



Office of the New York State Attorney General Letitia James

Office of Special Investigation

August 19, 2022

Report on the Investigation into the Death of Timothy Flowers

SUMMARY

New York Executive Law Section 70-b (“Section 70-b”) authorizes the Office of the Attorney General (“OAG”), acting through its Office of Special Investigation (“OSI”), to investigate, and if warranted, prosecute offenses arising from any incident in which the death of a person is caused by police officer. When the OAG does not seek charges, Section 70-b requires the issuance of a public report.

On June 4, 2021, Rochester Police Department (“RPD”) Officers Samuel Giancursio and Michael Bennett shot and killed Timothy Flowers, after an exchange of gunfire, as they attempted to arrest him for attempted murder. OAG will not seek charges against Officers Giancursio or Bennett because the evidence in OSI’s investigation indicates their use of deadly physical force was justified under Article 35 of the Penal Law.

FACTS

A. Background – May 2021 Shootings

According to Rochester Police Department Investigator Robert Henkes, who spoke to members of OSI and provided his reports, he and Investigator Charles LoTempio were assigned to investigate a May 10, 2021, shooting at 2 Sumner Park in Rochester, which left one victim paralyzed from the waist down. Video surveillance from a nearby corner store depicted the shooting, where a heavysset Black male got out of a gray/silver Toyota Camry, walked into the roadway, and fired at least ten rounds from a pistol, held in his left hand, into a passing minivan. There were three people in the van, and two were struck; one of the victims was shot in the base of his neck and was paralyzed from the waist down. As the suspect ran away, he touched a parked car that was covered in pollen.

Based on the video surveillance, RPD received Crimestoppers¹ tips that named Timothy Flowers as the possible suspect. Mr. Flowers generally matched the description of the suspect (5’8”, 230 pounds, black male) and was left-handed. Inv. Henkes created a photo array with Mr. Flowers’s photo in it, and one of the victims identified Mr. Flowers as the shooter in a “double-blind” procedure².

From the scene, evidence technicians collected thirteen 9mm casings, and lifted fingerprints from the pollen covered car that the shooter touched as he ran away. The fingerprints matched a set of Mr. Flowers’s fingerprints that were on file from a prior arrest.

Inv. Henkes and Inv. LoTempio learned that other RPD investigators had evidence connecting Mr. Flowers to at least two other shootings around the same time.

¹ Crimestoppers is a non-profit organization that works with Rochester area law enforcement agencies to help prevent, detect, and solve crimes. Among other services, Crimestoppers maintains an anonymous tip line, and will pass along these tips to the appropriate law enforcement agency (see <https://roccrimestoppers.com/>).

² In a “double blind” procedure the officer administering the photo array does not know which person in the array is the suspect or does not know where the suspect is in the array (see CPL 60.25[1][c]).

On May 3, 2021, at 4 Eighth Street in Rochester, a victim was shot five times with a 9mm handgun after an argument. Evidence technicians collected 9mm casings from the Eighth Street scene that ballistically matched the 9mm casings from the 2 Sumner Park shooting. Moreover, the suspect in the Eighth Street shooting got into a black Nissan; when RPD Officers later found that vehicle, its occupants told them Mr. Flowers borrowed it around the time of the shooting. When he returned the car, Mr. Flowers told them he had been involved in something serious. Later he texted them a news article of the shooting and said he was involved in other “bang outs” recently.

On May 6, 2021, at 760 Genesee Street in Rochester, a victim was shot twice after the suspect fired at least eleven rounds from a 9mm handgun into a crowd outside a house party. Video of the incident depicted a left-handed shooter with the same build as Mr. Flowers. The suspect also got into a grey/silver sedan, similar to the grey/silver Toyota Camry used in the 2 Sumner Park shooting.

In connection with these investigations, Inv. Henkes and Inv. LoTempio learned that RPD Officer Adam Brodsky spoke to a relative of Mr. Flowers. That relative told Officer Brodsky they did not know Mr. Flowers’s location because he had recently shot another family member, and they were no longer on speaking terms. The family member also said that Mr. Flowers was likely to fire at the police if officers attempted to arrest him. Officer Brodsky filed a report memorializing the conversation.

Based on their investigation Inv. Henkes and Inv. LoTempio put together a “wanted package” to arrest Mr. Flowers for the May 10, 2021, shooting on charges of Attempted Murder in the Second Degree, Assault in the First Degree, and Criminal Possession of a Weapon in the Second Degree. RPD was not required to apply for an arrest warrant³ and they chose not to because they wanted to question Mr. Flowers on all three shootings.⁴ The “wanted package” included an unfiled Felony Complaint charging the above listed crimes, victim statements, the photo array, fingerprint reports, and police reports related to all three shootings—including Officer Brodsky’s conversation with Mr. Flowers’s family member. Inv. Henkes and Inv. LoTempio obtained a search warrant to track Mr. Flowers’s cell phone, based on the number provided by his parole officer. After consulting with their superiors, they handed the case off to the Tactical Unit (“TACT”) to conduct surveillance and locate Mr. Flowers, and to the Special Weapons and Tactics (“SWAT”) team to arrest him once found.

³ See CPL 140.10(1).

⁴ Under New York law, the police may not question a suspect once they have obtained an arrest warrant. A suspect’s right to counsel attaches when the police file an accusatory instrument with the court, and that filing is required before a court may issue a warrant. Thus, once the police obtain an arrest warrant, a suspect’s indelible right to counsel prevents them from questioning the suspect in the absence of an attorney (see, e.g., *People v Samuels*, 49 NY2d 218, 221 [1980]; CPL 120.20).

B. Surveillance and Chase

According to Sergeant Karl Berg, who spoke to members of OSI and provided his unit members' reports, he was the supervisor of TACT on June 4, 2021, when Mr. Flowers was located. At 3:00 p.m., Mr. Flowers's cell phone pinged in the vicinity of his last known address: 873 North Avenue. Sgt. Berg sent plain clothed TACT officers to that location, and they reported that a woman drove away in a grey/silver Toyota Camry. TACT officers followed the car as it made various stops, at one point stopping to pick up a black male who matched Mr. Flowers's description. At 4:45 p.m., the car parked at the Homewood Suites Hotel, located at 2095 Hylan Drive, and TACT officers saw the same man head towards the hotel. TACT officers showed hotel staff a picture of Mr. Flowers, and the staff confirmed Mr. Flowers was indeed staying there with a woman and two small children—the reservation was under her name. TACT officers relayed this information to Sgt. Berg, who in turn relayed Mr. Flowers's location to SWAT Team Commander Sergeant Jason Rudolph.

According to Sgt. Rudolph, who spoke to members of OSI and provided his unit members' reports, he was the SWAT⁵ team commander on June 4, 2021, and was responsible for supervising the high-risk apprehension of Mr. Flowers. Sgt. Rudolph received the wanted package created by Inv. Henkes and Inv. LoTempio, which included Officer Brodsky's reported conversation with Mr. Flowers' family member. He considered Mr. Flowers to be armed and extremely dangerous, based on the brazen and violent nature of the suspected crimes, that the pistol used in the shootings was not recovered, and that Mr. Flowers's own family expressed concerns that he might shoot at the police. Therefore, Sgt. Rudolph wanted to arrest Mr. Flowers away from other people, to reduce the risk that any bystanders might be put in harm's way if he started shooting. Sgt. Rudolph originally planned to conduct a high-risk vehicle takedown: boxing in Mr. Flowers's vehicle on the highway. Sgt. Rudolph called in members of the SWAT team, briefed them on the plan, and told them about the tip that Mr. Flowers' might "shoot it out" with them.

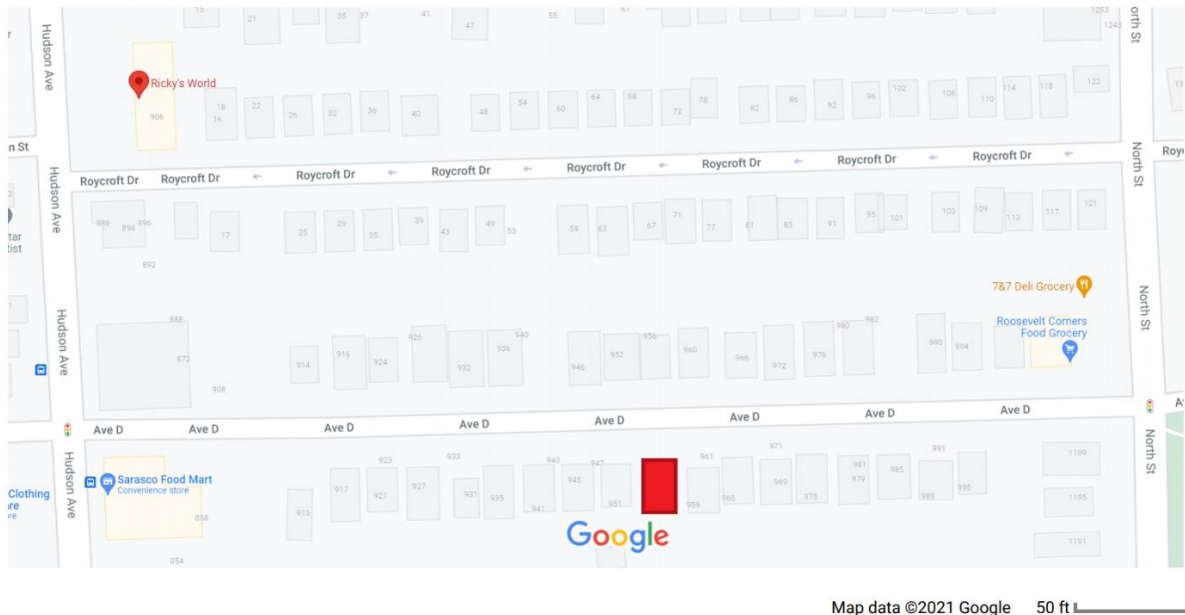
According to recorded radio transmissions, at 8:25 p.m., TACT officers relayed that Mr. Flowers left the hotel in a Mazda SUV, along with a woman and two children.

Since Mr. Flowers was not alone, Sgt. Rudolph said he was concerned for the safety of the other occupants of the SUV and called off the vehicle takedown. TACT officers continued to follow the SUV and relay its location.

According to recorded radio transmissions, at 8:50 p.m., TACT officers relayed that the SUV stopped near the Ricky's World store, located at 912 Hudson Avenue in Rochester, and Mr. Flowers got out of the car; the woman drove away with the two children. Mr. Flowers initially mingled with various people in the area, then walked to the south side of Ricky's World, towards a parking lot, where he was relatively alone.

⁵ According to RPD General Order 630, SWAT is a volunteer group of members who are specially selected, trained, and equipped to deal with unique, high-risk, law enforcement situations, including but not limited to "high-risk suspect apprehension."

When TACT officers relayed that Mr. Flowers was finally away from others, Sgt. Rudolph said he gave the command for the SWAT team to move in and arrest him in the parking lot. At 9:05 p.m., SWAT vehicles converged on the parking lot, SWAT members got out and attempted to arrest Mr. Flowers, shouting “Police, don’t move.” Mr. Flowers ran.

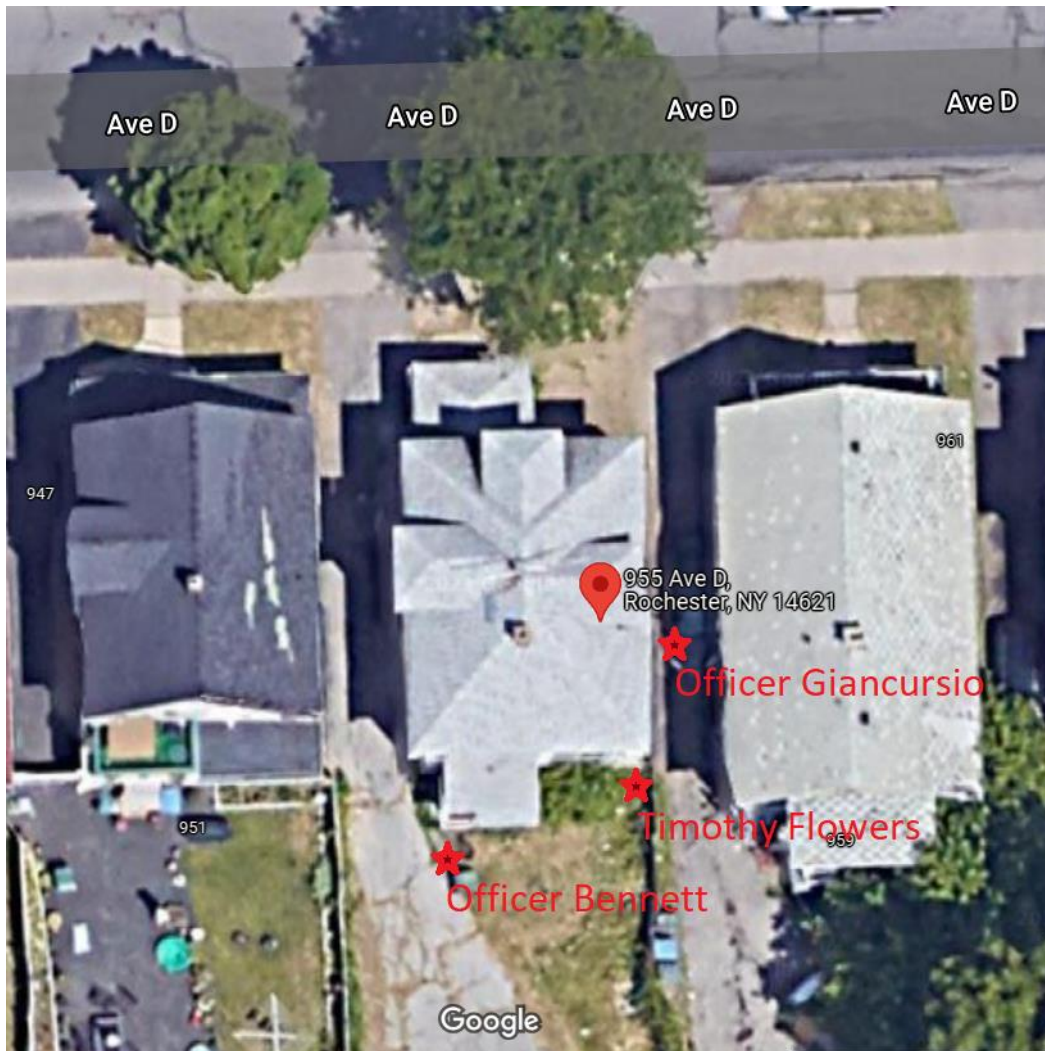


*Ricky's World located near the intersection of Hudson Ave. and Roycroft Dr.
955 Avenue D marked in red on the south side of Avenue D.*

C. Incident

There is no body worn camera footage of the attempted arrest at Ricky’s World, chase, or the shoot-out at 955 Avenue D between SWAT Officer Samuel Giancursio, SWAT Officer Michael Bennet, and Mr. Flowers. RPD policy prohibits the recording of SWAT operations without express command authorization.⁶ There is BWC footage from officers who responded afterwards.

⁶ See RPD Body-Worn Camera Manual, § IV(H)(6) [Recording Requirements and Restrictions, Special Circumstances, Special Teams], available at <https://data-rpdny.opendata.arcgis.com/documents/rpdny::body-worn-camera-bwc-manual/explore> (May 25, 2022). Although RPD updated the BWC Policy on May 25, 2022, the prohibition on recording SWAT operations remained unchanged.



Approximate locations of Officer Giancursio, Mr. Flowers, and Officer Bennett at the time of the shooting

1. Officer Samuel Giancursio's Account

Members of OAG interviewed Officer Giancursio, and the following is a summary of his account.

Officer Giancursio said he got out of his patrol vehicle near Ricky's World and saw Mr. Flowers run south towards Roycroft Drive. He chased him east on Roycroft Drive, then south through residential yards towards Avenue D. When Officer Giancursio approached Avenue D, he realized Officer Bennett was behind him. Officer Giancursio saw Mr. Flowers run across Avenue D, then south down the driveway between 955 and 959 Avenue D.

Officer Giancursio followed Mr. Flowers down the driveway on the east side of 955 Avenue D. He slowed his pace and drew his pistol as he advanced toward the backyard. When Officer Giancursio was approximately 2/3 of the way down the driveway, he said that Mr. Flowers

jumped out from behind the southeast corner of the house, pointed a black and silver pistol at him and fired a round from approximately 12 feet away. Officer Giancursio returned fire and simultaneously lost his footing. He fell on his right side, felt a warm rush on his right elbow, and believed he had been shot. Mr. Flowers retreated behind the corner of the house, then reappeared and pointed his pistol at Officer Giancursio a second time. Officer Giancursio fired at Mr. Flowers again, forcing Mr. Flowers to retreat behind the house once more. Officer Giancursio continued to fire at the corner of the house until he regained his footing and moved to a better tactical position. Officer Giancursio saw Mr. Flowers partially appear a third time, by reaching his arm, holding the gun, around the corner of the house, but keeping his body shielded from view. Officer Giancursio fired at Mr. Flowers again and the latter retreated a third time.

At this point Officer Giancursio said he saw a light he recognized as a rifle-light behind the house and heard Officer Bennett's voice yell "drop the gun" multiple times. Officer Giancursio saw Mr. Flowers backpedal into view, facing the light. His pistol was up in a shooting position, aimed towards the light. Officer Giancursio heard rifle fire behind the house, and saw Mr. Flowers fall to the ground with the pistol still in his hand.

Officer Giancursio said he kept his pistol pointed at Mr. Flowers and ordered him to drop the gun several times. Mr. Flowers eventually responded, "I can't." Officer Giancursio maintained his position, with his gun pointed at Mr. Flowers until additional officers arrived.

Officer Giancursio retreated towards the street to assess himself for injuries, believing he had been shot in the arm. With the assistance of other officers, he found two bullet holes in the groin area of his pants: one in the front and a second in the back. It appears a single bullet went through Officer Giancursio's clothing but missed his body. Officer Giancursio also had a laceration on his right elbow from falling, which required treatment and stitches at Highland Hospital.



Still image from Officer Kevin Leckinger's Body Worn Camera of bullet hole in Officer Giancursio's pants.



Still image from Officer Kevin Leckinger's Body Worn Camera of Officer Giancursio's elbow injury.

2. Officer Michael Bennett's Account

Members of OAG interviewed Officer Bennett, and the following is a summary of his account.

Officer Bennett said he got out of the SWAT van near Ricky's World and saw Officer Giancursio sprint south towards Roycroft Drive. He followed Officer Giancursio, and saw Mr. Flowers run east on Roycroft Drive, then south towards Avenue D. As both officers approached Avenue D, Officer Bennett shouted to Officer Giancursio, asking where Mr. Flowers had gone. Officer Giancursio pointed further east, and Officer Bennett saw Mr. Flowers run across Avenue D. Officer Bennett saw Mr. Flowers run south down the driveway on the east side of 955 Avenue D, then saw Officer Giancursio follow him.

Officer Bennett ran down the driveway on the west side of 955 Avenue D. When he reached the backyard, Officer Bennett heard a single gunshot to his left, followed immediately by a volley of gunshots—all seeming to originate from the east side of the house. Officer Bennett continued further into the backyard, looked east (left), and saw Mr. Flowers standing with his back to the residence at the southeast corner, looking toward his left (to the east). Mr. Flowers then raised his left hand toward the east-side driveway, and Officer Bennett saw him point a black and silver pistol towards Officer Giancursio's last known position.

Officer Bennett pointed his SWAT issued rifle at Mr. Flowers and used the mounted flashlight to illuminate him. At the same time, he shouted at Mr. Flowers to drop the gun multiple times. According to Officer Bennett, Mr. Flowers then looked in his direction, ignored the command to drop the gun, and turned the pistol towards Bennett. Officer Bennett deactivated his rifle's safety and fired until Mr. Flowers fell backward onto the driveway.

Officer Bennett called out "Shots fired, blue shots away" on the SWAT radio channel to alert other officers that he fired his weapon. SWAT Officer Peter Minurka arrived from the west-side

driveway moments later. Officers Bennett and Minurka walked towards Mr. Flowers and Officer Bennett saw the pistol still in his hand. Officers Bennett and Minurka yelled at Mr. Flowers to drop the gun, and he eventually responded he couldn't. Officer Minurka kicked the gun out Mr. Flowers's hand while other officers joined them and assisted in securing the weapon and placing Mr. Flowers into handcuffs.

3. Resident of 959 Avenue D's Account

A resident of 959 Avenue D ("CW")⁷ said he was asleep when the commotion outside woke him up. He heard several gunshots, then heard someone yell "put the fucking gun down." CW looked out of his window into the driveway between 959 and 955 Avenue D and saw a man (Mr. Flowers) lying on the ground at the back corner of 955 Avenue D. There was a gun in his hand. CW saw an officer with a rifle (Officer Bennett) in the rear of 955 Avenue D and another officer (Officer Giancursio) in the driveway between 959 and 955. Officers approached the man, and again directed him to drop the gun. The man responded that he couldn't move his arm. One officer kicked the gun out of the man's hand, while another patted him down. The man said he was shot, and CW said that an officer responded that he would try to make him comfortable. CW then turned away from the window.

4. Officer Alexis Bermudez's Body Worn Camera⁸

RPD Officer Alexis Bermudez was not present during the shooting but was in the vicinity and his BWC was recording. According to his BWC, at 9:08:00 p.m. numerous gunshots rang out. Officer Bermudez ran to the scene, and additional gunfire occurred in the background. At 9:08:08 p.m., a final barrage of gunfire was audio-recorded. At 9:08:30 p.m., Officer Bermudez arrived at the driveway on the west side of 955 Avenue D and an unknown officer yelled, "he has the gun still" and to "drop it..." At 9:08:41 p.m., Officer Bermudez walked to the front of 955 Avenue D and Officer Giancursio appeared from the driveway on the east side of 955 Avenue D. Officer Giancursio did not appear to know if he had been shot, and other arriving officers checked him for injuries. Officer Bermudez saw a hole in Officer Giancursio's pants ("That's a bullet hole in your pants. In your leg. In and out, right there.") and told him to take off his pants to check for a gunshot. With his pants removed, they confirmed Officer Giancursio was not struck.

5. Officer Peter Minurka

RPD Officer Peter Minurka was not present during the shooting and did not have a BWC. According to Officer Minurka's report, he arrived on the west side of 955 Avenue D moments

⁷ This witness will be referred to as CW (confidential witness) to protect his/her identity. Investigation did not disclose any other civilian witness to the shooting.

⁸ The relevant portion of Officer Bermudez's BWC video can be accessed here: [Bermudez Clip](#)

after he heard gunshots. He saw Officer Bennett pointing his rifle at Mr. Flowers, who was on his back fifteen feet away. Mr. Flowers had a semi-automatic pistol in his left hand. According to Officer Minurka, he ordered Mr. Flowers to “drop the gun” and “don’t move” multiple times. Mr. Flowers responded he could not drop the gun, and Officer Minurka noticed his arm was injured. Officers Minurka and Bennett approached Mr. Flowers, and Officer Minurka kicked the gun out of his hand. With the help of additional officers who had arrived on scene, Officer Minurka handcuffed and searched Mr. Flowers. Within moments, SWAT Paramedic Dustin Kloch⁹ arrived and Officer Minurka assisted in rendering first aid. They cut off Mr. Flowers sweatshirt and saw multiple gunshot wounds. Paramedic Kloch, Officer Minurka, and RPD Investigator Ryan Hickey applied chest seals to the chest wounds and a tourniquet to the left leg; Officer Minurka wrote on Mr. Flower’s body the time they applied the tourniquet so medical personnel would know how long it was in place. When additional emergency medical personnel arrived, Officer Minurka helped lift Mr. Flowers onto a gurney and escorted him to the ambulance.

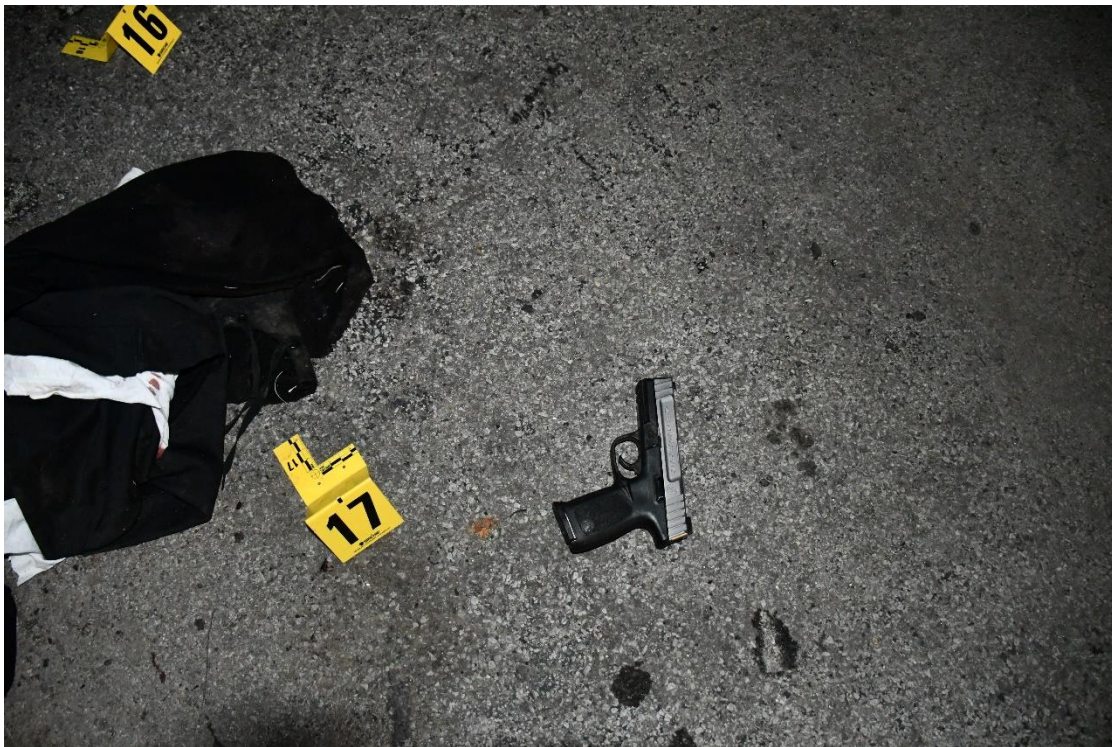
D. Physical Evidence

Near Mr. Flowers’s position in the backyard of 955 Avenue D, RPD evidence technicians recovered a black and silver Smith and Wesson SD9VE 9mm semi-automatic pistol. The pistol had a total capacity of seventeen rounds, and thirteen remained in it when it was recovered. They also recovered one 9mm fired cartridge case, brand Perfecta. The weapon and cartridge case were submitted to the lab for ballistics analysis (see below).

⁹ Paramedic Kloch worked for American Medical Response (“AMR”), which previously entered into an agreement with RPD to supply medics trained in tactical emergency medical procedures, and to have them on stand-by in the SWAT command/staging area (see RPD General Order 630[3][K]).



*Photograph of the southeast Corner of 955 Avenue D after the shooting.
The recovered firearm is on lower left (#17) and the fired cartridge case is on the middle left (#21).*



Photograph of the recovered firearm (#17).



Photograph of the recovered 9mm fired cartridge case (#21).

Near Officer Giancursio's position in the driveway of 955 Avenue D, RPD evidence technicians recovered thirteen Winchester Ranger 9mm pistol cartridge casings. Officer Giancursio carried a Glock 17 9mm pistol, which had a capacity of eighteen rounds (seventeen in the magazine plus one in the chamber). When he submitted the pistol for inspection after the shooting, it had five Winchester Ranger 9mm rounds remaining. Accordingly, all of Officer Giancursio's ammunition was accounted for, and it appears he fired thirteen rounds.

Near Officer Bennett's position in the back yard of 955 Avenue D, RPD evidence technicians recovered six Winchester Ranger 5.56 rifle cartridge casings. Officer Bennett carried an All Star Tactical AT15 5.56x45mm rifle, which had a capacity of thirty-one rounds (thirty in the magazine plus one in the chamber). When he submitted the rifle for inspection after the shooting, it had twenty-two Winchester Ranger 5.56 rounds remaining. Officer Bennet stated he loaded the thirty round rifle magazines with only twenty-eight rounds to ensure it seated properly in the rifle. When he submitted his spare thirty round rifle magazines for inspection, each of those was loaded with only twenty-eight rounds. Accordingly, all of Officer Bennett's ammunition was accounted for, and it appears he fired six rounds.

At 959 Avenue D, adjacent to 955 Avenue D, evidence technicians located what appeared to be a projectile strike that penetrated an external wall and struck an internal wall column; after removing paneling, technicians located the fired bullet fragment in the basement, directly below the wall column. From 850 Hudson Avenue (directly behind 959 and 955 Avenue D), RPD evidence technicians recovered five fired bullets and one fired bullet jacket.

The 9mm pistol Mr. Flowers was holding, Officer Giancursio's 9mm pistol, Officer Bennet's 5.56mm rifle, all ejected cartridge casings, and all other ballistic evidence were submitted to the Monroe County Crime Laboratory for microscopic comparison analysis (see below).

E. Medical Evidence

According to audio from PO Bermudez's BWC footage, the final gunshot was fired at 9:08:11 p.m.; at 9:10:30 p.m., on scene officers can be heard on PO Bermudez's BWC footage discussing with the dispatchers the best way to get the ambulance into the scene. And at 9:14:09 p.m., the ambulance can be seen on arriving on location.

American Medical Response records show that paramedics saw that Mr. Flowers had multiple gunshot wounds to the torso and extremities, and officers had applied a tourniquet his left leg. The paramedics applied occlusive dressings ("chest seals") to the torso, then moved Mr. Flowers to the ambulance. On the way to the hospital Mr. Flowers became unresponsive. At 9:28 p.m., he went into cardiac arrest, and paramedics began chest compressions. At 9:32 p.m., the ambulance arrived at Strong Memorial Hospital and staff rushed Mr. Flowers into the Emergency Department. He did not have a pulse. Attempts to resuscitate Mr. Flowers were unsuccessful and at 10:01 p.m. he was pronounced dead.

On June 6, 2021, Dr. Christine Yoo of the Monroe County Office of the Medical Examiner performed an autopsy of Mr. Flowers. Dr. Yoo's written report stated the cause of death to be multiple gunshot wounds. Mr. Flowers was struck nine times: 1) right-side lower chest, 2) right-side upper abdomen, 3) left-side upper back, 4) right hip, 5) left hip, 6) left elbow, 7) left forearm, 8) left thigh, and 9) a graze to the right arm. None of the wounds appeared to have been from close range—there was no soot deposition or gunpowder stippling on the surrounding skin.

Dr. Yoo recovered four projectiles from Mr. Flowers's body during the autopsy:¹⁰

- a. A deformed jacketed projectile (bullet) from the posterior-lateral left-side of the abdominal wall. The bullet corresponded to a gunshot wound to the right side of the lower chest that traveled front to back, right to left, and downward
- b. A deformed jacketed projectile (bullet) from the right-side of the pelvis, which corresponded to a gunshot wound to the right hip
- c. A separated projectile jacket and core fragment (bullet) from the left arm, which corresponded to a gunshot wound to the left elbow
- d. A grey metal projectile fragment from the left thigh, which corresponded to a gunshot wound to the left hip

¹⁰ Wounds without a recovered bullet or fragment were noted in the autopsy as having an exit path or were graze wounds.

Dr. Yoo submitted these bullets and fragments to the Monroe County Crime Laboratory for analysis (see Ballistics Evidence, below).

On August 12, 2021, in meeting with OAG, Dr. Yoo said either of two gunshot wounds would likely have been fatal. The wounds to the right-side lower chest (bullet recovered in the left-side abdominal wall) and right-side upper abdomen (no bullet recovered, exit wound noted) each caused massive damage and significant hemorrhaging to the liver and surrounding organs and tissues, which ultimately led to Mr. Flower's death.

F. Ballistics Evidence

Eric Freemesser, a Forensics Firearms Examiner with the Monroe County Crime Laboratory, conducted microscopic comparison analysis of Officer Giancursio's pistol, Officer Bennet's rifle, Mr. Flowers's pistol, recovered cartridge casings from the scene, and bullets and fragments from Mr. Flowers's body and the area surrounding 955 Avenue D.

Regarding the four projectiles removed from Mr. Flowers's body during the autopsy (see above):

- a. The bullet in Mr. Flowers' left-side abdominal wall (and one of two likely fatal wounds) was fired by Officer Bennet's rifle
- b. The bullet in Mr. Flowers' right-side pelvis was fired by Officer Bennet's rifle
- c. The bullet in Mr. Flowers' left elbow was fired by Officer Giancursio's pistol
- d. The bullet fragment in Mr. Flowers' left hip was not suitable for microscopic comparison.

The 9mm cartridge case (brand: Perfecta) recovered near Mr. Flowers's body at the scene, was ejected from the Smith and Wesson SD9VE 9mm pistol found in Mr. Flowers's hand.

The National Integrated Ballistic Information Network (NIBIN) positively matched test firings from that pistol to the ejected cartridge casings from the May 3, May 6, and May 10 shootings (see Background, above).

The bullet fragment found in the basement of 959 Avenue D was a rifle bullet but could neither be matched to nor eliminated from Officer Bennet's rifle.

All but one of the bullets and bullet jacket from 850 Hudson Avenue were fired from Officer Giancursio's pistol; the last 9mm bullet was not fired by any of the submitted firearms.

LEGAL ANALYSIS

Under New York Law, the available evidence indicates Officers Giancursio and Bennett were each justified in their use of deadly physical force against Timothy Flowers.

New York State Penal Law Section 35.30(1) permits a police officer to use deadly physical force in the course of effecting or attempting to effect an arrest of a person when: (a)(i) the offense committed by the person was a felony involving the use of physical force; (b) the offense committed by the person was a felony and in the course of resisting arrest therefor or attempting to escape from custody the person is armed with a firearm or deadly weapon; or (c) regardless of the offense committed by the person, the use of deadly physical force is necessary to defend the police officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

Under subsection section (a)(i), the evidence indicates Officers Giancursio and Bennett used deadly physical force to attempt to arrest Mr. Flowers for Attempted Murder in the Second Degree (Penal Law 110.00; 120.25[1] and Assault in the First Degree (Penal Law 120.10[1]). Both crimes are felonies involving the use of physical force upon another—a shooting that left one victim paralyzed from the waist down.

Under subsection (b), the evidence indicates Officers Giancursio and Bennett used deadly physical force to arrest Mr. Flowers for the felonies listed above, and he resisted arrest by running from them while he was armed with a firearm. Penal Law Section 205.30 defines “resisting arrest” as the intentional prevention or attempt to prevent a police officer from effecting an authorized arrest, and multiple courts have held that fleeing from the police constitutes resisting arrest (see *People v Shoulars*, 291 AD2d 238 [1st Dep 2002]; *People v Hamm*, 254 AD2d 535 [3d Dept 1998]; *People v Simpson*, 99 AD2d 555 [2d Dept 1984]). In this case, Mr. Flowers intentionally attempted to prevent his arrest by 1) running from police officers after they shouted “Police! Don’t move!”, and 2) shooting at Officer Giancursio. Moreover, Mr. Flowers was armed with a firearm, which he fired at Officer Giancursio, in furtherance of resisting apprehension.

Under subsection (c), the evidence indicates that Officers Giancursio and Bennett used deadly physical force because it was necessary to defend themselves from what they reasonably believed to be the use of deadly physical force by Mr. Flowers.¹¹

Courts have interpreted the term reasonable in the justification context to require a two-part test: 1) subjectively, did the actor actually believe the other person was using or about to use deadly physical force, and therefore that their own use of deadly physical force was necessary;

¹¹ Under Penal Law Section 35.30(c), if a police officer reasonably believes deadly physical force is being used or will imminently be used against the officer or another person, while the officer is attempting to make an arrest, retreat is not required (*compare to* Penal Law Section 35.15[2][a], requiring civilians to retreat if they can do so in complete safety to themselves and others). Even though not required to retreat, neither officer could have safely done so in this case. Officer Giancursio was pinned down in the driveway by Mr. Flower’s gunfire, and Officer Bennett could not have retreated without leaving Officer Giancursio in genuine danger.

and 2) objectively, would a reasonable person, knowing what the actor knew and being in the same circumstances, have those same beliefs.¹²

Subjectively, Officer Giancursio told members of OAG that he fired at Mr. Flowers to protect himself after Mr. Flowers fired at him. Officer Bennett told members of OAG that he fired at Mr. Flowers to protect himself and Officer Giancursio after he heard gunshots, saw Mr. Flowers point a gun in Giancursio's direction, and saw Mr. Flowers refuse to drop the weapon and, instead, turn and point it at Officer Bennett.

Objectively, the officers' accounts are corroborated by the neighbor witness and the physical evidence. CW heard officers yell "put the gun down" and saw Mr. Flowers on the ground with a pistol still in his hand. That same pistol was recovered by the police after they kicked it out of Mr. Flowers's hand, along with a nearby 9mm cartridge case that was ballistically determined to have been fired by the same pistol. Finally, there was a bullet-sized hole in Officer Giancursio's pants that appears consistent with his account that Mr. Flowers fired at him.

Accordingly, under Penal Law Section 35.30, Officers Giancursio and Bennett were each justified as police officers in their use of deadly physical force against Mr. Flowers when they attempted to arrest him.

¹² See *People v Wesley*, 76 NY2d 555 [1990]; *People v Goetz*, 68 NY2d 96 [1986].

RECOMMENDATION

OAG consistently recommends that all police departments equip officers with body-worn cameras (“BWCs”).¹³ In this case, witness accounts and physical evidence provide a relatively clear picture of what occurred. Nevertheless, use of BWCs would have provided substantial benefits, including increased transparency and accountability, better documentation of evidence, and the potential for better performance in the future through officer training.

Although RPD had a general policy requiring BWCs on the date of this incident, members assigned to special teams like SWAT were excepted from it.¹⁴ Although not stated in the policy, SWAT teams often justify not wearing BWCs to keep their specialized tactics a secret.¹⁵ But recently some SWAT teams across the nation have revisited that concern, reversed course, and now allow SWAT members to wear BWCs.¹⁶

Accordingly, OAG recommends RPD equip all officers with BWCs, including those on SWAT and other specialized teams - the teams most likely to be involved in volatile encounters with citizens. RPD should review its BWC Policy to remove the prohibition on these recordings without prior command-level authorization, and to require SWAT and other specialized team officers to turn BWCs on under the same circumstances as any other member of service.¹⁷

Date: August 19, 2022

¹³ First Report Pursuant to Executive Law Section 70-b (ny.gov) (p. 16, “Recommendations”), published on October 1, 2021, after this incident occurred.

¹⁴ See RPD Body-Worn Camera Manual, § IV(H)(6) [Recording Requirements and Restrictions, Special Circumstances, Special Teams].

¹⁵ See Why Would SWAT Officers Not Wear Body-Worn Cameras? available at <https://www.rochesterfirst.com/news/why-would-swat-officers-not-wear-body-worn-cameras> (June 5, 2021).

¹⁶ See Buffalo Police Manual of Procedures, Body-Worn Camera Program, § IX [SWAT Team] [requiring SWAT officers assigned to entry teams to be equipped with BWCs], available at <https://www.bpdny.org/DocumentCenter/View/189/BPD-MANUAL-OF-PROCEDURES?bidId=> (March 22, 2022); Orlando Police SWAT members Are Now Wearing Body Cameras, After Policy Reversal, available at <https://www.orlandosentinel.com/news/orange-county/os-ne-opd-swat-body-cameras-20190612-2onor3tulzdkroyzn56bz5ga-story.html> (June 12, 2019).

¹⁷ See, e.g., RPD Body-Worn Camera Manual, § IV(B) [Mandatory BWC Recording], § IV(C) [Standard BWC Recordings], § IV(D) [Optional BWC Recording], § IV(E) [Exceptions to Standard and Optional Recording Requirements].