



Office of the New York State Attorney General Lettla James

Office of Special Investigation

June 28, 2023

Report on the Investigation into the Deaths Marcelo Pelaez and Leonardo Rodriguez- Mendoza

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, including an off-duty police 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 into the deaths of Marcelo Pelaez and Leonardo Rodriguez-Mendoza, which were caused by Police Officer Angelo Hurtado, a member of the New York City Police Department (NYPD).

On May 24, 2021, at 12:26 a.m.¹ at the intersection of Woodhaven and Rockaway Boulevards in Queens County, PO Hurtado, who was off-duty and driving his personal car, struck Mr. Pelaez and Mr. Rodriguez-Mendoza as they crossed the intersection, causing their deaths. After a full evaluation of the facts and the law, OSI will not seek charges against PO Hurtado because we conclude that a prosecutor would not be able to prove beyond a reasonable doubt that PO Hurtado committed a crime when he caused Mr. Pelaez's and Mr. Rodriguez-Mendoza's deaths.

FACTS

PO Hurtado

PO Hurtado was assigned to the 61st Precinct, Brooklyn. At the time of the collision he was driving home with his wife and three-year-old daughter after visiting friends. His NYPD disciplinary records show that he had not previously been the subject of disciplinary action. His DMV Abstract indicates he was convicted in 2015 for improper use of a bus lane and failure to wear a seatbelt.

The Intersection

The collision occurred when PO Hurtado was driving northbound on Woodhaven Boulevard and Mr. Pelaez and Mr. Rodriguez-Mendoza were walking in the northern crosswalk of the intersection with Rockaway Boulevard, crossing Woodhaven Boulevard from east to west.

Woodhaven Boulevard at the intersection with Rockaway Boulevard is eight lanes wide, including bus lanes and service roads. The intersection is governed by traffic lights, has pedestrian crosswalks marked in white, and lighted pedestrian walk-don't-walk signals. Rockaway Boulevard at that intersection is five lanes wide, including left-turn lanes. Woodhaven Boulevard has a posted speed limit of 30 miles per hour (mph) and Rockaway Boulevard has an unposted speed limit of 25 mph. The weather conditions at the time of the incident were clear and dark, with abundant overhead lighting from streetlamps and commercial establishments. See the photo and diagram, below, Figures 1 and 2.

¹ All times are approximate unless otherwise noted.



Figure 1. Photo taken by PO Matthew Grilo of Highway District Collision Technician Group after the incident of the intersection of Woodhaven and Rockaway Boulevards, facing northbound along Woodhaven Boulevard, showing what would have been PO Hurtado's point of view as he entered the intersection. Mr. Pelaez and Mr. Rodriguez-Mendoza were walking in the far intersection from right to left.

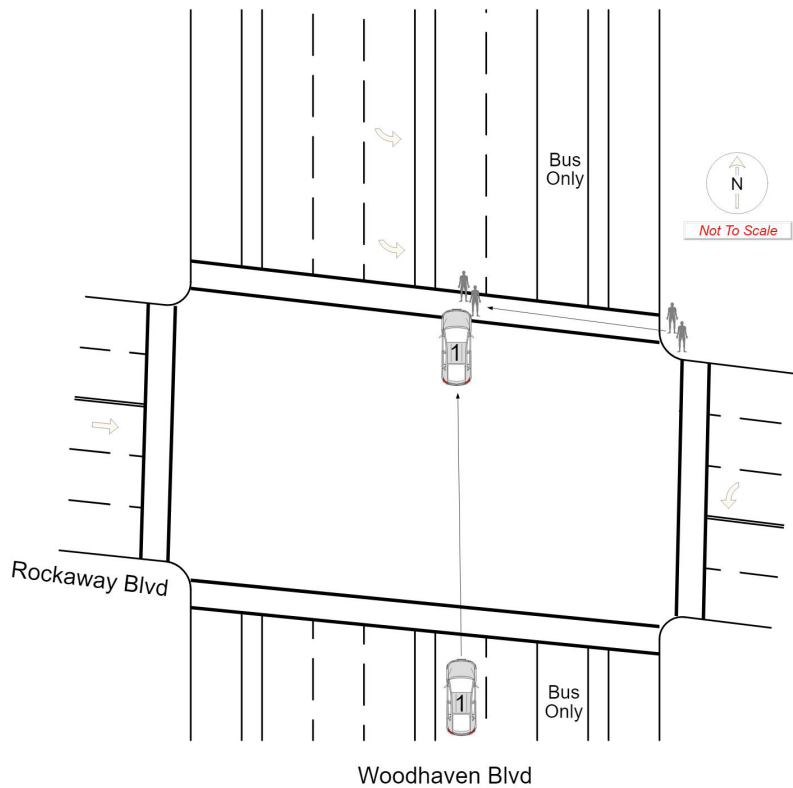


Figure 2. A diagram of the intersection created by Collision Investigation Squad Detective Patrick McMahon. PO Hurtado's car is shown as "1" and Mr. Pelaez and Mr. Rodriguez-Mendoza are shown as two figures, first on the sidewalk (to the right) and then in the crosswalk (near the center).

Video

Video surveillance from the bus lane, Camera 2, captured the collision ([Bus Lane Video](#)). The Bus Lane Video shows that PO Hurtado had the green light at the time of the collision and was driving in the left lane, and that Mr. Pelaez and Mr. Rodriguez-Mendoza entered the crosswalk and crossed the street against the light. Two stills from the Bus Lane Video are below, Figures 3 and 4.



Figures 3 and 4: Two stills from the New York City Department of Transportation Automated Enforcement Unit Bus Lane Video showing PO Hurtado's car and Mr. Pelaez and Mr. Rodriguez-Mendoza less than a second

before impact. The time is shown in military notation at the tops of the stills; the time stamps, 00:25:58.085 am and 00:25:58.405 am, show that the stills were taken about 3 tenths of a second apart.

911 Calls

The incident was reported to 911 by seven callers. The first 911 call was placed at 12:27 a.m. by an unidentified female caller who said a car had hit two men while they were crossing the street near Modell's. She said she could see one of the men was still breathing but the other one was lying still. At the end of the call she said the police had arrived and needed an ambulance as soon as possible.

The second call was placed at 12:27 a.m. by R.R.,² who said he heard an impact and saw two people on the floor, unconscious. He said he did not see the accident but saw that a black Honda Accord stopped right away. He said the two men on the ground seemed to be unconscious but breathing and in need of medical assistance. He said the police were already there.

The third call was placed at 12:29 a.m. by PO Hurtado, who said he had been involved in a car accident and struck two men. He said he had the green light, and the men came from the right into the road and he couldn't avoid hitting them. He asked for medical attention.

The remaining four 911 calls were close in time to the previous calls and very similar. The callers all said two men were struck by one car and that medical attention was needed.

Medical Attention and Cause of Death

Mr. Pelaez was moved to Jamaica Hospital and pronounced dead on arrival at 2:46 a.m.

Mr. Rodriguez-Mendoza was moved to Jamaica Hospital in critical condition. According to medical records, Mr. Rodriguez-Mendoza was unresponsive, in a vegetative state, and had traumatic brain injury. On July 14, 2021, after seven weeks in the hospital, Mr. Rodriguez-Mendoza died.

No autopsy of either decedent was conducted.³ The death certificate for Mr. Pelaez, dated May 24, 2021, states the cause of death as multiple blunt force trauma injuries and the manner of death as accident. The death certificate for Mr. Rodriguez-Mendoza, dated July 14, 2021, states the cause of death as complications of blunt impact of head and torso and the manner of death as accident.

Police Arrival

OSI interviewed Transit District 23 Sergeant Arnaldo Simo. He and PO Derrick Martin were the first officers to arrive on scene, at 12:28 a.m. They were on their way to conduct routine patrol at the train station at Woodhaven Boulevard and Liberty Avenue when they noticed

² Civilians' initials are used to maintain anonymity

³ Members of Mr. Pelaez's family chose not to have an autopsy. No family was ever located for Mr. Rodriguez-Mendoza, and the hospital did not request an autopsy.

people gathered around a car in the left northbound lane of Woodhaven Boulevard, waving their hands to flag them down. When they stopped Sgt. Simo said they saw two men lying in the roadway, unresponsive. Sgt. Simo said he called for two ambulances and requested any available officers from the 106th Precinct to respond. Sgt. Simo said he spoke to three women who each said they saw the two men crossing the street against the light when the driver hit them.⁴

In his OSI interview Sgt. Simo said that at 12:30 a.m. he spoke with PO Hurtado, who identified himself as a police officer and said he was coming from a friend's house with his wife and child. Sgt. Simo said PO Hurtado was visibly upset when describing the accident. PO Hurtado told Sgt. Simo he had the green light, and the pedestrians came out into the street. Sgt. Simo told OSI he was standing about two feet away from PO Hurtado when they spoke and did not smell alcohol or notice any sign that he was impaired.⁵

OSI interviewed PO Derrick Martin, who said he was driving Sgt. Simo on the night of the incident when they were flagged down by a civilian at the corner of Woodhaven and Rockaway Boulevards. There was a black Honda Accord with damage to the front end and two men, unconscious, lying in the road. There was a crowd of people and some of them told PO Martin that the injured men were drunk and walked into the street against the green light. PO Martin did not speak with PO Hurtado but said he was steady on his feet and did not smell of alcohol.

According to OSI's investigation, PO Martin was the only responding officer who activated his BWC at the scene. However, the audio in his BWC footage is not clear enough for OSI to confirm the witness statements he reported in his interview, nor is the video clear enough for OSI to confirm his observations of PO Hurtado.

OSI interviewed Sergeant Erika Dean, of the 106th Precinct, who arrived at 12:30 a.m. and took over supervising the crime scene from Sgt. Simo, who left the area with PO Martin. Sgt. Dean said she heard the radio transmission from Sgt. Simo of an accident with multiple injuries and went to the scene. At 12:41 a.m. Sgt. Dean called Highway Collision Investigation Squad (CIS) Unit 3 and asked them to respond to the scene; Sgt. Dean said one reason she needed CIS was to administer sobriety tests, which she was not qualified to administer.

According to OSI's investigation at 1:40 a.m. Highway CIS Patrol Supervisor Sgt. McCarren responded to Jamaica Hospital. Sgt. Tripodi, Supervisor for the Collision Technician Group, was the first member of Highway CIS to arrive at the scene of the incident, at 1:53 a.m.; Detective Cunningham and PO Grilo arrived shortly after, at 1:58 a.m.

⁴ Sgt. Simo did not obtain name or contact information from any of the three women, and therefore OSI was unable to contact them.

⁵ Sgt. Simo's written report included these observations of PO Hurtado.

In the interview with OSI, Sgt. Dean said she spoke to two women who said they were in a vehicle at the red light when they saw the two men walk into the street; they said the driver had a green light when he hit them. Sgt. Dean said she checked on the passengers of PO Hurtado's car and was concerned for his wife because she was pregnant. She spoke to PO Hurtado and said he was steady on his feet, that his speech was clear and not slurred, and that he did not smell of alcohol.⁶ She said he was upset but cooperative. She looked into PO Hurtado's car and saw Burger King bags but no signs of alcohol.

OSI interviewed PO Richard Lennon, of the 106th Precinct. He said he was with PO Robert Trotti in a marked police van when he came upon the scene. He said Sgt. Dean asked them to bring PO Hurtado, his wife, and child from the scene to the precinct.⁷ PO Lennon said he did not speak with PO Hurtado or his wife or daughter during the short drive to the precinct. PO Lennon said he put the Hurtado family in the rollcall room. He said he did not smell alcohol on PO Hurtado and that he did not appear intoxicated.

OSI interviewed PO Robert Trotti. He said PO Hurtado was seated directly behind him in the van on the way to the precinct and that he did not smell alcohol on him. PO Trotti said PO Hurtado was steady on his feet.

OSI interviewed PO Brendan Storz who said he was with the Transit Sergeant (referring to Sgt. Simo) when PO Hurtado gave him his license and told him that he was a police officer. PO Storz had never met PO Hurtado before, but he is a PBA delegate, so he spoke with PO Hurtado. PO Storz said PO Hurtado was upset and crying but did not smell of alcohol. PO Hurtado asked if PO Storz could check on his pregnant wife and child and said he was concerned for the health of the pedestrians. PO Storz said he suggested to Sgt. Dean that PO Hurtado and his family be brought back to the 106th Precinct because he was concerned for PO Hurtado's pregnant wife. Sgt. Dean approved bringing PO Hurtado back to the precinct to wait for Highway. PO Storz said PO Hurtado told him he had been at a friend's house and had had one drink hours ago. PO Storz said he told PO Hurtado that Highway was coming and would do a sobriety test and that he should be truthful and honest. PO Hurtado asked PO Storz what would happen if he didn't submit to the test, and PO Storz told him his license would be suspended. PO Storz told OSI he did not advise PO Hurtado whether or not to submit to the test. PO Storz said was standing close to PO Hurtado and did not notice any odor of alcohol, slurred speech, or soiled clothing. PO Storz said he was present, later in the night, when Highway gave the field sobriety test.

OSI interviewed PO Sofia Hamid of the 106th Precinct. She said she was working with PO Storz and went to the scene in response to the radio request for additional units. PO Hamid went back to the precinct with PO Storz and later drove PO Hurtado from the precinct back

⁶ Sgt. Dean's written report included these observations of PO Hurtado.

⁷ Sgt. Dean's decision to remove PO Hurtado from an active CIS scene prior to Highway's arrival and the mandatory administration of a Preliminary Breathalyzer Test was a violation of Patrol Guide section 217-02. Sgt. Dean was disciplined and placed on a modified assignment.

to the accident scene. She said she did not notice any signs of impairment when she transported PO Hurtado, did not smell alcohol, that he was steady in his movements, and that his speech was clear.

OSI interviewed PO Vincent Difinizio of the 106th Precinct, who responded to the scene. He said as he walked past the black car that had been in the accident PO Hurtado approached him and told him he was a police officer. PO Difinizio said PO Hurtado spoke clearly and did not smell of alcohol.

OSI interviewed Queens ADA Joshua Garland who said he responded to the scene and briefly spoke with PO Hurtado around 2:00 a.m., after PO Hurtado had been brought back to the scene of the incident. He said PO Hurtado did not appear impaired and allowed him to review his call and text history, which revealed no relevant calls or texts.

At 2:12 a.m., more than an hour and 45 minutes after the incident, and almost 20 minutes after the first Highway officer arrived on scene, Police Officer Grilo of NYPD Highway 3 Unit administered three field sobriety tests to PO Hurtado: an eye examination (a horizontal gaze nystagmus test, or “follow my finger”), a walk and turn test, and a one leg stand test. According to PO Grilo’s report, PO Hurtado passed the three tests without exhibiting signs of impairment. However, PO Hurtado refused PO Grilo’s attempt to perform a preliminary breathalyzer test (PBT), which resulted in his suspension from NYPD for 30 days and a summons for violating New York Vehicle & Traffic Law Section 1194(1)(b).

Other Video Evidence, Digital Evidence, and Collision Reconstruction

Before the incident

OSI obtained video from a camera outside 115-26 Myrtle Avenue, Queens. The video shows that at 9:33 p.m. PO Hurtado arrived with his wife and child. They met two men and a woman and spoke for a while on the sidewalk. Another man joined the group carrying what appears to be a case of beer. At 9:53 p.m. someone handed PO Hurtado a beer and he drank from it. At 10:05 p.m. someone gave PO Hurtado another beer; PO Hurtado drank from it until 10:36 p.m. when he put it down; he did not pick it up again. PO Hurtado went out of the view of the camera until 10:45 p.m. when he reappeared with another beer in his hand, from which he drank until 10:59 p.m. At 11:22 p.m. PO Hurtado, his wife, and daughter left the location.

OSI obtained video from a Sunoco Gas Station parking lot at 135-45 Cross Bay Boulevard, Queens, next to a Burger King. The video shows that PO Hurtado parked his car and entered the Burger King with his wife and daughter at 11:50 p.m. He seemed steady on his feet. They left the store and got into their car with bags of food and drinks at 12:04 a.m. and drove away.

EDR and Cell Phone Data

PO Hurtado consented to a download of his vehicle's Event Data Recorder (EDR); a member of NYPD's Collision Investigation Squad (CIS) reviewed the data and determined that no data were preserved of the incident.⁸ PO Hurtado consented to a search of his iPhone's call and text message history. A review by Detective McMahon of CIS showed he had not made, sent, or received any calls or texts around the time of the accident.

Collision Reconstruction

OSI interviewed Detective Patrick McMahon of CIS, who examined the crash site and noted there were no tire braking marks or skid marks on the roadway, which suggested to him that the car was not traveling at a high rate of speed.

OSI interviewed Detective Edward Behringer of CIS, who said he used the Bus Lane Video to create a time-distance analysis, which indicated that PO Hurtado was traveling about 39 miles per hour when the collision occurred, 9 mph above the posted speed limit.

OSI engaged an independent expert in collision reconstruction, John Kwasnoski, to determine the speed of PO Hurtado's car at the time of the collision. OSI gave Mr. Kwasnoski the Bus Lane Video and, using a frame-by-frame time analysis, Mr. Kwasnoski opined that the speed of PO Hurtado's car was between 35 and 39 miles per hour at the time of the collision.

Statements by PO Hurtado and Maria Hurtado

Craig Hayes, attorney for PO Hurtado, told OSI his client refused to be interviewed.

Detective McMahon of CIS spoke with PO Hurtado's wife, Maria Hurtado, on the night of the accident at 2:15 a.m. She said she was sitting in the rear of the car with her daughter, and her husband was driving them home after stopping at Burger King to get food. She said the accident happened so fast she did not see where the pedestrians had come from, but she did know her husband had the green light. Former OSI Investigator Brian Mason contacted Maria Hurtado by phone and she refused to be interviewed by OSI.

LEGAL ANALYSIS

Under Penal Law 125.10, "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."

"Criminal negligence" is defined in Penal Law Section 15.05(4): "A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will

⁸ When activated, EDRs will preserve data, including speed, from the seconds before and during an event. In general terms, activation requires a collision severe enough to trigger a vehicle's airbags, or an equivalent event. The event in the present case does not appear to have been severe enough to activate the EDR in PO Hurtado's car. Detective Edward Arango of CIS reviewed the EDR data at the 106th Precinct on May 24, 2021, at 7:40 p.m. using Bosch crash data retrieval software and determined that the EDR preserved no data relating to the incident.

occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.”

In a series of decisions, the New York Court of Appeals has required prosecutors to establish “criminal negligence” in vehicular homicide cases with evidence not clearly implied in the statutory definition. Under these decisions, proof of the defendant’s failure to perceive a risk is not sufficient to convict him or her of criminally negligent homicide, even if the failure is a “gross deviation” from a reasonable standard of care. In addition, the prosecutor must prove that the defendant committed an “additional affirmative act” or engaged in “risk-creating behavior” amounting to “seriously blameworthy carelessness.” People v Cabrera, 10 NY3d 370 (2008); People v Boutin, 75 NY2d 692 (1990).

In Cabrera, the Court reversed a conviction of criminally negligent homicide based on the defendant driver’s excessive speed, saying “it takes some additional affirmative act by the defendant to transform speeding into dangerous speeding; conduct by which the defendant exhibits the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community’s general sense of right and wrong.” Cabrera, 10 NY3d at 377, citing Boutin, 75 NY2d at 696 (internal quotation marks omitted). The Court continued:

“Thus, in the cases where we have considered the evidence sufficient to establish criminally negligent homicide, the defendant has engaged in some other ‘risk-creating’ behavior in addition to driving faster than the posted speed limit (*compare* People v Haney, 30 NY2d 328 [defendant was speeding on city street and failed to stop at red light before killing pedestrian crossing street with green light in her favor]; People v Soto, 44 NY2d 683 [defendant, who was speeding and drag racing on city street, struck and killed driver stopped at red light]; People v Ricardo B., 73 NY2d 228 [defendant was drag racing at between 70 and 90 miles per hour on a busy metropolitan street, ran a red light and struck vehicle crossing intersection with light in its favor]; People v Loughlin, 76 NY2d 804, 807 [intoxicated defendant was speeding on obstructed street under construction in residential neighborhood in Queens]; People v Maker, 79 NY2d 978, 980 [intoxicated defendant drove at speeds of 50 to 100 miles per hour in 35 miles per hour zone in Manhattan, disobeying several traffic signals]; People v Harris, 81 NY2d 850, 851-852 [‘defendant, while legally intoxicated, drove his motor vehicle in the dark of night from a public highway into an unfamiliar farmer’s field, accelerated at times to a speed approximating 50 miles per hour, intermittently operated the vehicle without headlights, and suddenly and forcefully drove through a hedgerow of small trees and shrubs, not knowing what obstacles and dangers lurked on the other side’]; People v Ladd, 89 NY2d 893, 894-895 [intoxicated defendant driving on wrong side of a foggy road at 4:30 A.M.], *with* People v Perry, 123 AD2d 492, 493 [4th Dept 1986], *affd* 70 NY2d 626 [no criminal negligence present where defendant was driving approximately 80 miles per hour in

a 55 miles per hour zone 'on a rural road, on a dark night,' struck a utility pole, and killed two passengers; defendant's 'conduct . . . d(id) not constitute a gross deviation from the ordinary standard of care held by those who share the community's general sense of right and wrong' (citations omitted)). The question [is whether the conduct] constituted 'not only a failure to perceive a risk of death, but also some serious blameworthiness in the conduct that caused it' (Boutin, 75 NY2d at 696)."

Cabrera, at 377-378, emphasis added.

In People v Badke, 21 Misc3d 471, (Suffolk Co. Ct. 2008), the court examined the sufficiency of the evidence presented to the Grand Jury for the charge of criminally negligent homicide. The evidence was that defendant drove at excessive speed with passengers in his car, collided with another vehicle, and caused the deaths of three passengers. The court dismissed the criminally negligent homicide charges as legally insufficient, stating, "criminal negligence requires some additional affirmative act by the defendant to transform speeding into dangerous speeding, that is, conduct by which the defendant exhibits the kind of seriously blameworthy carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong." 21 Misc3d at 476.

The evidence shows that PO Hurtado was driving 5-9 mph above the posted speed limit of 30 mph when the collision took place. Therefore, although he was driving above the speed limit, his conduct was not "dangerous speeding" under the precedents cited above.

Driving while impaired by drugs or alcohol could be deemed "risk-creating behavior" or "seriously blameworthy carelessness" for purposes of proving criminally negligent homicide, and there is evidence PO Hurtado was drinking alcohol before the collision. Video shows he drank from what appeared to be three beers from 9:53 p.m. to 10:59 p.m., or about two and a half hours to one and a half hours prior to the collision. In addition, he refused to submit to a portable breath test almost two hours after the collision, which is circumstantial evidence of his concern that the test would find alcohol in his system more than three hours after he last appeared to drink alcohol. However, there is no direct evidence of how much alcohol PO Hurtado drank nor how much alcohol was in his system at the time of the collision. In addition, the witnesses who saw and spoke to PO Hurtado shortly after the collision say they did not see signs of impairment. Under these circumstances, it would be difficult for a prosecutor to prove beyond a reasonable doubt that PO Hurtado's drinking was "risk-creating behavior" or "seriously blameworthy carelessness" under the precedents cited above.

As for the other circumstances of the collision, PO Hurtado had the green light and was not using his cell phone, and Mr. Pelaez and Mr. Rodriguez-Mendoza were crossing against the light, which would have made their appearance in the crosswalk unexpected to a driver.

Therefore, under all the facts and circumstances, OSI does not believe a prosecutor could prove beyond a reasonable doubt that PO Hurtado committed criminally negligent homicide,

and as a result will not present this case to a grand jury for consideration of criminal charges.

RECOMMENDATION

OAG recommends NYPD hold officers to the same standards as civilians and breath-test them as quickly as practicable after a serious motor vehicle collision.

PO Hurtado was not asked to take a preliminary breath test (PBT) until about an hour and 45 minutes after the collision. NYPD's Patrol Guide Section 217.02 requires that, if a police officer is involved in a collision which results in death, the patrol supervisor should administer the breath test if he is qualified to do so; if not qualified, the patrol supervisor should request a qualified Highway Unit officer to administer the PBT. Here, Sgt. Dean, the patrol supervisor who arrived at the scene minutes after the collision, was not so qualified and requested that Highway respond. PO Grilo, who arrived on scene about an hour and a half after the collision, requested that PO Hurtado take the PBT, but PO Hurtado refused.

In the state of New York slightly more than 30% of fatal car crashes are alcohol-related.⁹ In accordance with NYPD's Patrol Guide section 217.02 civilian drivers are breath-tested on scene close in time to the collision, whether or not they exhibit signs of impairment or intoxication. This same standard should be applied to off-duty (or on-duty) police officers involved in motor vehicle incidents, especially collisions that have resulted in death.

Alcohol is metabolized in the body at an average rate of 0.015g/100mL/hour, which means the average person's blood alcohol level falls by 0.015 per hour. For men, this is a rate of about one standard drink per hour.¹⁰ Consequently, the delay of an hour and 45 minutes in administering the field sobriety tests and a PBT (which he refused) to PO Hurtado could have had a significant effect on the results.

OAG therefore recommends that all patrol supervisors be trained in the administration of the PBT and field sobriety tests so that any on-duty or off-duty police officer (or any civilian) involved in a motor vehicle collision can be tested on scene as soon as practicable to determine with greater accuracy whether they were operating a vehicle while impaired by alcohol.

Dated: June 28, 2023

⁹<https://troopers.ny.gov/impaireddriving#:~:text=In%20New%20York%20State%20slightly.minutes%20associate%20with%20drunk%20driving>

¹⁰ | <https://www.alcoholrehabguide.org/alcohol/how-long-alcohol-stay-system/>