer Rivera said the gun was "going everywhere," pointed at him, the other officers, and the Black man. Officer Rivera walked over to them as they fought in the street, with Mr. Capellan hunched over on the ground trying to stand up and the Black man on top of him. Officer Rivera said he ordered Mr. Capellan to drop the gun but Mr. Capellan did not comply. Officer Rivera believed Mr. Capellan was going to shoot the Black man but then it appeared he was pointing the gun at him, Officer Rivera, and Officer Rivera fired at Mr. Capellan. Officer Rivera said he could not recall how many times he fired, but that he stopped firing when Lt. Gomez said to cease fire.

Officer Anthony Stabile

OSI interviewed Officer Stabile who said that Nagle Avenue and Dyckman Street is a busy commercial area with several night clubs and is known for car accidents, fights, shootings, car thefts, and guns. Officer Stabile said on October 16, 2022, he and the other officers were driving north on Nagle Avenue toward Dyckman Street, headed to "PG"[9] because it was "letting out." According to Officer Stabile, when the nightclubs close for the night "they have problems" so officers are sent there during closing to monitor the area. Officer Stabile said when they approached Nagle Avenue and Dyckman Street one of his partners pointed out a fight near the corner and Officer Rivera pulled over and stopped the car. Officer Stabile said when he got out he heard a gunshot, saw the crowd disperse, and saw Mr. Capellan on the ground. Officer Stabile said Mr. Capellan picked up a gun from the ground and was tackled by a Black man. When Mr. Capellan attempted to get up, holding the gun, Officer Stabile said he gave Mr. Capellan numerous verbal commands to drop the gun. According to Officer Stabile, Mr. Capellan raised his arm, waving the gun around in the direction of the Black man and in the direction of the officers. Officer Stabile said he feared for his life, for the life of his partners, the Black man, and all the bystanders. He said he discharged his gun, experienced "tunnel vision," and called for a cease fire when Mr. Capellan was no longer a threat. Office Stabile said the Black man rolled off Mr. Capellan, and Mr. Capellan was face down with his arms under his body. Officer Stabile said he turned Mr. Capellan around and removed the gun from his hand.

Officer Stephen Tomaszewski

OSI interviewed Officer Tomaszewski who said that the area around Nagle Avenue and Dyckman Street has several nightclubs and is prone to fights, shootings, and drug activity. Officer Tomaszewski said on October 16, 2022, he and the other officers were headed to the nightclubs because the clubs were "letting out" and fights were typical at closing time, so officers routinely respond to the area to patrol. As Officer Tomaszewski approached Nagle Avenue and Dyckman Street he said he saw a fight near the corner, with ten to fifteen people pushing and shoving each other. Once Officer Rivera pulled up to the corner, Officer Tomaszewski said he got out of their police car and heard one shot fired. Officer Tomaszewski said a dark-skinned Black man tackled Mr. Capellan, who was holding a gun in his left hand, and the two men fought on the ground. Officer Tomaszewski and Officer Stabile approached to the right of the men and Lt. Gomez and Officer Rivera approached to the left of the men. Mr. Capellan waved the gun around and pointed it at the Black man he was fighting with. Officers Stabile and Rivera were closest to the men and ordered Mr. Capellan to drop the gun; Officer Tomaszewski believed he may have also commanded Mr. Capellan to drop the gun. Officer Tomaszewski said he discharged his gun six times because he perceived Mr. Capellan to be a threat, and shot until Mr. Capellan was no longer a threat and heard Lt. Gomez and Officer Stabile yell, "Cease fire." Officer Tomaszewski ran to the Black man to check him for injuries when another Black man, with what appeared to be a "graze wound," approached him, said Mr. Capellan shot him, and that the man fighting with

[9] Referring to PreGame, a sports bar at 104 Dyckman Street.

Mr. Capellan was his brother. Officer Tomaszewski said he was not certain which officer fired first.

C.R.

OSI interviewed C.R. who said she was a family friend of Mr. Capellan and was with him, her fiancé, her two siblings, and Mr. Capellan's two uncles (E.G. and J.G.) on October 16, 2022, celebrating her sister's birthday.[10] C.R. said she first saw Mr. Capellan at around 11:00 pm when they all arrived at a club called República. Mr. Capellan was with a woman, but C.R. did not speak with the woman or learn her name. C.R. said when they entered República they were all thoroughly searched and patted down by security guards. According to C.R., the security guards may have known Mr. Capellan and his uncle because they were from the neighborhood. C.R. said their group, including Mr. Capellan, were drinking but not doing drugs. C.R. said she was very drunk and did not remember all the details of that night but recalled their group getting kicked out of República around 2:00 am after a dispute between E.G. and the group at a table next to them. C.R. said she walked ahead of Mr. Capellan and others in the group as she headed toward the parking garage on Dyckman Street. C.R. said after turning the corner on Dyckman Street she heard one gunshot and then heard several gunshots. C.R. said she turned around and saw a body in the street; thinking it was her brother she ran toward the person and realized it was Mr. Capellan. C.R. said she did not see Mr. Capellan fighting with anyone before the shooting and did not see anyone in her group with a gun.[11]

J.G.

NYPD's Force Investigation Division interviewed J.G., Mr. Capellan's uncle, who said he arrived at República on the date of the incident at around 12:30 am and was accompanied by C.R., C.R.'s husband, C.R.'s siblings, E.G. (his brother), and Mr. Capellan. J.G. said that while they were at the lounge E.G. was arguing with a man from another table. J.G. tried to defuse the situation but ultimately decided to leave the lounge at about 3:00 am and wait for the rest of the group to meet him outside. When the rest of their group met J.G. they walked toward the train station, with J.G. walking ahead of the group. J.G. said he turned the corner and heard one gunshot; he turned around to see what happened and then heard multiple gunshots. J.G. said he was aware his brother and Mr. Capellan were following behind him and the rest of the group so he went to check on them and saw Mr. Capellan on the ground. J.G. said he did not see a fight or hear a confrontation between anyone before the shooting and, since he was around the corner when the shooting took place, did not see the shooting.[12]

[10] C.R.'s fiancé and siblings declined to be interviewed by OSI.

[11] C.R. was interviewed by the NYPD Force Investigation Division. In addition to information consistent with her OSI interview, C.R. told NYPD that Mr. Capellan, E.G., and maybe her brother, left the lounge first and when she left the lounge Mr. Capellan had already been shot.

[12] OSI requested to interview J.G. and E.G. but, through their attorney, they declined to be interviewed.

H.A.

NYPD's Force Investigation Division interviewed H.A. who said he was celebrating his brother's, L.P.'s, birthday with L.P. and a few others at a club from 1:00 am to 3:00 am. H.A. said his group did not have any issues or problems with anyone at the club and he did not know what prompted the fight between Mr. Capellan and L.P. outside the club. He said Mr. Capellan displayed a gun. H.A. said Mr. Capellan and his brother did not have a verbal dispute before the incident but had a "face fight." H.A. said after L.P. and Mr. Capellan "exchanged looks," Mr. Capellan's friend[13] walked over to the pair and reached for something in his back pocket, an object with a black handle, possibly a knife, but H.A. never saw a blade. As the friend began to remove the black handled item from his pocket, L.P. punched the friend. H.A. heard people yell, "He's got a gun, he's got a gun," and H.A. saw Mr. Capellan holding a gun. L.P. told Mr. Capellan he was not scared of the gun. H.A. said he tried to get his brother and himself away from Mr. Capellan, but it appeared he was following them and holding the gun. H.A. said he knocked the garbage can over to create distance between Mr. Capellan and himself but Mr. Capellan was still behind them. H.A. said Mr. Capellan, with the gun in his hand, struck L.P. in the head, and the gun discharged; he saw L.P. bleeding. H.A. recalls Mr. Capellan fell to the ground and the gun dropped. H.A. said he "tussled" with Mr. Capellan over the gun to prevent him from shooting. As they fought over the gun, H.A. said the next thing he remembered was the police shooting and him rolling over to avoid getting shot.[14]

L.P.

NYPD's Force Investigation Division interviewed L.P. who said he had no recollection of the events leading up to the incident except that he was walking to his car, alone, when he noticed that his brother, H.A., and other family members he was with that evening were not behind him. L.P. said he heard a commotion that prompted him to turn around, and that was when he noticed H.A. on the ground and cops shooting over him. L.P. said he and his group did not have any problems with anyone inside or outside the club and he did not hear a shot fired or know he was shot until someone told him he was shot.[15] L.P. said he did not recall having a physical fight with anyone.[16]

[13] The man H.A. believed to be Mr. Capellan's friend appears to be E.G.

[14] OSI asked H.A. for an interview but he declined to be interviewed.

[15] OSI is in receipt of L.P.'s medical records which lists the chief complaint as, "bullet graze to the head."

[16] OSI asked L.P. for an interview but he declined to be interviewed.

Evidence Collected from the Scene

NYPD's Crime Scene Unit (CSU) collected evidence and took photographs. A black Ruger EC9s 9mm semi-automatic pistol was recovered on the ground next to Mr. Capellan after he was shot.[17] The pistol contained one 9mm cartridge in the firing chamber and three 9mm cartridges in the inserted magazine (combined capacity of magazine and chamber: 7). NYPD's Firearms Analysis Section (FAS) conducted an operability test on the recovered pistol and two of the live rounds recovered with the pistol and concluded all were operable.

At the Dyckman Street and Nagle Avenue intersection, CSU recovered 34 discharged Speer +P 9mm Luger white casing/white primer shell casings (consistent with NYPD issued ammunition), five deformed fired bullets, and one discharged CBC 9mm Luger brass casing/brass primer shell casing (not consistent with NYPD issued ammunition).

Lt. Michael Disanto, the 34th Precinct Special Operations Lieutenant, inspected the state of the load of each involved officer's department-issued gun.

- Lt. Gomez's Smith & Wesson 5946 9mm pistol contained one 9mm Luger Speer +P, white casing/white primer cartridge in the firing chamber and 14 9mm Luger Speer +P, white casing/white primer cartridges in the inserted magazine (combined capacity of magazine and chamber: 16); the state of load was consistent with Lt. Gomez's firing one round from his gun.
- Officer Rivera's Glock 17 9mm pistol contained one 9mm Luger Speer +P white casing/white primer cartridge in the firing chamber and one 9mm Luger Speer +P white casing/white primer cartridge in the inserted magazine (combined capacity of magazine and chamber: 16); the state of load was consistent with Officer Rivera's firing 14 rounds from his gun.
- Officer Stabile's Glock 17 9mm pistol contained one 9mm Luger Speer +P white casing/white primer cartridge in the firing chamber and two 9mm Luger Speer +P white casing/white primer cartridges in the inserted magazine (combined capacity of magazine and chamber: 16); the state of load was consistent with Officer Stabile's firing 13 rounds from his gun.
- Officer Tomaszewski's Glock 17 9mm pistol contained one 9mm Luger Speer +P white casing/white primer cartridge in the firing chamber and nine 9mm Luger Speer +P white casing/white primer cartridges in the inserted magazine (combined capacity of magazine and chamber: 16); the state of load was consistent with Officer Tomaszewski's firing six rounds from his gun.

[17] Officer Stabile's BWC showed that he recovered the pistol. The pistol was processed by Officer Amy Johnson of CSU.

Figure 6. Still image from Officer Stabile's BWC showing Mr. Capellan on the ground and a pistol next to his body.

Figure 7. Crime Scene photo showing the pistol recovered next to Mr. Capellan; its magazine; one cartridge recovered from its chamber; three cartridges recovered from its magazine.

Figure 8. NYPD evidence markers indicating the location of ballistic evidence recovered.

CSU recovered 34 discharged Speer +P 9mm Luger white casing/white primer shell casings, five deformed fired bullets, and one discharged CBC 9mm Luger brass casing/brass primer shell casing at the Dyckman Street and Nagle Avenue intersection. FAS microscopically compared the shell casings and fired bullets with test fires from each officer's department-issued pistol and the Ruger EC9s pistol recovered next to Mr. Capellan and concluded the following:

- One CBC 9mm Luger caliber shell casing was discharged from the Ruger EC9s pistol;
- One Speer +P 9mm Luger caliber shell casing was discharged from Lt. Gomez's pistol;
- 13 Speer +P 9mm Luger caliber shell casings were discharged from Officer Stabile's pistol;
- Six Speer +P 9mm Luger caliber shell casings were discharged from Officer Tomaszewski's pistol;
- 14 Speer +P 9mm Luger caliber shell casings were discharged from Officer Rivera's pistol;
- The results for one of the fired bullets identified it as having been fired from Lt. Gomez's pistol;
- The results for the remaining fired bullets and fragments were inconclusive.

The Ruger EC9s pistol recovered next to Mr. Capellan was dusted for fingerprints. One latent print from the body of the magazine was potentially of value, but later determined to be of "No Value" by the NYPD Latent Print Unit.

The Ruger EC9s pistol was swabbed for DNA. The Office of Chief Medical Examiner's (OCME's) Department of Forensic Biology tested the following samples and made the following conclusions:[18]

- The swab from the "textured grip areas" showed three DNA contributors. OCME concluded that Joel Capellan was a contributor to the DNA sample and that his DNA was 97.92% of the mixture. According to OCME, a DNA profile for the additional contributors could not be determined.

- The swab from the "edges of the trigger and trigger guard" showed three DNA contributors. OCME concluded that Joel Capellan was a contributor to the DNA sample and that his DNA was 88.34% of the mixture. According to OCME, a DNA profile for the additional contributors could not be determined.

- The swab from the "textured areas/edges/of the magazine release, slide stop, manual safety and take down pin" showed three DNA contributors. OCME concluded that Joel Capellan was a contributor to the DNA sample and that his DNA was 93.25% of the mixture. According to OCME, a DNA profile for the additional contributors could not be determined.

Medical Examiner[19]

From October 17, 2022 through October 19, 2022, Dr. Anne Hoffa of OCME performed the autopsy of Mr. Capellan and concluded that the cause of Mr. Capellan's death was "gunshot wounds of torso and extremities." Dr. Hoffa's report said Mr. Capellan was shot 32 times, 14 times in the torso and 18 times in the extremities. Dr. Hoffa deemed the manner of death to be "homicide (shot by police)."

LEGAL ANALYSIS

New York Penal Law Article 35 sets forth the defense of justification to crimes involving the use of physical force. Justification is a defense, not an affirmative defense, Penal Law Section (PL) 35.00. If a defense is raised at trial, the burden is on the prosecutor to disprove it 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, *People v Padgett*, 60 NY2d 142 (1983); *People v Steel*,

[18] The following areas were swabbed but not examined by the OCME: "inside the barrel," "edges of the loading port and edges of the base plate," and "base plate."

[19] OCME Report of Autopsy of Joel Francisco Capellan (M-22-032408), October 19, 2022.

26 NY2d 526 (1970).

In this case, Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski 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 35.15 the use of "deadly physical force" is justified if the actor reasonably believes that deadly physical force is "necessary to defend himself, herself or a third person," and if "the actor reasonably believes that [the] other person is using or about to use deadly physical force." If the actor is a police officer making or attempting to make an arrest for an offense, the officer is under no duty to retreat before using deadly physical force, PL 35.15(2)(a)(ii) and PL 35.30(1).

In *People v Goetz*, 68 NY2d 96 (1986), and later in *People v Wesley*, 76 NY2d 555 (1990), the Court of Appeals held that the phrase "reasonable belief" has both a subjective and an objective component. The subjective component is satisfied if the defendant believed, "honestly and in good faith" that deadly force was about to be used against him or her (or another person) at the time the defendant used deadly physical force, and that the defendant's use of deadly physical force was necessary to repel the danger, regardless of whether that belief was accurate. *Goetz*, 68 NY2d at 114. The objective component is satisfied if a "reasonable person" under the same "circumstances" could have held those same beliefs. *Goetz* at 115.

In this case, OSI concludes that a prosecutor would not be able to disprove that it was reasonable for Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski to believe that deadly physical force was necessary to defend themselves and others from what they believed to be the use or imminent use of deadly physical force by Mr. Capellan. The officers said they saw a large disturbance at the corner of Dyckman Street and Nagle Avenue and stopped their car to intervene. Officers Rivera, Stabile, and Tomaszewski said they heard a shot fired when they got out of their car and Lt. Gomez and the three officers said they saw Mr. Capellan with a gun in his hand as he wrestled with H.A. Lt. Gomez and Officers Rivera, Stabile, and Tomaszewski said Mr. Capellan was given several verbal commands to drop the gun, but Mr. Capellan did not drop the gun and began to lift himself from the ground with the gun in his hand. Saying they feared Mr. Capellan was going to shoot them or others nearby, Officers Rivera and Stabile fired at Mr. Capellan; Officer Tomaszewski said he shot Mr. Capellan because he believed Mr. Capellan to be a threat as he waved the gun around and ignored commands to drop it; Lt. Gomez said he shot Mr. Capellan after Mr. Capellan ignored repeated commands to drop the gun and he, Lt. Gomez, heard a shot fired and saw Officers Rivera, Stabile, and Tomaszewski firing at Mr. Capellan.

Lt. Gomez's and Officers Rivera's, Stabile's, and Tomaszewski's accounts are corroborated by the loaded gun, as shown a few seconds after the shooting on Officer Stabile's BWC, lying on the ground next to Mr. Capellan's body; the BWC images of Mr. Capellan holding the gun as he wrestled with H.A. before the police shooting; the BWC audio that captured the officers' verbal commands to Mr. Capellan to drop the gun; the DNA results verifying the presence of Mr. Capellan's DNA on the gun; and the ShotSpotter notification of a fired round before the police shooting.

For these reasons, OSI concludes that a prosecutor would not be able to disprove beyond a reasonable doubt at trial that Lt. Gomez's and Officers Rivera's, Stabile's, and Tomaszewski's actions were justified, and therefore will not seek charges against the officers and will close the matter with the issuance of this report.

Dated: September 17, 2024