



Office of the Bronx District Attorney

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Report of the Investigation Into the Use of Force Against Jahmel Leach

May 18, 2021

Public Integrity Bureau

OVERVIEW OF THE INVESTIGATION

In June of 2020, the Bronx County District Attorney's Office ("BXDA") initiated an investigation into the use of force by members of the New York City Police Department ("NYPD") against Jahmel Leach ("Mr. Leach"). On June 1, 2020, at approximately 9:00 p.m., during protests in the aftermath of the murder of George Floyd, in the vicinity of East Fordham Road and Morris Avenue in the Bronx, after Mr. Leach attempted to light a piece of debris on fire, Police Officer Kevin Hickey tasered Mr. Leach causing him to fall to the ground and sustain injuries to the right side of his face. Approximately two seconds later, while Mr. Leach was still on the ground with both arms underneath him, Police Officer Brendan Latimer struck Mr. Leach one time with a baton to his lower body. Then, less than a second later, Officer Nasser Suddah struck Mr. Leach one time with a baton to his lower body.

As described more fully below, BXDA's review of this incident was comprehensive and included:

1. The review of materials obtained via grand jury subpoena, including medical records¹;
2. Interviews of civilian witnesses, including Mr. Leach;
3. Interviews of the NYPD officers including PO Kevin Hickey, PO Brendan Latimer, PO Nasser Suddah and PO Tyler Hanson;
4. The review of NYPD reports and memo books;
5. The review of relevant NYPD Patrol Guide policies;
6. The review of surveillance video evidence;
7. The review of NYPD body-worn camera video;
8. The review of relevant New York Penal Law Statutes and case law.

Based on the totality of the evidence, BXDA finds insufficient evidence that the force used to arrest and restrain Mr. Leach was excessive or otherwise unjustified. Therefore, BXDA has concluded criminal charges against any of these officers is not warranted.

FACTUAL SUMMARY

In response to the murder of George Floyd many protests took place in each of New York City's five boroughs in the days following May 28, 2020. Despite those protests being predominantly peaceful, violence and looting erupted on June 1, 2020, in the vicinity of East Fordham Road in the Bronx. What follows is a factual summary gleaned from BXDA's review of all available evidence.

¹ Pursuant to CPL § 190.25 certain information obtained and analyzed as part of the Office's investigation has been omitted from this report as required by grand jury secrecy provisions.

On June 1, 2020, at approximately 8:55 p.m., Mr. Leach, a sixteen-year-old male was walking in the vicinity of East Fordham Road and Jerome Avenue.² Mr. Leach walked towards a T-Mobile storefront located at 7 East Fordham Road alongside a group of people.³ Mr. Leach made his way to the front of the group of people who were crowded in front of the T-Mobile storefront, turned his back to the store and began heel-kicking the door.⁴

Mr. Leach and the crowd of people in front of the T-Mobile store dispersed in different directions on East Fordham Road after a marked police car passed by.⁵ Next, Mr. Leach hurried eastbound along East Fordham Road to the intersection at Morris Avenue.⁶ Mr. Leach, along with another individual, referred to by Mr. Leach as “Abdul” (hereinafter “Abdul”) ran into the middle of East Fordham Road.⁷

In the immediate vicinity of where Mr. Leach and Abdul stopped in the roadway, there were large piles of what appeared to be garbage, other debris, and unknown items littered about the street.⁸ Some people in the area continued to throw pieces of debris and other unknown objects into the street near their direction.⁹ As Mr. Leach and Abdul were in the middle of the road, groups of people were traveling on nearby sidewalks, and vehicles passed by them on the other side of the road.¹⁰

Mr. Leach picked up debris off the street and repeatedly sparked a lighter near it.¹¹ While he was attempting to light a fire, three uniformed Police Officers: Hickey, Latimer, and Suddah, of the NYPD 52nd Precinct, were patrolling the East Fordham Road area in an unmarked police vehicle.¹² After observing Mr. Leach for approximately ten seconds, Officer Hickey slowly pulled the vehicle behind him.¹³ As Officer Hickey exited his vehicle, Mr. Leach and Abdul turned in the direction of

² See ARGUS Camera 3.2249 Surveillance at Fordham Road and Jerome Avenue from 6/1/2020 between 8:55 p.m. and 9:02 p.m.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ After being taken into custody, Mr. Leach told Officers Hickey, Suddah, and Latimer that an individual that he referred to as “Abdul” told him to start a fire and was planning on attacking an NYPD precinct. In an interview with the Bronx County District Attorney’s Office, Mr. Leach stated that he knew Abdul from middle school, and that Abdul had attempted to start the fire. BXDA Interview Notes 06/17/2020 : Mr. Leach. See also PO Suddah BWC 21:02:35.

⁸ See ARGUS Camera 3.2249 in vicinity of East Fordham Road and Jerome Avenue from 6/1/2020 between 8:55 p.m. and 9:02 p.m.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² See ARGUS Camera 3.2248 in vicinity of East Fordham Road and Walton Avenue from 6/1/2020 between 8:55 p.m. and 9:02 p.m.

¹³ Id.. See also, PO Hickey BWC at 20:59:09.

the officers and then immediately began to run away in the opposite direction.¹⁴ Officer Hickey deployed his taser, the prongs of which struck Mr. Leach on the left side of his face near his temple and on his left hip.¹⁵ Immediately after Officer Hickey's taser deployment, Mr. Leach fell to the ground and struck the right side of his face on the street.¹⁶

As the unmarked vehicle came to a stop behind Mr. Leach, Officer Latimer exited the rear passenger seat, ran around the front of the vehicle and struck Mr. Leach one time on his lower body with his straight baton.¹⁷ Meanwhile, Officer Suddah exited the front passenger seat, ran around the front of the vehicle and struck Mr. Leach one time on his lower body with his straight baton.¹⁸ Based on our review of available video footage, we have determined that the baton strikes from Officers Latimer and then Suddah occurred within less than one second of each other and within approximately two seconds of PO Hickey's taser deployment.¹⁹ By the time either officer got to Mr. Leach, he was laying face-down on the ground with his arms underneath him as a result of the taser deployment.²⁰

Officer Latimer restrained Mr. Leach on the ground by positioning himself over the back of Mr. Leach's body while holding his left arm.²¹ Approximately ten other officers in riot gear who were already in the immediate area ran over to Officers Hickey, Latimer, and Suddah.²² Police Officer Kacper Boho²³ secured Mr. Leach's hands with flex cuffs.²⁴

Mr. Leach was then taken to the 52nd Precinct arriving just after 9:00 p.m., and was transported to St. Barnabas Hospital for treatment of the cuts, bruises and swelling he suffered to his face at approximately 9:56 p.m.²⁵ At approximately 10:30 p.m., medical staff at St. Barnabas learned that Mr. Leach was a minor and notified his mother.²⁶ Mr. Leach's mother, Ms. Daisy Acevedo, arrived at St. Barnabas at approximately 11:00 p.m.²⁷

¹⁴ Id.

¹⁵ BXDA Interview 06/17/2020: Mr. Leach.

¹⁶ ARGUS Camera 3.2248 from 6/1/2020 between 8:55 p.m. and 9:02 p.m. *See also*, PO Hickey BWC at 20:59:10

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ PO Hickey BWC at 20:59:29

²² PO Hickey BWC at 20:59:29

²³ PO Boho's date of appointment to the NYPD was 01/07/2015

²⁴ PO Hickey BWC at 21:00:11

²⁵ BXDA Interview Notes 07/08/2020: PO Tyler Hanson; *See also* PO Hanson's electronic Memo book entry reflected that he was the officer that took Mr. Leach to the hospital and that they left the precinct at 9:56 p.m..

²⁶ BXDA Interview Notes: Mr. Leach and Daisy Acevedo 06/17/20. *See also*, "I demand justice": Bronx mom who says her 16-year-old son was brutalized by cops during George Floyd protest pleads for answers" *The New York Post* The New York Post 11 June 2020, <https://www.nydailynews.com/new-york/ny-jahmel-leach-police-brutality-nypd-bronx-da-probe-20200611-tiynxqy7lnf3len4rjuu7wogxm-story.html>

²⁷ BXDA Interview 06/17/2020: Mr. Leach and Daisy Acevedo

BXDA INTERVIEWS WITH OFFICERS

BXDA conducted interviews of the subject Officers Hickey, Latimer, and Suddah. Additionally, BXDA interviewed Police Officer Tyler Hanson who escorted Mr. Leach to the hospital. Each officer provided a narrative of the incident from their perspectives. What follows is a summary of all the officers' versions of events as conveyed to BXDA as well as information gleaned from our review of relevant video footage.

Officer Hickey joined the NYPD on July 8, 2015, and has been with the NYPD 52nd Precinct for his entire career. On June 1, 2020, prior to the instant incident with Mr. Leach, Officer Hickey had observed fires, burglarized storefronts, and rioting in the vicinity of East Fordham Road.²⁸ In the immediate vicinity of Mr. Leach, East Fordham Road was littered with what appeared to be garbage, debris, and other unknown items. According to Officer Hickey, he observed Mr. Leach pouring what appeared to be an accelerant on the items in the middle of East Fordham Road and observed him make multiple attempts to ignite a fire.²⁹ Officer Hickey further stated that, based on his observations of Mr. Leach, he perceived there to be a “threat” to the safety of himself, his fellow officers, and the public.³⁰ Officer Hickey informed BXDA that he activated his body worn camera as soon as he saw Mr. Leach sparking what he believed to be a lighter and concluded that he was going to subdue and arrest Mr. Leach.³¹ A review of Officer Hickey’s body worn camera shows that at 8:59:07 p.m., while still operating the unmarked police vehicle, he unholstered his taser and held it in his right hand.³² Officer Hickey stated that he observed Mr. Leach make multiple attempts to start a fire. At 8:59:16 p.m., Officer Hickey exited his vehicle from the driver’s seat and deployed his taser towards Mr. Leach.³³ The taser functioned properly and both of the prongs spread out in a V-shaped pattern in the direction of Mr. Leach; one of the prongs struck him on the left side of his face near his temple and the other struck him on his left hip. Officer Hickey stated that he observed Mr. Leach fall to the ground on his face and arms.³⁴ Officer Hickey also told BXDA that after Mr. Leach fell to the ground, he was unable to see his hands because Mr. Leach was keeping them under his body.³⁵ When BXDA

²⁸ BXDA Interview Notes 07/08/2020: PO Hickey

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Officer Hickey activated his body worn camera at 8:58:55 p.m. See PO Hickey BWC

³³ PO Hickey BWC

³⁴ BXDA Interview Notes 07/08/2020: PO Hickey

³⁵ Id.

inquired as to whether he searched for, or found, either the accelerant or the source of the flame, Officer Hickey responded that he did not find anything, but noted that there was debris covering the ground.³⁶ Officer Hickey stated that he did submit a Threat, Resistance, or Injury (hereinafter “T.R.I.”) report following this incident.³⁷

Officer Latimer has been an NYPD police officer since January 10, 2018 and has been with the NYPD 52nd Precinct for his entire career. On the night of June 1, 2020, Officer Latimer remembered receiving a radio run that other officers were getting “airmail,” or items thrown at them, from protestors in the vicinity of East Fordham Road.³⁸ He also remembered seeing “fire and broken glass” in the area.³⁹ Officer Latimer stated that he observed Mr. Leach and another individual standing over a large pile of debris and trying to light what he believed to be a fire.⁴⁰ Officer Latimer stated “we all decided to make an arrest of the individuals lighting a fire,” although he acknowledged that the officers did not discuss how they would make said arrest while all of the officers were observing Leach from their vehicle.⁴¹ Upon exiting the vehicle, he observed Mr. Leach trip on the ground and believed that Mr. Leach was concealing, underneath his body, the object that he had been trying to light moments earlier.⁴² Officer Latimer explained that he was unaware that Mr. Leach had been tased by Officer Hickey.⁴³ Officer Latimer further explained that during the brief period of time between when the officers first observed Mr. Leach to be sparking what they believed to be a lighter, his focus was exclusively on Mr. Leach and he was not aware of what the other officers were doing until after Mr. Leach had been tasered, struck with the batons, and taken into custody.⁴⁴ Officer Latimer used the term “tunnel vision” to describe his mindset during the course of the incident.⁴⁵ Officer Latimer stated that he approached Mr. Leach and struck him one time to the back of his body with his straight baton.⁴⁶ A review of surveillance video shows that at approximately 8:59 p.m., Officer Latimer physically restrained Mr. Leach by positioning himself over his back and body and grabbing his left

³⁶ Id.

³⁷ PO Hickey T.R.I. report (6/1/20 at 9:00 p.m.). NYPD Patrol Guide Sections 221-03 and 221-18 state that uniformed members of service must prepare T.R.I. incident reports for any use of force against subjects, as well as for incidents in which injuries are sustained to any person in connection with police action.

³⁸ BXDA Interview Notes 07/08/2020: PO Latimer

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ BXDA Interview Notes 07/08/2020: PO Latimer; *See also* ARGUS Camera Surveillance at Fordham Road and Walton Avenue

arm.⁴⁷ Officer Latimer conceded that he did not recover anything of evidentiary value from Mr. Leach's person, or from the immediate area around where he fell.⁴⁸ Officer Latimer stated that he did not realize that Officer Hickey had tased Mr. Leach until he saw the taser prong embedded on the left side of Mr. Leach's face.⁴⁹ Officer Latimer admitted that he did not file a T.R.I report following this incident.

Officer Suddah has been an NYPD police officer since July 8, 2015 and has been with the NYPD 52nd Precinct for his entire career. He recalled that the evening of June 1, 2020, was "unlike any other" and described that based on his observations of the activity on Fordham Road, he believed that he was in "the most danger that [he] had ever been in."⁵⁰ Officer Suddah remembered that earlier on June 1, 2020, he had observed hundreds of people throwing projectiles and yelling profanities at police on Fordham Road. According to Officer Suddah, as the unmarked vehicle approached Mr. Leach from behind, he observed Mr. Leach standing with another individual.⁵¹ As recounted to BXDA, while still seated in the front passenger side of the unmarked vehicle, Officer Suddah could see Mr. Leach with his elbows up and arms moving as if he was manipulating something in his hands.⁵² Officer Suddah added that he observed the glow of a flame emanating from the front of Mr. Leach's body, which caused him to believe that Mr. Leach could have been preparing a Molotov cocktail.⁵³ He further added that the Molotov cocktail incident from Brooklyn the previous night caused him to be concerned that Mr. Leach was attempting to do something similar.⁵⁴ According to Officer Suddah, the perception that Jamel Leach was participating in criminal activity, specifically arson, was also informed by Officer Suddah's hearing a bystander warning Mr. Leach to run as the officers approached him.⁵⁵ Officer Suddah stated that, upon exiting the front passenger seat of his vehicle, he observed Mr. Leach trip over debris and land on his hands and arms.⁵⁶ Officer Suddah admitted that

⁴⁷ See ARGUS Camera 3.2448 from 6/1/2020 between 8:55 p.m. and 9:02 p.m.; see also PO Hickey BWC 20:59:28

⁴⁸ BXDA Interview Notes 07/08/2020: PO Latimer

⁴⁹ Id.

⁵⁰ BXDA Interview Notes 07/08/2020: PO Suddah

⁵¹ BXDA Interview Notes 07/08/2020: PO Suddah; See also, ARGUS Camera 3.2448 from 6/1/2020 between 8:55 p.m. and 9:02 p.m

⁵² Id.

⁵³ Id.

⁵⁴ 2 Lawyers, Upstate Woman with Criminal History Charged in NYPD Firebombings, NBC News NYC, May 31, 2020, <https://www.nbcnewyork.com/news/local/upstate-ny-woman-behind-molotov-cocktail-attack-on-nypd-officers-2-others-federally-charged/2440200/>

⁵⁵ Id.

⁵⁶ BXDA Interview Notes 07/08/2020: PO Suddah; See also, ARGUS Camera 3.2448 from 6/1/2020 between 8:55 p.m. and 9:02 p.m.

he struck Mr. Leach one time with a straight baton on the back of his right leg.⁵⁷ As explained by Officer Suddah, this was done in order to get Mr. Leach to remove his arms from underneath his body because the officer believed that Mr. Leach may have still been concealing whatever it was that he was trying to light.⁵⁸ Officer Suddah conceded that he did not find anything in Mr. Leach's hands once they were removed from underneath his body, and further stated that he did not search the ground near where Mr. Leach had fallen.⁵⁹ Officer Suddah told BXDA that he only became aware that Mr. Leach had been tased when he observed Officer Hickey insert a new cartridge into his taser shortly after Officer Suddah finished striking Mr. Leach with his baton.⁶⁰ As with Officer Latimer, Officer Suddah stated that he became focused only on Mr. Leach after seeing him ignite what appeared to be a lighter and that he was no longer aware of the actions that his fellow officers were taking or had taken to restrain Mr. Leach, and that he therefore saw neither Officer Hickey's use of his taser nor Officer Latimer's baton strike. Also as with Officer Latimer, Officer Suddah used the term "tunnel vision" to describe his mindset during the incident. Officer Latimer asserted that this "tunnel vision" prevented him from observing both Officer Hickey's use of his taser and Officer Latimer's baton strike. Officer Suddah admitted that he did not file a T.R.I. report following this incident.

At approximately 9:00 p.m., Mr. Leach was placed in flex-cuffs by another responding officer.⁶¹ At approximately 9:02 p.m., Mr. Leach was placed inside of the unmarked police vehicle and was transported to the NYPD 52nd Precinct by Police Officers Hickey, Latimer, and Suddah, arriving at 9:06 p.m.⁶² BXDA also interviewed Police Officer Tyler Hanson of the NYPD 52nd Precinct, with the NYPD since October 24, 2018. Per Officer Hanson, Mr. Leach left the precinct at approximately 9:56 p.m., wherein he was transported to St. Barnabas Hospital by ambulance, escorted by Police Officers Tyler Hanson and Jael Perez of the NYPD 52nd Precinct.⁶³ Officers Hanson and Perez were merely escort officers, and did not make any notifications to the family of Mr. Leach.⁶⁴

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ P.O Hickey BWC 21:00:11

⁶² PO Hickey and Suddah BWC 21:02:20

⁶³ PO Hanson Memo Book 06/01/2020. *See also*, BXDA Interview Notes 07/08/2020: PO Hanson.

⁶⁴ Id. *See also*, BXDA Interview Notes: Mr. Leach and Daisy Acevedo 06/17/20. *See also*, "I demand justice': Bronx mom who says her 16-year-old son was brutalized by cops during George Floyd protest pleads for answers" *The New York Post* The New York Post 11 June 2020, <https://www.nydailynews.com/new-york/ny-jahmel-leach-police-brutality-nypd-bronx-da-probe-20200611-tiynxqy7lnf3len4rjuu7wogxm-story.html>

BXDA INTERVIEW WITH JAHMEL LEACH

Mr. Leach met with members of BXDA on June 17, 2020. Also present for the meeting was his attorney, Mr. Sanford Rubenstein, community leader Reverend Kevin McCall, his mother, Ms. Daisy Acevedo, and his cousin, Mr. Yamil Miller.

As conveyed by Mr. Leach, on June 1, 2020, he was on his way home after hanging out with a group of friends at Capsule NYC, a men's clothing shop located at 14 West Fordham Road. As he was leaving Capsule NYC to go to his father's house, he encountered a different group of friends and acquaintances who were participating in the protests related to the murder of George Floyd. Mr. Leach stated that the second group of friends pressured him to go to the T-Mobile store. Mr. Leach added that he observed many of his friends attempting to damage the T-Mobile storefront. When confronted, Mr. Leach denied that he participated in any looting, rioting, or destruction of property, and then specifically denied that he attempted to damage or enter the T-Mobile store on East Fordham Road.

After the group failed to get inside of T-Mobile, Mr. Leach and his friends moved eastbound on East Fordham Road. It was at this time that Mr. Leach stated that his friend from middle school, Abdul, pressured him to go into the middle of East Fordham Road with him. Mr. Leach insisted that he did not intend to light anything on fire and that Abdul picked up trash off the street and handed it to him. According to Mr. Leach, Abdul pulled a purple lighter from somewhere on his person, and then attempted to light the debris Mr. Leach was holding.⁶⁵ Mr. Leach stated that Abdul gave him the lighter, and Mr. Leach flicked it one time.⁶⁶ Mr. Leach maintained that he felt like he could not say no to Abdul.

Mr. Leach stated that he did not remember being tasered by the police, being struck by any officers, or being transported to the NYPD 52nd Precinct. As stated by Mr. Leach, his first memory after being on East Fordham Road was inside the 52nd Precinct telling members of the NYPD that he was sixteen years old. Mr. Leach was treated for the abrasion to the right side of his face and for the trauma he sustained to his head and teeth from striking the ground. Mr. Leach stated that he did not have any visible injury or pain to his legs or lower body aside from where the taser prong struck his left hip.⁶⁷

⁶⁵ BXDA Interview 06/17/2020: Mr. Leach

⁶⁶ Id.

⁶⁷ Id.

In addition to interviewing Mr. Leach, BXDA also had an opportunity to speak to Ms. Daisy Acevedo and Mr. Yamil Miller, Mr. Leach's cousin. They stated that they joined Mr. Leach at the hospital sometime after 10:30 p.m., after being notified by employees of St. Barnabas Hospital that Mr. Leach was being treated there. On June 2, 2020, Mr. Miller, notified prosecutors of this incident.⁶⁸

LEGAL ANALYSIS

In this incident, three separate and distinct uses of force were made by Officers Hickey, Latimer, and Suddah. What follows is BXDA's legal analysis of each use of force.

PO Hickey's Use of His Taser

The following represents BXDA's analysis as to the criminality, or liability, of Officer Hickey's use of his taser in effectuating the arrest of Mr. Leach and our conclusion that criminal charges are not supported in this case.

A review of the NYPD Patrol Guide provides guidance on the parameters for uses of force by members of the NYPD. The NYPD Patrol Guide contains provisions for the use of force generally⁶⁹ and the use of tasers specifically. With regards to the latter, Section 221-08 of the NYPD Patrol Guide permits police officers to use their tasers to subdue a subject when warranted given "the totality of the circumstances" including the "immediacy of the perceived threat" and the "presence of a hostile crowd." The same Patrol Guide Section states that officers should only use their tasers against "persons who are actively resisting, exhibiting active aggression, or to prevent individuals from physically harming themselves or other person(s) actually present."

When considering the viability of criminal charges, we must consider not only potential criminal charges, but also viable defenses to any such charges. Article 35 of the New York State Penal Law sets forth the specifics of the defense of justification. As applicable to the actions of Officer Hickey, New York State Penal Law Section 35.30 states: "A police officer or peace officer, in the course of effecting or attempting to effect an arrest...of a person whom he or she reasonably believes

⁶⁸ BXDA was forwarded an e-mail from the King's County District Attorney's Office sent by Yamil Miller regarding the incident involving Mr. Leach.

⁶⁹ NYPD Patrol Guide Section 221-01: Force Guidelines. Provides that "[f]orce may be used when it is reasonable to ensure the safety of a member of service or a third person," with reasonableness being determined based on the totality of the circumstances, and "viewed from the perspective of a member with similar training and experience." The Force Guidelines also provide eleven factors to consider in determining whether a use of force was reasonable, including the "[i]mmediacy of the perceived threat."

to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest.” Additionally, Penal Law Section 35.30(1)(a)(ii) expressly permits an officer to use force, including lethal force, to effect an arrest or prevent an attempt of escape from custody of a person whom he or she reasonably believes to have committed or attempted an arson.

Federal and New York State Courts have found that the use of a taser, in and of itself, is not lethal force. See *People v. Patterson*, 115 A.D.3d 1174, 1175 (4th Dept. 2014) (use of a taser is “non-lethal force”); *Buckley v. Haddock*, 292 F. App’x. 791, 795 (11th Cir. 2008) (unpublished opinion) (use of a taser is “at most moderate, non-lethal force”); *Negron v. City of New York*, 976 F. Supp. 2d 360, 367 (E.D.N.Y. 2013) (“the likelihood of sustaining serious, permanent injuries from a taser is relatively low”); *United States v. Fore* No. 06-5518 F3d 412 (6th Cir. 2007) (a taser is a “non-lethal weapon that emits an electrical charge to incapacitate a subject.”).

In analyzing whether Officer Hickey’s use of non-lethal force was justified, BXDA must first determine whether he had the subjective belief that Mr. Leach was committing or attempting to commit a crime, and that his use of physical force was necessary to effect Leach’s arrest, to prevent his escape, or in defense of self or others from what Officer Hickey reasonably believed to be the imminent use of physical force. Earlier that evening, Officer Hickey had observed other fires, burglarized storefronts, and rioting in the vicinity of East Fordham Road.⁷⁰ ARGUS video surveillance and Officer Hickey’s body worn camera show Mr. Leach attempting to ignite large pieces of debris that he had picked up from a larger debris pile on the street, consistent with Officer Hickey’s account. Mr. Leach himself admitted that at one point, he did in fact possess Abdul’s lighter and did attempt flick it one time.⁷¹ Additionally, the video surveillance shows that upon turning in the direction of the officers, Mr. Leach attempted to flee. Officer Hickey stated that, based on his observations of Mr. Leach, he perceived there to be a “threat” to the safety of himself, his fellow officers, and the public.⁷² Indeed, he observed (and the videos from that night depict) that East Fordham Road was littered with potentially flammable debris, in close proximity to vehicles, buildings, and other people. Furthermore, based upon all of the facts gleaned during the course of this investigation, there is nothing that negates Officer Hickey’s perception that Mr. Leach was attempting to start a fire, such a

⁷⁰ BXDA Interview Notes: PO Hickey 07/08/20

⁷¹ BXDA Interview Notes: Mr. Leach 06/17/20

⁷² BXDA Interview Notes: PO Hickey 07/08/20

fire posed an immediate “threat” to the general public in the immediate vicinity, and that Mr. Leach was attempting to flee.

Taking Officer Hickey’s version of events from the perspective of a reasonable officer faced with the same circumstances, when he responded to East Fordham Road that night, he claimed to be in the midst of an extremely hostile crowd that was actively throwing debris into the road. As previously stated, there were also numerous piles of debris and unknown objects strewn about East Fordham Road that night. Upon observing Mr. Leach holding what appeared to be a lit flame and attempting to light an unknown object on fire, Officer Hickey had probable cause to believe that Mr. Leach was in the process of committing arson. These facts permitted Officer Hickey to arrest Mr. Leach, and to use non-deadly physical force, if necessary.⁷³ Mr. Leach began to run away from officers, leading Officer Hickey to believe that he was attempting to escape.⁷⁴ Again, Penal Law Section 35.30(1)(a)(ii) expressly permits an officer to use physical force to the extent he reasonably believes such force is necessary to effect an arrest or prevent an attempt of escape from custody of a person whom he or she reasonably believes to have committed an offense, such as arson. As noted above, the Patrol Guide permits officers to use their tasers to subdue a subject given “the totality of the circumstances” including the “immediacy of the perceived threat” and the “presence of a hostile crowd.” According to the Patrol Guide Section 221-08, “Members should use a CEW⁷⁵ for one standard cycle (five seconds) while constantly assessing the situation to determine if subsequent cycles are necessary.” The “Health Report” for the taser assigned to PO Hickey (Serial # 13004ATZ), indicates that on June 1, 2020 at 9:01:14 p.m., when Officer Hickey discharged his taser at Mr. Leach, he did so for a single cycle lasting five seconds. As such, Officer Hickey took actions that, considering the totality of the circumstances, were within the bounds of conduct permitted by the New York Penal Law and the NYPD Patrol Guide.

Officer Hickey’s observations of Mr. Leach gave him the reasonable belief that Mr. Leach was actively attempting to light a large debris pile on fire (on the roadway nearby passing vehicles and

⁷³ Penal Law § 35.30(1) specifically permits an officer to use physical force (when and to the extent the officer believes it necessary) to effect an arrest or prevent escape when the officer reasonably believes the individual has committed or attempted to commit the crime of arson or another offense, or in defense of self or others from the imminent use of physical force. Penal Law § 35.30(1)(a)(ii) also permits the use of lethal force under such a scenario when the offense being committed or attempted is “kidnapping, arson, escape in the first degree, [or] burglary in the first degree.”

⁷⁴ Officer Hickey’s belief that Mr. Leach was attempting to flee is corroborated by ARGUS Camera Surveillance at Fordham Road and Walton Avenue, showing Mr. Leach attempting to run away from the officers when they exited their vehicle.

⁷⁵ Conducted Electrical Weapon, *see* NYPD Patrol Guide Procedure No. 22-108 (https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg221-08-use-of-conducted-energy-weapons.pdf)

copious other potentially flammable items, and in the midst of numerous other individuals) and then attempted to evade arrest. Officer Hickey's use of his taser was objectively reasonable considering the instructions and guidelines provided in the New York State Penal Law and NYPD Patrol Guide. Moreover, given the totality of the circumstances, the use of less than lethal force to effectuate the arrest, prevent escape, and prevent harm to the officers and public was reasonable. Ultimately, it is the defense of justification, which the People would be obligated to disprove beyond a reasonable doubt, that is determinative and precludes the People from bringing charges against Officer Hickey. BXDA's analysis of the evidence and law leads us to conclude that disproving such a defense would be unsuccessful.

Officers Latimer and Suddah's Respective Baton Strikes

The following represents BXDA's analysis as to the viability of a successful prosecution against PO Latimer and PO Suddah for their respective uses of force against Mr. Leach. First BXDA examined what if any criminal charges would be applicable. Second, BXDA considered any possible defenses the officers would have.

The Elements of Assault

If the baton strikes by Officers Latimer and Suddah are criminal in nature, then the applicable Penal Law statutes would be § 120.00(1) and § 120.05(2), respectively third-degree Assault and second-degree Assault.

To be guilty of Assault in the Third Degree, a person must be found to have acted with the intent to cause physical injury to another person and, in doing so, caused physical injury to that person. Penal Law § 120.00(1). To be guilty of Assault in the Second Degree, a person must have acted with intent to cause physical injury to a person and, in doing so, caused physical injury to that person by means of a "deadly weapon or dangerous instrument."⁷⁶ Penal Law § 120.05(2). Importantly, both statutes require that the actor engaged in conduct with the *intent to cause the injury*. *Id.* (emphasis added). "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."⁷⁷ In

⁷⁶ A baton, such as the type of baton used against Mr. Leach, is a deadly weapon or dangerous instrument as defined in Penal Law § 10.00(11) and § 10.00(12).

⁷⁷ See NY Penal Law § 15.05(1).

determining one's intent, one may consider the person's conduct and all of the circumstances surrounding that conduct, including, but not limited to, the following: what, if anything, did the person do or say; what result, if any, followed the person's conduct; and was that result the natural, necessary and probable consequence of that conduct.⁷⁸ Additionally, a person is guilty of attempt to commit a crime when, "with intent to commit a crime, he or she engages in conduct which tends to effect the commission of such crime."⁷⁹ Intent is an "invisible operation of [the] mind," where direct evidence is rarely available (in the absence of an admission) and is unnecessary where there is legally sufficient circumstantial evidence of intent (*see People v. Rodriguez*, 17 N.Y.3d 486 [2011] [citing *People v. Bracey*, 41 N.Y.2d 296 (1977)]). Furthermore, "intent can also be inferred from the defendant's conduct and the surrounding circumstances," and by looking at the "natural consequences" of the defendant's actions. *See Bracey*, N.Y.2d at 301.

For one to be found criminally liable for either Assault in the Third Degree or Second Degree, the actor must have also caused injury to a person, that is "impairment of physical condition or substantial pain."⁸⁰ The definition is meant to exclude "petty slaps, shoves, kicks, and the like." *Matter of Phillip A.*, 49 N.Y.2d 198, 200 (1980). The "physical injury" element has been satisfied by evidence of injuries consisting of things such as swelling, bruising and pain that made it difficult for the victim to sleep or eat as the result of facial punches, *People v. Mullings*, 105 A.D.3d 407, 408 (1st Dept. 2013), a bleeding and broken fingernail from a bite delivered in the course of a robbery, that resulted in "moderate pain," *People v. Chiddick*, 8 N.Y.3d 445, 447 (2007), and a gunshot wound causing a laceration, even though the witness denied suffering from pain. *People v. Rojas*, 61 N.Y.2d 726, 727 (1984) (substantial pain can be inferred from gunshot wound resulting in 1.5-inch laceration because it is the type of injury that would cause an ordinary person pain).

In determining whether the People have demonstrated evidence of "impairment of physical condition or substantial pain," to establish physical injury, the Courts have held that "there is an objective level ... below which the question is one of law." *See People v. Oquendo*, 134 A.D.2d 203, (1st Dept. 1987) (citing *Matter of Philip A.*, 49 N.Y.2d 198 (1980)). Thus, it has been held that such minor injuries as a one centimeter cut above the lip, *People v. Jimenez*, 55 N.Y.2d 895 (1982), superficial scratches, *People v. Rutenbur*, 112 A.D.2d 13 (4th Dept. 1985), small abrasions *People v. Contreras*, 108 A.D.2d 627 (1st Dept. 1985), and redness with some degree of pain, *Matter of Philip A.*, *supra*, do not

⁷⁸ *See* NY Criminal Jury Instructions on Intent (<https://www.nycourts.gov/judges/cji/1-General/CJI2d.Intent.pdf>)

⁷⁹ *See* NY Criminal Jury Instructions on Attempt (<https://www.nycourts.gov/judges/cji/2-PenalLaw/110/110.pdf>); *see also* NY Penal Law § 110.00.

⁸⁰ *See* NY Penal Law § 10.00(9).

constitute “substantial pain” within the meaning of New York Penal Law § 10.00(9). *See also People v. McDowell*, 28 N.Y.2d 373, 375 (1971) (evidence of a blackened eye, without any development of its appearance, seriousness, swelling, or any suggestion of pain is insufficient to qualify as a “physical injury”); *People v. Rios*, 142 A.D.3d 28 (1st Dept. 2016) (injury consisting of slight redness to victim’s neck and hands, without lacerations or abrasions or any testimony on the subjective level of pain was insufficient to establish “physical injury”); *In re Jose B.*, 47 A.D.3d 461 (1st Dept. 2008) (where hospital records established only minor soft tissue damage, treatment with Motrin, and no bruising or reduction in range of motion, evidence that victim was punched multiple times, sought treatment at a hospital, and testified that he experienced pain for multiple days was legally insufficient to support element of physical injury).

Officer Latimer’s Baton Strike

According to Officer Latimer, he observed Mr. Leach standing over a pile of debris attempting to light something on fire. Officer Latimer maintained that he struck Mr. Leach with his baton to disarm Mr. Leach, and to gain control over whatever object he believed Mr. Leach was concealing. As previously stated, according to Officer Latimer, he was unaware Mr. Leach had been tased by Officer Hickey.

When BXDA interviewed Mr. Leach approximately two weeks after the incident, he definitively stated that he had never had any injuries to his lower body at the time of the incident or in the days and weeks following with the exception of marks left on his face and left hip by the taser prongs. In addition to having no observable injuries on his lower body as a result of being struck with the batons, Mr. Leach stated that he does not recall anything after being tased and never felt any pain in his lower body at the time of the incident or in the following days and weeks.⁸¹

Officer Suddah’s Baton Strike

According to Officer Suddah, he observed Mr. Leach standing with his elbows up and arms moving as if he was manipulating something in his hands. He further stated that he observed the glow of a flame emanating from the front of Mr. Leach’s body, causing him to believe that Mr. Leach could have been preparing a Molotov cocktail. After exiting his vehicle, Officer Suddah maintained that he struck Mr. Leach on his lower body with his baton to gain compliance, so that he could disarm him,

⁸¹ BXDA Interview 06/17/2020: Mr. Leach

gain control of him, and ultimately arrest him for arson. He asserts that he believed Mr. Leach had tripped and did not know that Officer Hickey had deployed a taser. Officer Suddah also maintains that he did not see Officer Latimer strike Mr. Leach with a baton less than a second before Officer Suddah did the same, and cited explicitly to how quickly events were unfolding and his “tunnel vision” caused by the perceived threat of arson that centered his focus only on Mr. Leach.

As previously stated, Mr. Leach stated that he never had any injuries to his lower body at the time of the incident or in the days and weeks following. In addition to having no observable injuries, Mr. Leach stated that does not recall anything after being tased and he never felt any pain in his lower body at the time of the incident or in the following days and weeks. Mr. Leach stated that the injuries he sustained from his encounter with the police on June 1, 2020, were limited to the injuries he sustained from being tased and subsequently falling to the ground on his face.

BXDA's Findings as to Possible Assault Charges

Upon a review of all of the evidence in this case, BXDA has been unable to find any evidence that Mr. Leach suffered a “physical injury” to his lower body as a result of Officers Suddah and Latimer’s baton strikes. According to Mr. Leach, he did not have any pain to his lower body or any observable marks (other than those related to the taser prongs). Each injury that Mr. Leach has described is associated with the taser (taser marks on his left leg, taser marks to the left side of his face, and abrasions to the right side of his face caused by his fall to the pavement). Mr. Leach has no recollection of the baton strikes and cannot provide any testimony of suffering subjective pain or incurring damage that would be expected—objectively—to cause physical injury or impairment of physical condition (to compensate for the absence of evidence on subjective pain). Both officers struck Mr. Leach one time about his lower body and stated that the intent behind their actions was to disarm or otherwise prevent Mr. Leach from igniting whatever object they believed that he may still have had in his hand, and to ultimately place him under arrest and take him into custody. Given that their strikes did not leave any trace of their occurrence, and lacking any evidence to the contrary, BXDA can only conclude that the two officers did not use enough force to injure Mr. Leach with their baton strikes. Since appellate courts have reversed convictions as being legally insufficient where more evidence of injury had been presented than that which is available here, *see, e.g., McDowell*, 28 N.Y.2d at 375; *Rios*, 142 A.D.3d 28; *In re Jose B.*, 47 A.D.3d 461, it leads to the conclusion that the People would not be able to meet their burden of proof on the physical injury element of assault.

Although Officers Latimer and Suddah both intended to strike Mr. Leach with their batons, they articulated that their specific intent in striking Mr. Leach was to prevent him from continuing to commit the crime of arson.⁸² Thus, they have not provided evidence that their internal mind set was to intentionally cause physical injury. As previously stated, however, in determining one's intent, one may consider the person's conduct and all of the circumstances surrounding that conduct, including what was the natural consequence of said conduct.⁸³ Thus, if an injury is the natural consequence of engaging in a particular behavior, it is permissible to infer that the person who engaged in that behavior intended to cause that injury. It is fair to say that an unrestrained strike with a baton would be expected to result in substantial pain. Presumably, even if the officers had used more than a minimal level of force in their strikes, it likely would have left some mark or been accompanied by some discernable level of pain. That Mr. Leach did not have any marks or pain whatsoever leads to the conclusion that the officers limited the force exerted through their batons. A restrained, single strike with a baton is not necessarily the type of action that would naturally be expected to cause "substantial pain or impairment of physical condition" within the meaning of the Penal Law. Thus, engaging in that conduct does not necessarily support the inference that the actor intended to cause "physical injury." Under the circumstances, BXDA would not be able to prove beyond a reasonable doubt that either Officer Suddah or Officer Latimer, neither of whom did not render a blow strong enough to result in any perceptible injury, acted with the necessary intent to cause "physical injury" in order to satisfy the *mens rea* element of the relevant Penal Law sections. Accordingly, there is no sustainable charge of assault against either Officer Suddah or Officer Latimer as there is no evidence that they acted with the intent required by Penal Law § 120.00(1) and § 120.05(2) or that they caused or attempted to cause "physical injury."

Justification Defense

Even if there were sufficient evidence that Officer Suddah and Officer Latimer intended to and caused or attempted to cause physical injury to Mr. Leach, the People would still have the burden to disprove the defense of justification beyond a reasonable doubt.

New York State Penal Law Section 35.30 states: "A police officer or peace officer, in the course of effecting or attempting to effect an arrest or attempting to prevent the escape from custody, of a person whom he or she reasonably believes to have committed an offense, may use physical force

⁸² See Penal Law § 35.30(1)(a)(ii).

⁸³ See NY Criminal Jury Instructions on Intent (<https://www.nycourts.gov/judges/cji/1-General/CJI2d.Intent.pdf>)

when and to the extent he or she reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody.” Additionally, Penal Law Section 35.30(1)(a)(ii) expressly permits an officer to use the level of force the officer reasonably believes is necessary, including deadly physical force, to effect an arrest or prevent an escape from custody of a person whom he or she reasonably believes to have committed arson. The defense requires the following circumstances:⁸⁴ First, the officer must actually believe that the individual is committing or attempting to commit arson, and that their use of physical force is necessary to effect the individual’s arrest or prevent his/her escape. Second, a reasonable officer in the subject officer’s position, knowing what the officer knows and being in the same circumstances, would also hold those beliefs.⁸⁵ See also *Plumbhoff v. Rickard*, 572 U.S. 765 (2014) (use of force not unreasonable to prevent escape); *Scott v. Harris*, 550 U.S. 372 (2007) (same).

Penal Law § 35.30(1) also permits an officer who is in the course of effecting or attempting to effect an arrest or to prevent an escape to “use physical force when and to the extent he or she reasonably believes such to be necessary in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force.” In order for this portion of the justification defense to be successful against an assault charge, Officers Latimer and Suddah must have been operating under a reasonable belief that Mr. Leach’s actions placed the officers or members of the public-at-large at risk of imminent harm at the time that each officer used force against Mr. Leach. See *People v. Colecchia*, 251 A.D.2d 5 (1st Dept. 1998) (right to use force terminates when there is no longer a reasonable belief that the assailant poses a threat of harm); *People v. Del-Debbio*, 244 A.D.2d 195 (1st Dept. 1997) (each shot must be justified); see also *Plumbhoff v. Rickard*, 572 U.S. at 777 (if officer is justified in using force against a suspect to end a threat to public safety, the officer need not stop using force until the threat has ended). In determining whether the officers’ conduct is reasonable, his/her actions must be judged from the perspective “of a reasonable officer on scene, rather than in light of 20/20 hindsight.” *Graham v. Connor*, 490 U.S. at 396. Further, the evaluation must “allo[w] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 396-97.

⁸⁴ See *People v. Goetz*, 68 NY2d 96 (1986).

⁸⁵ See generally NY Criminal Jury Instructions on Justification: Use of Deadly Physical Force to Prevent Arson Penal Law 35.20 (1) and (2) (<https://www.nycourts.gov/judges/cji/1-General/cjigc.shtml>).

Justification Analysis of Officer Latimer's Use of Force

In assessing whether Officer Latimer's use of force was justified, BXDA must first assess whether he subjectively believed Mr. Leach was committing a crime. As previously stated, Officer Latimer described June 1, 2020, as a difficult tour; he recalled receiving radio runs that other officers were getting "airmail,"⁸⁶ and personally observed "fire and broken glass" in the vicinity of East Fordham Road, as well as debris strewn throughout the road and a large boisterous crowd both in the street on the sidewalks surrounding the East Fordham Road.⁸⁷ Officer Latimer stated that he observed Mr. Leach standing over a large pile of debris and trying to light what he believed to be a fire.⁸⁸ BXDA does not have any evidence to disprove that this was Officer Latimer's subjective belief beyond a reasonable doubt. On the contrary, the evidence tends to corroborate his subjective beliefs. Mr. Leach himself admitted that just before he was tased, he was attempting to spark a lighter near the debris.⁸⁹ Additionally, surveillance video shows Mr. Leach picking debris off the street and repeatedly sparking what appears to be a lighter near it.⁹⁰

The next question is whether Officer Latimer believed force was necessary to effect an arrest or to protect others, and whether that was objectively reasonable. Since each use of force must be justified, Officer Latimer's use of force must be viewed in the context of the events, which includes Officer Hickey's tasing of Mr. Leach approximately two seconds before Officer Latimer's baton strike. According to Officer Latimer, at the time of the baton strike he was unaware that Mr. Leach had been tased by Officer Hickey.⁹¹ Instead, Officer Hickey believed that Mr. Leach had tripped on the items in the street in his haste to flee and was continuing to conceal his hands and the item he had been attempting to set aflame under his body.⁹² The video surveillance does not disprove Officer Latimer's contention. Mr. Leach is seen turning and starting to move in a direction away from the police after the police exit their vehicle, and then falling in such a way that his hands land underneath his body. It also depicts a considerable amount of debris and items in the vicinity which he could have tripped on. Furthermore, beyond the prongs, which were now positioned underneath Mr. Leach's body, there was no readily observable physical evidence that would have indicated to Officer

⁸⁶ "Airmail" is a police term for objects and debris being thrown at officers typically from above.

⁸⁷ BXDA Interview Notes 07/08/2020: PO Latimer

⁸⁸ Id.

⁸⁹ BXDA Interview 06/17/2020: Mr. Leach

⁹⁰ See ARGUS Camera 3.2249 in vicinity of East Fordham Road and Jerome Avenue from 6/1/2020 between 8:55 p.m. and 9:02 p.m.

⁹¹ BXDA Interview Notes 07/08/2020: PO Latimer

⁹² Id.

Latimer that Mr. Leach had already been tased. Moreover, according to Officer Hickey, the officers did not discuss how they would effectuate Mr. Leach's arrest in advance,⁹³ thus Officer Latimer was not on notice that Officer Hickey planned to use his taser. Additionally, the video establishes that Officer Latimer was in the process of exiting the passenger side of the police vehicle and running around it at the point that Officer Hickey (who was positioned in between the vehicle and open driver's seat door with his back towards Officer Latimer) deployed the taser.

Officer Latimer further stated that his use of force was for the purpose of preventing what he believed was an imminent act of arson.⁹⁴ According to Officer Latimer, he believed Mr. Leach still possessed the items that he had been using to start a fire. Mr. Leach's arms were under his body, and his body was positioned in such a way that his arms were not displayed where Officer Latimer could see them, nor was he in a position that indicated he was submitting to the arrest. Moreover, the use of force consisted of a single baton strike to the lower body (which did not result in any discernible injuries⁹⁵), quickly followed by Officer Latimer restraining Mr. Leach on the ground by positioning himself over the back of Mr. Leach's body while holding his left arm.⁹⁶ As this was occurring, the roadway was littered with items that could be set aflame, and numerous bystanders (both pedestrians and those in motor vehicles) were close to the danger.

In analyzing Officer Latimer's baton strike against Mr. Leach, it is important to consider the timeframe in which this incident occurred. Based on Officer Hickey's statement to BXDA that he activated his body worn camera immediately upon observing Mr. Leach holding what appeared to be a lighter, BXDA has been able to determine the timeframe in which the entire incident unfolded using the timestamp of that body worn camera. That timestamp shows that the incident began at 8:58:55pm, which the officers first observed Mr. Leach to be striking what appeared to be a lighter; by 8:59:20pm, the officers had tased Mr. Leach and struck him twice with batons. Officer Hickey brought the car to a stop and tased Mr. Leach at 8:59:16pm. Based upon the body worn camera footage and ARGUS footage, BXDA has determined that even before the car came to a complete stop Officer Latimer was already beginning to exit the vehicle and was moving towards Mr. Leach. Officer Suddah then exited within seconds of Officer Latimer and also began moving towards Mr. Leach. When Officer Hickey deployed his taser at 8:59:16pm, Officer Latimer had already begun to position his body to strike Mr. Leach and struck him within two seconds of Mr. Leach falling to the ground. Considering the

⁹³ Id.

⁹⁴ BXDA Interview Notes 07/08/2020: PO Latimer

⁹⁵ BXDA Interview 06/17/2020: Mr. Leach

⁹⁶ PO Hickey BWC at 20:59:29

extremely fast-moving nature of events and the window of seconds between Officer Hickey's tasing of Mr. Leach and Officer Latimer's baton strike, and further considering Officer Latimer's own admission that he had "tunnel vision," BXDA is unable to conclude that Officer Latimer had time to confer with Officer Hickey or even fully consider the rapidly unfolding events around him to determine that his use of force was no longer necessary. This conclusion is supported by the fact that Officer Latimer stated that his focus was exclusively on Mr. Leach and that, as a result of that narrowed focus, he did not see Officer Hickey pull out his taser or even realize that Officer Hickey had tased Mr. Leach until he saw the one of the taser's prong above Mr. Leach's eye once they had placed him in custody and they were all back in the vehicle. Under these circumstances, there is no evidence to disprove beyond a reasonable doubt that Officer Latimer personally believed a single strike of the baton was necessary to effectuate the arrest and/or to protect the safety of all those nearby from the imminent threat of an arson.

Moreover, based on the totality of the circumstances, the People would be unable to disprove beyond a reasonable doubt that Officer Latimer's belief that force was necessary to stop Mr. Leach was objectively reasonable. An officer in Officer Latimer's position responding to the disruption on Fordham Road likely would have believed that Mr. Leach was attempting to light a fire and would have concluded that the many items littering the road provided more than sufficient kindle to place the numerous people nearby (officers and civilians, pedestrians and motorists) in imminent harm's way. Further, that Mr. Leach still had his hands under his body after he went to the ground likely would result in a reasonable officer believing that the threat persisted and needed to be resolved quickly. Thus, delivering a single blow to the lower body with limited force (such that it did not result in an injury) would be considered an effective method to immediately distract the suspect (thereby ceasing further manipulation of the items in his hands), and acquire control of the suspect without further incident. The option of engaging in a hand-to-hand struggle instead could have led to a prolonged interaction that also may have resulted in injuries (to the suspect, the officers, or others nearby) and would not necessarily be effective at containing the source of fire.

Justification Analysis of Officer Suddah's Use of Force

In assessing whether Officer Suddah's use of force was justified, BXDA must first assess whether he subjectively believed Mr. Leach was committing a crime. As previously stated, Officer Suddah recalled that the evening of June 1, 2020, was "unlike any other" and based on his observations of the activity on Fordham Road, he believed that he was in "the most danger that [he] had ever been

in.”⁹⁷ Officer Suddah recounted that earlier that day, he had personally observed groups of people throwing projectiles at police on Fordham Road.⁹⁸ He further added that the Molotov cocktail incident from Brooklyn the previous night caused him to be concerned that something similar could happen on East Fordham Road.⁹⁹ Officer Suddah stated that he could see Mr. Leach with his elbows up and arms moving as if he was manipulating something in his hands.¹⁰⁰ Officer Suddah added that as he observed Mr. Leach, he could see the glow of a flame emanating from the front of Mr. Leach’s body, which caused him to believe that Mr. Leach could have been preparing a Molotov cocktail.¹⁰¹ Additionally, Officer Suddah heard a bystander warning Mr. Leach to run as the officers approached him.¹⁰² BXDA does not have any evidence to disprove that Officer Suddah subjectively believed that Mr. Leach was committing a crime. Again, the evidence available to BXDA tends to corroborate his subjective beliefs. Mr. Leach stated that he had possession of Abdul’s purple lighter and was attempting to spark it.¹⁰³ Additionally, surveillance video appears shows Mr. Leach picking debris off the street and repeatedly sparking what appears to be a lighter near it.¹⁰⁴

As with Officer Latimer, the next query is whether Officer Suddah subjectively believed force was necessary to detain Mr. Leach or to protect others, and whether that assessment was objectively reasonable. Officer Suddah’s single baton strike was less than three seconds after Officer Hickey deployed his taser and less than a second after Officer Latimer struck Mr. Leach. According to Officer Suddah, he was unaware of either of those events. In his interview with this office, Officer Suddah stated that, upon exiting the front passenger seat of his vehicle, he observed Mr. Leach trip over debris and land on his hands and arms. He contends he only became aware that Mr. Leach had been tased when he observed Officer Hickey insert a new cartridge into his taser immediately following his own baton strike against Mr. Leach.¹⁰⁵

As previously stated, the extremely short timeframe in which this incident unfolded must be taken into account when considering each officer’s use of force against Mr. Leach.¹⁰⁶ Again, using the

⁹⁷ BXDA Interview Notes 07/08/2020: PO Suddah

⁹⁸ Id.

⁹⁹ 2 Lawyers, Upstate Woman with Criminal History Charged in NYPD Firebombings, NBC News NYC, May 31, 2020, <https://www.nbcnewyork.com/news/local/upstate-ny-woman-behind-molotov-cocktail-attack-on-nypd-officers-2-others-federally-charged/2440200/>

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ BXDA Interview 06/17/2020: Mr. Leach

¹⁰⁴ See ARGUS Camera 3.2249 in vicinity of East Fordham Road and Jerome Avenue from 6/1/2020 between 8:55 p.m. and 9:02 p.m.

¹⁰⁵ BXDA Interview Notes 07/08/2020: PO Suddah

¹⁰⁶ See *supra* at 19.

timestamp on Officer Hickey's body worn camera, BXDA has determined that Officer Hickey's tase occurs at 8:59:16pm and both Officers Latimer and Suddah's baton strikes occurred within a four second window following that initial use of force. Specifically, Officer Latimer strikes Mr. Leach with his baton two seconds after Officer Latimer's use of his taser and Officer Suddah strikes Mr. Leach with his baton less than one second after Officer Latimer's baton strike. Officer Latimer is the first to exit the vehicle and does so before it even comes to a complete stop, and Officer Suddah begins exiting immediately after Officer Latimer. Officer Suddah, just like Officer Latimer, is moving along the passenger's side and around the front of the vehicle and moving towards Mr. Leach before Officer Hickey (who is wedged between the driver's seat and ajar driver's side door) deploys his taser, causing Mr. Leach to fall to the ground. According to Officer Suddah, he was unaware of the taser's deployment as his focus was trained exclusively on Mr. Leach and the perceived threat he posed and not his fellow officers. Given that Officer Suddah was in the midst of clearing the police vehicle on the opposite side of Officer Hickey and Mr. Leach and running towards Mr. Leach, as well as what would have been an obstructed view had he looked in Officer Hickey's direction, we would not be able to establish that Officer Suddah saw Officer Hickey deploy the taser. Nor is there any evidence that the officers discussed the planned use of a taser either while in the car or in the seconds before Officer Suddah struck Mr. Leach with a baton. Finally, since the deployment of a taser is not accompanied by the emission of a large noise or eye-catching visual, and the projectiles are fairly small, we would not be able to prove that Officer Suddah should have been aware of its use that night in the midst of a quickly unfolding situation. Officer Suddah also maintains that his "tunnel vision" on Mr. Leach during the rapidly evolving encounter caused him not to realize Officer Latimer struck Mr. Leach with a baton less than a second before Officer Suddah did the same. Considering these physical factors within the extremely narrow time frame of action, his assertion of what he was able to perceive in a tense moment is not one that can readily be disproven. Indeed, the People have no evidence that could establish what Officer Suddah was actually aware of beyond a reasonable doubt.

Furthermore, in evaluating a use of force that occurs within a few second's timespan, the mere physical momentum of the officers becomes a factor. By the time Officer Latimer struck Mr. Leach with his baton, Officer Suddah had already begun to turn his body and generally position his body to strike Mr. Leach. Effectively, Officer Suddah was taking the physical steps necessary to strike Mr. Leach with his baton before Officer Latimer even completed his own baton strike. The momentum behind Officer Suddah's baton strike, therefore, had begun even before Officer Latimer's baton strike had concluded. Thus, even assuming Officer Suddah were aware of Officer Latimer's actions, we

would not be able to prove beyond a reasonable doubt that less than one second was enough time for him to process that information, re-evaluate the situation, and halt his own response that was already in motion. Nor could we establish that Officer Suddah must have concluded in that split-second that his own use of force was no longer necessary to quell the threat. After all, at the point Officer Suddah struck Mr. Leach, Mr. Leach's hands remained under his body and not visible to Officer Suddah.

Under these circumstances, there is no evidence to disprove beyond a reasonable doubt that Officer Suddah personally believed a single strike of the baton to the lower body (which did not produce any injury) was necessary to effectuate the arrest and/or to protect the safety of all those nearby from the imminent threat of an arson.

Finally, in light of the totality of the circumstances, for all of the reasons addressed in evaluating the objective reasonableness of Officer Latimer's belief that force was required, the People also would be unable to disprove beyond a reasonable doubt that Officer Suddah's belief that force was necessary to stop Mr. Leach was objectively reasonable.

CONCLUSION

BXDA has concluded its thorough investigation into the force used to effect Mr. Leach's arrest and determined that it did not violate the New York Penal Law. Therefore, there are no viable charges to be brought against officers Hickey, Latimer, or Suddah.

Video of the incident can be viewed here: <https://youtu.be/ISly-LJGvUI>