SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM, PART 19R

THE PEOPLE OF THE STATE OF NEW YORK

-against-

PETER LIANG,

Defendant.

Kings County
Indictment Number
9988/2014

MEMORANDUM OF LAW

STATEMENT OF FACTS

The Grand Jury Evidence

A. The Shooting

On the night of November 20, 2014, twenty-eight year old Akai Gurley was visiting his girlfriend, MELISSA BUTLER, in her apartment at 2724 Linden Boulevard, which was part of the Louis H. Pink Houses in Brooklyn (Butler: 6-7; [redacted] 30-31; Medical Examiner FLORIANA PERSECHINO: 115).[1] The building at 2724 Linden Boulevard has eight floors (Butler: 7; Crime Scene Detective MATTHEW STEINER: 151). Ms. Butler lived on the seventh floor in an apartment with her parents, two siblings, her daughter, and her niece (Butler: 7, 21).

[1] Unless otherwise indicated, numerals in parentheses refer to the sequentially numbered pages of the bound copy of the grand jury minutes. The names preceding the numerals refer to the witnesses whose testimony is cited.

At approximately 11:00 p.m., Mr. Gurley decided to leave (Butler: 9). Ms. Butler and Mr. Gurley walked to the elevator, pressed the elevator button, and waited for several minutes, but the elevator car did not appear (Butler: 10). So Ms. Butler and Mr. Gurley decided to walk down the stairs (Butler: 10).

There were two staircases in the building, which were designated staircase A and staircase B ([redacted]: 33; Steiner: 152). Because the elevator in 2724 Linden Boulevard was slow, everyone in the building, from the "children to the seniors," used the stairs at all hours of the day and night ([redacted]: 47-48; [redacted]: 77-78; Butler: 10).

Shortly after 11:00 p.m., Mr. Gurley and Ms. Butler opened the door to stairwell A and walked onto the seventh-floor landing (Butler: 10-11). The stairwell was dark because, that evening, the lights in the vicinity of the seventh-floor landing and the eighth floor landing were not working (Butler: 11, 18; Steiner: 159).[2]

Defendant Police Officer Peter Liang and Police Officer SHAUN LANDAU were police officers assigned to PSA2 ("Public Service Area 2"), which is a bureau of the New York City Police Department which primarily works within the New York City Public Housing

[2] The lights on the landings on the third, fourth, and fifth floor were working that evening (Butler: 18; [redacted]: 47).

buildings (Landau: 260-61; Lieutenant VITALY ZELEKOV: 99, 108). On November 20, 2014, Sergeant Martinez had assigned defendant and Officer Landau to patrol the "Pink Houses, post one," which was a particular set of buildings within the Pink Houses (Landau: 266-67).

At approximately 11:00 p.m., defendant and Officer Landau were checking the eighth-floor hallway of the building at 2724 Linden Boulevard (Landau: 274-75). Defendant and Officer Landau were in uniform and were equipped with police radios and flashlights (Landau: 272-73). Each of them was also carrying a service weapon, a semi-automatic Glock 19 (Landau: 274, 279; Ballistics Squad Detective MARK ACEVEDO: 138-39).

Defendant and Officer Landau walked to the door leading to stairwell A (Landau: 275-76). The officers looked through the window in the door of stairwell A, but they could not see anything because the lights on the eighth-floor landing were not working (Landau: 276-78; Butler: 11, 18; Steiner: 159). Officer Landau took out his flashlight and shined it through the window, but he and defendant still could not see anything in the stairwell (Landau: 276-77, 314).

Defendant, who was left-handed, took out his flashlight and held the flashlight in his right hand above his head (Landau: 279-

81). He then drew his Glock pistol with his left hand and pointed it directly in front of him (Landau: 279-81, 283).

Defendant pushed open the stairwell door with his shoulder and quickly stepped onto the eighth-floor landing (Landau: 280-82, 284). He then turned left, so that he was facing the stairs leading down to the seventh-floor landing (Landau: 282-84). Defendant fired his gun (Landau: 282, 284-85).

Ms. Butler heard the stairwell door open on the eighth floor (Butler: 11-12, 21-22). She then heard the sound of the gunshot and saw a light (Butler: 12, 22). Ms. Butler began running down the stairs, with Mr. Gurley close behind her (Butler: 12-13, 22).

When Ms. Butler and Mr. Gurley reached the fifth-floor landing, Mr. Gurley collapsed to the floor (Butler: 13). Ms. Butler saw that Mr. Gurley had a bullet wound to the chest (Butler: 14). Mr. Gurley was conscious, but he was not talking (Butler: 16). Ms. Butler ran down the stairs to the fourth-floor landing, exited the stairwell into the fourth-floor hallway, and began knocking on doors, looking for help (Butler: 13-14).

Officer Landau had been standing in the eighth-floor hallway, outside stairwell A, when defendant fired his gun down the

stairwell (Landau: 281-82).[3] Immediately after the shot was fired, Officer Landau had heard the sound of running footsteps in the stairwell (Landau: 285).

Defendant stepped out of the stairwell and returned to the eighth-floor hallway (Landau: 285). Officer Landau asked defendant, "What the fuck happened?" (Landau: 285). Defendant asserted that, "It went off by accident" and repeatedly said that he would be fired (Landau: 286, 291).

Officer Landau told defendant that he would not be fired, but said that defendant should call Sergeant Martinez to let him know what had happened (Landau: 286-87). Officer Landau said this because he knew that they were supposed to notify a superior officer if they discharged a weapon (Landau: 289, 318-19).

Defendant told Officer Landau, "You call" (Landau: 287). Officer Landau replied, "No. You call" (Landau: 287). The officers argued back and forth for about two minutes about who should report the shooting to their superior officers (Landau: 287, 289, 314).

At one point during this argument, defendant asked Officer Landau for Sergeant Martinez's number (Landau: 288). Officer

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[3] Officer Landau's gun was in its holster (Landau: 297). Officer Landau never took out his gun at any time during the incident (Landau: 297).

Landau found Sergeant Martinez's number in his cell phone and showed it to defendant (Landau: 286, 288). Defendant grabbed the cell phone from Officer Landau's hand and "clicked a number" (Landau: 288). Officer Landau grabbed his cell phone back and put the phone in his pocket (Landau: 288). Officer Landau thought that, because defendant had been the person to discharge his weapon, defendant should call Sergeant Martinez from his own cell phone (Landau: 288, 317).

Defendant and Officer Landau did not call Sergeant Martinez and did not report defendant's discharge of his weapon at that time (Landau: 287-88, 325).

During the evening of November 20, 2014, [redacted] 2724 Linden Boulevard [redacted]

At around 11:00 p.m., [redacted] was in the kitchen [redacted] was in the shower [redacted] 31-32; [redacted] 70-72). Shortly after 11:00 p.m. [redacted] heard a loud bang, which sounded like it came from stairwell A [redacted] 32-33; [redacted] 70-71, 82).

Shortly thereafter, [redacted] heard a knock on their door [redacted]; 33; [redacted] 71; Butler: 14). [redacted]

[redacted] looked through the door's peephole and saw Melissa Butler [redacted]: 34; [redacted] 72; Butler: 14-15). [redacted] recognized Ms. Butler as someone who lived in the building [redacted] 34-35; [redacted] 72).

When they opened the door, Ms. Butler told them that her boyfriend had been shot and asked them to call 911 [redacted]: 35-36; Butler: 14). Ms. Butler was crying and her hands were bloody [redacted]: 35-36; [redacted] 72). Ms. Butler went back to the stairwell (Butler: 15; [redacted] 36; [redacted] 73).

[redacted] grabbed [redacted] cordless phone and called 911 [redacted] 36, 38; [redacted]: 73; People's Exhibits 1, 6).[4] [redacted] 911 call was received at 11:14 p.m. and 46 seconds (Intelligence Analyst NATALIE LEARY: 402, 419). [redacted] went to [redacted] bedroom to get dressed [redacted] 73).

[redacted] left [redacted] apartment, with [redacted] cordless phone, opened the door to stairwell A, and walked onto the fourth-floor landing [redacted] 36-37). [redacted] saw Mr. Gurley and Ms. Butler up on the fifth-floor landing (Butler: 15; [redacted] 37-38). Mr. Gurley was

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[4] The People introduced into evidence as People's Exhibits 1 and 6 disks containing a recording of [redacted] 911 call, of a 911 call made by another person at 11:19 p.m., and of police transmissions regarding the incident [redacted] 48-49; MARY ANNE JOHNSON: 222-23; Leary: 400, 403, 421).

lying on the floor, with a gunshot wound to his chest, and Ms. Butler was trying to help him ([redacted] 37).

The 911 operator with whom [redacted] had been speaking transferred [redacted] call to an EMS operator [redacted] 38). [redacted] asked Ms. Butler whether Mr. Gurley was still breathing [redacted] 50). When Ms. Butler said that he was still breathing, [redacted] relayed that information to the EMS operator on her phone [redacted] 50).

The EMS operator asked [redacted] to give Ms. Butler a towel [redacted] 50). [redacted] ran back to [redacted] apartment, grabbed a towel, re-entered the stairwell, ran up to the fifth floor, handed Ms. Butler the towel, and then ran back down to the fourth-floor landing (Butler: 15; [redacted] 50-51). [redacted] told Ms. Butler to put pressure on the wound [redacted] 51).

Meanwhile, up on the eighth floor, Officer Landau decided to enter the stairwell to see what had happened to the bullet that defendant had fired from his gun (Landau: 289-90). Defendant followed Officer Landau into the stairwell (Landau: 290). Using his flashlight, Officer Landau started to check the walls of the stairwell, looking for a bullet hole (Landau: 290).

Officer Landau heard a grunting noise coming from somewhere below him (Landau: 290-91). Defendant and Officer Landau followed the noise down the stairs (Landau: 291). When they reached the

fifth-floor landing, Officer Landau saw Mr. Gurley's body, lying on the floor, and Ms. Butler kneeling over him, crying (Landau: 292-93).

From [redacted] position on the fourth-floor landing, [redacted] saw defendant and another police officer at the fifth-floor landing [redacted] 40-41, 51, 64). [redacted] noticed that defendant had a cell phone in his hand [redacted] 42, 52-55).

Ms. Butler suddenly screamed, "He's not breathing" [redacted] 52). The EMS operator on the telephone with [redacted] asked [redacted] whether Ms. Butler was willing to perform CPR [redacted] 52-53). [redacted] relayed the question to Ms. Butler [redacted] 52-53). Although Ms. Butler had never performed CPR before and had never received any training on CPR, Ms. Butler agreed to try to perform CPR on Mr. Gurley (Butler: 16; [redacted]: 52).

The EMS operator instructed [redacted] on how to conduct CPR [redacted] 38-39, 53-55). [redacted] then relayed those instructions to Ms. Butler (Butler: 15; [redacted] 38-39, 52-55). In accordance with those instructions, Ms. Butler put Mr. Gurley's head back, pinched his nose, and began breathing into Mr. Gurley's mouth and performing chest compressions on Mr. Gurley's chest (Butler: 16-17; [redacted] 39, 52, 55).

Defendant and Officer Landau had both received training and been certified on performing CPR (Landau: 316). Officer Landau

was aware that, when necessary, police officers were required to perform CPR (Landau: 320). However, neither defendant nor Officer Landau provided any medical care to Mr. Gurley (Landau: 297, 325; [redacted]: 52, 54). Nor did they summon an ambulance for Mr. Gurley (Landau: 293-95). Instead, defendant and Officer Landau walked around Mr. Gurley and Ms. Butler on the fifth-floor landing and went down the stairs to the fourth-floor landing, where [redacted] was on the telephone with the EMS operator [redacted] 42, 53, 63, 66; Landau: 292-93, 295-96).

Around this time, [redacted] entered the fourth-floor stairwell [redacted] 73). [redacted] saw [redacted] defendant, and Officer Landau on the fourth-floor landing [redacted] 74-75, 82; Landau: 294). [redacted] saw Ms. Butler performing chest compressions on Mr. Gurley on the fifth-floor landing [redacted]: 74-75, 83). [redacted] overheard Officer Landau say to defendant, "Hurry up and call. Hurry up and call" [redacted] 75, 83; Landau: 293, 295).

At some point, defendant asked Officer Landau if he knew the address of the building (Landau: 295). Officer Landau said that he did not know the address (Landau: 295). Defendant repeated the question, "What's the address?" (Landau: 295; [redacted] 41-43, 53, 65). [redacted] told defendant the address of the building (Landau: 295; [redacted] 43).

At 11:19 and 25 seconds, the EMS operator asked [redacted] if the police were there (Leary: 404). [redacted] explained that there were police officers there, but that they were not with Ms. Butler (Leary: 404). The EMS operator asked if anyone was with Ms. Butler (Leary: 404). [redacted] responded, "No, she's alone with him [Mr. Gurley]. She still doing CPR" (Leary: 404; [redacted] 53-54).

At 11:19 and 46 seconds, defendant got on his police radio and reported, "Pink House, post one" (Landau: 293-95; Leary: 404-05, 419).[5] At 11:19 and 57 seconds, defendant repeated on his police radio, "Post One" (Landau: 295; Leary: 405). At 11:20 and 9 seconds, defendant again transmitted, "Post One" (Landau: 295; Leary: 405). At 11:20 p.m. and 24 seconds, a police officer from Post One radioed "accidental fire" (Leary: 402-03, 418). At 11:20 p.m. and 34 seconds, a police officer from Post One radioed "[a]ccidental discharge" (Leary: 410, 418).

On November 20, 2014, at about 11:15 p.m., Lieutenant VITALY ZELEKOV received a report that a man had been shot at 2724 Linden Boulevard (Zelekov: 94-95). The lieutenant drove to the location (Zelekov: 95). Lieutenant Zelekov arrived at the building at

[5] At the time, Officer Landau was thinking that what defendant should have said was: "Accidental discharge. Male shot. Need an ambulance" (Landau: 295, 316, 319).

about the same time as numerous other police officers (Zelekov: 95; Officer SALVATORE TRAMANTANA: 378-79, 386; Officer ANDRE FERNANDEZ: 390).

The lieutenant and the other police officers ran up the stairs of stairwell A (Zelekov: 95; [redacted] 43; [redacted]: 76, 83; Tramantana: 379). When Lieutenant Zelekov reached the fourth floor, he saw defendant standing on the fourth-floor landing (Zelekov: 95-96). Lieutenant Zelekov asked defendant what had happened [redacted] 44-45, 66; [redacted]: 77, 86; Zelekov: 96). Defendant said, "I shot him accidentally," and pointed to the fifth-floor landing [redacted] 44-45, 56-57; [redacted] 77, 86; Zelekov: 96; Landau: 296). The lieutenant took defendant's gun, secured it in his waistband, and then ran up the stairs in order to assist Mr. Gurley [redacted] 45; [redacted] 77; Zelekov: 96-97, 107; Landau: 296).

When Lieutenant Zelekov arrived at the fifth-floor landing, Ms. Butler was performing mouth-to-mouth resuscitation on Mr. Gurley (Zelekov: 97-98). Mr. Gurley did not appear to be responsive (Zelekov: 107). Lieutenant Zelekov directed Police Officer SALVATORE TRAMANTANA to relieve Ms. Butler and to perform CPR on Mr. Gurley (Zelekov: 98; Tramantana: 380). Lieutenant Zelekov radioed the police dispatcher to "rush the bus," that is, to send an ambulance as soon as possible, at 11:21 and 7 seconds,

at 11:21 and 10 seconds, and again at 11:21 and 19 seconds (Leary: 411, 413, 419-20, 424; Pino: 360). Lieutenant Zelekov was the first police officer to order that an ambulance be sent to the Pink Houses that evening (Leary: 411).

Officer Tramantana put on his gloves and began administering CPR to Mr. Gurley (Tramantana: 380-81; Fernandez: 391). Officer Tramantana yelled at Mr. Gurley, saying, "Are you okay? Are you okay," but Mr. Gurley did not respond (Tramantana: 385). Officer Tramantana checked for Mr. Gurley's pulse, but Officer Tramantana did not detect a pulse (Tramantano: 385).

Sometime thereafter, Officer Tramantana's partner, Officer ANDRE FERNANDEZ, relieved Officer Tramantana and began performing CPR on Mr. Gurley (Tramantana: 380; Fernandez: 389, 391). Officer Fernandez screamed at Mr. Gurley, "Stay with me. Come on. Stay with me," but Mr. Gurley was not responsive (Fernandez: 391-92). Officer Fernandez continued to give CPR to Mr. Gurley until someone from EMS took his place (Fernandez: 391).

Mr. Gurley was transported to Brookdale Hospital (Persechino: 115). Mr. Gurley was pronounced dead at the hospital at 11:55 p.m. (Persechino: 118-19).

B. The Police Investigation

Lieutenant Zelekov checked the state of the load of the Glock pistol that he had taken from defendant (Zelekov: 99). There was one bullet missing from defendant's service weapon (Zelekov: 99-100).

During the early morning hours of November 21, 2014, Detective MATTHEW STEINER of the Crime Scene Unit went to 2724 Linden Boulevard and examined stairwell A (Steiner: 150-51). On the eighth-floor landing right at the first step leading down to the seventh-floor landing, Detective Steiner recovered a nine-millimeter shell casing (Steiner: 153-54, 160, 162; Fernandez: 392-93). Near the seventh-floor landing, on the cinder block wall that divided the up and down staircases between the seventh and eighth floors, Detective Steiner noticed an oval-shaped ballistics impact mark, which was about five feet two inches from the floor (Steiner: 155-56, 160, 162-63; Persechino: 128-29). The presence of the ballistics impact mark meant that a bullet had struck that wall (Steiner: 163). There were small pieces of fresh concrete and dust on the floor of the stairwell beneath the ballistics impact mark (Steiner: 171).

On November 21, 2014, Doctor FLORIANA PERSECHINO, a medical examiner with the Office of the Chief Medical Examiner of the City of New York and an expert in the fields of forensic pathology and

medical examination, performed on autopsy on Mr. Gurley's body (Persechino: 111, 113-14). Doctor Persechino determined that the cause of Mr. Gurley's death was a gunshot wound to the torso (Persechino: 118). The bullet had entered the left chest wall of Gurley's body, traveled just underneath the surface of his skin, fractured his third rib, nicked his sternum, gone through his heart and diaphragm, and entered his liver (Persechino: 116-18).

In Doctor Persechino's medical opinion, a person suffering from the kind of gunshot wound that Mr. Gurley had sustained would have been able to run down several flights of stairs after being shot (Persechino: 132). Also, in Doctor Persechino's medical opinion, Mr. Gurley would not have survived this gunshot wound, even if CPR had been performed immediately after he sustained the gunshot wound (Persechino: 128).

During the autopsy, Doctor Persechino recovered the bullet from Mr. Gurley's liver (Persechino: 117, 119). One side of the bullet was flattened (Persechino: 119, 127; Parlo: 233). In Doctor Persechino's opinion, the bullet must have hit a hard object in order to be flattened in that fashion (Persechino: 119-20; Parlo: 233). The bullet did not strike any hard objects when it was in Mr. Gurley's body (Persechino: 120). Therefore, Doctor Persechino concluded that the bullet had hit a hard object before it entered Mr. Gurley's body (Persechino: 120).

Doctor Persechino went to 2724 Linden Boulevard and viewed the ballistics impact mark on the wall between the seventh and eighth floors (Persechino: 121, 128-29). In Doctor Persechino's opinion, the bullet could have struck that concrete wall before entering Mr. Gurley's body (Persechino: 120-22).

Detective MARK ACEVEDO, a firearms examiner from the Firearms Analysis Section of the New York City Police Department and an expert in the operability of firearms and ammunition, tested defendant's service pistol and his ammunition (Acevedo: 134, 136-40). He determined that both defendant's weapon and his ammunition were operable (Acevedo: 140).

Detective Acevedo also conducted a trigger pull test on defendant's pistol (Acevedo: 142). The purpose of a trigger pull test is to determine the amount of pressure that it takes to fire a particular weapon (Acevedo: 135-36, 140-41).

The average trigger pull for a weapon that is sold directly from a manufacturer is about 5½ pounds (Acevedo: 142). The service weapons that are used by the New York City Police Department are modified so that much more pressure is needed to fire a New York City Police Department service weapon than is needed to fire a weapon sold directly by a manufacturer (Acevedo: 142-43). The trigger pull for weapons that are used by the New York City Police Department generally range from nine to twelve

pounds (Acevedo: 142). The trigger pull of defendant's pistol was 11½ pounds (Acevedo: 142-43).

Detective MATTHEW PARLO, a firearms examiner at the New York City Police Department laboratory and an expert in the microscopic comparison of ballistics evidence, examined ballistics evidence that was recovered in connection with this case (Parlo: 227, 229-30). Detective Parlo was not able to determine whether the bullet that was recovered from Mr. Gurley's body had been fired from defendant's gun, because there were not enough individual characteristics on the bullet recovered Mr. Gurley's body to make a determination (Parlo: 234-35). However, Detective Parlo was able to conclude that the shell casing that was recovered from the eighth-floor landing was ejected from defendant's service pistol (Parlo: 231-32).

C. Defendant's Police Training

Defendant and Officer Landau were members of the July 2013 class at the New York City Police Academy (Lai: 337; Landau: 260-61; Agosto: 176). They graduated from the Police Academy in December of 2013, about eleven months prior to the shooting of Akai Gurley (Landau: 260-61).

Sergeant AARON LAI was the curriculum supervisor for the Police Academy in 2013 (Lai: 337). The recruits in the July 2013

class were given copies of the New York City Police Department Patrol Guide and a police student guide regarding patrol operations and vertical patrols (Lai: 338-40, 342-43; Landau: 262; People's Exhibits 7, 8).

The Patrol Guide and the police student guide stated that a police officer should "[r]eport immediately to the patrol supervisor and the platoon commander any unusual crime, occurrence or condition" (Lai: 340-44). The recruits were taught that the discharge of a weapon by a police officer or the discovery of a person suffering from a serious physical injury would constitute the kind of unusual occurrence or condition that would require an immediate report to a supervisor (Lai: 341-42; Zelekov: 101; Landau: 319-20). The recruits were instructed that they should report these occurrences or conditions to the police dispatcher using their police radios (Lai: 341-42).

The Patrol Guide also stated that police officers must "[r]ender all necessary police service in [their] assigned area" (Lai: 344). The recruits were taught that, under this provision, police officers were required to administer CPR under circumstances where it was necessary (Lai: 344-45; Landau: 320).

During their training, the recruits were further taught that police officers were supposed to help provide a safe environment

for those living in New York City Housing Authority buildings (Lai: 346-48).

Detective JOSEPH AGOSTO was a firearms and tactics instructor, who was responsible for the curriculum that was used to train the police recruits in the July 2013 class on firearm fundamentals, firearm safety, and firearm tactics (Agosto: 175-78, 182).

Each police recruit in the July 2013 class was given a book, called the Firearms and Tactics Student Guide, which he or she was required to read (Agosto: 179-81; Landau: 262; Exhibit 5). The Guide stated that a firearm could fire only if a finger or other object was placed within the trigger guard and the trigger was pressed with sufficient force to disengage the hammer mechanism (Agosto: 183, 186, 189).[6] The Guide instructed the recruits that, ordinarily, when they were holding a firearm, they should keep their trigger finger alongside the frame of the gun (Agosto: 184, 191-94, 200; Landau: 264-65). The Guide stated repeatedly that police officers should not place their trigger finger within the trigger guard until they were ready to fire their weapon (Agosto: 185-93).

[6] The trigger guard is the loop around the trigger, which prevents the trigger from being engaged when the gun is not supposed to be fired (Agosto: 184, 200).

On page 17, in a section dealing with firearm safety in the context of police training, the Guide stated:

> The TRIGGER FINGER should be kept OUTSIDE THE TRIGGER GUARD until ready to fire.

(Exhibit 5; Agosto: 185-86) (upper-case letters in original).

On page 18, the Guide contained a list of general safety precautions (Agosto: 186). The list included the following:

> Number 6: Keep the finger out of the trigger guard and away from the trigger until ready to fire.

(Agosto: 187).

On page 19, the Guide contained instructions for police officers to follow every time they handled a firearm (Agosto: 188). The instructions stated that police officers should make sure that:

> A. Finger is kept outside of the trigger guard.

(Agosto: 188).

On page 29, the Guide discussed privately-own guns (Agosto: 189-90). With respect to these guns, the Guide stated:

> Always keep your finger off the trigger until ready to fire.

(Agosto: 190).

On Page 42, the Guide stated that, to hold a weapon in "high tac ready" position, a police officer should keep "the finger alongside the frame" of the weapon (Agosto: 190-91).

On page 44, in a section on semi-automatic pistols, the Guide stated, in capital letters:

TRIGGER FINGER OUTSIDE OF THE TRIGGER GUARD.

(Agosto: 191-92).

On page 45, the Guide outlined a four-step procedure for drawing semi-automatic pistols (Agosto: 192). The Guide said:

> The ready position is when you establish the grip. Grasp stock of pistol, establish grip with the trigger finger alongside the frame, and place the thumb on the snap.
>
> Two is: Unsnap the holster, rock the pistol forward and lift straight up along the ribcage keeping the trigger finger outside the trigger guard and alongside the frame.
>
> . . . Keeping muzzle pointed downrange and level to the ground, bring your pistol in close to the body, about chest high. Keep elbows close to the sides of your torso and establish a two handed supported grip, keeping the trigger finger alongside the frame.
>
> And step four says: Extend the pistol out and up to eye level and establish proper sight picture, keeping the trigger finger alongside the frame.

(Agosto: 192-93) (emphasis added).

On page 116, the Guide gave instructions for handling a firearm in a stairway (Agosto: 193). The Guide stated:

> OFFICERS SHOULD CONSIDER NOT DRAWING THEIR WEAPONS WHEN CLIMBING OR RUNNING. MERELY PLACING ONE'S THUMB ON THE SNAP OF THE HOLSTER PREPARES THE FIREARM FOR USE AND IS INFINITELY SAFER. IF A FIREARM MUST BE DRAWN THE TRIGGER FINGER SHOULD BE PLACED OUTSIDE THE TRIGGER GUARD AND POINTED IN A SAFE DIRECTION.

(Agosto: 194) (emphasis added).

On page 140, the Guide gave instructions regarding the tactical use of firearms (Agosto: 194). The Guide stated:

> During armed confrontations, when giving chase on foot the firearm should be kept in the holster. However if the situation requires the firearm to be out of the holster, the officer should place the trigger finger alongside of the frame. This would minimize the likelihood of the firearm discharging accidentally, should the officer stumble and/or fall while running.

(Agosto: 194) (emphasis added).

The material covered in the Guide was reinforced and supplemented by classroom lectures, live firearm exercises, and role-play scenarios (Agosto: 178, 185, 196; Landau: 262-63). The recruits were tested to ensure that the recruits understood all the police protocols (Agosto: 178-79; Landau: 263-64).

Detective LEONARDO PINO oversaw the training of police recruits in 2013 with respect to safety services (Pino: 355-56).

The recruits were taught that if a police officer encounters someone who is in need of aid, the police officer is required by the Patrol Guide to provide reasonable aid to that person (Pino: 359, 373). Police officers are supplied with latex gloves and masks, so that they can provide aid safely (Pino: 373-74).

Detective Pino told the recruits that when a police officer encounters a person who appears to be in need of aid, the police officer should first ask the person if he or she is okay (Pino: 360-61). If the person does not respond, the police officer should immediately summon an ambulance (Pino: 360-62; Zelekov: 100-01).

The police officer should then check the person's airway, breathing, and circulation (Pino: 360-61, 363). If there is a problem with the person's airway, breathing, or circulation, then the police officer should perform CPR on the person (Pino: 360-62).

If the injured person is suffering from a trauma injury, such as a gunshot wound or a stab wound, then the police officer should take steps to dress the wound and to stop the bleeding (Pino: 364-67, 373).

The recruits were also taught that if, as police officers, they encounter someone who needs aid, "you stay with that aided at

all times as long as it's safe for you to be there" (Pino: 362-63).

The recruits at the Police Academy were given six to seven hours of training in first aid techniques and six to seven hours of training in CPR (Pino: 357-58). The training included lectures and videos, and an opportunity to practice techniques on human manikins (Pino: 358, 364, 368-69, 373).

The recruits were provided with two books: (1) a book regarding CPR, which was prepared by the American Heart Association; and (2) a book regarding first aid, called CPR Plus, which was prepared by the Regional Emergency Medical Services Counsel of New York City (Pino: 356-58, 367; People's Exhibit 10).

In order to graduate from the Police Academy, each recruit was required to: (1) pass a practical examination, in which he or she had to perform various CPR techniques on a manikin; (2) pass a written examination; and (3) obtain a certification in performing CPR (Pino: 366, 369-70).

POINT I

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT PURSUANT TO C.P.L. § 210.30(6) SHOULD BE DENIED BECAUSE THE EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH DEFENDANT'S COMMISSION OF THE CHARGED CRIMES.

The evidence before the grand jury was legally sufficient to establish that defendant committed all of the crimes charged in the indictment. Therefore, defendant's motion to dismiss the indictment pursuant to C.P.L. § 210.30(6) should be denied.

In order for a grand jury to indict a defendant on a charge, the People must present legally sufficient evidence of the defendant's guilt of that charge. See C.P.L. § 190.65(1). Legally sufficient evidence is defined as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof." See C.P.L. § 70.10(1).

"In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt." People v. Bello, 92 N.Y.2d 523, 526 (1998) (citations omitted); see People v. Grant, 17 N.Y.3d 613, 616 (2011). In determining a motion to dismiss an indictment pursuant to C.P.L. § 210.30, the reviewing court must view the evidence in the light most favorable to the People, and

defer all questions "as to the weight and quality of the evidence." People v. Carroll, 93 N.Y.2d 564, 568 (1999); see People v. Jennings, 69 N.Y.2d 103, 114 (1986). The reviewing court may not examine whether the evidence established reasonable cause to believe that defendant committed the charged crimes, because the resolution of that question "'is exclusively the province of the Grand Jury.'" People v. Deegan, 69 N.Y.2d 976, 979 (1987) (quoting Jennings, 69 N.Y.2d at 115).

"The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference." Bello, 92 N.Y.2d at 526 (citation and internal quotation marks omitted); see Grant, 17 N.Y.3d at 616. "That other, innocent inferences could possibly be drawn from the facts is irrelevant on this pleading stage inquiry, as long as the Grand Jury could rationally have drawn the guilty inference." Deegan, 69 N.Y.2d at 979; accord Bello, 92 N.Y.2d at 526; People v. Woodson, 105 A.D.3d 782, 783 (2d Dep't 2013).

In this case, when the evidence submitted to the grand jury is viewed in accordance with these standards, that evidence was legally sufficient to establish every element of the charged crimes.

A. Manslaughter and Assault

The evidence presented to the grand jury in this case was legally sufficient to establish that defendant committed the crimes of Manslaughter in the Second Degree and Assault in the Second Degree. A defendant commits the crime of Manslaughter in the Second Degree when he recklessly causes the death of another person. P.L. § 125.15(1). A defendant commits the crime of Assault in the Second Degree when he recklessly causes serious physical injury to another person by means of a deadly weapon.[7] P.L. § 120.05(4).

In this case, the testimony of Police Officer Shaun Landau, Melissa Butler, and Doctor Floriana Persechino established that defendant fired a shot from his service revolver, which struck Akai Gurley and killed him (Landau: 282, 284-85; Butler: 12-14; Persechino: 118). In fact, defendant admitted to Lieutenant Vitaly Zelekov that he fired the shot that caused Mr. Gurley's injury (Zelekov: 96; [redacted]: 44-45, 56-57, 64; [redacted]: 77, 86; Landau: 296). Thus, the evidence established that defendant

[7] The term "serious physical injury" means, in relevant part, "physical injury which creates a substantial risk of death, or which causes death . . . or protracted loss or impairment of the function of any bodily organ." P.L. § 10.00(10). The term "deadly weapon" means, in relevant part, "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged." P.L. 10.00(12).

caused death and serious physical injury to Mr. Gurley by means of a deadly weapon. See In re Anthony M., 63 N.Y.2d 270, 280 (1984) (for criminal liability to attach, a defendant's actions must have "'forged a link in the chain of causes which actually brought about the death'"); People v. Rivera, 70 A.D.3d 1177, 1182-83 (3d Dep't 2010) (a reasonable view of the evidence established second-degree manslaughter, where bullet ricocheted and struck victim); People v. Vargas, 60 A.D.3d 1236, 1238 (3d Dep't 2009) (evidence was sufficient to establish reckless third-degree assault, where bullet ricocheted and struck victim's hand).

The evidence showed that there was no legal justification for defendant to have killed Mr. Gurley. Mr. Gurley had not threatened defendant with the imminent use of deadly physical force. See P.L. § 35.15(2)(a) (setting forth circumstances in which a person may use deadly physical force in self-defense). Defendant was not in the process of arresting Mr. Gurley when defendant fired the fatal shot. See P.L. § 35.30(1) (setting forth circumstances in which a police officer may use deadly physical force in connection with an arrest).

The evidence further established that defendant was acting recklessly with respect to the death of anyone who happened to be nearby at the time he fired his weapon. A defendant "acts

recklessly with respect to a result or to a circumstance . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists." P.L. § 15.05(3). "The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Id. A "small risk" that death will occur is a "substantial and unjustifiable" risk for purposes of this definition. People v. Lewie, 17 N.Y.3d 348, 357 (2011).

Here, the evidence showed that defendant was trained on firearm safety, that defendant deliberately disregarded that training in the stairwell of 2724 Linden Boulevard, and that, as a result of defendant's improper handling of his weapon, Mr. Gurley was killed.

A loaded firearm is a deadly weapon and therefore requires a high degree of care in its use and handling. See P.L. § 10.00(12); People v. Heber, 192 Misc. 2d 412, 420 n.8 (Sup. Ct. Kings Cty. 2002). "This concept is set out in the Restatement (Second) of Torts, which provides: 'those who deal with firearms * * * are required to exercise the closest attention and the most careful precautions, not only in

preparing for their use but in using them.'" Heber, 192 Misc. 2d at 420 n.8 (citations omitted).

The evidence established that, less than a year before the shooting, during his police training, defendant had been taught how to handle a firearm safely. He had been taught that, in order to prevent an accidental firing of the gun, he should always keep his trigger finger along the frame of the gun, until he was ready to fire (Agosto: 184, 191-94, 200). He was instructed never to place his trigger finger within the trigger guard, until he decided to fire (Agosto: 186-93).

These rules of firearm safety were repeated over and over again in defendant's police training materials (Agosto: 184-94). They were further reinforced in lectures, field exercises, and role-play scenarios (Agosto: 178, 185, 196).

The evidence showed that, on November 20, 2014, defendant disregarded his training on firearm safety. Officer Landau testified that while he and defendant were in the residential apartment building, defendant drew his service pistol, entered an eighth-floor stairwell, turned left, and then fired his pistol toward the seventh-floor landing (Landau: 279-85). The evidence further showed that, in order to have fired his weapon, defendant must have placed his finger within the trigger guard

and he must have exerted 11½ pounds of pressure on the trigger (Agosto: 183, 186, 189; Acevedo: 142-43).

Defendant may have placed his finger on the trigger because he felt unsafe in the unlit stairwell or because he was being careless that day. But placing a finger on the trigger of a gun in the stairwell of a residential apartment building, when there was no reason to discharge the weapon, was contrary to everything that defendant had been taught about the safe handling of a loaded firearm. On this basis alone, the grand jury could have concluded that defendant created a substantial and unjustifiable risk of death and serious physical injury, even if the grand jury also believed that defendant did not intend to fire the gun. See People v. Licitra, 47 N.Y.2d 554 (1979) (trial evidence was legally sufficient to establish defendant's guilt of second-degree manslaughter, where defendant swung across his body a loaded firearm with his finger on the trigger, even if discharge of weapon was unintentional); People v. White, 75 A.D.3d 109, 120 (2d Dep't 2010) (defendant's "brandishing a loaded gun in front of the youths, with his finger on the trigger," was sufficient to establish second-degree manslaughter, "even if, as [defendant] claims, the gun accidentally discharged when the victim tried to grab it away from him"); People v. Rammelkamp, 167 A.D.2d 560 (2d Dep't 1990)

(evidence was sufficient to establish a reckless homicide where defendant displayed loaded gun with finger on trigger).

Moreover, the evidence suggested that defendant was in complete control of his gun when he fired the gun. Defendant was alone on the eighth-floor landing when the pistol was discharged. So the discharge of defendant's weapon was not caused by someone bumping into him or jostling his arm or trying to wrest the gun away from him.

Defendant did not stumble or fall while he was in the stairwell. Therefore, the discharge of the weapon was not caused by gravity or an involuntary movement of defendant's hand.

In addition, the trigger pull of defendant's gun made it difficult for a person to fire, unless the person intended to fire it. According to a police ballistics expert, a person would have to exert 11½ pounds of pressure to fire defendant's gun, which was more than twice the amount of pressure that would be required to fire a gun that was released directly by a manufacturer (Acevedo: 142-43). This was a heavy trigger pull. See People v. Kalinowski, 118 A.D.3d 1434, 1435 (4th Dep't 2014) (expert describes a trigger pull of 5 to 7 pounds as "'a substantial trigger pull'"); People v. Hansen, 290 A.D.2d 47, 52 (3d Dep't 2002) (expert describes a trigger pull of 7½ pounds as

"'a relatively heavy'" trigger pull), aff'd, 99 N.Y.2d 339 (2003).

Given that defendant did not slip or fall, that no one bumped into defendant, and that 11½ pounds of pressure had to be exerted in order to fire defendant's gun, the grand jury could have concluded that defendant was responsible for pulling the trigger of his gun. On this basis as well, the grand jury could have reasonably found that, when defendant fired his gun, he was acting recklessly with respect to the death of another person. See Kalinowski, 118 A.D.3d at 1435 (defendant's claim that rifle accidentally discharged when rifle slipped out of her hands was undermined by evidence that it would take 5 to 7 pounds of pressure to pull rifle's trigger); People v. Cunningham, 222 A.D.2d 727 (3d Dep't 1995) (trial evidence was legally sufficient to establish a reckless homicide where evidence showed, inter alia, that 8 to 10 pounds of pressure had to be exerted to fire weapon); People v. Quiles, 172 A.D.2d 859 (2d Dep't 1991) (jury properly rejected defendant's claim that gun accidentally discharged where, among other factors, 7 to 7½ pounds of pressure were needed to fire weapon); People v. Sams, 170 A.D.2d 945 (4th Dep't 1991) (jury properly rejected defendant's claim that gun discharged as a result of someone

bumping into defendant, where trigger pull of defendant's gun was between 4¼ and 4½ pounds).

Thus, given the totality of the evidence in this case, a valid line of reasoning and permissible inferences established a prima facie case of Manslaughter in the Second Degree and Assault in the Second Degree. Therefore, defendant's motion to dismiss these counts should be denied. See Licitra, 47 N.Y.2d at 559; see also People v. George, 43 A.D.3d 560, 564 (3d Dep't 2007) (evidence was sufficient to establish second-degree manslaughter because "[d]efendant's conduct in pointing the rifle at the victim and shooting him, whether accidental or purposeful, evinced, in our view, such a conscious disregard of a substantial and unjustifiable risk that the result would occur"), aff'd, 11 N.Y.3d 848 (2008); People v. Coley, 289 A.D.2d 252 (2d Dep't 2001) (trial evidence was legally sufficient to establish second-degree manslaughter where gun discharged while defendant was dancing and posing with gun); People v. Bernier, 204 A.D.2d 732 (2d Dep't 1994) (trial evidence was sufficient to establish second-degree manslaughter where defendant, a nightclub security guard, accidentally shot someone while using rifle and elbow to push back crowd).

Defense counsel's arguments to the contrary are without merit. Defense counsel speculates that the People may not have

introduced evidence before the grand jury regarding police regulations relevant to the shooting, and argues that, without such evidence, the People's proof was insufficient to establish that defendant's actions created a substantial and unjustifiable of risk of death or serious physical injury (Defense Affirm. at ¶¶ 18, 22). Contrary to counsel's speculation, the People introduced a substantial amount of evidence regarding the police practices and procedures that were relevant to the shooting (Lai: 337-49; Agosto: 175-200; Pino: 355-74). That evidence supported the conclusion that, when defendant fired his gun in the stairwell of 2724 Linden Boulevard, he acted recklessly with respect to the death of another person. See, supra, at 30-31.

Moreover, defendant's reliance on People v. Lora, 85 A.D.3d 487 (1st Dep't 2011), in support of his argument is misplaced (Defense Affirm. at ¶¶ 19-20). In Lora, the First Department said, in dicta, that if it had not reversed on another ground, it would have held that a police officer's conviction for second-degree manslaughter was against the weight of the evidence, because the evidence supported the conclusion that the police officer fired his weapon with the intent to injure another person, and because the People did not introduce evidence regarding police rules and procedures. 85 A.D.3d at 494-95. That case is irrelevant here, because the People in

this case did introduce evidence regarding police rules and procedures, and because, in any event, the standard for reviewing whether a trial conviction is against the weight of the evidence is completely different from the standard for reviewing whether the evidence before a grand jury is legally sufficient to warrant a trial on the charge. See generally People v. Bleakley, 69 N.Y.2d 490, 494-95 (1987). Indeed, in reviewing the legal sufficiency of the evidence in the grand jury, a court must defer all questions relating to the weight of the evidence. Carroll, 93 N.Y.2d at 568; see also People v. Galatro, 84 N.Y.2d 160, 165 (1994) (noting that the proof that the People had to present in the grand jury in a reckless endangerment case was less than the proof that the People had to present at trial).

Defense counsel further argues that the evidence was legally insufficient because, theoretically, it was possible that defendant's finger may have accidentally slipped from the frame to the trigger as a result of defendant being startled or panicked and that defendant may then have accidentally fired the gun (Defense Affirm. at ¶ 17). The grand jury had reason to reject this inference. Defendant's gun had a trigger guard, which was designed to prevent people from accidentally slipping their finger onto the trigger (Agosto: 40, 56). In addition, there was no

evidence of anything startling or panic-inducing happening in the stairwell. Moreover, defendant had to exert 11½ pounds of pressure in order for the gun to discharge.

In any event, the fact that an innocent inference can be drawn from the evidence "is irrelevant on this pleading stage inquiry, as long as the Grand Jury could rationally have drawn the guilty inference." Deegan, 69 N.Y.2d at 979; accord Bello, 92 N.Y.2d at 526; People v. Campbell, 69 A.D.3d 645, 646 (2d Dep't 2010) ("the fact that the evidence presented to the grand jury also is susceptible of other inferences as to the defendant's culpable mental state is irrelevant"). Here, given all of the circumstances, including the fact that defendant did not trip or fall in the stairwell, that no one bumped into or jostled defendant when he was in the stairwell, and that defendant had to place his finger within the trigger guard and exert 11½ pounds of pressure in order to fire the weapon, the grand jury could reasonably have drawn the inference that defendant acted recklessly with respect to the death of Mr. Gurley.

Therefore, the evidence was legally sufficient to establish that defendant committed the crimes of Manslaughter in the Second Degree and Assault in the Second Degree.

B. Criminally Negligent Homicide

The evidence was legally sufficient to establish that defendant committed the crime of Criminally Negligent Homicide. A defendant commits the crime of Criminally Negligent Homicide when, with criminal negligence, he causes the death of another person. P.L. § 125.10.

For the reasons set forth in section A, the testimony of Police Officer Shaun Landau, Melissa Butler, Doctor Floriana Persechino, and Lieutenant Vitaly Zelekov was sufficient to establish that defendant caused Mr. Gurley's death. See supra, at 27-28; see also People v. Smith, 121 A.D.3d 1297, 1298 (3d Dep't 2014) (evidence at trial was legally sufficient to establish guilt of criminally negligent homicide, where bullet ricocheted and struck victim).

The evidence was also sufficient to establish that, at the time of the shooting, defendant was acting with criminal negligence with respect to the death of anyone who happened to be nearby. As a matter of law, "[a] person who acts with the recklessness necessary for a conviction of manslaughter in the second degree also acts with criminal negligence." People v. Randolph, 81 N.Y.2d 868, 869 (1993) (citations omitted). Therefore, if this Court concludes that the evidence was sufficient to establish that, at the time of the shooting,

defendant acted recklessly with respect to the death of another person (see, supra, at 28-37), then this Court must also conclude that the evidence was sufficient to establish that, at the time of the shooting, defendant acted with criminal negligence with respect to the death of another person.

Furthermore, even if this Court were to conclude that the grand jury evidence was legally insufficient to establish that, at the time of the shooting, defendant was acting recklessly with respect to the death of another person, the evidence established that defendant was acting with criminal negligence when he fired the shot that killed Akai Gurley. A defendant "acts with criminal negligence with respect to a result or to a circumstance . . . when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists." P.L. § 15.05(4). "The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." Id.

In this case, by putting his finger on the trigger of a loaded firearm and pulling the trigger in the stairwell of a large apartment building, defendant created a substantial and unjustifiable risk of death. See People v. Conway, 6 N.Y.3d 869 (2006) (evidence at trial was legally sufficient to establish a

police officer's guilt of criminally negligent assault on the basis of a police officer firing his weapon while pursuing a fleeing suspect, even though the firing of the weapon was accidental).

Indeed, the facts of this case are comparable to the facts of People v. Conway, 6 N.Y.3d 869 (2006), which facts the Court of Appeals held were legally sufficient to establish a criminally negligent assault. In Conway, a police officer was pursuing in a police car a suspect who was fleeing on foot. The police officer used his right hand to steer the car and to hold his service weapon. The police officer used his left hand to reach through the open driver's window and to grab the suspect. The gun accidentally fired, severely wounding the suspect. Id. at 871.

The Court of Appeals held that these facts were sufficient to establish criminal negligence, even though the officer's firing of the gun was unintentional, because the officer's handling of his service weapon created a substantial and unjustifiable risk of physical injury. Id. at 872. Similarly, here, the evidence was legally sufficient to establish that defendant was acting with criminal negligence, because defendant's improper handling of his service weapon in the

stairwell of 2724 Linden Boulevard created a substantial and unjustifiable risk of death.

C. Reckless Endangerment

The evidence was legally sufficient to establish that defendant committed the crime of Reckless Endangerment in the Second Degree. A defendant commits the crime of Reckless Endangerment in the Second Degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person. P.L. § 120.20.

For conduct to constitute reckless endangerment in cases involving a firearm, the defendant's use of the firearm must create an actual risk of harm (People v. Davis, 72 N.Y.2d 32, 36 [1988]), although there is no requirement that the defendant be in close proximity to the victim. People v. Payne, 71 A.D.3d 1289, 1290 (3d Dep't 2010). "A finding that defendant aimed the gun directly at anyone is [also] not required, since bullets may ricochet or persons in the vicinity of gunfire may move unexpectedly into its path." People v. Byrd, 79 A.D.3d 1256, 1257 (3d Dep't 2010) (citation omitted).

In this case, defendant created a substantial risk of serious physical injury, by firing his weapon in a stairwell in a large apartment building. See Payne, 71 A.D.3d at 1290-91

(defendant committed reckless endangerment by firing in the street, even though four of the victims were in their apartments at the time of the shooting); People v. Graham, 14 A.D.3d 887, 889 (3d Dep't 2005) (defendant committed reckless endangerment by firing his weapon in room in which other people were present, even though defendant did not point the weapon at anyone, because defendant "created a situation whereby [the individuals in the room] could be struck by a ricochet").

Moreover, for the reasons set forth in section A, the evidence was sufficient to establish that, at the time of the shooting, defendant was acting recklessly with respect to the creation of a substantial risk of serious physical injury to another person. See, supra, at 28-37.

Therefore, the evidence was legally sufficient to establish defendant's guilt of this count.

D. Official Misconduct

Counts five and six of the indictment charge defendant with Official Misconduct. A public servant commits the offense of Official Misconduct when, with intent to obtain a benefit or deprive another person of a benefit, the public servant knowingly refrains from performing a duty which is imposed upon

him by law or is clearly inherent in the nature of his office. P.L. § 195.00(2).

Counts five and six are based on defendant's failure to seek and to provide medical care for Akai Gurley. Count five charges defendant with Official Misconduct under the theory that the duty to seek or provide medical care for Mr. Gurley was inherent in the nature of defendant's office as a police officer. Count six charges defendant with Official Misconduct under the theory that defendant's duty to seek or provide medical care for Mr. Gurley was imposed upon defendant by law.

The evidence before the grand jury established every element of each of these counts. First, the evidence established that defendant was a public servant, because the evidence showed that defendant was a police officer (Landau: 261). See P.L. § 10.00(15)(a) (defining a public servant, in relevant part, as "any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state").

Second, the evidence established that defendant knowingly refrained from seeking or providing medical care for Mr. Gurley. The testimony of Officer Landau, Ms. Butler, [redacted] showed that when defendant arrived at the fifth-floor landing, Mr. Gurley was lying on the floor, suffering from a gunshot

wound. Ms. Butler screamed that Mr. Gurley was not breathing. The testimony of Officer Landau, Ms. Butler, [redacted] showed that defendant did not summon an ambulance for Mr. Gurley, that defendant did not attempt to perform CPR on Mr. Gurley, and that defendant did not render any other kind of first aid to Mr. Gurley. Indeed, defendant "did nothing the whole time" as Mr. Gurley lay dying on the fifth-floor landing [redacted]: 54).

Defendant's behavior was in stark contrast to the behavior of his fellow officer, Lieutenant Zelekov. When Lieutenant Zelekov arrived at the scene, he immediately directed Officer Salvatore Tramantana to perform CPR on Mr. Gurley and he summoned an ambulance three times, ordering the dispatcher to "rush the bus" (Zelekov: 98; Tramantana: 379-80; Leary: 411, 413, 419-20, 424; Pino: 360).

Third, the evidence was legally sufficient to establish that defendant intended to obtain a benefit or deprive another person of a benefit. A benefit is defined as "any gain or advantage to the beneficiary." P.L. § 10.00(17). The definition is "broad[]" (People v. Garson, 6 N.Y.3d 604, 612 [2006]) and is not limited to "graft or financial advantage." People v. Feerick, 93 N.Y.2d 433, 446 (1999).

In this case, the evidence supports the inference that defendant did not immediately report the shooting to his superiors because he was worried about losing his job. After he saw that Mr. Gurley was injured, he continued to delay notifying his superiors and also failed to summon an ambulance or to provide Mr. Gurley with prompt and appropriate medical care. A trier of fact may presume that a defendant intends the natural and probable consequence of his or her acts. See People v. Bueno, 18 N.Y.3d 160, 169 (2011); People v. Lopez, 104 A.D.3d 554 (1st Dep't 2013); People v. Travis, 273 A.D.2d 544, 548 (3d Dep't 2000). See generally Sandstrom v. Montana, 442 U.S. 510 (1979). Here, the natural and probable consequence of defendant's decision not to summon an ambulance and not to perform CPR or provide other first aid was to deprive Mr. Gurley of the benefit of immediate medical care by a person with appropriate medical training, as Mr. Gurley lay dying. See Lopez, 104 A.D.3d at 554 (jury could presume that defendant intended the natural consequence of his acts, regardless of whether defendant simultaneously had another intent).

Fourth, the evidence was legally sufficient to establish count five of the indictment because seeking and providing medical care to an injured person is a duty in inherent in the nature of the office of a police officer. "The role of the

police in our society is a multifaceted one." People v. De Bour, 40 N.Y.2d 210, 218 (1976). "A primary role of the police is to . . . provide emergency assistance to those whose lives may be in danger." People v. Krom, 61 N.Y.2d 187, 198 (1984); see De Bour, 40 N.Y.2d at 218 (the police are charged with "supplying emergency help and assistance" [citing, inter alia, ABA Standards for the Urban Police Function 1.1(b)]).

This duty is reflected in the New York Police Department Patrol Guide. The Patrol Guide requires police officers to provide reasonable aid to civilians who are in need of it (Lai: 344-45; Landau: 320; Pino: 359, 373).

This duty is also reflected in police training. The evidence before the grand jury showed that police recruits are taught that if they encounter someone who is non-responsive, they should summon an ambulance; if they encounter someone who has problems with his or her airway, breathing, or circulation, they should perform CPR; and if they encounter someone suffering from a gunshot wound, they should try to dress the injury and stop the bleeding (Pino: 360-73). The police recruits receive six to seven hours of training in first aid and six to seven hours of training in CPR (Pino: 357-58). The police recruits are required to pass written and practical examinations with respect

to first aid and CPR and to become certified in CPR in order to graduate from the Police Academy (Pino: 366, 369-70).

In light of this evidence, the grand jury had a sufficient basis to conclude that seeking and providing medical care was inherent in the nature of the office of a police officer.

Fifth, the evidence was legally sufficient to establish count six of the indictment, because, under the circumstances of this case, defendant was required by law to seek or to provide medical care for Mr. Gurley. State actors have a constitutional duty, under the Due Process Clause of the Fourteenth Amendment, to seek or provide medical care for a person, where state actors have created a danger to the life of that person and where the failure to seek or provide medical care for that person would be so egregious and outrageous as to shock the contemporary conscience. See Chavis v. City of New York, 94 A.D.3d 440, 442-43 (1st Dep't 2012); Penilla v. City of Huntington Park, 115 F.3d 707, 709 (9th Cir. 1997); Robischung-Walsh v. Nassau County Police Department, 421 Fed. Appx. 38, 40-42 (2d Cir. 2011); Garagher v. Marzullo, 478 F. Supp. 2d 1008, 1013-14 (N.D. Ill. 2006); Regaldo v. City of Chicago, 40 F. Supp. 2d 1009, 1114-15 (N.D. Ill. 1999). See generally DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

In this case, defendant created a danger to the life of Mr. Gurley, by shooting him. Defendant's failure to take any steps to help Mr. Gurley as Mr. Gurley lay dying from a gunshot wound that defendant himself had inflicted was so outrageous and appalling that it shocks the conscience.

Thus, the evidence made out a prima facie case as to both counts of Official Misconduct.

Defense counsel's arguments to the contrary are without merit. First, defense counsel argues that the People failed to establish that defendant intended to deprive defendant of a benefit because -- according to defense counsel -- a deprivation of a person's civil rights is not a benefit for purposes of Official Misconduct (Defense Affirm. at ¶ 38-39). But the People are not alleging that defendant deprived Mr. Gurley of his civil rights. Instead, the People are alleging that defendant deprived Mr. Gurley of prompt, appropriate medical care, from someone with medical training, which certainly falls within the broad definition of "benefit" for purposes of Penal Law § 195.00(2). See Garson, 6 N.Y.3d at 612.

Second, defense counsel contends that defendant had no obligation to provide Mr. Gurley with medical care so long as someone else was providing Mr. Gurley with medical care (Defense Affirm. at ¶ 45). But, in this case, the only person who was

providing Mr. Gurley with care immediately after the shooting was Ms. Butler, Mr. Gurley's distraught girlfriend, who had no training or experience in CPR, but who was trying, as best she could, to follow the instructions that [redacted] was relaying to her from an EMS operator. The fact that defendant, who had received training in CPR and was certified in CPR, stood by and did nothing while a civilian, who had no training in CPR, attempted to perform CPR for the first time on the basis of relayed telephone instructions, was outrageous. Under these circumstances, defendant had a duty to intervene and try to help save Mr. Gurley's life.

E. Conclusion

For all of these reasons, the evidence before the grand jury was sufficient to establish a prima facie case of each and every offense with which defendant was charged. Therefore, defendant's motion to dismiss the indictment on the ground of alleged legal insufficiency of the evidence should be denied.

CONCLUSION

FOR THE FOREGOING REASONS, DEFENDANT'S MOTION TO DISMISS THE INDICTMENT SHOULD BE DENIED.

Dated: Brooklyn, New York
April 29, 2015

Respectfully submitted,

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POINT II

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT PURSUANT TO C.P.L. § 210.35(5) SHOULD BE DENIED BECAUSE DEFENDANT'S CLAIM WITH RESPECT TO THE GRAND JURY PRESENTATION IS MERITLESS.

Defendant's motion to dismiss the indictment pursuant to Criminal Procedure Law § 210.35(5) should be denied. The defense motion is premised on the theory that Officer Shaun Landau gave false testimony before the grand jury (Defense Affirm. at ¶¶ 47-56). The grand jury minutes prove that defendant's contention about Officer Landau's testimony is baseless. Therefore, this claim provides no basis to dismiss defendant's indictment.

Criminal Procedure Law § 210.35(5) provides that a grand jury proceeding is defective when:

> The proceeding otherwise fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result.

Criminal Procedure Law § 210.35(5) is "the statutory equivalent of the common-law principle that an indictment issued by a legally constituted Grand Jury need not be dismissed because of a simple technical error if the accused was not prejudiced or the fundamental integrity of the process impaired." People v. Williams, 73 N.Y.2d 84, 90 (1989).

This provision sets forth a "demanding" standard to meet (People v. Darby, 75 N.Y.2d 449, 454 [1990]), and the dismissal of an indictment under this provision should be "rare." People v. Huston, 88 N.Y.2d 400, 410 (1996). The "impairment of the integrity of the proceeding" requirement is "very precise and very high," an "unquestionably high prong," and a "very high hurdle." Darby, 75 N.Y.2d at 455. A "mere flaw, error or skewing" (id.), or a "technical" defect (Williams, 73 N.Y.2d at 90), is not sufficient to satisfy this "high test" (Darby, 75 N.Y.2d at 455) and to entitle a defendant for the "drastic, exceptional remedy" of dismissal. People v. Moffitt, 20 A.D.3d 687, 688 (3d Dep't 2005).

Furthermore, to be entitled to dismissal under this provision, a defendant must also satisfy the prejudice prong. See Darby, 75 N.Y.2d at 455. Although a defendant does not have to establish actual prejudice under this provision, the defendant must demonstrate "an articulable 'likelihood of' or at least 'potential for' prejudice." People v. Adessa, 89 N.Y.2d 677, 686 (1997) (quoting Huston, 88 N.Y.2d at 409). Vague and conclusory allegations of prejudice are not sufficient to satisfy this standard. The defendant must identify "some specific theory of prejudice" or some "concrete problem" in order to be entitled to dismissal. Adessa, 89 N.Y.2d at 686.

The question of whether a defendant has established a potential for prejudice "turns on the particular facts of each case." Huston, 88 N.Y.2d at 409. In making this determination, a reviewing court must consider "all of the surrounding circumstances." Adessa, 89 N.Y.2d at 685. Dismissal of an indictment is warranted under Criminal Procedure Law § 210.35(5) only "where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the Grand Jury." Huston, 88 N.Y.2d at 409.

In his motion, defense counsel contends that defendant is entitled to the dismissal of the indictment under this provision because -- according to counsel -- Officer Landau may have given false testimony before the grand jury. Defendant speculates that Officer Landau may have testified that he was not given a benefit in exchange for his testimony (Defense Affirm. at ¶ 49). Defendant contends that this alleged testimony would have been false, because Officer Landau received immunity from prosecution by virtue of his testifying before the grand jury (Defense Affirm. at ¶¶ 47-49). See C.P.L. § 190.40(2). Defendant further contends that the People erred by failing to correct this allegedly false testimony (Defense Affirm. at ¶¶ 49, 51).

Defense counsel's claim is meritless because it is based upon an incorrect premise. Contrary to counsel's contention, Officer

Landau never testified at all about whether he received any benefit in exchange for his testimony (Landau: 260-32). Consequently, Officer Landau never gave any false testimony before the grand jury on this subject -- or, to the People's knowledge, on any subject -- and the People were never under any obligation to correct Officer Landau's testimony.

Insofar as defendant's motion arguably suggests that the People's instructions with respect to Officer Landau's testimony were inadequate, that claim too is meritless. The grand jury was instructed when it was initially impaneled that a witness who testifies before the grand jury receives immunity from prosecution, unless the witness waives immunity (Grand Jury Minutes dated Jan. 20, 2015, at 11). Therefore, the grand jurors in this case were aware that all of the witnesses who testified before them, including Officer Landau, received immunity from prosecution in connection with this case, by virtue of their grand jury testimony. See People v. Alarcon, 184 A.D.2d 514 (2d Dep't 1992) (in assessing the adequacy of the legal instructions to the grand jury, reviewing court may consider the initial instructions that were given to the grand jury); People v. Augustine, 172 A.D.2d 843 (2d Dep't 1991); see also People v. Hewitt, 233 A.D.2d 171, 172 (1st Dep't 1996) ("It is very common for a prosecutor to

rely on a Grand Jury's prior receipt of legal instructions either at the beginning of the term or in connection with another case").

Moreover, the People were not required to give the grand jury a special instruction regarding Officer Landau's receipt of immunity. The law does not require the People to inform a grand jury that a grand jury witness has received a benefit in exchange for the witness's testimony, because such a fact relates solely to the credibility of the witness, which is collateral to the issues that a grand jury has to decide. See People v. Hansen, 290 A.D.2d 47, 50-51 (3d Dep't 2002) (People did not have to inform grand jury that People made a deal in exchange for witness's testimony, because that fact pertained only to witness's credibility, which was collateral to the issue the grand jury had to decide), aff'd, 99 N.Y.2d 339, 346 n.6 (2003) (agreeing with the Appellate Division's determination of this issue); People v. Tolliver, 217 A.D.2d 978 (4th Dep't 1995) (People did not have to inform grand jury that "a prosecution witness had made a deal in exchange for favorable treatment," because "'[c]redibility is a collateral matter that generally does not materially influence a Grand Jury investigation'" [citations omitted]); People v. Kaba, 177 A.D.2d 506, 507 (2d Dep't 1991) (same); People v. Bartolomeo, 126 A.D.2d 375, 394-96 (2d Dep't 1987) (same).

Therefore, even if the grand jury had not been informed that all grand jury witnesses, except those who waive immunity, receive immunity from prosecution, the People's failure to give such an instruction to the grand jury would not have been error, let alone an error so serious as to warrant the "exceptional remedy" of the dismissal of an indictment pursuant to the demanding standard of Criminal Procedure Law § 210.35(5).

For all of these reasons, defendant's motion to dismiss the indictment pursuant to C.P.L. § 210.35(5) should be denied.

CONCLUSION

FOR THE FOREGOING REASONS, DEFENDANT'S MOTION TO DISMISS THE INDICTMENT SHOULD BE DENIED.

Dated: Brooklyn, New York
April 29, 2015

Respectfully submitted,

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