



Office of the New York State Attorney General Letitia James

Office of Special Investigation

December 10, 2021

Report on the Investigation into the Death of Mark Gaskill

SUMMARY

New York Executive Law § 70-b(1) authorizes the Office of the Attorney General (“OAG”) 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 OAG does not seek charges, Executive Law § 70-b(6) requires issuance of a public report.

On May 14, 2021, Rochester Police Department (“RPD”) Officers Donald Flood, Jr. and Blake Langdon shot Mark Gaskill, causing his death. OAG will not seek charges in this matter because we cannot disprove that the officers’ actions were justified under Article 35 of the New York Penal Law.

FACTS¹

ShotSpotter Activation – Lyell Avenue

According to RPD records and dispatch recordings reviewed by OAG, at approximately 4:21 A.M. on May 14, 2021, RPD Patrol Officer Connor Davidson (“PO Davidson”) heard gunshots while he was on duty in the 300 block of Lyell Avenue in the City of Rochester. A review of the police radio communications by OAG revealed that PO Davidson then radioed into Rochester’s Emergency Communications Department (“ECD”) and asked if there had been any ShotSpotter notifications. ShotSpotter is an automated gunshot detection technology. According to ECD records reviewed by OAG, approximately one minute later, at 4:22 A.M., ShotSpotter alerted ECD that it detected six gunshots near 521 Lyell Avenue. At 4:22 A.M., ECD sent out a radio dispatch advising RPD officers working in the Lake section² of the ShotSpotter activation at 521 Lyell, according to a radio dispatch recording OAG reviewed. 521 Lyell is a vacant lot; the house next door is 523 Lyell Avenue.

¹ The facts set forth in this report are based on OAG’s review of all relevant BWC video and audio, private and public surveillance video, police reports, police radio communications, photographs, scene diagrams, autopsy report, forensic testing reports, and interviews with the involved officers and civilians (described more fully below).

² For purposes of dispatching, Rochester is divided into the eastside and westside, which are further divided into “sections;” this incident occurred in the westside Lake section.

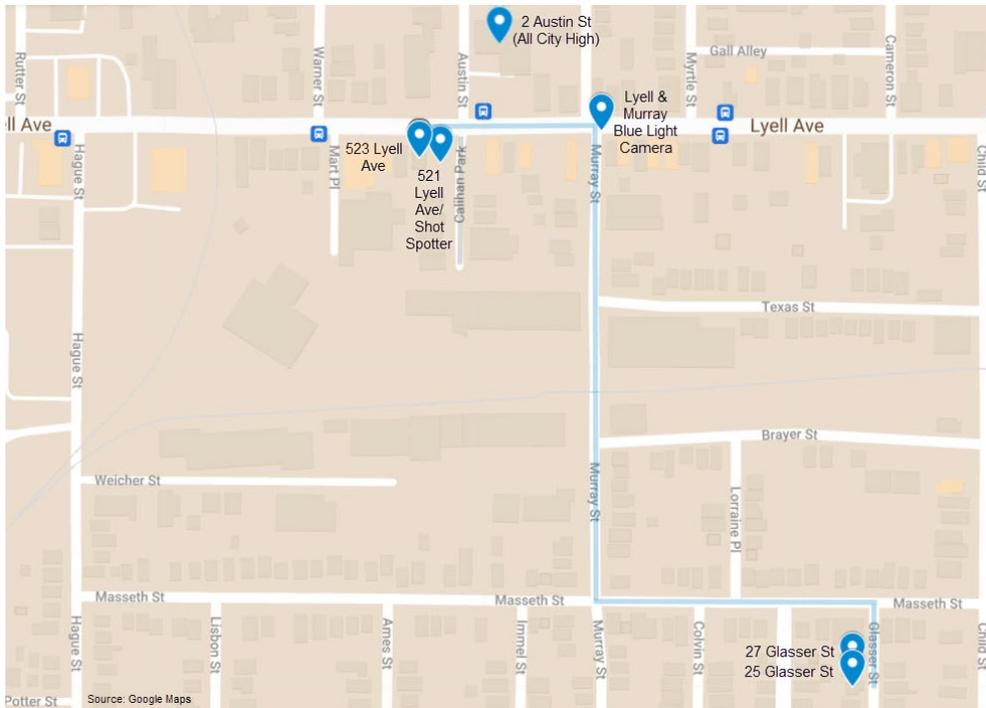


Vacant lot at 521 Lyell Ave. (above, center); 523 Lyell Ave. is the house to the right and Calihan Park is the street to the left.

RPD Patrol Officer Donald Flood, Jr. (“PO Flood”) was on patrol in the Lake section when, at 4:23 A.M., a review of police radio recordings reveals that he advised ECD that he was responding to 521 Lyell. According to ECD and RPD records OAG reviewed, at about the same time, a technician in RPD’s Overt Digital Surveillance System Center³ (“camera room”) looked at the feed from a blue light camera at the southwest corner of the intersection of Lyell and Murray Street – the camera closest to 521 Lyell – and saw a dark-colored sedan leaving the area of 521 Lyell.

According to the police radio recordings OAG reviewed, at 4:23:20 A.M., the camera room technician radioed that a dark sedan left the area of 521 Lyell and turned onto Murray Street, going southbound, and less than 30 seconds later broadcast that PO Flood was right behind the sedan; PO Flood radioed, “yeah...he went eastbound on Masseth Street.” Seconds later, at 4:24:05 A.M., PO Flood radioed that the car was “going south on Glasser. I haven’t caught up yet...he’s not driving too fast”; and at 4:24:23 A.M., PO Flood radioed that he was at 27 Glasser Street with the car.

³ The camera room is responsible for monitoring the more than 50 surveillance cameras (“blue light cameras”) operated by RPD that are located at various intersections throughout the City of Rochester. The camera room received the dispatch advising of the ShotSpotter activation.



Blue line depicts known path of travel of Ford Fusion from driveway at 523 Lyell to 25 Glasser.

Initial Encounter - Glasser Street

When OAG interviewed PO Flood, he said the vehicle stopped and parked by 25 Glasser Street.⁴ Body-worn camera (“BWC”) video, reviewed by OAG, shows that PO Flood did not activate his overhead lights or sirens before the car stopped. PO Flood said he saw a woman leave the car from the driver’s seat. PO Flood said he parked his patrol car directly behind the car, which was a dark blue, four-door Ford Fusion.

BWC video, reviewed by OAG, shows that PO Flood got out of his patrol car at 4:24:30 A.M., about two minutes after the initial dispatch advising officers of the ShotSpotter alert.⁵ When OAG interviewed him, PO Flood said he approached the woman driver (“CW1”), who was standing in the grass near the curb where the car was parked. CW1 said she was on the way to the hospital and got out of the car because she was feeling ill.⁶ She said she and the other occupants of the car – one of whom was her boyfriend – were coming from her house at 523 Lyell. PO Flood told OAG he approached the Ford Fusion, pointed his flashlight into it, and saw two men: one in the rear passenger-side seat, later identified as Mark Gaskill, 28, and

⁴ 25 Glasser Street is about .4 miles from 521 Lyell Avenue.

⁵ PO Flood activated his RPD-issued BWC immediately after leaving his patrol car. OAG reviewed the BWC footage, which captured PO Flood’s actions on Glasser Street in their entirety, except for about seven minutes when he turned off his BWC to perform a record check at his patrol car. PO Flood’s BWC videos may be accessed here: [[Flood Pre-Record Check Video](#)]; [[Flood Post-Record Check Video](#)].

⁶ For privacy reasons, we omit medical details CW1 gave to PO Flood.

one in the front passenger seat (“CW2”).

Around the same time, according to BWC video, RPD Patrol Officer Alexander Pierce (“PO Pierce”) arrived and parked his patrol car directly behind PO Flood’s. According to PO Pierce, he was on patrol and came to 25 Glasser Street after hearing the dispatch advising of the ShotSpotter alert and the later dispatches from the camera room technician.

PO Pierce said he got out of his car, briefly approached the Ford Fusion, saw the two men in it, and saw CW1, who was sitting in the grass by the curb. PO Pierce’s BWC footage, reviewed by OAG, shows that he walked away from the Ford Fusion and approached CW1 at 4:26:15 A.M.; he remained with CW1 until after other officers discharged their weapons.⁷

At 4:26 A.M., RPD Patrol Officer Blake Langdon (“PO Langdon”) arrived at 25 Glasser in response to PO Flood’s radio transmissions that PO Flood was there with the vehicle seen leaving the scene of the ShotSpotter alert, according to PO Langdon’s interview with OAG. PO Langdon said he got out of his car and saw PO Pierce speaking with CW1, who was sitting in the grass near the Ford Fusion, and PO Flood speaking with the passengers of the Fusion.⁸

PO Flood’s BWC shows that, at about 4:25 A.M., at the Fusion, PO Flood asked CW2 if he (Flood) could open the front passenger door of the car. When CW2 agreed, PO Flood opened the door and asked CW2, “What’s going on, man?” CW2 said they were all on the way to the hospital because of his girlfriend, CW1.⁹ CW2 said that they were coming from CW1’s house on Lyell Avenue.

PO Flood’s BWC video and audio further show PO Flood asking CW2, “Who’s this?” referring to Gaskill, but CW2 did not respond. PO Flood asked CW2 whether Gaskill was “like a friend.” CW2 paused and then said, “yeah...he’s something like that.” PO Flood’s BWC shows that, at 4:26:58 A.M., when PO Flood asked CW2, referring to Gaskill, “Is this guy alright?” Gaskill responded directly to PO Flood, “I’m good. Why you talking to him about me?” PO Flood said, “because you’re sweating, and I can’t really talk to you.” PO Flood told Gaskill to roll down his window. BWC video shows Gaskill apparently trying to open the window before saying, “It ain’t on.” CW2 said the window’s child safety lock was on.

As shown in the BWC, neither CW2 nor Gaskill provided identification when PO Flood requested it, so PO Flood asked them their names and dates of birth. CW2 gave his correct name and date of birth. Mark Gaskill said his name was “Brandon Gaskill” and gave a date

⁷ PO Pierce activated his BWC upon leaving his patrol car. That footage captured his actions on Glasser Street in their entirety except for about three minutes when he turned off his BWC to perform a record check. PO Pierce’s post-record check BWC video – which captures audio of the shooting – may be accessed here: [[Pierce Post-Record Check Video](#)].

⁸ PO Langdon activated his BWC upon leaving his patrol car and left it on until about eight minutes after the shooting. PO Langdon’s BWC video may be accessed here: [[Langdon BWC Video](#)].

⁹ For privacy reasons, we omit medical details from what CW2 said about CW1.

birth. Gaskill then asked PO Flood, “Did I do something wrong, though?” PO Flood said they were “trying to figure that out.”

According to PO Flood, he walked away from the Ford Fusion and went to his patrol car to perform the record check, which confirmed CW2’s identity, but found no record for a person with the name and date of birth provided by Gaskill.¹⁰

As shown by PO Langdon’s BWC, while PO Flood was conducting the records check, PO Langdon was at the passenger side of the Ford Fusion, speaking intermittently with Gaskill and CW2. PO Langdon’s BWC audio captures Gaskill repeatedly asking “What’s going on,” and shows Gaskill having a video conversation on his cell phone.¹¹ At 4:30:20 A.M., Gaskill said, “I’m about to go live” and began “livestreaming” a video of himself in the backseat of the Ford Fusion on Facebook Live. As captured on PO Langdon’s BWC, while Gaskill was livestreaming, PO Langdon told CW2 and Gaskill that gunshots were fired on Lyell Avenue and that theirs was the only car leaving the area at that time; Gaskill questioned why their vehicle was stopped and questioned PO Langdon’s statement that it was the only vehicle on Lyell at that time.

According to radio dispatch recordings and BWC video and audio OAG has reviewed, at about 4:31:08 A.M., RPD Patrol Officer Zachary Costello (“PO Costello”), who had gone to Lyell Avenue after the ShotSpotter dispatch, radioed that officers “got a couple casings in the driveway of 5-2-3 Lyell Avenue.” According to PO Langdon’s BWC, upon hearing that transmission, PO Langdon, at 4:31:13 A.M., asked CW2 where he stayed on Lyell; two seconds later, CW2 said, “523,” saying it was his “baby momma’s house” and that they were just trying to get her to the hospital; at 4:31:40 A.M., Gaskill asked if he could get out of the car; PO Langdon replied, “no, not right now”; at 4:32:01 A.M., CW2 told PO Langdon that the Ford Fusion had been parked in the driveway of 523 Lyell.

In his interview with OAG and RPD Major Crimes Unit Investigators, PO Langdon said, upon hearing PO Costello’s radio transmission and CW2’s statement that the Ford Fusion had been parked in the driveway at 523 Lyell, he believed the Fusion was involved in the gunshots near 521 Lyell and likely contained a firearm.

¹⁰ At the time of his death, Gaskill was under parole supervision with the New York State Department of Corrections and Community Supervision as the result of a 2014 conviction. Gaskill’s maximum parole expiration date was November 27, 2024. This could have motivated Gaskill to provide a false identity.

¹¹ Forensic analysis of Gaskill’s cell phone revealed that he received and answered an incoming Facebook Messenger call at 4:29:21 A.M., that lasted 47 seconds. Gaskill then went “Live” on Facebook at 4:30:31 A.M., for a period of one (1) minute and 23 seconds. He received and answered a second Facebook Messenger call from the same caller at 4:32:59 A.M., that lasted approximately one (1) minute and 12 seconds. Gaskill did not receive or make any further audio or video calls. OAG reviewed a recording of the livestreamed video.

Shooting Incident

As shown by PO Flood's BWC,¹² at 4:37:13 A.M., PO Flood left his patrol car and began walking back toward the Ford Fusion. PO Flood told OAG he had heard PO Costello's radio broadcast regarding the cartridge cases located at 523 Lyell. As shown by PO Flood and Langdon's BWCs, as PO Flood approached the car, at 4:37:20 A.M., he told PO Langdon CW2 was "negative" for arrest warrants, but that Gaskill had given a "fake name"; at 4:37:30 A.M., PO Flood approached the rear passenger-side door and knocked, asking Gaskill, "You good if I open this door to talk to you?" Gaskill, seen on BWC video holding his cell phone in his right hand, is heard on PO Flood and Langdon's BWCs responding, "Talk to me for what?" before both PO Flood and PO Langdon attempted – unsuccessfully – to open the rear passenger-side door. Both officers' BWCs captures them telling Gaskill that they could not hear him.

According to PO Flood's BWC video, at 4:37:38 A.M., PO Langdon opened the front passenger-side door and PO Flood was by the rear passenger-side door. At that moment, both officers' BWC audio captures POs Flood and Langdon repeatedly shouting "Gun!" and PO Langdon shouting, "Drop it! drop it!" At 4:37:37 A.M., PO Langdon's video shows Gaskill start to raise his right arm; his right elbow is pointed up.

The officers' BWC videos depict that, as they were yelling "gun" and "drop it," both officers were retreating away from Gaskill and the Ford Fusion. BWC video depicts that PO Flood, who turned his back to Gaskill and threw his cell phone and notebook to the ground after yelling "gun," moved away from the rear passenger seat and towards the southeast corner of 25 Glasser, while PO Langdon moved to the back of the vehicle and then towards the northeast corner of 25 Glasser. According to both officers, when they stopped, turned around, and observed Gaskill from their respective locations, he appeared to be attempting to get out of the vehicle or get into a better firing position.

Based on the two officers' BWC, forensics recovered at the scene, and the medical examiner's report, over a 24-second period, between 4:37:44 A.M. and 4:38:08 A.M., PO Flood and PO Langdon discharged eleven shots, striking Gaskill six times. BWC video depicts that, when he fired the first shots, PO Flood was on the west side on sidewalk in front of 25 Glasser, approximately 10-15 feet away from Gaskill and the Ford Fusion. PO Flood's BWC further depicts that he continued to back away from the Ford Fusion after firing those initial shots, and fired the final shots from the southeast corner of 25 Glasser, approximately 25-30 feet away from Gaskill and the Fusion. PO Langdon, who, as noted above, had retreated to the northeast corner of 25 Glasser, fired his rounds from that position, approximately 20 feet from Gaskill and the Ford Fusion.

PO Flood fired seven rounds and PO Langdon fired four rounds. Gaskill did not fire any shots.

¹² As there appears to be a one to two-second difference in the times depicted in PO Flood and PO Langdon's BWC videos, times referenced herein are taken from PO Flood's BWC video unless otherwise specified.

During the firing, PO Flood's BWC video shows, from 4:37:47 to 4:37:57 A.M., Gaskill opening the rear passenger-side door and putting one foot and then the other outside the car and onto the pavement, and the audio captures the officers repeatedly shouting, "show me your hands."

Post-Incident Scene

After the shooting, according to their interviews with OAG and their BWC videos, PO Flood and PO Langdon attempted to assess the conditions of Gaskill and CW2. One minute after the last shot was fired, at 4:39:08 A.M., according to both officers' BWCs, CW2, who was in the front passenger's seat when all the shots were fired, said he was not injured. At 4:39:25 A.M., PO Flood's BWC audio reveals that he radioed that the front seat passenger was not struck but that Gaskill appeared to be struck and was still moving and had a gun; at 4:40:33 A.M., PO Flood radioed that Gaskill had stopped moving. According to both officers' BWCs, PO Langdon then told CW2 to get out of the car; BWC video shows CW2 getting out of the car at 4:41:20 A.M.

Additional RPD officers arrived on scene in response to the shots fired call and, at 4:44:35 A.M., according to BWC video, a team of four officers approached Gaskill with a protective ballistics shield to assess his condition. The team found Gaskill unresponsive in the back seat of the Ford Fusion, lying on his back on the back seat, with both legs out of the vehicle and both feet on the ground.

At 4:44:46 A.M., BWC audio of Patrol Officer Peter Resch ("PO Resch"), a member of the shield team, captures him calling out, "Gun's down by his hand" and shows him removing the gun from the back seat and placing it on the trunk of the Ford Fusion.¹³ The gun, later identified as a Browning Hi-Power 9mm semi-automatic pistol, was loaded with one round in the chamber and three rounds in the magazine. The gun remained on the trunk of the vehicle until it was photographed at the scene. It was later submitted to the Monroe County Crime Laboratory. No 9mm cartridge cases were found at the Glasser Avenue scene.

At 4:46:03 A.M., Patrol Officer Timothy Kish ("PO Kish") is heard on his BWC audio saying that he did not detect a pulse on Gaskill. An ambulance arrived at 4:49:40 A.M., just over eleven minutes from PO Flood's last shot. A paramedic supervisor declared Gaskill dead at 4:50:42 A.M.

Scene Processing

Members of the RPD Technicians Unit recovered eleven .45 caliber cartridge cases at the Glasser scene. Seven cartridge cases were found near the southeast corner of the house at 25 Glasser, where PO Flood was, and four near the northeast corner of 25 Glasser, where PO

¹³ The relevant portion of PO Resch's BWC video may be accessed here: [[Resch Post-Incident Video](#)].

Langdon was. Members of the Tech Unit also photographed and inspected the Ford Fusion at the scene. The front and back passenger-side windows were shattered, and there were bullet holes on the passenger-side rear quarter panel, rear passenger-side door, and through the shattered front passenger-side window. The Tech Unit found several fired projectiles and projectile fragments in the car, including in the trunk, rear passenger door, speaker box, and rear passenger quarter panel.

The individual accounts of the incident from PO Flood, PO Langdon, and PO Pierce are below.¹⁴

PO Flood

The following is the account provided by PO Flood.

As the officers were attempting to get Gaskill to open the rear passenger door, Gaskill leaned forward and reached into the right side of his waistband, pulled out a black semi-automatic handgun with his right hand, and raised it up toward PO Flood and PO Langdon. PO Flood, fearing for his life and PO Langdon's life, dropped his cell phone and notebook, drew his gun from its holster, and yelled "Gun!" multiple times. PO Flood moved away from the car, drew his gun and fired four times at Gaskill.

PO Flood saw Gaskill appearing to get into a position to fire at PO Langdon, whom PO Flood could not see but knew was to his left. PO Flood shouted, "Let me see your hands." PO Flood fired two more shots. Gaskill continued to move as if he had not been struck. PO Flood again ordered Gaskill to show his hands, and fired one final shot when Gaskill continued to move as if he were attempting to get into a better firing position.

PO Langdon

The following is the account provided by PO Langdon.

After PO Flood said Gaskill had given a false identity, they attempted to open the rear passenger-side door to speak further with Gaskill. PO Langdon was already suspicious that this car was involved with the gunshots at 521 Lyell, and his suspicions increased upon learning that Gaskill, who appeared agitated and argumentative, had provided a false identity.

As PO Langdon and PO Flood were attempting to open the door, PO Langdon saw Gaskill reach into the right side of his waistband with his right hand, lean to the left,

¹⁴ PO Flood was interviewed jointly by OAG personnel and RPD Major Crimes Unit investigators. PO Langdon was also interviewed jointly by OAG personnel and RPD MCU investigators. PO Pierce's interview was conducted exclusively by OAG personnel.

draw a black handgun with his right hand, and point the gun at PO Langdon. PO Langdon shouted, "Gun!" several times, and believed Gaskill was going to fire at the officers.

PO Langdon retreated, drew his gun, and yelled, "Drop it, drop it!" Gaskill did not drop his gun, so PO Langdon fired two rounds, at least one of which shattered the rear passenger-side window. As PO Langdon was backing away, he saw Gaskill attempting to get out of the car with the gun in his hand. PO Langdon fired two shots at Gaskill at that point, which appeared to miss Gaskill. PO Langdon's view of Gaskill was at that point partially obstructed by a tree, but he saw Gaskill continue to move as though trying to get out of the car. PO Langdon repeatedly yelled "stop moving" and "show me your hands." PO Langdon did not see Gaskill drop the handgun, but he appeared to stop moving.

PO Pierce

This is the account provided by PO Pierce.

PO Pierce was talking with CW1, standing near her by the passenger side of his patrol car, when PO Flood and PO Langdon fired their guns. He heard PO Flood yell, "Gun!" and saw PO Flood and PO Langdon backing away from the Ford Fusion with their guns drawn. PO Pierce drew his gun and took cover behind PO Flood's patrol car before telling CW 1 to get on the ground and not move. According to PO Pierce, PO Flood's and Langdon's tone indicated to him that they were under duress and felt threatened.

PO Pierce did not see what was going on inside the Ford Fusion, because it was dark, and he was about two car lengths away.

PO Pierce heard multiple gunshots but decided not to fire because he could not see clearly inside the Ford Fusion and did not personally observe the threat.

523 Lyell Avenue Gunshots

While POs Flood, Pierce and Langdon were on scene at 25 Glasser, other RPD officers were in the area of 521 Lyell Avenue in response to the initial ShotSpotter activation. PO Costello found five 9mm cartridge cases in the driveway of 523 Lyell. The Tech Unit photographed and documented the 9mm cartridge cases at the scene and submitted them to the Monroe County Crime Laboratory.



Evidence markers indicating location of five (5) cartridge cases in driveway at 523 Lyell. Vacant lot at 521 Lyell pictured at left.

In addition to interviewing the involved officers, OAG personnel interviewed CW1 and CW2 separately and reviewed video from the Lyell Avenue area.¹⁵

Surveillance video shows Gaskill, CW1, and CW2 in front of 523 Lyell at approximately 4:20 A.M. At approximately 4:21 A.M., video shows CW1 and CW2 entering the house while Gaskill remained outside. According to CW1 and CW2, they heard multiple gunshots after they entered the house. While CW1 and CW2 were inside, video shows Gaskill appearing to crouch by garbage totes in the driveway of 523 Lyell as a white car drives by. Gaskill entered 523 Lyell shortly thereafter and, at 4:22 A.M., video shows Gaskill, CW1, and CW2 leaving the house, getting into the dark-colored sedan, and driving away. CW1 and CW2 say that CW2 asked Gaskill what had just happened and Gaskill said he “dumped”¹⁶ on a white car but did not think he struck any of the occupants.

¹⁵ OAG personnel interviewed CW1 without RPD personnel present. OAG and RPD Major Crimes Unit investigators were present for CW2’s interview. The surveillance footage reviewed is from a blue light camera at Murry St. and Lyell Ave. (“blue light footage”), and private surveillance video from Rochester’s All City High, 2 Austin St. (“2 Austin St. footage”).

¹⁶ “Dumping” is an apparent slang term for shooting a firearm.

FORENSIC EVIDENCE

Ballistics/Firearms Evidence

The Monroe County Crime Laboratory performed ballistics analysis of the Browning Hi Power 9mm semi-automatic pistol recovered from the backseat of the Ford Fusion and the cartridge cases recovered at 523 Lyell Avenue. The analyst concluded that the weapon was operable, and that the cartridge cases were fired from the 9mm semi-automatic pistol recovered from the backseat of the Fusion where Gaskill was located.

The lab has not yet reported on its analysis of the cartridge cases and projectiles recovered from the Glasser Street scene and from Gaskill at autopsy.

DNA Evidence

The Monroe County Crime Laboratory performed DNA analysis on the recovered Browning 9mm pistol. Those results were inconclusive. The DNA profile obtained from a swab of the Browning pistol was a mixture of at least four contributors, at least one of whom is male.

MEDICAL EXAMINER'S FINDINGS¹⁷

Dr. Christine Yoo of the Monroe County Office of the Medical Examiner performed a post-mortem examination of Gaskill and issued a final case summary and autopsy report on November 3, 2021. Dr. Yoo ruled the cause of death to be multiple gunshot wounds and the manner of death to be homicide.¹⁸ The autopsy revealed that Gaskill was struck six times, sustaining gunshot wounds to the right side of the upper chest; the left side of the lower chest; right hand; left arm; right leg; and right thigh. According to Dr. Yoo, the gunshot wound to the left side of Gaskill's lower chest – which damaged this pericardium, heart and left lung – caused the most serious internal injuries. Dr. Yoo found no evidence of close-range discharge on any of the gunshot wounds. Dr. Yoo recovered three bullets, which she submitted to the Monroe County Crime Laboratory.

¹⁷ The following information is derived from the final case summary and autopsy report, as well as conversations between Dr. Yoo and OAG investigators.

¹⁸ Cause of death is the specific disease or injury that leads to death; manner of death is the determination of how that disease or injury occurred. In New York, the "Manner of Death" set forth in an autopsy is a medical determination made pursuant to New York State Public Health Law § 4143(3), which directs that medical examiners investigate deaths that occur without medical attendance and, if they are the result of external causes, deem them "accidental, suicidal, or homicidal." The homicide designation in an autopsy is not a legal culpability determination.

LEGAL ANALYSIS

Under New York State Penal Law § 35.15(2)(a), a person may use deadly physical force upon another person when that person “reasonably believes that such other person is using or about to use deadly physical force.” Notwithstanding that provision, however, even in such case, the person may not use deadly physical force “if he [or she] knows that he [or she] can with complete safety to himself [or herself] and others avoid the necessity of doing so by retreating” (Penal Law § 35.15[2][a][ii]).¹⁹

The Court of Appeals interpreted the “reasonably believes” language contained in Penal Law § 35.15 in *People v Goetz* (68 NY2d 96 [1986]) and then later in *People v Wesley*, 76 NY2d 555 [1990]). In those cases, the Court held that the phrase “reasonable belief” has both a subjective component and an objective component. The subjective component is satisfied if the defendant in fact actually believed, “honestly and in good faith,” that deadly force was being used or was about to be used against him or her at the time the person used deadly physical force, and that the use of deadly physical force was necessary to repel the danger, regardless whether the belief was accurate (see *Goetz*, 68 NY2d at 114). The objective component is satisfied if a “reasonable person” under the same “circumstances” could have held those beliefs (see *Goetz*, 68 NY2d at 115; *Wesley*, 76 NY2d at 559).

RPD General Order 340 (“GO 340”) sets forth RPD’s policy regarding the use of deadly physical force by its members and essentially mirrors the language of Penal Law § 35.15(2)(a). The policy also includes the “subjective” and “objective” reasonableness components established in *Goetz* and *Wesley*. GO 340 is silent on the issue of the duty to retreat.

To sustain criminal charges against PO Flood and/or PO Langdon for using deadly force and thereby causing Gaskill’s death at a trial, OAG would need to disprove beyond a reasonable doubt (see *People v Steele*, 26 NY2d 526 [1970]) that the officers (subjectively) believed that Gaskill was about to use deadly physical force or that such belief was reasonable. The OAG would also need to disprove beyond a reasonable doubt at trial that the officers knew that “with complete personal safety, to [themselves] and others [they could] avoid the necessity of [using deadly physical force] by retreating.” In light of the facts and circumstances of this case, OAG cannot do so.

Addressing first the “circumstances” of their encounter with Gaskill, the evidence establishes that, prior to using deadly physical force, PO Flood and PO Langdon were aware that: (1) there was a ShotSpotter activation in the area of 521 Lyell at approximately 4:21 A.M.; (2) the Ford Fusion in which Gaskill was a passenger was observed leaving that location one minute

¹⁹ It should be noted that, while not applicable here, the law imposes no such duty to retreat on police officers and/or peace officers when they are using deadly physical force to make and arrest or prevent an escape under Penal Law § 35.30.

later; (3) PO Flood encountered that Ford Fusion less than one mile away, approximately two minutes after the ShotSpotter alert; (4) the occupants of the Ford Fusion, including Gaskill, were coming from 523 Lyell; (5) Gaskill and CW2 did not provide identification and Gaskill provided a false identity; and (6) cartridge cases had been located in the driveway at 523 Lyell at approximately 4:31 A.M.

Turning next to the reasonableness of PO Flood's and PO Langdon's belief that Gaskill was about to use deadly physical force before they fired their guns, PO Flood and PO Langdon were consistent in their accounts that Gaskill leaned forward and pulled a black handgun from his right side with his right hand. PO Langdon's BWC video, between 4:37:37 A.M. and 4:37:38 A.M., shows Gaskill leaning forward and reaching towards the right side of his body with his right hand. At 4:37:38 A.M., PO Langdon's BWC video shows what appears to be a dark-colored object in Gaskill's right hand.

BWC clearly captures PO Langdon and PO Flood repeatedly yelling "gun!" in a startled tone. According to PO Pierce, PO Flood's and Langdon's tone indicated to him that they were under duress and felt threatened, so much so that he placed CW1 behind the safety of a vehicle and took cover himself.

The officers shot at Gaskill eleven times in 24 seconds, striking him six times. BWC footage shows that before each shot was fired, an officer shouted a command at Gaskill; the officers told OAG he did not follow these commands. Before the first series of shots was fired, PO Langdon yelled, "Drop it!" twice; the officers say they fired at that point because Gaskill did not drop the gun. The next two shots were fired over a one-second period beginning after the rear passenger-side door opened. Two more shots were fired after both officers repeatedly yelled for Gaskill to show his hands and after his left foot landed on the pavement. PO Flood fired the final shot after Gaskill's right foot landed on the pavement outside the rear passenger's seat and immediately after Flood yelled, "Show me your hands."

From the time the shooting began until the moment it ended, no officer directed Gaskill to exit the vehicle; instead, they repeatedly told him to drop the gun and show his hands. Yet BWC video clearly establishes that Gaskill changed positions in a manner consistent with what the officers described. When the shooting began, Gaskill was fully inside the vehicle, with the rear passenger-side door closed. After the last shot was fired, the rear passenger-side door was open, both of Gaskill's legs were facing out, and both of his feet were on the pavement. The investigation established that Gaskill was in possession of a loaded 9mm pistol when the officers fired, and that Gaskill had used that gun only minutes before to fire six shots. Because of the ShotSpotter alert and the blue light camera surveillance, the officers were aware that Gaskill might have been involved in the prior shooting.

There is no evidence the officers mistook Gaskill's cell phone for a gun. Shortly before the officers yelled "gun," they were aware of and did not react to Gaskill's cell phone use. At

4:37:29 A.M., just before Officer Flood attempted to open the rear passenger-side door, Gaskill's cell phone is clearly visible in his right hand on both officers' BWC video.

Similarly, there is no evidence that PO Flood and PO Langdon knew that they could avoid the use of deadly physical force against Gaskill, with complete safety to themselves and others, by retreating. As noted above, the evidence demonstrates that, immediately after yelling "gun," both officers did in fact retreat away from Gaskill and the Ford Fusion before firing any shots. However, according to the officers, after they retreated to their respective positions at the northeast and southeast corners of 25 Glasser, and were approximately 20-30 feet away from Gaskill and the Ford Fusion, each was aware that the other officer was present somewhere on the opposite side of 25 Glasser, but did not know the other's exact location or the exact location of PO Pierce.

While there is at least an argument that each officer might have been able to retreat with complete safety to himself at that point by continuing to move away from Gaskill and the car, there is no evidence either officer knew he could do so with complete safety to others. PO Flood and PO Langdon knew that two civilians and other officers were still in the vicinity of the Ford Fusion and Gaskill, whom they had just seen pointing a handgun at them and refusing their commands to drop it.

As discussed above, PO Flood and PO Langdon's observations that Gaskill possessed a handgun, minutes after the ShotSpotter alert, was pointing the gun at them, and was not complying with their commands led to their reasonable belief that Gaskill was about to use deadly physical force against the officers, and that they needed to use deadly physical force to protect themselves and the other officers, and at least two civilians. In sum, there is no evidence the officers could have avoided the use of deadly physical force by retreating, because there is no evidence that they knew they could retreat with complete safety to themselves and others.

Therefore, for the reasons set forth above, OAG cannot disprove beyond a reasonable doubt that PO Flood's and PO Langdon's use of deadly physical force was justified under Article 35 of the Penal Law.

December 10, 2021