

EXECUTIVE SUMMARY

On July 8, 2015, Governor Andrew Cuomo signed Executive Order No. 147 (the “Executive Order”), appointing the Attorney General as the special prosecutor “to investigate, and if warranted, prosecute certain matters involving the death of an unarmed civilian . . . caused by a law enforcement officer.” On November 2, 2016, Ariel Galarza died following an interaction with members of the New York Police Department (“NYPD”). Governor Cuomo subsequently issued Executive Order No. 147.7, which expressly conferred jurisdiction upon the Attorney General to investigate any potential unlawful acts or omissions by any law enforcement officers relating to Mr. Galarza’s death.

Pursuant to Executive Orders No. 147 and 147.7, the investigation by the Office of the Attorney General (“OAG”) included, among other investigative steps:

- Review of the New York City Office of the Chief Medical Examiner (“OCME”) Report, including autopsy and toxicology records, and the report of a forensic pathologist, Dr. Michael Baden, who was retained by the OAG;
- Review of medical records relating to the incident and prior medical records of Mr. Galarza;
- Interviews of civilian witnesses who saw or heard various parts of the incident and NYPD officers and emergency medical personnel who responded to the incident scene;
- Review of a report generated by a Taser used by the NYPD during the incident; and
- Review of NYPD records, including a 911 recording, NYPD dispatch records, and a report generated by NYPD Crime Scene Unit.¹

The evidence shows that NYPD officers’ use of force against Mr. Galarza was justified under the New York Penal Law. The NYPD’s involvement began with a 911 call from a neighbor who resided in the same multi-family home as Mr. Galarza. The neighbor told the 911 operator that a resident of the house’s basement apartment looked “violent” and “pale,” was “breathing heavy,” was swinging around a “big knife,” and was screaming as if he was arguing with someone. The caller was unsure whether Mr. Galarza’s roommate or anyone else was in the apartment with him. Finally, the caller stated that this conduct was out of the ordinary for Mr. Galarza and that she believed that Mr. Galarza was under the influence of some type of a mood-altering substance.

Six officers responded to the house in response to the 911 call. Three of the responding officers covered a rear exit, while the other three, including a sergeant, went down to the basement. The officers entered the basement apartment, where they encountered Mr. Galarza seated at the

¹ Attached hereto are: (1) NYPD policies on the use of force and the use of Tasers (Exhibit A); (2) the User Manual for the Taser Model X26 (Exhibit B); (3) the entries for Dates on the Taser Evidence Sync Report, a usage report generated by the Taser that reflects information about utilization of the Taser (Exhibit C); (4) the OCME autopsy report (Exhibit D); and (5) Dr. Baden’s autopsy report (Exhibit D).

end of a narrow hallway, holding a glass bottle. Mr. Galarza was shirtless and sweating profusely. He was punching the air and shouting about another person wanting to fight him. The officers ordered Mr. Galarza to lie down on the floor. Mr. Galarza ignored these commands and then, with the sergeant standing only a few feet in front of Mr. Galarza, stood up and raised the glass bottle. The sergeant at that point deployed his Taser in “dart-probe” mode,² striking Mr. Galarza in the left side of his torso and activating an electric current for five seconds. Mr. Galarza dropped the bottle and went to the floor; but when one of the officers tried to handcuff him, Mr. Galarza resisted vigorously, flailing his arms, kicking his legs, and trying to stand up. As the officers who had been stationed outside rushed in, the sergeant activated the Taser again for five seconds. With three officers now attempting to restrain him, Mr. Galarza continued to struggle. Finally, the sergeant pressed the Taser against the back of Mr. Galarza’s shoulder and activated it in “drive-stun” mode for five seconds. At this point, Mr. Galarza stopped resisting and the officers were able to handcuff him. Shortly thereafter, Mr. Galarza lost consciousness and his heart stopped beating.

Within minutes, emergency medical personnel arrived on scene; they were able to restore a faint heartbeat and rushed Mr. Galarza to the hospital. However, emergency room physicians were unable to maintain a normal heart rhythm, and approximately 40 minutes after his arrival at the hospital, Mr. Galarza was pronounced deceased. The OCME of New York City found that the cause of death was “cardiac arrest following physical exertion, restraint and use of conducted electrical weapon in an individual with atherosclerotic cardiovascular disease, acute drug intoxication (i.e., cocaine and N-Ethylpentylone, a psychoactive substance commonly found in bath salts) and obesity.”

Under New York law, police officers are permitted to use reasonable force under a range of circumstances, including (i) to prevent what they reasonably believe to be the imminent use of unlawful force against another individual and (ii) to effect an arrest. As discussed in more detail below, use of a Taser is widely regarded as a nonlethal form of force, equivalent to the use of “pepper spray.” Here, the sergeant first deployed the Taser only after Mr. Galarza had ignored several commands from the officers and had brandished a bottle, while standing fewer than eight feet from the sergeant in a narrow hallway. In light of Mr. Galarza’s conduct, the other officers then properly used physical force in an attempt to restrain and handcuff an agitated Mr. Galarza. The sergeant activated his Taser twice more – once in dart-probe mode and, when Mr. Galarza continued to forcefully resist the officers, once in drive-stun mode.

As discussed more fully below, the officers’ use of force was justified under New York State Penal Law due to the fact that Mr. Galarza: (a) had been reported as brandishing a large knife; (b) ignored multiple commands from the officers to lie down on the floor; (c) was acting erratically (e.g., punching the air and shouting about another person wanting to fight him although no one else appeared to be present); (d) brandished a glass bottle while standing fewer than eight feet from the officers in a narrow hallway; and (e) vigorously attempted to resist being handcuffed, including flailing his arms, kicking his legs, and trying to stand up. Accordingly, no criminal charges against any NYPD officers are warranted.

² As explained in more detail below, “dart-probe” mode of a Taser releases darts from the Taser that, when they pierce the skin, can cause temporary neuromuscular incapacitation and result in an individual being unable to move. In “drive-stun” mode, the Taser’s electrodes are pressed directly against the individual. Drive-stun mode delivers an electric shock, but does not override an individual’s central nervous system.

STATEMENT OF FACTS³

This incident can be divided into three segments: the events leading to law enforcement officers being called to Mr. Galarza's apartment; the interaction between the officers and Mr. Galarza up to and including Mr. Galarza's being subdued; and the response of law enforcement and medical personnel after Mr. Galarza was subdued.

A. Events Preceding the Arrival of Law Enforcement

On the date of his encounter with NYPD law enforcement officers, Mr. Galarza – 49 years old, 5'5" tall, and weighing approximately 240 lbs. – had been living in the basement apartment of a multi-family house at 1840 Mayflower Avenue, in the Bronx, for three years. At the time, he had been sharing the apartment with two roommates, although neither was present at the time of the incident.

MM and her husband JM⁴ were longtime residents of 1840 Mayflower Avenue; they lived with their daughter in an apartment on the first floor. Their front door was immediately adjacent to a door that opened onto the steps leading down to the basement. MM and JM had known Mr. Galarza, and had had a friendly relationship with him, since he had moved in.

On November 2, 2016, sometime after 2:00 pm, MM and JM heard a "banging noise," and the sounds of "yelling, throwing, breaking" coming from the basement. JM went down to the basement to investigate. He approached Mr. Galarza's apartment door and heard Mr. Galarza speaking in a loud tone, as if arguing with someone. He put his ear to the door, but did not hear a second voice. JM knocked on the door, but no one responded, so JM went back upstairs.

MM later again heard loud banging noises from the basement, and she could hear Mr. Galarza speaking in a tone that suggested he was in an argument. MM opened the basement door and looked down to the bottom of the stairs. There, she saw Mr. Galarza, wearing shorts but no shirt or shoes; MM said something "did not look right" about him. She asked Mr. Galarza if he was alright, and he said that he was. MM closed the door and returned to her apartment. MM did not know at that time if either or both of Mr. Galarza's roommates, or anyone else, was in the apartment with Mr. Galarza, though she did not see anyone else when she looked down the stairs.

The loud noises continued, and a short time later MM again opened the basement door. This time, she saw Mr. Galarza at the foot of the stairs, with his back to her. He was coming out of the boiler room next to his apartment, and shouting, "Get out, you owe me money." As he continued to yell, MM heard no other voices in response. MM called down again to ask Mr. Galarza if he needed help; he did not answer. Mr. Galarza then turned around and MM noticed that he was holding a large knife in his hand and swinging it in front of him – as if someone were

³ None of the information referenced in this report was obtained through the use of grand jury subpoenas. Any subpoenas issued were pursuant to New York State Executive Law Section 63(8).

⁴ All civilian witnesses are identified by initials in order to protect their privacy.

there. Mr. Galarza yelled out, “Motherfucker, I’m gonna get you.” MM asked Mr. Galarza if he needed help; he yelled back that he did not.

To MM, Mr. Galarza’s skin color was “different;” he looked “pale,” he looked “puzzled,” and his eyes were “not right.” Prior to this incident, neither MM nor JM had ever previously observed any type of erratic behavior from Mr. Galarza.

At 5:29 pm, MM called 911 and reported that “my neighbor downstairs has a knife, and I think he took something that’s not right because that’s not him.” She said he was swinging a big knife around and that he said, “this motherfucker’s gonna pay.” MM also told the operator that her neighbor had the boiler room open and that she thought he had broken his door. She said it sounded like he was having an argument with someone, “but I think he’s alone because I don’t hear another person arguing with him.” She noted that she had “never seen him like that, and it’s scaring me.” MM said that Mr. Galarza looked “violent” and “pale,” that he was “without a shirt,” that he was “breathing heavy,” that he was “arguing, screaming,” and that “he’s not himself.”⁵

The operator told MM that she was going to send EMS (“Emergency Medical Services”) “just in case he has a psychiatric history and needs to go to the hospital,” but that she was also having the police respond.

B. Law Enforcement Interaction with Mr. Galarza

At approximately 5:33 pm, NYPD central dispatch put out a radio call regarding an emotionally disturbed person: “Female caller says neighbor swung a big knife at her. He’s in the basement of the location. It’s a male Hispanic, no shirt and shorts.” Central dispatch also called for an ambulance to respond.

At approximately 5:36 pm, two patrol cars arrived on the scene, one carrying Sgt. William Melrose and Police Officer (“PO”) Mary Dickson, the other carrying POs James Olson and James Biondo. MM met the sergeant and three officers on the main entry level of the house. She reiterated that her downstairs neighbor had a knife, and she showed them the door leading down to the basement.⁶ MM told the officers that the basement apartment had a door accessible to the backyard. PO Olson then exited through MM’s apartment to secure the basement apartment’s back door. At this time, a third patrol car carrying POs Juan Martinez and Christopher Rosado also arrived on the scene. PO Dickson directed POs Martinez and Rosado to join PO Olson in the

⁵ The entire call 911 call is captured on the automated NYPD recording system. On two occasions during the call, the operator asked if the neighbor had swung the knife at *her*; although MM answered yes both times, her description of the events indicated that while Mr. Galarza had swung the knife while facing her, they were in fact separated by an entire flight of stairs. In subsequent interviews, MM made clear that Mr. Galarza had not swung the knife *at* her.

⁶ It is Sgt. Melrose’s recollection that MM also stated that her neighbor had been running around in the street with a knife prior to their arrival. None of the other officers recalled MM making this statement. At several other points, Sgt. Melrose’s recollection differs from that of other officers and/or from what the physical evidence indicates. These differences are noted throughout the Statement of Facts. None of them, however, affect our ultimate determination, for the reasons described in detail in the “Legal Analysis” section below.

back of the house, where PO Martinez was able to look through a window into Mr. Galarza's apartment.

PO Biondo, Sgt. Melrose, and PO Dickson, in that order, headed single-file down the basement stairs. PO Biondo's firearm was unholstered. Mr. Galarza was no longer standing at the foot of the stairs, but they could hear a man yelling from somewhere in the basement. Sgt. Melrose recalled that he heard the man say, "Jose [or Joe], you cut me. I can't believe you cut me." At that point, Sgt. Melrose called via radio for an Emergency Services Unit, which specializes in handling emotionally disturbed persons, to respond to the scene.⁷

Mr. Galarza's apartment was at the bottom of the stairs immediately to the left. The apartment's front door was off of its hinges. The doorway led into a narrow hall about 12 feet long. Just inside, leaning against one side of and partially blocking the hallway, was the apartment's (removed) front door. At the end of the hallway, up against a wall, was a table. Mr. Galarza was sitting in a chair immediately to the left of that table, facing the hallway in the direction of the front door.

Mr. Galarza was shirtless, rocking back and forth, and sweating profusely; Sgt. Melrose recalls that he had scratches on his body such that it looked like he had been in a fight. Mr. Galarza was also holding a large glass bottle in his hand,⁸ shouting about someone wanting to fight him, and punching into the air.⁹ He was not looking at the officers. Immediately to Mr. Galarza's right (and to the officers' left, at the end of the hall), the hallway opened up into a living room with an adjacent small kitchen and a bathroom. Sgt. Melrose recalls that Mr. Galarza said, "This fucking guy cut me" and motioned in the direction of the living room. PO Biondo made his way past Mr. Galarza (who did not appear to see the officer) and into the living room to check if anyone else was in the apartment. He saw no one. By this time, PO Biondo had holstered his firearm. Sgt. Melrose meanwhile moved down the hall past the removed front door until he was no more than eight feet from Mr. Galarza,¹⁰ with PO Dickson following closely behind. Sgt. Melrose recalls that he told Mr. Galarza that they were calling an ambulance for him. Mr. Galarza did not respond, although (according to PO Dickson) he may have put the bottle down on the table. From the living room area, PO Biondo told Mr. Galarza, who continued to rock and swing his arms, to lie down on the floor.

⁷ This call is captured on the automated NYPD recording system and reflected in the dispatch records at shortly after 5:38 p.m.

⁸ It is Sgt. Melrose's recollection that the bottle may have been broken. None of the other officers indicated that the bottle was broken. When the NYPD's Crime Scene Unit processed the scene, it recovered an unbroken 12-ounce glass bottle of Tabasco sauce with no cap.

⁹ It is Sgt. Melrose's recollection that Mr. Galarza was holding a knife in his hand at that point rather than a bottle. None of the other officers indicated that Mr. Galarza was holding a knife.

¹⁰ It is Sgt. Melrose's recollection that he was approximately 10 feet from Mr. Galarza. However, based on the accounts of the other officers on the scene, and measurements of the hallway, it is clear that Sgt. Melrose was at most eight feet away, and likely closer.

Abruptly, Mr. Galarza stood up, with the bottle in his hand and facing Sgt. Melrose, and then raised the bottle in the air. Sgt. Melrose took out his Taser, and – along with the other officers – ordered Mr. Galarza to put down the bottle. Mr. Galarza did not comply.¹¹

Sgt. Melrose recalls that at this point Mr. Galarza began to advance toward him, from no more than eight feet away. Sgt. Melrose deployed his Taser, the two prongs attaching to Mr. Galarza on the left side of his torso roughly 3.75 inches apart, and activated a five-second electric charge, designed to temporarily incapacitate Mr. Galarza.¹² While the officers continued to order Mr. Galarza to drop the bottle and lie on the floor, Mr. Galarza fell back into his chair, dropped the bottle, slumped on the floor, and turned onto his stomach. PO Biondo approached and put one of Mr. Galarza's hands in handcuffs without any resistance by Mr. Galarza. Before PO Biondo could get Mr. Galarza's other hand in handcuffs, however, Mr. Galarza began screaming, flailing his arms, kicking his legs, and attempting to stand up. At this point, Sgt. Melrose depressed the Taser trigger a second time, again activating a five-second charge.

Meanwhile, the three officers who had been stationed outside, having heard and seen the commotion, came back through the house, down the stairs, and into the apartment to assist. By this point, the second Taser charge had ended, but Mr. Galarza – who was shouting incoherently – continued to struggle with the officers and to ignore commands. Sgt. Melrose then placed the Taser directly on Mr. Galarza's shoulder and activated it in the drive-stun mode, which causes localized pain, but does not use an electric charge to incapacitate.¹³ After this third use of the Taser, Mr. Galarza rolled onto his stomach and the officers were able to place both of his hands in the handcuffs. Once in handcuffs, Mr. Galarza was rolled onto his side. This portion of the encounter was over by approximately 5:41 pm, less than three minutes after the officers had entered the apartment.¹⁴

¹¹ It is MM's recollection that, from upstairs, she heard the officers calling out, "Drop the knife, drop the knife," and "Get down on the floor."

¹² Once Taser darts connect with an individual, electrical pulses are conducted through wires each time the Taser is deployed. The pulses normally incapacitate an individual by causing muscles to contract, resulting in the loss of body control. See, e.g., <http://www.theiacp.org/portals/0/pdfs/EMDT9Steps.pdf>. To be most effective, when a Taser is used in dart-probe mode, there should be between nine and 18 inches separating the darts, and the darts should connect with major muscle groups. See generally The Physiologic Effects of Multiple Simultaneous Electronic Control Device Discharges, West J Emer Med 2010 11(1), and <https://www.policeone.com/less-lethal/articles/4558608-TASER-basics-What-every-judge-and-jury-should-know/> ("The probes are less effective on fatty tissues than on major muscle groups.") Here, because Mr. Galarza and Sgt. Melrose were close to one another, the prongs were separated by only approximately 4.25 inches (and were embedded in fatty tissues), which may be why the instrument never produced the type of neuromuscular incapacitation one would commonly encounter.

¹³ The Taser that was used generates an automated readout indicating the date and time that the Taser was deployed and how long it was activated. In this case, the Taser clock appears to have been inaccurate as to the actual time of each use. The Taser report, however, does indicate that on the date in question, the Taser was activated three times, for five seconds each time – with a gap of 33 seconds between the first and second usages, and a gap of 27 seconds between the second and third usages. This usage pattern is consistent with the narrative described above.

¹⁴ The NYPD's automated recording system and dispatch records captured a call at this time indicating, "EDP [Emotionally Disturbed Person] is in custody."

C. Actions by Law Enforcement After Mr. Galarza Was Subdued

Moments after both of Mr. Galarza's hands were placed in handcuffs, the officers observed that his skin appeared to be turning blue and that he was losing consciousness. At approximately 5:42 pm, PO Martinez called in to the dispatcher to "put a rush on that bus" – that is, have the ambulance respond quickly.¹⁵ About 40 seconds later, Sgt. Melrose radioed that Mr. Galarza was "possibly having a heart attack."¹⁶ Sgt. Melrose recalls that, while waiting for the ambulance, the officers rubbed Mr. Galarza's chest, tapped him on the face, and shook him to get him to start breathing again – which he briefly did before he stopped breathing a second time. PO Olson recalls that, at some point before the ambulance's arrival, Mr. Galarza vomited.

By 5:45 pm, a SeniorCare EMS unit arrived. Emergency Medical Technicians ("EMTs") observed that Mr. Galarza was unconscious, in cardiac arrest, and had a bluish coloration of the lips and skin. The EMTs, who were trained in Basic Life Support, proceeded to conduct CPR (cardiopulmonary resuscitation) on Mr. Galarza. At approximately 5:53 pm, an FDNY EMS unit – this one trained in Advanced Live Support – arrived on the scene. Mr. Galarza was still in cardiac arrest, had no pulse, and was not breathing on his own. With the aim of reviving him, the EMTs intubated Mr. Galarza to help him breathe, and started an intravenous line with medications. The EMTs also attached Automatic Electronic Defibrillator ("AED") pads to Mr. Galarza's chest, but received a "No Shock Advised" message from the machine and did not activate the shock mechanism.¹⁷ They did manage to restore a heart rhythm, though Mr. Galarza was still unconscious and not breathing on his own. Mr. Galarza was removed from the scene in an ambulance at approximately 6:28 pm and transported to the emergency room at the Weiler Division of Montefiore Medical Center, arriving at approximately 6:37 pm. PO Martinez traveled with Mr. Galarza in the ambulance; his heart was still beating at the time he was transferred to hospital care.

At the hospital, Mr. Galarza was freshly intubated and medical personnel continued the intravenous line with medications and CPR. Over the next 45 minutes, Mr. Galarza was in continuous cardiac arrest with brief periods of resumption to normal heart rhythm. Mr. Galarza was pronounced dead at 7:22 pm.

¹⁵ As mentioned above, the 911 operator had originally dispatched Emergency Medical Services to the scene when MM first called.

¹⁶ The NYPD's automated recording system and dispatch records captured both of these calls.

¹⁷ An automated external defibrillator is a portable device that checks the heart rhythm and is capable of sending an electric shock to the heart to try to restore a normal rhythm. AEDs are used to treat sudden cardiac arrest. Most sudden cardiac arrests result from ventricular fibrillation, a rapid and unsynchronized heart rhythm, which can lead to death. The heart can sometimes be "defibrillated" to restore a normal rhythm. Sticky pads with sensors are attached to the chest of the person who is experiencing sudden cardiac arrest. The electrodes send information about the person's heart rhythm to a computer in the AED. The computer analyzes the heart rhythm to find out whether a shock (defibrillation) is advised ("shock indicated") or not ("no shock advised"). When the machine indicates "no shock advised" on a person without a pulse, it has not detected a shockable rhythm. <https://www.nhlbi.nih.gov/health/health-topics/topics/aed>; https://www.heart.org/idc/groups/heart-public/@wcm/@hcm/documents/downloadable/ucm_300340.pdf.

At approximately 9:22 pm, members of the NYPD's Crime Scene Unit processed the scene of the encounter between Mr. Galarza and the police officers. On the floor directly in front of a sofa in the apartment's living room, they recovered an unbroken 12-ounce glass bottle of Tabasco sauce with no cap. Also on the floor, to one side of the sofa, they recovered a butcher knife with a 9" blade and a 5.5" handle. They recovered a second butcher knife, this one with a 10" blade and 5" handle, on the counter of a small kitchen just off the living room. A significant amount of spatter of what appeared to be Tabasco sauce could be seen on the apartment walls in the immediate area of the encounter between Mr. Galarza and the officers.¹⁸ Following the encounter, Sgt Melrose observed a pattern of similarly colored spots on his uniform.

MEDICAL EXAMINERS' DETERMINATIONS

Mr. Galarza's body was autopsied by Dr. Kara Storck of the OCME on November 3, 2016.

Attached to the left side of his torso were two Taser probes penetrating the skin.

An examination of Mr. Galarza's heart revealed advanced hypertensive and atherosclerotic cardiovascular disease, that is, damage to the heart caused by high blood pressure and clogging of the arteries due to plaque accumulation. The autopsy findings included: cardiac hypertrophy (enlargement of the heart); left ventricular hypertrophy (thickening of the muscle wall of the left lower chamber); biventricular and right atrial dilatation (dilation of both lower chambers and the right upper chamber); coronary atherosclerosis (clogging of the arteries that supply blood to the heart); multiple remote myocardial infarcts (death of heart muscle with replacement by scar tissue, indicating prior heart attacks); aortic atherosclerosis (plaque buildup in the aorta); aortic dilatation (enlargement of the aorta); and pulmonary hypertension (high blood pressure affecting the lungs and right side of the heart).

A toxicology report detected the presence of a number of legal and illicit substances in Mr. Galarza's blood, including small amounts of cocaine, benzoylecgonine (a metabolite of cocaine), and N-Ethylpentylone, a psychoactive substance commonly found in bath salts, as well as delta-9-Carboxy THC, the inactive metabolite of delta-9-THC, which is the principle psychoactive ingredient of marijuana/hashish.

The OCME autopsy report notes the manner of death as "homicide."¹⁹ The autopsy report notes the cause of death as: "Cardiac arrest following physical exertion, restraint and use of conducted electrical weapon in an individual with hypertensive and atherosclerotic cardiovascular disease, acute drug intoxication (cocaine and N-Ethylpentylone) and obesity."

During a meeting with the OAG on May 18, 2017, Dr. Storck explained that, in her opinion, by the date of his encounter with the police, the disease afflicting Mr. Galarza's heart had rendered it highly vulnerable to stress – a condition exacerbated by Mr. Galarza's obesity. At

¹⁸ Given that there were no signs from Mr. Galarza's body or the officers' bodies that they had been bleeding and that there had been an open Tabasco container at the scene, the substance was not tested.

¹⁹ The designation "homicide," as used by a Medical Examiner, means a death at the hands of another person or persons. In and of itself, the designation does not indicate or otherwise suggest criminality.

the time of that encounter, the use of stimulants (*i.e.*, cocaine and N-Ethylpentylone) had further increased the stress on Mr. Galarza's heart. In Dr. Storck's opinion, under those circumstances, pain and stress caused by the electrical current from the Taser – even if it did not reach the heart – together with the physical struggle with the officers were sufficient to increase stress on the heart to the point of cardiac arrest.

A separate autopsy and a review of the OCME report were conducted by Dr. Michael Baden, a medical examiner retained by the OAG. Dr. Baden identified as the manner of death: "Homicide." Dr. Baden identified as the cause of death: "Cardiorespiratory arrest due to physical restraint and use of conducted electrical weapon by police." Dr. Baden also identified the following as "other significant conditions": obesity, cardiac hypertrophy and N-Ethylpentylone abuse.

During a meeting with the OAG on June 19, 2017, Dr. Baden articulated some differences with the OCME report. He said he could not rule out respiratory interference as having played a role in Mr. Galarza's death – which commonly causes the skin to turn blue, as observed in Mr. Galarza.²⁰ He also was inclined to believe that the electric current had in fact reached Mr. Galarza's heart.²¹ Finally, Dr. Baden stated that he was not prepared to rely on the finding of cocaine in Mr. Galarza's system, because such a finding was not confirmed in a second toxicological examination.²²

However, Dr. Baden did agree with the OCME report in finding that Mr. Galarza had suffered from cardiac arrest, and that his obesity, the effects of N-Ethylpentylone, and the weakened condition of Mr. Galarza's heart – when combined with the use of a Taser and physical force by the police – had contributed to his death.

LEGAL ANALYSIS

Pursuant to New York State law, police conduct that causes the death of another person is criminally culpable when and only when that conduct violates a provision of the penal law – and when that conduct cannot otherwise be disproven to have been justified. The evidence indicates that NYPD officers' use of force was justified under New York law as a reasonable exercise of their official duties, on two distinct grounds: (i) to prevent what they reasonably believed to be the

²⁰ Cyanosis, which is caused by a lack of oxygen in the blood and results in discoloration of the skin, may also be caused by poor circulation or a failure of the heart to pump blood adequately. Dr. Storck could not entirely rule out an asphyxial component in the death.

²¹ It was Dr. Baden's opinion that the current would have been conducted to the heart via blood flowing into the heart. Dr. Storck had found this unlikely, due to (among other factors) the location of the Taser darts, which were below and to the side of the heart. Dr. Storck also believed it unlikely that if the current had impacted the heart directly, Mr. Galarza would have been able to continue struggling with the police.

²² According to Dr. Gail Cooper, Director of the OCME's Toxicology Laboratory, the second toxicological examination – which was conducted by an outside laboratory – likely did not indicate the presence of cocaine or benzoylcegonine because (i) the examination was conducted several months after the tested blood was drawn, during which time these substances continued to break down and (ii) the elements still present in the blood would not have been in high enough quantity to be included in the outside laboratory's report.

imminent use of unlawful force by Mr. Galarza against Sgt Melrose, and (ii) to effect an arrest of Mr. Galarza for brandishing a glass bottle.

A. Reasonable Belief of Imminent Use of Unlawful Force

Under Penal Law Section 35.15(1), “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.” On the basis of this statute, the NYPD officers were justified in using the force they did to defend Sgt. Melrose from what they reasonably believed to be the imminent use of unlawful force by Mr. Galarza.²³

As described above, Mr. Galarza had risen from his chair with a glass bottle lifted in the air, face-to-face with and just a few feet away from Sgt. Melrose, in the confined space of a narrow hallway, and ignored the commands of officers to drop the bottle, before force was first used by the officers. Under these circumstances, and especially in light of Mr. Galarza’s use of violent language and the reports that he had shortly before swung a knife at a civilian, the officers reasonably believed that Sgt. Melrose was at risk of being imminently struck by Mr. Galarza with the bottle. It was only then that Sgt. Melrose deployed his Taser. Mr. Galarza did at that point drop to the ground and drop the bottle, neutralizing the immediate threat to Sgt. Melrose. But once Mr. Galarza had demonstrated a readiness to use force against Sgt. Melrose again, and then continued to actively resist the officers’ efforts to put him in handcuffs, it was reasonable for the officers to use sufficient additional force, including the two other deployments of the Taser and the use of physical force (principally, holding down Mr. Galarza’s legs, and grabbing and pulling his arms together behind his back to place him in handcuffs).

Taser use is non-lethal force.²⁴ See Buckley v. Haddock, 292 Fed. Appx. 791, 796 (11th Cir. 2008) (use of a Taser is “at most-moderate, non-lethal force”); Whitfield v. City of Newburgh, 2015 WL 9275695, *11 (S.D.N.Y. Dec. 17, 2015) (discussing where on the force continuum Taser use should be and describing the use of a Taser as a “significant” amount of force); Negron v. City of New York, 976 F.Supp.2d 360, 367 (E.D.N.Y. 2013) (“Common sense suggests that, in the ordinary case, the likelihood of sustaining serious, permanent injuries from a Taser is relatively low”); People v. Patterson, 115 A.D.3d 1174, 1175 (4th Dept. 2014) (use of a Taser is “non-lethal force”); see also Jeff Fabian, Don’t Tase Me Bro! A Comprehensive Analysis of the Laws Governing Taser Use by Law Enforcement, 62 FLA. L. REV. 763, 766 (2010) (“Research shows that the large majority of Taser incidents result in mild or no injuries to the suspect.”).

²³ Under Penal Law Section 35.15(2), an individual generally may not use deadly physical force unless the individual reasonably believes that deadly physical force is being used or is about to be used against him or her. However, this limitation is not applicable with respect to the police use of force against Mr. Galarza since, as discussed above, the force used against Mr. Galarza (including the Taser) did not constitute deadly physical force.

²⁴ “Deadly physical force” is defined as “physical force which, under the circumstances in which it is used, is readily capable of causing deadly or other serious physical injury.” Penal Law § 10.00(11). An officer may use deadly physical force if he or she reasonably believes that the person to be arrested committed “a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person.” Penal Law § 35.30(1)(a)(i).

Several courts have held, for purposes of civil liability, that the use of a Taser is reasonable for the purpose of restraining an individual whom officers have authority to restrain.²⁵ See, e.g., Crowell, 400 Fed. Appx. 592, 595 (2d Cir. 2010) (holding that drive-stun Taser use was reasonable where plaintiffs actively resisted arrest by chaining themselves to a several hundred pound barrel drum); Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004) (holding that use of a Taser was not excessive force where a suspect who was stopped because his license plate was not illuminated was hostile, belligerent, and uncooperative); Neal-Lomax v. Las Vegas Metropolitan Police Dept., 574 F. Supp.2d 1170, 1185-86 (Dist. Ct. D Nevada 2008) (noting vigorous resistance in finding reasonable Taser use on an individual under the influence of PCP who died of cardiac arrest, including five Taser strikes after the decedent had been restrained); Wright v. Deghetto, No. 5:06CV-133-R, 2008 WL 199890 (W.D. Ky. Jan. 23, 2008) (holding that it was reasonable to Taser a suspect who was verbally combative and who resisted officers' attempts to handcuff him); Johnson v. City of Lincoln Park, 434 F. Supp.2d 467, 479-80 (E.D. Mich. 2006) (holding that the use of a Taser was reasonable where a fourteen-year old, who was handcuffed and surrounded by four police officers, still violently resisted arrest).

The number of times a Taser is used and the duration of the Taser applications are relevant to whether the use of force was reasonable. Here, Mr. Galarza was Tasered three times, within a span of 75 seconds, for a total Taser application time of 15 seconds. A large man, Mr. Galarza was brandishing a glass bottle and was ignoring officers' repeated commands before the Taser deployment. Courts have determined that multiple Taser applications may be reasonable when necessary to subdue a subject. See Neal-Lomax, *supra*, 574 F. Supp.2d at 1187-88 (holding that it was reasonable to Taser the defendant seven times – for a total of 31 seconds – including five times after he was handcuffed, because he resisted an officer's attempts to place him in an ambulance); Sanders v. City of Fresno, 551 F. Supp. 2d 1149, 1168-76 (E.D. CA 2008) (holding that ten total Taser applications – for a total of a maximum of 70 seconds – by three officers were not unreasonable due to the suspect's apparent physical threat to his wife, his continued resistance against officers, and the inability of multiple officers to physically subdue him).²⁶

Finally, courts have found the use of Tasers to be reasonable under circumstances involving no resistance or far less resistance than Mr. Galarza put forth. See, e.g., Buckley v. Haddock, *supra* at 795 (11th Cir. 2008) (holding that it was reasonable to Taser a handcuffed arrestee as the arrestee sat on the side of a road during a traffic stop, refusing to stand up and walk to the patrol car); Edwards v. City of Martins Ferry, 554 F. Supp.2d 797, 807-08 (S.D. Ohio 2008) (holding that it was reasonable for an officer to Taser an eighty-two year old man with Alzheimer's disease because the man struggled with an officer during an arrest for public urination); Campos v. City

²⁵ Courts have emphasized whether, as here, officers warned a civilian that he or she would be Tasered if the civilian did not stop certain conduct. See Negron, *supra*, 976 F.Supp.2d at 367 (noting the importance of giving a warning before a Taser is used); Neal-Lomax, *supra*, 574 F.Supp.2d at 1185 (officers gave warnings); cf. Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009) (use of a Taser on a car passenger for refusal to exit a car stopped for speeding constituted excessive force because the officer Tasered the passenger without warning and the Taser use was disproportionate to the underlying crime); Casey v. City of Federal Heights, 509 F.3d 1278 (10th Cir. 2007) (use of a Taser on a passively resisting suspect was unreasonable because the officer Tasered the suspect without warning and the use of force was disproportionate to the underlying crime (removing from the courthouse court records that the suspect showed an officer on the way back into the courthouse and the officer refused to take them)).

of Glendale, 2007 WL 4468722 (D. Ariz. Dec. 14, 2007) (holding that it was reasonable for police to Taser an unconscious man, because the man pulled his arms away as officers tried to handcuff him).

Under the circumstances, the use of the Taser on Mr. Galarza was justified as a matter of law.

The physical force used by the police officers between and after the Taser activation in order to subdue Mr. Galarza and place him in handcuffs was also reasonable under the circumstances. The United States Supreme Court has held that a determination of whether police use of force is reasonable is a fact-specific inquiry that requires balancing the nature of the use of force with the countervailing government interests at stake. Relevant considerations include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” See Graham v. Connor, 490 U.S. 386, 396 (1989).²⁷ In light of Mr. Galarza’s threatening conduct, it was certainly reasonable for the police officers to seek to restrain him. (Restraining Mr. Galarza was also called for in order to effect his legal arrest, as addressed below.) A Taser was initially used in order to counter the immediate threat to Sgt. Melrose; however, Mr. Galarza continued to kick and flail, preventing the officers from gaining control of Mr. Galarza. Physical force of the kind used by the officers at this point was less severe than both the prior use of the Taser and the other options available to the police, such as a baton or firearm. Police officers are in fact encouraged, when use of force is called for, to use self-generated physical force, as opposed to using weapons.²⁸

Under the circumstances, this use of physical force was also justified as a matter of law.

B. Use of Force to Effect an Arrest

New York State Penal Law Section 35.30(1) permits a police officer to, “in the course of effecting an arrest . . . of a person he or she reasonably believes to have committed an offense,” “use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest” On the basis of this statute, the officers were also justified in using the force they did to effect a legal arrest of Mr. Galarza.

At the time force was used, the officers reasonably believed that Mr. Galarza was committing a crime. Under Penal Law Section 120.13(1), “A person is guilty of menacing the second degree when: [h]e or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon [or a] dangerous instrument” Under Penal Law Section 265.01(2), “A person is guilty of

²⁷ In Graham, the United States Supreme Court set “the minimum standard of care which a police officer must exercise in making an arrest to avoid violation of the arrestee’s Fourth Amendment rights.” See McCummings v. New York City Transit Auth., 81 N.Y.2d 923, 927 (1993).

²⁸ The autopsy report by the OCME and the report by Dr. Baden neither establish nor conclusively exclude positional asphyxiation (i.e., interference with breathing as a result of external compression) as a cause of Mr. Galarza’s death. If such compression was involved, however, there is no evidence suggesting that it arose out of an improper use of force by the officers.

criminal possession of a weapon in the fourth degree when: [h]e or she possesses any dagger, dangerous knife, dirk, machete, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another.” Penal Law Section 10.00(13) defines a “dangerous instrument” as “any instrument, article or substance . . . which, under the circumstance in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.” In brandishing a dangerous instrument – namely, the glass bottle – while facing Sgt. Melrose from just a few steps away, it was reasonable to believe that Mr. Galarza was committing the crimes of menacing in the second degree and criminal possession of a weapon on the fourth degree.²⁹

Because the officers were effecting a valid arrest of Mr. Galarza, the force they used was reasonable, for the reasons delineated above. For the reasons delineated above, the use of force by the officers satisfies this standard.

CONCLUSION

For the reasons stated above, no criminal charges against any law enforcement officers are warranted, because the evidence demonstrates that the officers’ use of force was justified under New York law.

²⁹ Arguably, the officers also reasonably believed that Mr. Galarza was committing the crime of attempted assault in the second degree. Under Penal Law Section 120.05(2), “A person is guilty of assault in the second degree when: [w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument.” Under Penal Law Section 110.00, “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.”