The City of New York

POLICE DEPARTMENT

October 16, 2023

In the Matter of the Charges and Specifications	:	
- against -	:	
Police Officer Brendan Thompson Tax Registry No. 960025 46 Precinct	:	Case No. 2021-23558
Police Officer Herbert Davis Tax Registry No. 932526 46 Precinct	:	Case No. 2021-23559

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Rosemarie Maldonado
Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Andre Applewhite & Brian Arthur, Esqs.
Civilian Complaint Review Board
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New York, NY 10007

For Respondent Thompson: Michael Martinez, Esq.
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For Respondent Davis: Richard H.B. Murray, Esq.
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To:

HONORABLE EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2021-23558

1. Police Officer Brendan Thompson, on or about April 14, 2019, at approximately 2300 hours, while assigned to the 046 PCT and on duty, in the vicinity of 1616 Grand Avenue, Apt. 409, Bronx County, used force without police necessity in that, with the intent to cause serious physical injury, he intentionally fired multiple shots from his gun at Kawaski Tyrone Trawick, causing serious physical injury. *(As amended)*

P.G. 221-01	FORCE GUIDELINES
P.G. 221-02	USE OF FORCE
Penal Law §120.10(1)	ASSAULT IN THE FIRST DEGREE

2. Police Officer Brendan Thompson, on or about April 14, 2019, at approximately 2300 hours, while assigned to the 046 PCT and on duty, in the vicinity of 1616 Grand Avenue, Apt. 409, Bronx County, intentionally used force without police necessity in that in attempting to cause serious physical injury, he intentionally fired multiple shots from his gun at Kawaski Tyrone Trawick. *(As amended)*

P.G. 221-01	FORCE GUIDELINES
P.G. 221-02	USE OF FORCE
Penal Law §§110/120.10(1)	ATTEMPTED ASSAULT IN THE FIRST DEGREE

3. Police Officer Brendan Thompson, on or about April 14, 2019, at approximately 2300 hours, while assigned to the 046 PCT and on duty, in the vicinity of 1616 Grand Avenue, Apt. 409, Bronx County, wrongfully used force, in that he intentionally placed or attempted to place Kawaski Tyrone Trawick in reasonable fear of physical injury by pointing his gun at Kawaski Tyrone Trawick without police necessity. *(As amended)*

P.G. 221-01	FORCE GUIDELINES
P.G. 221-02	USE OF FORCE
Penal Law §120.14(1)	MENACING IN THE SECOND DEGREE

4. Police Officer Brendan Thompson, on or about April 14, 2019, at approximately 2300 hours, while assigned to the 046 PCT and on duty, in the vicinity of 1616 Grand Avenue, Apt. 409, Bronx County, wrongfully used force, in that with intent to cause physical injury to Kawaski Tyrone Trawick, he caused such injury to him by intentionally firing a

dart from his conducted electrical weapon into Kawaski Tyrone Trawick without police necessity. *(As amended)*

P.G. 221-08	USE OF CONDUCTED ELECTRICAL WEAPONS (CEW)
P.G. 221-02	USE OF FORCE
Penal Law §120.05(2)	ASSAULT IN THE SECOND DEGREE

5. Police Officer Brendan Thompson, on or about April 14, 2019, at approximately 2300 hours, while assigned to the 046 PCT and on duty, in the vicinity of 1616 Grand Avenue, Apt. 409, Bronx County, abused his authority as member of the New York City Police Department, in that he recklessly engaged in conduct which created a substantial risk of serious physical injury to Kawaski Tyrone Trawick when he failed to render aid to Kawaski Tyrone Trawick without police necessity. *(As amended)*

P.G. 221-04	FIREARMS DISCHARGE BY UNIFORMED MEMBERS OF SERVICE
Penal Law §120.20	RECKLESS ENDANGERMENT IN THE SECOND DEGREE

Disciplinary Case No. 2021-23559

1. Police Officer Herbert Davis, on or about April 14, 2019, at approximately 2307 hours, while assigned to the 046 PCT and on duty, in the vicinity of 1616 Grand Avenue, Apt. 409, Bronx County, abused his authority as member of the New York City Police Department, in that he did not render medical aid to Kawaski Tyrone Trawick.

P.G. 221-04	FIREARMS DISCHARGE BY UNIFORMED MEMBERS OF SERVICE
Penal Law §120.20	RECKLESS ENDANGERMENT IN THE SECOND DEGREE

1. Introduction and Procedural History

The central issue in this disciplinary proceeding is whether Police Officer Brendan Thompson engaged in sanctionable misconduct when he tased and then fatally shot Kawaski Trawick in his Bronx apartment on the night of April 14, 2019. Also at issue is whether

Respondent Thompson and his partner, Respondent Herbert Davis, warrant disciplinary sanctions for their failure to render medical aid after the shooting.

At the outset, this tribunal acknowledges that what follows is a profoundly unsettling analysis that can be attributed, in part, to procedural lapses. In an administrative disciplinary hearing of this nature, a tribunal would typically be required to determine whether police officers followed the Department's rules and regulations as they handled an encounter. Here, however, CCRB first voted to bring charges against Respondents after the statute of limitations had already expired, then served Respondents with the actual charges over four-and-a-half months after missing that mandatory deadline.[1] As reflected in the record:

- Date of incident: April 14, 2019
- Date CCRB requested Body-worn camera ("BWC") recordings: June 4, 2019
  The Bronx District Attorney's Office ("Bronx DA") requested that CCRB "hold" its investigation until the conclusion of its criminal inquiry.[2] NYPD did the same.[3]
- Date Bronx District Attorney released its Report and videos: November 17, 2020[4]
- Date CCRB received 23 BWC recordings from NYPD: January 8, 2021[5]
- Date extended statute of limitations expired: May 31, 2021[6]
- Date CCRB Board voted to bring charges: June 9, 2021
- Date charges were served: October 20, 2021

[1] The tribunal notes that it is common practice to timely serve charges in order to preserve the statute of limitations and then amend the pleadings if additional information is revealed through the discovery process. It is unclear to the tribunal why CCRB did not avail itself of this option.

[2] CCRB Post-Trial Brief at 2

[3] *See* Tr. 12-13; this tribunal takes judicial notice that on March 4, 2020, New York Lawyers for the Public Interest filed an Article 78 proceeding seeking access to police body-worn camera footage and other evidence related to this shooting. The Department moved to dismiss based on the ongoing NYPD Force Investigation Division inquiry. The motion to dismiss was denied. In a subsequent decision, the Department was ordered to pay plaintiff's attorneys' fees after the judge found that the FOIL fee-shifting provision applied because (i) the records were a matter of public interest and (ii) the agency lacked a "reasonable basis in law" for withholding them. *See N.Y. Lawyers for the Pub. Interest v. N.Y. City Police Dep't.*, Index No. 152402/2020 (Nov. 9, 2021)

[4] The Bronx District Attorney Office's Report of the Investigation into the Fatal Shooting of Kawaski Trawick ("Bronx DA Report") is in evidence as Respondent Exhibit A. The Bronx District Attorney Office concluded that, as a matter of law, they could not prove beyond a reasonable doubt that Officer Thompson's use of deadly physical force was not justified; therefore, criminal charges were not warranted. The Bronx DA video clip compilation that was released in November 2020 is in evidence as CCRB Ex. 6.

[5] Tr. 6-7

[6] The standard 18-month statute of limitation for filing of disciplinary charges set forth in New York Civil Service Law Section 75(4) would have expired on October 14, 2020. However, due to the COVID-19 pandemic, the statute was tolled pursuant to Gubernatorial Executive Order 202.8. This gave CCRB an additional seven months to serve the charges.

In most instances, the law prohibits the commencement of a disciplinary case where the service date is missed. An exception to this statutory deadline is permitted where the misconduct "complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime."[7] Relying on this crime exception to the limitations period, however, frequently results in a greater evidentiary burden for the administrative prosecutor. Unlike disciplinary cases where charges are timely served, when the crime exception clause is invoked it may be insufficient to prove misconduct by establishing that an officer violated Department rules. Instead, the administrative prosecutor must establish, by a preponderance of the evidence, the specific elements of each crime charged as set forth in the New York State Penal Law.[8] In sum, when charges are not served by the mandated deadline, the focus of the administrative prosecution must shift to the Penal Law.

NYPD teaches police officers that Department guidelines can impose a greater level of professional accountability than the Penal Law. Police officers receive clear notice of their professional obligations, beginning with their training in the Police Academy. The Police Student's Guide explicitly notes that:

> [E]ven though a shooting or other use of force may be legally justifiable [under the Penal Law], it is likely to result in Department discipline if it occurred because an officer unnecessarily put themselves in harm's way by using poor tactics or by violating other Department procedures .... [O]fficers who have to hurt or kill people in order to get themselves out of danger - *that they should have avoided by using proper tactics* - are likely to be disciplined.... [I]n Department proceedings the focus ... is upon the tactics used by officers immediately prior to the use of force and upon whether improper tactics contributed to the need for force that could otherwise have been avoided.[9]

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[7] New York Civil Service Law Section 75(4)

[8] *See* Disciplinary Case No. 2018-19274 (Aug. 19, 2019), citing *Aronsky v. Bd. of Ed.*, 75 N.Y.2d 997, 1000 (1990)

[9] Police Student's Guide, Ch. 4, *Use of Force*, p.5 (Oct. 2019). This longstanding principle has been included as part of the Department's Use of Force training since 2006.

This distinction is relevant here because the additional responsibilities imposed by the Patrol Guide permit the Department to discipline officers for non-criminal tactical failings that force preventable deadly confrontations.

Following precedent established by the Police Commissioner, this tribunal issued a pretrial ruling dismissing as untimely all charges against both Respondents alleging that they engaged in misconduct when, pursuant to Penal Law §140.15(1), Criminal Trespass in the Second Degree, they "knowingly" and "unlawfully" entered Mr. Trawick's apartment "without sufficient legal authority or permission."[10] That ruling is incorporated into this Report and Recommendation as Appendix A and is being forwarded to the Police Commissioner for review.

Respondents Davis and Thompson appeared before me on April 24 and 25, and May 11 and 12, 2023 to conduct a trial on the remaining charges. Respondents, through their counsel, entered pleas of Not Guilty. The CCRB introduced video evidence of the incident and called retired Chief Howard Jordan, formerly of the Oakland Police Department, and Dr. Terra Cederroth, Deputy Chief Medical Examiner of the City of New York, as expert witnesses. Both Respondents testified at trial; Deputy Chief Kevin Maloney was also called as their witness. The trial record was closed on June 2, 2023 - the date the parties submitted their post-trial briefs. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's final determination.

Upon careful review of the record in its entirety, this tribunal finds that CCRB failed to establish, by a preponderance of the evidence, all the elements of the crime of Reckless Endangerment (Penal Law §120.20) as alleged against Respondents Davis and Thompson. Accordingly, the tribunal finds that Specification 1 against Respondent Davis and Specification 5

[10] *See Disciplinary Case No. 2018-19734* (Apr. 4, 2022)

against Respondent Thompson are time-barred and must be dismissed. This tribunal further finds that CCRB failed to prove by a preponderance of the evidence, all the elements of the crimes of Assault in the First Degree (Penal Law §120.10(1)), Attempted Assault in the First Degree (Penal Law §§110/120.10(1)), Menacing in the Second Degree (Penal Law §120.14(1)) and Assault in the Second Degree (Penal Law §120.05(2)) as alleged against Respondent Thompson. Moreover, the record failed to disprove the applicability of the justification defense. Accordingly, the tribunal finds that Specifications 1, 2, 3 and 4 of the charges against Respondent Thompson are time-barred and must also be dismissed.

In making these findings, this tribunal notes that the trial record raised serious doubts as to whether Respondent Thompson followed Department guidelines during this incident – specifically, the tactical operation guidelines related to encounters with Mentally Ill or Emotionally Disturbed Persons ("EDP") set forth in Patrol Guide 221-13. It is critical to underscore that the guiding principle of NYPD's Force Guidelines is the preservation of human life. In fact, the first line of Patrol Guide 221-01 states that:

> *The primary duty of all members of the service is to protect human life, including the lives of individuals being placed in police custody.*

The stark contrast between Respondent Davis' approach and that of Respondent Thompson casts a troubling shadow on the latter's course of action and whether he complied with these Department procedures. As documented by the videos, Respondent Davis made three overt attempts to prevent Respondent Thompson from tasing and shooting Mr. Trawick, including, at one point, actually pushing his partner's firearm down.

Notwithstanding, the NYPD Force Investigation Division ("FID") Report[11] seemingly ignored Patrol Guide 221-13. Moreover, the FID Report summary of facts and findings sections

[11] The FID Report was issued on November 25, 2020. Its findings were approved by the Police Commissioner in January 2021.

failed to address Respondent Davis' repeated attempts to prevent this tragic outcome. This tribunal is puzzled by these omissions – particularly since the "event type" on the first page of the FID Report classifies this incident as an: "*Adversarial Officer Shooting Resulting in the Death of an Emotionally Disturbed Person.*"[12] The failure to address this critical issue head-on was another missed opportunity for the timely resolution of this case.

The evidence presented at trial only compounded the above-noted flaws in the FID Report. The testimony of FID's commanding officer at the time of this incident was dismissive on these points. Most notably, when asked whether it would have been "tactically sound [for the officers] to close the door once they had a visual of Mr. Trawick," he responded:

> At that point, you know…you always wanna keep a subject under your view right? You know it's a little Monday morning quarterback to say like coulda, shoulda, woulda. Like had they closed the door, would this never have happened? I don't know that you can say that. (Tr. 279)

While keeping a visual of a subject is critical in many routine situations, the witness' testimony inexplicably overlooked and undermined basic tenets of the Patrol Guide's EDP procedures in a matter that FID itself classified as EDP-involved. The clear language of the Patrol Guide's EDP section states that officers should attempt to "de-escalate" and "isolate and contain the EDP while maintaining a zone of safety until arrival of patrol supervisor and Emergency Service Unit personnel." In fact, this same Patrol Guide section lists equipment given to officers, such as a "door rope or door wedge," that can be used to close a door and keep an EDP "isolated and contained." Patrol Guide 221-13, p.2, paragraph 10 (eff. Nov. 28, 2018) The FID Report and the trial testimony of its commanding officer leave this tribunal with disquieting questions about FID's conclusion that Respondent Thompson acted "consistent with "Department guidelines."

[12] The FID Report did identify three minor tactical concerns: (i) that Officer Thompson held both his Taser and his firearm simultaneously; (ii) that Officer Thompson subsequently dropped his Taser preventing him from deploying a second cycle after Mr. Trawick stood back up; and (iii) that Officer Davis was not wearing his body-worn camera.

If the charges in this case had been timely served, it would have been within this tribunal's jurisdiction to undertake a *de novo* review of FID's conclusion. Instead, CCRB's failure to preserve the statute of limitations hijacked this NYPD disciplinary trial and distorted it into a quasi-criminal proceeding where the evidentiary threshold focused on the Penal Law instead of Patrol Guide compliance. As such, whether Respondent Thompson's actions violated the Department's Force and EDP guidelines is moot because the charges were not served by the statutory deadline.

2. Background

Kawaski Trawick was a 32 year-old male who resided at Hill House, a supportive housing facility in the Bronx established to assist homeless individuals secure permanent housing. According to family members, he was an aspiring professional dancer and personal trainer. Mr. Trawick moved to New York City from Georgia and had resided at Hill House since 2018. During the last few months of his life, however, Hill House residents and staff observed Mr. Trawick acting in an erratic manner that generated multiple 911 calls and police responses. (CCRB Ex. 12 at 12, 17, 48; Resp. Ex. A at 2, 35-41)

3. Events Leading up to April 14, 2019 Police Response

a. Initial Complaints Concerning Mr. Trawick's Conduct

At approximately 2130 hours on April 14, 2019, Hill House security guard, [redacted], and [redacted], Mr. Trawick's Hill House caseworker, discussed multiple tenant complaints reporting that Mr. Trawick was engaging in loud and disruptive behavior. Ms. [redacted] advised Security Officer [redacted] to "have the tenants write a statement and submit it to management, and if they felt threatened, [to] call 911." (CCRB Ex. 12 at 46)[13] Shortly

[13] The Bronx DA Report states that an unnamed social worker had contacted a security guard at 1830 hours to report that building residents had been calling "all evening complaining that Mr. Trawick was bothering them." (Resp. Ex. A at 4-5)

thereafter, a tenant on Mr. Trawick's floor called Security Officer [redacted] to report that when he complained to Mr. Trawick about "yelling" and "loud music," Mr. Trawick responded, in sum and substance, "I run this shit, don't tell me to keep it down. I'll slit someone's throat like the white man did." (Resp. Ex. A at 5; *see* CCRB Ex. 12 at 42) Security Officer [redacted] reached out to Mr. Trawick over the intercom and asked him to keep the noise down. (CCRB Ex. 12 at 42; Resp. Ex. A at 5) She then observed him outside the building carrying a stick. (CCRB Ex. 12 at 42) According to the FID Report, that stick was vouchered under Invoice No. 2000862843 as "one (1) brown wood stick (four feet, five and a half inches (4' 5 ½") in total length)." (*Id.* at 58)

Video captured by building security cameras confirm that Mr. Trawick exited the building at 2237 hours with the stick in one hand and a cell phone in the other. He wore a long, sleeveless, black vest, grey underwear and black knee high boots. The vest was unfastened, leaving his chest and underwear exposed as he walked around. (CCRB Ex. 6 at 0:01-0:04)

b. Interaction with Hill House Superintendent

At 2242 hours, security cameras capture Mr. Trawick standing in the hallway outside his own apartment holding the stick, a cell phone and, in addition, a serrated knife. After rifling through his vest pockets, Mr. Trawick turns and walks down the hall. (Resp. Ex. A at 5; CCRB Ex. 6 at 0:05-0:34) According to the FID Report, the knife was vouchered under Invoice No. 2000862843 as "one (1) white metal knife with brown handle (thirteen and one quarter inches (13 ¼") in total length with an eight inch (8") blade)." (CCRB Ex. 12 at 58)

At approximately 2246 hours, security cameras recorded Mr. Trawick walking toward Hill House Superintendent [redacted]'s basement apartment while carrying the same stick and a knife. (CCRB Ex. 6 at 0:38-0:40) Superintendent [redacted] told investigators that Mr. Trawick approached his door because he was locked out of his apartment. Through the

peephole, he observed that Mr. Trawick carried a large stick. He refused to open the door and directed the tenant to building security. Mr. Trawick is alleged to have replied, "I will burn this motherfucker down and I will fuck you up." Superintendent [redacted] also reported that Mr. Trawick specifically "threatened to punch [him] in the face." (CCRB Ex. 12 at 18; Resp. Ex. A at 2)

The security cameras confirm that Mr. Trawick was at the superintendent's apartment door. The footage captured him waving his arms and raising the knife over his head before knocking. (CCRB Ex. 6 at 0:41-0:45) As he appears to speak, he gestures and holds the knife in his right hand. Mr. Trawick then places the knife in his pocket, moves around, knocks on the door a second time and speaks as both arms are up against the doorframe. (*Id.* at 0:53-01:30) Soon thereafter, he rips paper off the door and tosses it across the hall.[14] (CCRB Ex. 6 at 01:37-01:45) When he returns to the superintendent's apartment, he hits the door with his stick. (CCRB Ex. 6 at 01:45-01:48) Mr. Trawick again appears to speak before banging on the door with both hands and exiting the hallway. (*Id.* at 01:48-02:48)

c. *Hill House Security Officer's First 911 Call*

At 2244 hours, Security Officer [redacted] called 911 to report Mr. Trawick's threatening conduct and request police assistance. What follows is a transcript of the relevant segments of that conversation:

Operator: New York City 911 do you need police, fire, or medical?
[redacted] Hi, yes, I have a tenant in the building who is harassing tenants and supers.... Right now, he's in the basement banging on the super's door.
Operator 1: Okay. Nobody's injured, right?
[redacted] No. But hopefully none of these tenants open the door because he's banging on the door, I'm about to call the super now so that he knows not to open the door right now.
(CCRB Ex. 6 at 01:33-02:27; Resp. Ex. A at 6-7)

[14] Superintendent [redacted] reported to investigators that this was likely a note on his door directing tenants to contact the security desk if they needed assistance after hours. (Resp. Ex. A at 6)

The operator coded the call as a 10-39H(1): other crimes in progress – harassment/inside. (Resp. Ex. A at 7)

d. Mr. Trawick's 911 Call

Four minutes later, Mr. Trawick called 911 from the building security desk. He first reported needing his keys to enter his apartment because an individual was allegedly "trying to attack" him. He then falsely reported that the building was on fire. Security Officer [redacted] is heard admonishing Mr. Trawick as he makes this false report to the 911 operator. What follows is a summary of the relevant segments of that 911 call:

Mr. Trawick: The emergency is, I'm having a problem with someone who's trying to attack me in my building, and I need them to come over. I'm safe, but I need the keys to get into my home. And the super, for some reason, is busy….
Operator 2: You need the fire department?
Mr. Trawick: Yes….. The building's on fire.
[redacted] *Kawaski (in background)*
FDNY Op.: What apartment or floor?"
Mr. Trawick: Hurry up, sir. It doesn't matter, if the building's on fire we'd be dead by now, my goodness….We'll be dead, bitch!
(CCRB Ex. 6 at 03:24-05:37; Resp. Ex. A at 8-10)

Because Mr. Trawick reported a fire, the call was classified as a 59, a fire job, separate and distinct from the harassment job previously created for this location. (Resp. Ex. A at 10; *see* CCRB Ex. 12 at 18)

e. Hill House Superintendent's 911 Call

At approximately 2248 hours, Superintendent [redacted] called 911 to report Mr. Trawick's threats and seek police assistance. What follows is a summary of the relevant segments of that 911 call:

Operator 3: And what is the emergency, sir?
[redacted] I'm being threatened by a tenant. I'm the superintendent of the building and I'm being threatened by a tenant right now.

Operator 3: Any weapons?...
[redacted] I don't know what he has, he said he will punch me in my face, he said, "I will knock you out." He wants to get in his apartment....
Operator 3: What apartment is he in?
[redacted] He's in 409. He locked himself out of his apartment, he said, "Motherfucker, I will punch you in the face."... This is not the first complaint I've had with him, okay?
(CCRB Ex. 6 at 06:01-08:31; CCRB Ex. 12 at 18; Resp. Ex. A at 10-12)

This 911 complaint was merged with the first harassment job created when Security Officer [redacted] called. (Resp. Ex. A at 12)

f. 911 Operator's Dispatch to Respondents

At 2249 hours, dispatch assigned the harassment calls to Respondents. The dispatcher stated: "Can you please check in and advise on this thirty-nine harassment, 1616 Grand Avenue, states that tenant is harassing her, banging on the super's door." (CCRB Ex. 6 at 02:58-03:07) Respondent Davis verbally accepted the job and the dispatcher informed them that it was a "sensitive location for [unintelligible] EDP." (*Id.* at 03:13-03:14) Neither Respondent verbally acknowledged that last transmission.

g. Hill House Security Guard's Second 911 Call

At 2251, Security Officer [redacted] called 911 a second time. She reiterated the need for police assistance and informed the 911 operator that the fire emergency reported by Mr. Trawick was false:

Operator 4: New York City 911 do you need police, fire, or medical?
[redacted] Um, yes, I need the police officers to come please, but the tenant just called, he like ran, he's losing his mind in the building. I called already, but he just called trying to say that there's a fire, there's no fire in the building at sixteen-sixteen Grand Avenue....There's no fire, he's losing his mind. I already called before he called, and asked for police to come get him because he's threatening tenants and banging on doors and everything.
Operator 4: ... Does he have a mental history?
[redacted] Um, not that I know of.
Operator 4: ... [W]hat is he doing now?

[redacted] He just ran out of the building, but before that he was banging on doors with a stick, a big wooden stick, he barely has on any clothes, yelling, screaming at tenants, and I'm getting crazy calls like every minute.... [H]e might need an ambulance, to be honest, yes, he might. But he called the fire department, so they're already coming, I hear them now.
Operator 4: I understand that, ma'am. Do you need an ambulance for him?
[redacted] I believe so, because I think he might be intoxicated with something, because he's been losing his mind all day....
(CCRB Ex. 6 at 08:38-11:34; Resp. Ex. A at 3; CCRB Ex. 12 at 18)

This call was assigned to the FDNY and a second NYPD unit.

h. FDNY Response

FDNY entered Hill House at approximately 2254 hours. (CCRB Ex. 12 at 19) Security Officer [redacted] informed Lieutenant Niami Dukette that there was no fire and that Mr. Trawick was "just acting crazy." (Resp. Ex. A at 15) Mr. Trawick then told Lieutenant Dukette that he was locked out of his apartment, there was food on the stove, and that the super would not let him in so the door had to be broken down. (*Id.*)

Once on the scene, FDNY Captain Thomas Moore asked Mr. Trawick what was going on. Mr. Trawick did not respond, but reportedly acted in a "loud, agitated manner, cursing at the superintendent and yelling about being locked out ... and about having food on the stove." (Resp. Ex. A at 15) Mr. Trawick then led the firefighters to his apartment where they forcibly opened the door with a Halligan tool. (CCRB Ex. 12 at 19; CCRB Ex. 6 at 12:52-13:20) The firefighters interviewed by the Bronx DA's Office noted that a pan on the stove was "not hot to the touch," the burners were not on, and that "it did not appear" to them that Mr. Trawick had been cooking. Captain Moore further reported that Mr. Trawick's demeanor changed from "agitated to ecstatic" once his apartment door was opened. (Resp. Ex. A at 3, 15-16) The firefighters did not report that Mr. Trawick was carrying a knife. (CCRB Ex. 12 at 49)

EMS arrived at Hill House at approximately 2258 hours. All fire trucks left the block by 2305 hours. (Resp. Ex. A at 3, 15-16, 26)

4. Police Response

a. Respondents' Arrival at Hill House

Respondents arrived at the intersection of Grand Avenue and Macombs Road at 2255 hours, but waited approximately five minutes for FDNY trucks to depart in order for them to park their RMP in front of Hill House. (Resp. Ex. A at 18; CCRB Ex. 12 at 19; Tr. 408, 478) At 2301 hours, Respondents informed the dispatcher that they were at 1616 Grand Avenue. (Resp. Ex. A at 3) Respondent Davis was aware from prior jobs that this location housed "sick people" and those who were formerly homeless. (Tr. 387, 403) Respondent Davis testified that he took "the lead" because he had more experience than his partner. (Tr. 391-92)

Security Officer [redacted] Superintendent [redacted] and [redacted], the on-call building supervisor, met Respondents and talked to them for about three minutes. None of these witnesses testified at trial.[15] According to Respondent Davis, Security Officer [redacted] and Superintendent [redacted] identified themselves as the 911 callers. Superintendent [redacted] complained that Mr. Trawick "was banging on his door and threatening to punch him in his face." Security Officer [redacted] added that there was "a male with a stick, that was upset, acting a little erratic" and that he had threatened to "hit her as well." She further explained that Mr. Trawick was "very upset" about his door being "messed up" because "he had locked himself out" and the Fire Department had helped "to get him in." (Tr. 387-89)

At trial, Respondent Davis testified that neither individual identified Mr. Trawick as an emotionally disturbed person nor did he inquire about Mr. Trawick's mental health. Based on

[15] In evidence are summaries of the statements they made when interviewed by FID and the Bronx DA. (CCRB Ex. 12; Resp. Ex. A)

the information provided by the complainants, he viewed this as a "regular argument, a guy that probably was upset, because … he couldn't get into his apartment. And that's all." (Tr. 390, 410, 452) However, according to the Bronx DA Report, Respondent Davis informed them that the details provided by the 911 callers led him to suspect that Mr. Trawick may be "under the influence" and need transport to the hospital.[16] The Bronx DA Report also noted Respondent Davis' statement that the superintendent had claimed that Mr. Trawick "tried to punch him in the face and had a stick and knife." (Resp. Ex. A at 18-19)

Respondent Thompson testified at trial that Superintendent [redacted] was "very nervous…saying Mr. Trawick was banging on his door," and that the Security Guard "raised concerns as well." Respondent Thompson's recollection is that neither complainant described Mr. Trawick as an emotionally disturbed person.[17] (Tr. 479-80, 509-11)

b. Respondents' Initial Interaction with Mr. Trawick

After talking to the complainants, Respondents, along with Mr. [redacted] and Superintendent [redacted] took the stairs to Mr. Trawick's fourth floor apartment. Respondents instructed Mr. [redacted] and Superintendent [redacted] to remain in the stairwell at the end of the hallway while they spoke to Mr. Trawick. (Tr. 480, 511-12, 522; CCRB Ex. 12 at 39-40)

Hill House surveillance footage captured Respondents putting on gloves as they approached Mr. Trawick's apartment. (CCRB Ex. 6 at 18:23-18:53; CCRB Ex. 1 at 00:00-00:12) Respondent Thompson's BWC recorded the apartment door opening slightly as Respondent Davis knocked and then pushed it. When the door swung back to close, Respondent Davis

[16] Other than these material facts, Respondent Davis' testimony was substantially consistent with the interview summaries in evidence. (*See* Resp. Ex. A at 16-19; CCRB Ex. 12 at 26-29)

[17] Respondent Thompson's testimony did not differ materially with the interview summaries in evidence. (*See* Resp. Ex. A at 16-19; CCRB Ex. 12 at 22-26)

extended his retractable asp and pushed the door back open multiple times. (CCRB Ex. 1 at 00:12-00:18) [18]

At trial, Respondent Davis explained that there was no answer when he first knocked. When he admittedly knocked "harder," the door then opened slightly and he "pushed" it to "see what [they] had." From the threshold, Respondent Davis observed Mr. Trawick carrying both a knife and stick. (Tr. 392) He described Mr. Trawick as "very upset that we were there" and kept his asp and Taser at hand as a precaution. Respondent Davis testified that he was hoping to start a "dialogue" with Mr. Trawick "if he drop[ped] the knife." (Tr. 393-94) At trial, Respondent Thompson confirmed that Mr. Trawick kept "moving back and forth" and that he seemed "a little bit agitated seeing us there." He recalled that music was playing inside the apartment and that Mr. Trawick lowered it. (Tr. 482)

c. *Taser Deployment*

Respondent Thompson's BWC recorded his Taser deployment. What follows is a summary of the BWC footage and Respondents' testimony explaining their actions.

BWC (CCRB Ex. 1):

00:19-00:29: Mr. Trawick can be seen inside his apartment. Respondent Thompson taps Respondent Davis on his right shoulder. When Respondent Davis pushes the door open, Respondent Thompson raises the Taser over Respondent Davis' right shoulder. Respondent Davis also points his Taser at Mr. Trawick.

00:30-00:34: The BWC audio starts. Mr. Trawick asks, "Why are you in my home?" Respondent Davis orders Mr. Trawick to "put it down." Respondents Thompson and Davis keep their Tasers trained on Mr. Trawick. Respondent Davis tells Respondent Thompson, "We ain't going to tase him."

00:35-00:40: Respondent Davis bangs the door with his asp. Mr. Trawick walks to the back of his apartment to turn down the music then turns toward the officers and repeats, "Why are you in my home?"

[18] A long black chain appeared to be attached to a closet and the inner doorknob of the main door.

00:41-00:46: Respondent Davis instructs Mr. Trawick to "put it down." Mr. Trawick, moves the knife to his right hand. At that point, Respondent Thompson states, "Oh he's got a knife." Respondent Davis responds, "Yeah I know." Mr. Trawick waves the knife around and steps closer to the officers as he explains, "I have a knife because I'm cooking."

00:46-00:46: Respondent Davis seems to reach back, gestures at Respondent Thompson and says, "Don't, don't, don't." Respondent Thompson simultaneously holsters his Taser and unholsters his firearm. He points the firearm at Mr. Trawick. (CCRB Ex. 6 at 19:27-19:30)

00:47-00:48: Respondent Davis repeatedly orders Mr. Trawick to put the knife down. Respondent Davis aims the Taser's red targeting dot at Mr. Trawick. Mr. Trawick insists that he is "cooking."

00:49-01:10: Mr. Trawick explains that he called FDNY because he was locked out and that firefighters had already responded. Mr. Trawick continues to ask why they had opened his door. Respondent Davis tells him, "The door was open with the chain, I knocked on the door," and then adds, "put the knife down on the counter." Respondent Thompson states, "My man, drop the knife."

01:11-01:17: Mr. Trawick does not put down the knife and steps toward the officers while gesturing with the knife. Respondent Thompson again instructs, "Drop the knife." Both officers are standing in the hallway just outside the apartment door. Respondent Thompson has his firearm pointed at Trawick as he again orders him to "drop the knife." Respondent Davis' Taser light goes out at 01:11; he is then heard stating, "I don't have my camera on, so be careful."

01:18-01:27: Respondent Davis reholsters his Taser. (CCRB Ex. 6 at 20:00) Mr. Trawick "moves the stick back into his right hand, holding both the knife and the stick parallel to each other at his side. The knife is pointed toward the ground. Mr. Trawick mumbles, "Just hold it in the center … of the brain … yea … hold it … hold it, hold it, the center, the center, the center of the brain." As he makes this statement, he points down at his head with his index finger. (Resp. Ex. A at 23) By this point, Respondents have instructed Mr. Trawick to "drop the knife" approximately nineteen times.

01:28-01:29: Respondent Thompson unholsters his Taser and deploys it, hitting Mr. Trawick in the thigh. He is also holding the firearm in his right hand.

01:29-01:34: Mr. Trawick falls to the ground with the stick and the knife in his hand. Respondent Thompson drops his Taser, holsters his firearm and enters the apartment, followed by Respondent Davis. The wooden stick is next to Mr. Trawick on the ground. It is unclear if the knife fell from his grip.

Respondent Davis explained on direct examination that he told Respondent Thompson, "We ain't going to tase him" and "Don't, don't" because he did not believe Mr. Trawick needed to be tased at that point. (Tr. 435-36) Respondent Davis had received NYPD Crisis Intervention Training on April 11, 2019 – three days prior to the incident. (CCRB Ex. 15 at 6)[19] Respondent Davis also explained that he had experience responding to EDP jobs and described two specific instances where he was able to effectively communicate with the individual and safely resolve the incident. (Tr. 381-84)[20]

Respondent Thompson testified that he immediately pointed the Taser at Mr. Trawick because he was holding a stick. (Tr. 530-31) He believes Mr. Trawick "grabbed" the knife at some point during their interaction. (Tr. 482) Respondent Thompson continued to point the Taser hoping that seeing the red dot would cause him to drop the weapons. According to his testimony, when Mr. Trawick was "very close," he unholstered his firearm to achieve the same goal. Respondent Thompson testified that he deployed the Taser to disarm Mr. Trawick by means of a "less lethal device." (Tr. 486-88, 498)

d. Shooting

Respondents were unable to restrain Mr. Trawick after he was tased. As documented by the BWC, about twenty seconds transpire between the deployment of the Taser and the firearm discharge.

BWC (CCRB Ex. 1):

01:35-01:38: After being tased, Mr. Trawick immediately jumps up from the ground, holds the knife and the stick and screams, "Get out" multiple times. Respondents back out of the apartment and into the hallway. Respondent Thompson unholsters his

[19] Pursuant to Respondent Davis' personnel file, he completed the "Responding to People in Crisis – Introduction to CIT Video Series" on October 16, 2018. He completed Module 1 of that video series on January 22, 2019. (CCRB Ex. 15 at 7; CCRB Exs. 17-18)

[20] Pursuant to his personnel file, Respondent Thompson completed the "Responding to People in Crisis – Introduction to CIT Video Series" on October 13, 2018 and Module 1 of that series on January 10, 2019. (CCRB Ex. 14 at 7-8; CCRB Exs. 17-18) He also confirmed that he received Crisis Intervention Training as a recruit in the Police Academy. At trial, however he seemed unsure of the training content. When specifically asked if he remembered his training, he responded, "Not off the top of my head. I don't remember all the details." (Tr. 540-41)

firearm. Mr. Trawick turns his back to them as he runs toward the rear of the apartment.

01:38-01:41: As Respondent Thompson aims his firearm at Mr. Trawick, Respondent Davis says, in sum and substance, "No, no, don't, don't, don't," and pushes Respondent Thompson's firearm down.

01:41-01:42: Mr. Trawick turns and leaps toward Respondents, screaming, "Get out, bitch. I'm gonna kill you all! Get out!" At first, he holds the stick and knife in different hands, but then he jumps in the air, transfers the knife, and holds both weapons in his right hand. The blade of the knife is angled downward. His empty left hand extends forward.

01:42-01:47: Mr. Trawick is within seven feet from the front door when Respondent Thompson discharges four rounds from his firearm. Mr. Trawick falls and the apartment door closes.

Hallway Security CAM 18 (CCRB Ex. 6)
20:25-20:30:
Respondent Davis unholsters his Taser and points it at Mr. Trawick. Simultaneously, Respondent Thompson discharges four rounds.

Respondent Thompson testified that they were unable to restrain Mr. Trawick after he was tased because he became "frantic" and "agitated" as he "got right up" and grabbed his weapons. He explained, "[I was] in fear of my life, my safety, and everything." According to Respondent Thompson, he initially fired three rounds because Mr. Trawick "was still closing the gap. And then he was still a threat to me and was still up. And I felt like he was about to continue to attack us, so I fired one more shot. And at that point he fell behind the door." (Tr. 490-91) Respondent Thompson testified that he did not recall Respondent Davis telling him, in sum and substance, "No, no, no" as he pointed the firearm, because his "main focus was on Mr. Trawick." (Tr. 546)

On direct examination, Respondent Davis explained that he told Respondent Thompson, in sum and substance, "Don't, don't" and pushed down Respondent Thompson's firearm because, immediately after being tased, Mr. Trawick ran away from them with "his back turned." (Tr. 397-98) Respondent Davis confirmed that he again unholstered his Taser when Mr. Trawick

was "coming at us . . . very fast" with the knife and stick in hand. Respondent Davis "focused on the knife," and was planning to deploy his Taser, but did not get the opportunity to do so because Respondent Thompson discharged his firearm. (Tr. 398-99, 435-36, 442, 461-62, 472-73)

During cross-examination, Respondent Davis agreed that it was a "mistake" for Respondent Thompson to shoot Mr. Trawick. (Tr. 442) On re-cross, he explained that answer in a manner that was consistent with the above-cited testimony he provided on direct examination. Specifically, Respondent Davis clarified that it was not appropriate for Respondent Thompson to shoot Mr. Trawick when he ran away from them with his back turned to the officers. (Tr. 465-66) Respondent Davis then added that it was not a mistake to shoot Mr. Trawick after he came running back toward them armed with a knife that could have injured them. (Tr. 466-67)

e. Shooting Aftermath and Calls for Assistance

Seconds after the shooting, Respondent Thompson notified the dispatcher, "Six response four, I got shots fired, 1616 Grand, shots fired. … Six response four. Let me get a bus rolling." (CCRB Ex. 6 at 20:34-20:49) He then added, "We got an EDP with a knife." (*Id.* at 20:52-20:53)

While Respondent Thompson was on the radio, Respondent Davis attempted to open the door twice. On the third try, he succeeded and held it slightly open. (*Id.* at 20:35-20:52) After about a minute, he stepped inside and looked down. (CCRB Ex. 1 at 03:04-03:12) Simultaneously, Respondent Thompson repeated his request for an ambulance and restated "shots fired." (CCRB Ex. 1 at 03:01-03:08)

EMS arrived at the apartment about two minutes after the shooting. (CCRB Ex. 1 at 04:03; Resp. Ex. A at 26) The BWC captured the EMTs repositioning Mr. Trawick and administering CPR. (CCRB Ex. 1 at 04:31-05:03)

Before their arrival, neither Respondent took any affirmative steps to determine whether Mr. Trawick was still alive, nor did they render direct aid. (Tr. 445-46, 553-54) Respondent Davis testified at trial that he was "gradually pushing the door open … because [Mr. Trawick] was laying right behind the door." Once inside, he observed "a male, unconscious. He wasn't moving. He wasn't breathing. His eyes were rolled back. And I knew he was done after that." (Tr. 400) When the dispatcher asked if any MOS was injured, Respondent Davis replied, "Nobody is injured, it's just a perp right now.[21] MOS is okay." (CCRB Ex. 1 at 04:41-04:50) Respondent Thompson testified that he was not aware of Mr. Trawick's condition because he was focused on securing the hallway where another resident was agitated and screaming hysterically. (Tr. 492-93, 551-52)

EMS carried Mr. Trawick to the ambulance at 2225 hours. They arrived at the hospital at approximately 2235 hours. Mr. Trawick was pronounced dead at 2246 hours. (Resp. Ex. A at 27)

f. Medical Examiner

On April 15, 2019, Dr. Terra Cederroth, Deputy Chief Medical Examiner of the City of New York, conducted Mr. Trawick's autopsy. The Autopsy Report concluded that Mr. Trawick died from two gunshot wounds and ruled the death a homicide. The toxicology report concluded that amphetamines and methamphetamines were in Mr. Trawick's system at the time of his death. (Tr. 69-70, 79; CCRB Ex. 7)

[21] At approximately 2313 hours, a sergeant responding to the scene asks, "Who's injured?" The response heard on the recording was, "Nobody, just a perp." Although the person who answered may have been Respondent Davis, this specific comment was not raised during his cross-examination. (CCRB Ex. 1 at 06:52-06:58)

Dr. Cederroth testified that the gunshot wound identified as "A" resulted from a bullet entering Mr. Trawick's left upper back.[22] That bullet "fractured the rib..., then it went through the left lung. It went through the heart, and then lodged in the soft tissues of the chest and muscles." Dr. Cederroth opined that gunshot wound "A" would have caused death within seconds. According to the expert witness, the gunshot wound identified as "B" resulted from a bullet entering the right side of Mr. Trawick's chest. That bullet then "fractured three of the ribs on the right side of the chest, grazed the right lung, went through the liver, and then lodged in the soft tissue of the back." She concluded that gunshot wound "B" would have caused death within a minute. (Tr. 72-73, 80-81; *see* CCRB Ex. 7 at 5-6)

At trial, Dr. Cederroth explained that there was a "remote possibility that's approaching zero" that Mr. Trawick could have survived being shot in the heart, but only "if he had immediate surgical intervention." She had "read of a few instances" of survival, adding that, "it's incredibly, vanishingly rare." (Tr. 76, 80-81)

1. Respondent Thompson

a. Specification 1: Assault in the First Degree

CCRB seeks Respondent Thompson's termination for the fatal shooting of Mr. Trawick. As noted above, because Respondent was not served within the extended statute of limitations period, a finding of misconduct cannot turn wholly on whether Respondent Thompson violated Departmental tactics set forth in the Patrol Guide. Due to this procedural irregularity, in place of using the Departmental construct applied to most disciplinary hearings, CCRB has the burden of proving all elements of Assault in the First Degree.

[22] The designation of gunshots "A" and "B" do not necessarily correlate with the sequence in which they were fired. Dr. Cederroth explained, "We tend to organize things based on body location, sometimes based on severity of the injury. It doesn't mean that it occurred first. It just means that this wound was a more significant injury because it hit vital organs." (Tr. 72)

Specification 1 mirrors New York Penal Law §120.10(1) which provides that "a person is guilty of assault in the first degree when, with intent to cause serious physical injury… he causes such injury to that person by means of a deadly weapon or dangerous instrument." Therefore, CCRB has the burden of proving, by a preponderance of the evidence, that:

i. Respondent Thompson, with intent to cause serious physical injury to Mr. Trawick, fired his service firearm;
ii. The firearm discharge caused serious physical injury; and,
iii. Respondent Thompson was not legally justified in shooting Mr. Trawick.

It is uncontested that Respondent Thompson intentionally shot at Mr. Trawick four times with a deadly weapon, striking him twice, and that Mr. Trawick succumbed to the injuries caused by the shooting. In dispute is whether CCRB has disproven Respondent Thompson's defense that he was justified in using deadly force against Mr. Trawick, as that defense is defined in the Penal Law.

Under New York Penal Law §35.15(2), "A person may not use deadly physical force upon another person … unless: (a) The actor reasonably believes that such other person is using or about to use deadly physical force." The Penal Law further provides that an individual may not use deadly physical force in self-defense if they can safely retreat. Police officers, however, are exempt from this requirement if they are acting pursuant to Penal Law §35.30, which states in relevant part:

> A police officer…, in the course of effecting or attempting to effect an arrest …. of a person whom he or she reasonably believes to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest … or in self-defense … from what he or she reasonably believes to be the use or imminent use of physical force; except that deadly physical force may be used for such purposes only when he or she reasonably believes that: (c) Regardless of the particular offense which is the subject of the arrest … the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

After reviewing the record in its entirety, this tribunal concludes that the credible evidence supports a finding that Respondent Thompson actually believed that discharging his firearm was necessary to prevent an imminent knife attack that could have endangered the officers and that his belief was reasonable under the circumstances.

It is uncontested that after being tased and falling to the floor, Mr. Trawick immediately bolted up, shrieked and rearmed himself with both a 4' 5 ½" stick and metal serrated knife with an 8" blade. As Respondents retreated to the hallway to create a tactical zone of safety, Mr. Trawick momentarily rushed to the rear of the apartment screaming, "Get out" multiple times. He then leaped toward Respondents waving the knife in his right hand and the stick in his left. While rapidly advancing, Mr. Trawick transitioned the stick from his left hand to his right hand. As he held both the knife and stick in his right hand he shouted, "I'm gonna kill you all! Get out!" When Mr. Trawick moved to within five-to-seven feet of the officers, Respondent Thompson discharged four rounds killing Mr. Trawick. (Tr. 398-99, 443, 490, 498; CCRB Ex.1 at 01:40-01:46; CCRB Ex. 12 at 21)

At trial, Respondent Thompson explained his reasons for discharging the firearm:

> So at that point [Mr. Trawick] jumps up. He's sort of frantic. He's agitated. He yells at us … 'I'm going to kill you all.' Which, you know obviously that makes me very – I felt very scared. And then he runs toward the back of the apartment, grabs the knife and starts to charge toward us. At that point I was very fearful. You know, I was in fear of my life, my safety and everything. And at that point, [Mr. Trawick's] charging towards us. He has a sharp object.... I'm thinking he can stab us.... And once he got within five feet, that's when I chose to discharge my firearm.... He could have killed one of us. He could have stabbed one of us. The vest wouldn't protect us. (Tr. 490-91)

Respondent Thompson was not alone in his belief that Mr. Trawick posed a serious threat immediately before shots were fired. Even Respondent Davis, who repeatedly attempted to stop Respondent Thompson from using force during this encounter, corroborated that the officers were in danger when Mr. Trawick charged at them. On direct examination, Respondent Davis

first explained that the video captured him telling Respondent Thompson, in sum and substance, "don't, don't" and pushing down Respondent Thompson's firearm because, immediately after being tased, Mr. Trawick ran away from them with "his back turned." (Tr. 398, 441) The BWC footage corroborates his direct testimony on this point. (CCRB Ex. 1 at 01:29-01:40) Respondent Davis further confirmed what was documented in the BWC footage: that Mr. Trawick then turned toward them "charging … at [Respondents]" "very fast" with the knife and stick. Respondent Davis testified that he "focused on the knife" as he "closed in" on them and believed Mr. Trawick "could have hurt me." (Tr. 398-99, 470, 472-73)

Additionally, the testimony of CCRB's expert witness, former Oakland Police Chief Howard Jordan, undermined the administrative prosecutor's argument that the elements of justification were disproven for this charge. On cross-examination, Chief Jordan affirmed that Mr. Trawick was "fairly close" to the officers, and moving forward with "decent momentum" immediately before the first shot was fired. He further conceded that his proximity to Respondents breached the approximate 20-foot "zone of safety" officers are trained to maintain, agreeing that Mr. Trawick had "shortened the distance" and could close it "pretty quickly." (Tr. 132, 143-44, 166, 211)[23] Chief Jordan also accepted that Mr. Trawick's exclamation -- "I'm gonna kill you"-- was a clear statement of intent. (Tr. 224) More pointedly, CCRB's expert did not dispute Respondent Thompson's stated safety concerns during those seconds when Mr. Trawick ran toward them with a knife, and conceded that, "I do believe that Officer Thompson did demonstrate ... that he was in fear of his life." (Tr. 145-46) He further agreed that

[23] Patrol Guide 221-13 defines zone of safety as: the distance to be maintained between the EDP and the responding member(s) of the service. This distance should be greater than the effective range of the weapon (other than a firearm), and it may vary with each situation (e.g., type of weapon possessed, condition of EDP, surrounding area, etc.). A minimum distance of 20 feet is recommended. An attempt will be made to maintain the "zone of safety" if the EDP does not remain stationary." CCRB expert, Chief Jordan, confirmed that this is a basic tenet of police training. (Tr. 132-33, 204-05, 275)

Respondent Thompson's fear was reasonable. (Tr. 181-182) In fact, when specifically asked whether Respondent Thompson was "justified in firing his weapon at the moment he did, when [Mr. Trawick] was within four-to-five feet, because he was faced with an imminent threat of deadly physical force, either to himself or to his partner," Chief Jordan unequivocally replied, "Yes." (Tr. 232)[24]

CCRB raised various legal theories in support of its position that Respondent Thompson was not justified in using deadly force. None were persuasive. For example, CCRB asserted that Respondent Thompson could not invoke the justification defense under Penal Law §35.30(1) because the officers were not "effecting or attempting to arrest" Mr. Trawick.[25] This argument is based both on an unreasonably restrictive interpretation of the law and on a faulty factual premise. Respondents responded to 911 calls reporting that Mr. Trawick was harassing and threatening building occupants with violence. Upon arrival, they interviewed two of the 911 callers and confirmed that Mr. Trawick had threatened both Superintendent [redacted] and Security Guard [redacted] as he was brandishing at least one weapon. Specifically, Superintendent [redacted] informed Respondents that Mr. Trawick "was banging on his door and threatening to punch him in his face." According to the DA Report, Superintendent [redacted] also advised Respondent Davis that Mr. Trawick was carrying a knife.[26] Security Officer [redacted] added that he "was upset, acting a little erratic," that he was carrying a "stick" and that he had threatened to "hit her as well." (Tr. 387-89, 480)

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[24] Chief Jordan emphasized, however, that better tactics could have prevented the situation from transpiring as it did. He concluded, "[I]t's my opinion that there were opportunities for the officers to de-escalate this situation to slow things down." (Tr. 235)

[25] The other prong of Penal Law Section 35.30, "preventing escape," is not at issue here.

[26] Resp. Ex. A at 18; CCRB Ex. 6 at 00:40-00:59 depicts Mr. Trawick waving the knife around in front of the Superintendent's closed apartment door.

Based on the information obtained, Respondents had reason to believe that Mr. Trawick had committed, at a bare minimum, harassment. As was their obligation, Respondents approached Mr. Trawick's apartment to look into the validity of the 911 complaints. As Respondent Thompson explained at trial:

> So basically, we were going to conduct an investigation. We thought we were going to be taking a report, or we had a possible arrest situation. So we just knocked on his door and were trying to speak to Mr. Trawick. (Tr. 556)

Contrary to CCRB's assertion, these investigative steps were taken within the context of legitimate police work, and do not negate the evidence Respondents already had to support the reasonable conclusion that the commission of an offense had occurred.[27]

Moreover, from the apartment threshold, Respondents observed Mr. Trawick holding a large stick and a serrated knife. It is important to underscore that Mr. Trawick was not, as CCRB argues, merely a person holding a knife while cooking in his kitchen -- a scenario that would not usually trigger suspicion or alarm. Here, Mr. Trawick was the subject of multiple 911 complaints concerning threats he made while armed with the same stick he held in his hand when the officers first encountered him, as well as a serrated knife with an 8-inch blade.

Within this context, Mr. Trawick's failure to comply with Respondents' immediate and repeated orders to put down the knife raised the threat level and reasonably elevated the officers' safety concerns. The failure to obey the officers' orders also provided independent grounds on which to base a lawful arrest. The Bronx District Attorney's conclusion that there was "no impropriety in [Respondents'] approach and entry into Mr. Trawick's apartment" is instructive on this point:

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[27] The Bronx DA Report also addressed this point: "After speaking to the Super and hearing his complaint of Mr. Trawick banging on his door and threatening him, the officers had reasonable cause to believe that Mr. Trawick had committed the offense of Harassment in the Second Degree." (Resp. Ex. A at 33)

> Given the information that they were provided [concerning harassment], their appearance at Mr. Trawick's apartment was not improper and the officers had the authority at that time to place Mr. Trawick under arrest. Additionally, as events preceding the shots fired by P.O. Thompson unfolded, the officers had reasonable cause to place Mr. Trawick under arrest for menacing the officers with a knife and a stick pursuant to Penal Law Section 120.13. Moreover, P.O. Thompson and P.O. Davis were authorized to take Mr. Trawick into custody pursuant to section 9.41 of the Mental Hygiene Law.... (Resp. Ex. A at 33)

In sum, given the totality of circumstances, this tribunal finds that there is insufficient evidence to support a finding that CCRB disproved the elements of justification because Respondents did not have a basis on which to make an arrest within the context of Penal Law §35.30.[28]

Similarly unpersuasive was CCRB's argument that, pursuant to Penal Law §35.15(1)(b), Respondent Thompson was the initial aggressor and therefore could not invoke the defense of justification. In its Post-Trial Brief, CCRB posited that:

> The mere holding of a knife in one's own apartment and refusing to put it down when ordered, unaccompanied by any physical threats or acts, did not make Mr. Trawick the initial aggressor. (CCRB Post-Trial Brief at 31)

This tribunal can only characterize this as a sanitized scenario that ignores the legitimacy of basic police functions. As noted in more detail above, Respondents were police officers responding to multiple 911 harassment calls. Upon their arrival at Hill House, they immediately verified the reported threats with the 911 callers. At the threshold of the subject's apartment, Respondents observed Mr. Trawick acting erratically while holding a large stick and a serrated knife. For everyone's safety, the officers reasonably issued an order for him to put down the

[28] CCRB cited the case *People v. Grim*, 166 A.D.2d 264 (1st Dept. 1990) as supporting its argument. *Grim*, however, deals with an assault committed by two off-duty officers. The off-duty officers attempted to invoke the justification defense available to officers who employ force in the course of making an arrest under Penal Law § 35.30. The trial court properly refused to instruct the jury on the defense of justification because the jury could not have reasonably found that defendants employed force in the course of making an arrest. In sum, this case does not address the justification defense within the context of legitimate police action.

weapons. Of particular concern was that the subject was holding the knife in close proximity to the officers -- well within the 20-foot zone of safety they were trained to maintain. Once Mr. Trawick failed to comply with Respondents' lawful orders, not once, but nineteen times, the threat level rose. At this point, the knife became "essentially a weapon rather than a utensil." *In re Jamie D.*, 59 N.Y.2d 589, 593 (1983) Under these circumstances, the law does not require that individuals wait until they are actually struck or wounded before using reasonable force. *People v. Valentin*, 29 N.Y.3d 57, 62 (2017)(No reversible error by trial court in including an initial aggressor exception in its justification charge. The case involved a fatal shooting during a brief but intense altercation in which the deceased victim threatened defendant with a mop handle. According to the court, there was a "reasonable view of the evidence that [decedent] was the initial aggressor as to physical force because he picked up the mop handle and followed defendant before defendant ever used or threatened the use of a gun"); *see also Merzon v. County of Suffolk,* 767 F.Supp. 432 (EDNY 1991)(An officer is authorized to use deadly force when he reasonably believes it necessary to defend from what he reasonably believes to be the use of imminent use of deadly force.) [29]

Likewise, this tribunal rejects the contention that the justification defense is not available to Respondent Thompson pursuant to Penal Law §35.15(1)(a), which exempts an individual whose conduct provoked the aggression with intent to cause physical injury. Specifically, CCRB argues that, "The marked contrast in Mr. Trawick's behavior before and after being tased -- going from being upset to becoming threatening – established that it was the tasing that provoked Mr. Trawick to approach the Respondents [with the knife]." They add that Mr. Trawick's

[29] This tribunal also rejects the assertion that this exception to the justification defense applies not only to the charges alleging Assault in the First Degree, but also to those alleging Attempted Assault in the First Degree, Menacing in the Second Degree, and Assault in the Second Degree.

"threatening" reaction was "foreseeable" because he did not want the officers in his home. (CCRB Post-Trial Brief at 32)

The legal implications of the Taser deployment are more fully discussed in the section addressing Specification 4 - Assault in the Second Degree. At the outset, this tribunal rejects the blanket contention that when a law enforcement officer uses less than lethal force in an attempt to disarm a recalcitrant subject, they are, in essence, acting as an initial aggressor as set forth in Penal Law §35.15(1)(a). A ruling to the contrary would erroneously criminalize an officer's defensive use of a Taser when an erratic subject puts officers in reasonable fear for their safety.

Accordingly, this tribunal finds that CCRB failed to disprove by a preponderance of the evidence that the justification defense applies to the charge set forth in Specification 1.[30]

Based upon the foregoing, Specification 1 is dismissed as untimely.

b. Specification 2: Attempted Assault in the First Degree

CCRB argued that Respondent Thompson engaged in misconduct when he fired four shots, including the two bullets that did not strike Mr. Trawick, and charged him with "intentionally using force without police necessity in that in attempting to cause serious physical injury, he intentionally fired multiple shots from his gun at Kawaski Tyrone Trawick."[31]

Inasmuch as the charges of Assault in the First Degree and Attempted Assault in the First Degree rely on the same facts and assertion of the justification defense, the analysis of Specification 1 above is applicable to this charge. Based on that analysis, this tribunal finds that CCRB failed to disprove Respondent Thompson's justification defense with respect to Specification 2. Therefore, Specification 2 is dismissed as untimely.

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[30] This tribunal also rejects the assertion that this exception to the justification defense applies not only to the charges alleging Assault in the First Degree, but also to those alleging Attempted Assault in the First Degree, Menacing in the Second Degree, and Assault in the Second Degree.

[31] Under Penal Law Section 110, "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

c. *Specification 3: Menacing in the Second Degree*

Respondent Thompson was charged with "wrongfully using force in that he intentionally placed or attempted to place Mr. Trawick in reasonable fear of physical injury by pointing his gun at Kawaski Tyrone Trawick without police necessity." The language of this specification mirrors the language of Penal Law §120.14 (1), Menacing in the Second Degree.

This charge must fail because its framework disregards the legitimate law enforcement context in which Respondent Thompson removed his firearm and pointed it at Mr. Trawick. (CCRB Ex. 1 at 00:46-01:27) As discussed above, it is uncontested that Mr. Trawick acted erratically and held a large stick and knife as Respondents attempted to investigate the 911 complaints. In addition, Mr. Trawick did not comply with Respondents' repeated orders to drop those weapons. When asked at trial why he removed his firearm, Respondent Thompson testified, "Mr. Trawick was very close to us, I took out my firearm. I pointed at him in hopes that he would—he would drop the weapons; the knife, the stick. Those are very dangerous instruments. You know, a knife is a blunt instrument, as well as the stick. Could have easily injured myself or Officer Davis, incapacitated us." (Tr. 486) In sum, Respondent had an objectively reasonable rationale for displaying his firearm defensively.

This falls squarely within the New York Court of Appeals' acknowledgement that frightening a person with a gun in order to defend one's life can be a viable defense. *See People v. Perry*, 19 N.Y.3d 70, 71 (2012) Moreover, in this case, Respondent Thompson pointed his gun to achieve a legitimate law enforcement purpose: to prevent an armed subject, who was standing within the 20-foot zone of safety, from advancing toward them as they attempted to conduct authorized police business. As such, this Penal Law section does not logically apply to this set of circumstances. Accordingly, Specification 3 is dismissed as untimely.

d. Specification 4: Assault in the Second Degree

CCRB contends that tasing Mr. Trawick constituted Assault in the Second Degree. This tribunal disagrees. Although significant tactical questions were raised concerning this Taser deployment, the evidence did not establish that Respondent Thompson committed felony assault when he used *less than lethal force* to disarm a subject who refused to drop his weapon as they stood only feet apart.

To prevail, CCRB had the burden of proving by a preponderance of the evidence the following elements of Penal Law § 120.05(2):

a. Respondent Thompson intended to cause physical injury;
b. Respondent Thompson caused physical injury; and
c. Respondent Thompson caused such physical injury using a dangerous instrument.

Penal Law § 10.00(13) defines a "dangerous instrument" as:

> [A]ny instrument, article, or substance, … which, under the circumstances in which it is used … is readily capable of causing death or other serious physical injury.

As such, in determining whether an object is a dangerous instrument, the question is whether it is readily capable of causing serious physical injury. Penal Law § 10.00(10) defines serious physical injury as:

> [A] physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

This record lacks the necessary proof to establish that, *as deployed here*, the Taser qualified as a dangerous instrument. Specifically, the evidence did not prove that this Taser discharge was *readily capable* of creating *protracted* or *serious* injury as required by law.

Legal precedent is clear: determining whether a Taser is a "dangerous instrument" requires a case-by-case assessment of its capability to cause serious harm as it was used by the

accused. Two cases illustrate this point. In *People v. Hall*, 18 N.Y.3d 122 (2011), defendants were convicted of Robbery in the First Degree. An issue on appeal was whether the stun gun[32] defendants used to incapacitate a store manager during the crime qualified as a "dangerous instrument" under Penal Law §10.00(13). In that case, the victim described the harm suffered as "pain, a burning sensation and temporary incapacitation." The Court of Appeals wrote, "These are very unpleasant things to experience, but they are not 'serious physical injury' as the statute defines it. The jury had no basis for concluding that the stun gun was readily capable of killing or maiming someone, or of causing any of the other severe harms described in Penal Law §10.00(10)." (*Id.* at 128-29) In contrast, the Appellate Division, Second Department held in *People v. MacCary* that the manner in which a stun gun was used by a police officer did qualify as a "dangerous instrument." In that case, the subject was restrained by one police officer while another applied a stun gun "several times to the complainant's body for several seconds during each application." The resulting injuries were considerable and included, "extreme pain, severe skin lesions and significant burns." *People v. MacCary*, 173 A.D.2d 646 (2d Dept. 1991)[33]

As in *Hall*, this record is insufficient to prove that the manner in which Respondent Thompson deployed the Taser rendered it a "dangerous instrument." First, the Taser prongs hit Mr. Trawick's front thigh, an area within the Patrol Guide's "recommended point of aim" and outside the zones likely to result in protracted harm. Second, the Taser cycle lasted, at most, five seconds. This is well within the fifteen seconds that the Department acknowledges, "may

[32] Penal Law § 265.00 (15-c) defines an electronic stun gun as "any device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, knock out or paralyze a person by passing a high voltage electrical shock to such person."

[33] CCRB cited two cases in support of its argument that the Taser was a dangerous instrument. After close review, this tribunal concludes that they have little precedential value. *People v. Sledge* does not stand for the proposition that a Taser is a dangerous instrument; rather, it only acknowledged *the possibility* that "a Taser can, in fact, result in death or other serious physical injury and as such, may qualify as a dangerous instrument." In making this observation, however, the court firmly asserted that, "This court's decision is limited to the finding that a Taser does not meet the definition of deadly weapon ...." *People v. Sledge*, 69 Misc. 3d 859, 861 (Kings Cty., Sup. Ct. 2020). Although the second case cited, *People v. Jones*, concluded that a Taser was a dangerous instrument, no factual details were provided that would guide an analysis of its applicability. *People v. Jones*, 173 A.D.3d 1062 (2d Dept. 2019)

increase risk of death or serious injury."[34] In short, the actual mechanics of the Taser discharge was within Department guidelines aimed at minimizing physical injuries.[35] Because the credible evidence does not support a finding that the Taser, in the manner in which it was used here, was a "dangerous instrument," this charge fails.[36]

An additional basis for rejecting Specification 4 is CCRB's failure to disprove the applicability of the justification defense. Penal Law § 35.15(1) states that:

> [A] person may ... use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself, or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person....

CCRB's argument that Respondent Thompson cannot avail himself of the justification defense for his use of the Taser again ignores both the law enforcement framework by which this encounter must be evaluated and the real safety risks present during this interaction.

It is pure fiction to suggest that, even though he was holding a knife, Mr. Trawick posed no threat to the officers because he was cooking in his kitchen. As discussed in more detail above,[37] Respondents were there to investigate multiple 911 harassment calls that they verified

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[34] Patrol Guide 221-08 warns against discharging a Taser "at an individual's head, neck and chest, if possible." It further states that the Taser "should not be intentionally aimed at an individual's groin."

[35] Patrol Guide 221-08 notes that Tasers "can be an effective means of subduing aggressive suspects and emotionally disturbed persons (EDPs)." The temporary incapacitation is meant to give officers a "window of opportunity" to subdue a subject while reducing the risk of injuries. (CCRB Ex. 16 at 21)

[36] CCRB's argument that the Taser prong disfigured Mr. Trawick because it "may have left a permanent scar had [he] survived," is insufficient to prove that the Taser was a dangerous instrument. (CCRB Post-Trial Brief at 28) According to precedent, protracted disfigurement is established "when a reasonable observer [of the injury] would find [the] altered appearance distressing or objectionable." *People v. McKinnon*, 15 N.Y.3d 311, 315 (2010) The wound at issue here fell far short of this standard. Dr. Cederroth testified that the Taser prong caused "a very small" puncture wound in the thigh. When asked whether that injury could leave a scar, she was equivocal and responded, "it might have or it might not have...." (Tr. 78; CCRB Ex. 10) The speculative nature of this testimony from a medical expert was, in itself, insufficient to establish this element of the crime. Even assuming that the puncture wound on the thigh would have scarred, based on this record it is reasonable to infer that it would not have become a serious and protracted disfigurement. This is consistent with legal precedent applying this Penal Law standard. *See People v. McKinnon*, 15 N.Y.3d 311 (2010)(The mere existence of two, three-centimeter bite mark scars on the arm would not make the victim's appearance distressing or objectionable); *People v. McBride*, 211 A.D.3d 512 (1st Dept. 2022)(Photos of the facial scar, and testimony from treating doctor, were not enough to warrant an inference of disfigurement); *People v. Smith*, 193 A.D.3d 1260 (3d Dept. 2021)(two circular gunshot wound scars on the leg did not qualify as protracted disfigurement)

[37] *See* pages 9-15, 27-29 above.

upon their arrival at Hill House. Respondents approached the threshold of the subject's apartment for the lawful purpose of investigating the complaints. There, they observed Mr. Trawick holding at least one of the weapons he had held in his hand as he threatened building staff with violence.

For everyone's safety, and consistent with training, the officers lawfully ordered the subject to drop the knife. He failed to comply with those lawful orders not once, but nineteen times. Compounding the difficulty of the encounter, Mr. Trawick was argumentative and defiant. Each time an order to put the knife down was ignored, it prompted a reasonable threat assessment of increased risk. In sum, this was an unpredictable encounter where an armed, non-compliant and erratic subject held a knife as he stood in close proximity to police officers responding to multiple 911 calls. To assert that this did not pose a threat to officer safety is simply incorrect.[38] In sum, the totality of the evidence presented at trial failed to disprove the justification defense asserted by Respondent Thompson for his defensive use of less than lethal force. Accordingly, Specification 4 must be dismissed.

In making this finding this tribunal acknowledges that, although not a crime, tasing Mr. Trawick was not the only tactical alternative available to Respondent Thompson. During trial, CCRB raised legitimate questions about applicable Patrol Guide procedures and tactics. For example, the record here included significant evidence that disengagement, by isolating and containing the subject, may have been a more prudent tactical option rather than pressing a harassment investigation to the point of a physical confrontation with an armed EDP.

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[38] This conforms with Patrol Guide 221-08, Use of Conducted Electrical Weapons, which states that a Taser "should only be used against persons who are actively resisting, exhibiting active aggression, or *to prevent individuals from physically injuring themselves or other persons actually present.*" [emphasis added] *See People v. Valentin,* 20 N.Y.3d 57 (2017) and full discussion on pages 29-31 above. *See also Fuentes v. Schemmer,* 2023 U.S. Dist. LEXIS 7200 (SDNY, Jan. 23, 2023) (federal civil claim of excessive force was dismissed where use of Taser was "reasonable in order to permit the officers to bring an unlawful situation to a safe and effective conclusion")

Respondents had sufficient information to suspect that Mr. Trawick was an EDP in need of assistance.[39] Mr. Trawick's semi-coherent mumblings and odd movements were obvious signs of an EDP episode. Specifically, Mr. Trawick appeared to disassociate as he raised his hand high and pointed down at his head muttering, "just hold it in the center...of the brain...yea...hold it...hold it... hold it...the center, the center, the center of the brain."[40] If there were any initial doubts about the subject's mental status, this conduct was certainly clarifying and should have altered Respondent Thompson's approach to the encounter.[41]

Respondent Davis' intervention to prevent the use of the Taser highlights that its deployment might have been tactically premature. In fact, at trial he confirmed that he told Respondent Thompson not to tase Mr. Trawick because there were other tactics they could have used to defuse the situation. (Tr. 436-38) Respondent Davis' position is supported by the Patrol Guide procedures in place for EDPs, as well as their CIT training.[42] Each emphasize the importance of the following interventions during encounters with EDPs to protect human life: endeavor to slow the pace of the interaction, establish a dialogue, employ de-escalation tactics, request a patrol supervisor and the Emergency Service Unit, and attempt to isolate and contain the EDP utilizing standard issue equipment such as a door rope or door wedge. *See* Patrol Guide 221-13

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[39] Indeed, Respondent Davis told the Bronx DA investigator that even before entering the apartment, he was under the impression, based on the representations of the security guard and superintendent, that Mr. Thompson might be under the influence and need transport to the hospital. (Resp. Ex. A at 19)

[40] Resp. Ex. A at 23

[41] Respondent Thompson himself described Mr. Trawick as an "EDP with a knife" when he called in the shooting and requested an ambulance. (CCRB Ex. 6 at 20:52-20:53)

[42] The introductory CIT training video, titled "Respondent to People in Crisis," (CCRB Ex. 17) advises officers to: "establish a rapport" and "apply proven communications technique to defuse potentially volatile situations." The training also emphasizes that: "We should always seek to slow down these incidents. Slowing the pace usually leads to a better outcome especially if you take the time to involve the person in crisis in the process."

Regrettably, given the untimely service of the charges, this tribunal cannot give full consideration to these important tactical guidelines. Instead, the legal questions this tribunal can appropriately address are limited to whether CCRB met its burden of proving the elements of Assault in the Second Degree. The evidence fell short of that required burden of proof. Accordingly, Specification 4 is found to be untimely and must be dismissed.

e. Specification 5: Reckless Endangerment in the Second Degree

Respondent Thompson is charged with "recklessly engaging in conduct which created a substantial risk of serious physical injury to Kawaski Tyrone Trawick when he failed to render aid to Kawaski Tyrone Trawick without police necessity." This charge mirrors Penal Law §120.20, Reckless Endangerment in the Second Degree, which describes that this prohibited conduct ensues when an individual "recklessly engages in conduct, which creates a substantial risk of serious physical injury to another person." At issue is whether CCRB proved by a preponderance of the credible evidence that Respondent Thompson was reckless and that the failure to render aid created a substantial risk of serious physical injury. The record does not support a finding that CCRB satisfied this burden of proof.

It is uncontested that Respondent Thompson called for an ambulance seconds after the shooting. EMS entered Mr. Trawick's apartment in under two-and-a-half minutes and immediately began chest compressions in an attempt to resuscitate him. (Tr. 494; CCRB Ex. 1 at 04:05; Resp. Ex. A at 26-27) It is further uncontested that neither Respondent checked his pulse or breathing, and that they failed to administer CPR after he was wounded. (Tr. 446, 553; CCRB Ex. 1 at 01:46-04:02) This inaction appears to constitute a failure to follow Patrol Guide 221-04 that requires all officers involved in a shooting to "render assistance to injured, if necessary." However, as discussed in more detail above, a finding of misconduct in this case cannot be based

solely on Patrol Guide standards. What must be proven are the elements of the crime Reckless Endangerment in the Second Degree.

Tragically, the evidence established that, given the grave nature of Mr. Trawick's injuries, any assistance within Respondents' capabilities would have been futile. As hard as it was to watch, Respondents' failure to personally administer aid to Mr. Trawick did not, in and of itself, create a substantial risk of serious physical injury. Without proof of this element of Penal Law §120.20, the charge must fail.

The tribunal bases its conclusion primarily on the testimony of CCRB's medical expert, Dr. Cederroth. At trial, she answered several general questions concerning the importance of immediately providing basic life support measures to individuals who are shot. When asked whether these measures increase the chance of survival she replied, "It depends on the severity." (Tr. 75-76)

Dr. Cederroth's opinion concerning Mr. Trawick's chances of survival, however, was much more pessimistic; she opined that gunshot wound "A" would have caused death "within seconds," and gunshot wound "B" would have caused death "within a minute." According to the expert, to survive gunshot wound "A" would have required "immediate surgical intervention" because it went through the heart. (Tr. 76, 80-81; *see* page 23 above) When asked if there was "a chance" Mr. Trawick could have survived if he had received immediate medical attention, Dr. Cederroth responded that she had "read of a few instances" but added:

> I think that it's a very remote possibility that's approaching zero, but if he had immediate surgical intervention, and really immediately, it's a possibility, but very unlikely.
> (Tr. 76)

In sum, the medical intervention required to assist Mr. Trawick at that point would have been surgical in nature – a medical treatment beyond Respondents' capabilities.[43] Given that an ambulance was immediately called and was on the scene within minutes, the evidence did not prove that Respondents failure to render direct aid increased the risk of serious physical injury as required by the Penal Law.

A Sixth Circuit Court addressing an analogous question of law is instructive. That case involved a federal §1983 civil rights lawsuit resulting from a fatal police shooting in which it was alleged that the officers were deliberately indifferent to the plaintiff's serious medical needs as he lay dying.[44] The Court addressed a police officer's due process duty to render aid "personally" and concluded:

> Imposing an absolute requirement for an officer to [render aid] ignores the reality that such medical emergencies often call for quick decisions to be made under rapidly evolving conditions. As long as the officer acts promptly in summoning aid, he or she has not deliberately disregarded the serious medical need of the detainee even if he or she has not exhausted every medical option. *Stevens-Rucker v. City of Columbus*, 739 F. App'x. 834, 846 (6th Cir. 2018)

Accordingly, this tribunal finds that CCRB failed to prove the elements to establish that Respondent Thompson's inaction created a substantial risk of serious physical injury as proscribed in Penal Law §120.20.[45] As such, Specification 5 is untimely and must be dismissed.

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[43] Officers are trained to render aid after a police-involved shooting by administering "basic first aid," utilizing a tourniquet or Quick Clot to stop the bleed. *Operations Order 022* (2016) Since 2018, officers have also been required to undergo BLASTT, "Basic Life Support and Trauma Treatment" training, which includes CPR training. *Operations Orders 009s* (2018) and *005* (2019)

[44] The standard applied in *Stevens-Rucker v. City of Columbus*, was "deliberate indifference to serious medical needs," which requires a finding that the defendants knew of and disregarded a substantial risk of serious harm to [the plaintiff's] health and safety.

[45] The sole case cited by CCRB in support of this specification states that an "increased risk," sufficient to meet the standard needed for reckless endangerment, was proven where defendants left an individual they had injured laying unattended "on a trafficked roadway" where he could be run over by cars. *People v. Galatro*, 84 N.Y.2d 160 (1994) That case is clearly distinguishable from the facts at hand.

Respondent Davis

a. Specification 1: Reckless Endangerment in the Second Degree

Respondent Davis is charged with "abusing his authority as a member of the New York City Police Department, in that he did not render medical aid to Kawaski Tyrone Trawick." The record does not support a finding that Respondent Davis engaged in the charged misconduct. First, although the charge against Respondent Davis alleges that he violated Penal Law §120.20, "Reckless Endangerment in the Second Degree," the charge itself failed to plead the elements of that crime as required when an administrative prosecutor invokes the crime exception to the statute of limitations.[46] This alone is sufficient to dismiss the charge.

Second, even if the pleading document itself were not defective, as discussed in detail above, the expert opinion presented at trial failed to support a finding that Respondent Davis' inaction after the shooting increased the risk of serious physical injury. (*See* pp. 23, 39 above) Accordingly, the charge against Respondent Davis is untimely and must be dismissed.

Respectfully submitted,

Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

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EDWARD A. CABAN
POLICE COMMISSIONER

[46] Notably, Respondent Thompson was initially charged with an identical specification. A year later Respondent Thompson was served with amended charges with language mirroring the elements of the Penal Law crime of reckless endangerment. Inexplicably, no such amendment was made to the pleading in Respondent Davis' case.

Appendix A

From: Rosemarie Maldonado, Deputy Commissioner, Trials

To: Andre Applewhite, Esq., for the Civilian Complaint Review Board
Michael Martinez, Esq., for Respondent Thompson
Richard Murray, Esq., for Respondent Davis

Subject: *Disciplinary Case Nos. 2021-23558 & 2021-23559*
Police Officers Brendan Thompson & Herbert Davis

Date: April 19, 2023

1. Introduction

This tribunal has carefully reviewed the parties' April 17, 2023 submissions made in response to my correspondence dated April 14, 2023. In my letter, I noted that the charges in these cases were served nearly five months after the expiration of the extended statute of limitations established by Executive Order 202.8. The failure to serve these charges in a timely manner raised issues akin to those reviewed by this tribunal and decided by the Police Commissioner in *Disciplinary Case No. 2018-19734* (April 4, 2022) and *Disciplinary Case No. 2021-24349* (October 20, 2022). Those decisions involved time-barred charges and the applicability of the crime exception to the statute of limitations set forth in New York Civil Service Law § 75(4).[1]

[1] New York Civil Service Law § 75(4) states:
Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges . . . provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

Pursuant to 38 RCNY §15-02, DCT is authorized to render "any ruling or order necessary [to ensure] the efficient adjudication of disciplinary proceedings." As such, I am dismissing the specifications alleging criminal trespass: Specifications 1 and 2 in Case No. 2021-23559 (Respondent Davis) and Specification 5 in Case No. 2021-23558 (Respondent Thompson). All other specifications shall proceed to trial.

2. Analysis

The elements of Criminal Trespass in the Second Degree are set forth in Penal Law section 140.15[1]: "A person is guilty of criminal trespass in the second degree when[] he or she knowingly enters or remains unlawfully in a dwelling." In the seminal case, *People v. Basch*, 36 N.Y.2d 154 (1975), the New York Court of Appeals explained that in the context of a charge of criminal trespass, "it must be proved that such person 'knowingly' entered the premises without license or privilege and, therefore, a person who enters upon premises accidentally, or who honestly believes that he is licensed or privileged to enter, is not guilty of any degree of criminal trespass." (*See People v Luke (Derek),* 37 Misc 3d 73, 78 [1st Dept. 2012], quoting *Basch, supra* at 159 ["A person knowingly enters or remains unlawfully in a building when he is aware that he is not licensed or privileged to do so . . . [Defendant's] conviction for criminal trespass in the third degree was against the weight of the evidence. An individual 'who enters upon premises accidentally, or who honestly believes that he is licensed or privileged to enter, is not guilty of any degree of criminal trespass. . . .' Therefore, [Defendant's] belief, even if mistaken, negated the element of 'knowingly and unlawfully remaining. Accordingly, the judgment of conviction is reversed.'"]; 6 New York Criminal Practice § 61.03 ["[T]he mental culpability required for trespass, actual knowledge that the entry or remaining is unlawful, is entirely subjective."]).

Assessing the factual claims in the light most favorable to CCRB, this tribunal finds that

the administrative prosecutor in this case failed to satisfy the standard set forth in this well-established legal precedent on criminal trespass. It focused instead on the theory that the officers' stated reason for entering the apartment (to make sure no one else was inside) was "disingenuous" and "not a sufficient basis for entering an apartment without a warrant given the totality of the circumstances and the absence of exigent circumstances." CCRB further contends that Respondent Thompson admitted there was no reason to believe anyone else was in the apartment. These factual assertions, however, do not create a basis for potential criminal liability.

The tribunal's finding in this case is consistent with Department precedent. Last year, this tribunal was presented with a similar legal issue in a case charging an officer with an otherwise time-barred unlawful entry that CCRB alleged also constituted criminal trespass in the second degree. *Disciplinary Case No. 2018-19734* (April 4, 2022). As noted in that decision, "The carve-out for crimes under Civil Service Law §75(4) is an exception to the jurisdictional 18-month statute of limitations in disciplinary matters, not a substitute for the timely service of Charges and Specifications." The judge further held that CCRB "failed to allege a basis upon which the tribunal could reasonably find that Respondent acted 'knowingly,' as that term is used and understood in connection with a criminal trespass . . . CCRB equates reasonableness in the context of Fourth Amendment violations with the assessment of *mens reas* in the context of criminal trespasses. The former is an objective reasonableness standard that typically exposes the violator, even for a mistake of law, to the remedy of the suppression of evidence or a civil action (typically brought in a 42 USC § 1983 action); while the latter requires particularized proof as to the violator's state of mind, exposing the violator to a criminal sanction." The judge recommended that the specification be dismissed, holding that CCRB "failed to allege

particularized facts tending to show that Respondent 'knowingly' entered complainant's home unlawfully." The Police Commissioner approved this recommendation on April 4, 2022.

In October 2022, the Police Commissioner issued a second decision dismissing a charge as time-barred and rejecting the criminal exception in a use of force case. In that matter, the tribunal held that "CCRB seems to engage in circular reasoning, asking the tribunal to find that because CCRB used certain operative words in the charge, the conduct therefore must constitute the crime alleged. This tribunal cannot and will not set a precedent that allows parties to circumvent the statute of limitations by making unsupported and entirely conclusory allegations of criminal elements to [save] otherwise time-barred Patrol Guide violation charges." *Disciplinary Case No. 2021-24349* (October 20, 2022).

While CCRB correctly notes that this matter is factually distinguishable from Case No. 2018-19734, the legal requirements for invoking the crime exception cannot be set aside based on factual distinctions. CCRB is required, as a matter of law, to allege a basis upon which the tribunal could reasonably find that Respondents acted "knowingly," as that term is used and understood in connection with a criminal trespass. It is insufficient to again conflate the reasonableness of an entry as it relates to Fourth Amendment violations with the *mens reas* required to establish criminal trespasses. The tribunal reiterates its prior position that "while the unlawful invasion of a home by government actors is a violation that strikes at the core of the individual liberties enshrined in the Fourth Amendment, the tribunal is not aware of [and has not been presented with] any precedent for the prosecution of an on-duty police officer for a criminal trespass under circumstances similar to the case at bar. This lack of precedent, although not fatal, supports the conclusion that CCRB has employed an unprecedented interpretation of the New York State Penal Law . . . ."

Accordingly, as CCRB has failed to allege particularized facts tending to show that either Respondent committed criminal trespass, the tribunal is compelled by law to dismiss Specification 5 in Case No. 2021-23558 and Specifications 1 and 2 in Case No. 2021-23559.

Rosemarie Maldonado
Deputy Commissioner Trials