POLICE DEPARTMENT

February 27, 2019

In the Matter of the Charges and Specifications	:	Case Nos.
- against -	:	
Deputy Inspector Jesse Lance Tax Registry No. 923789 Police Service Area 2	:	2017-17623
Lieutenant Omar Birchwood Tax Registry No. 945512 Narcotics Borough Brooklyn North	:	2017-17622

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

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB: Jonathan Fogel, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For Respondent Lance: Louis La Pietra, Esq.
La Pietra & Krieger, PC
30 Glenn Street- Suite 105
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For Respondent Birchwood: Marissa Gillespie, Esq.
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233 Broadway Suite 2340
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To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2017-17623

1. Deputy Inspector Jesse Lance, on or about January 1, 2017, at approximately 0030 hours, while assigned to PSA 2 and on duty, in the vicinity [redacted], Kings County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he entered [redacted] without sufficient legal authority.
   P.G. 203-10, Page 1, Paragraph 5 Public Contact - Prohibited Conduct

2. Deputy Inspector Jesse Lance, on or about January 1, 2017, at approximately 0030 hours, while assigned to PSA 2 and on duty, in the vicinity of [redacted] Kings County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he searched [redacted] without sufficient legal authority.
   P.G. 203-10, Page 1, Paragraph 5 Public Contact - Prohibited Conduct

Disciplinary Case No. 2017-17622

1. Lieutenant Omar Birchwood, on or about January 1, 2017, at approximately 0030 hours, while assigned to PA UPTU and on duty, in the vicinity of [redacted] Kings County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he entered [redacted] without sufficient legal authority.
   P.G. 203-10, Page 1, Paragraph 5 Public Contact - Prohibited Conduct

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on December 3 and 4 2018. Respondents, through their counsels, entered pleas of Not Guilty to the subject charges. The CCRB called Person A as a witness. Respondents testified on their own behalves. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having carefully reviewed all testimony and evidence in this matter, I find Respondents Not Guilty of the charged misconduct.

ANALYSIS

The following is a summary of the facts which are not in dispute. On January 1, 2017, at approximately 0024 hours, the ShotSpotter system[1] sent an alert regarding three gunshots in the vicinity of [redacted] Street (Court Exhibit 1). Respondent Birchwood, who was then the Anti-Crime Sergeant for PSA-2, responded to the location with Police Officers Jaffe and Frit (T. 106). As they approached the location, Respondent Birchwood observed that [redacted] Street, a New York City Housing Authority building, was located directly across the street from the address in the ShotSpotter alert (*Id.*).

Respondent Birchwood observed three males standing in the lobby of [redacted] Street; the males were looking at a mobile phone and appeared to be "excited" (T. 107, 108). As he approached the door to the building, Respondent Birchwood observed one of the males, wearing a green jacket, appear to be "fixing something" in his waistband (T. 108-109, 139). As the police officers opened the door to the lobby, two of the males fled into [redacted] which was located on the [redacted] floor; the other male fled in the opposite direction but was eventually detained by Respondent Birchwood, then released (T. 109-110). Respondent Birchwood then walked to the door of [redacted] where he met Police Officers Frit and Jaffe (T. 110). The two males who had fled into the apartment eventually stepped out of the apartment and into the hallway; both men professed to have been drinking and claimed that they had fled to avoid being

[1] The parties agree that "ShotSpotter" is a system utilized by this Department. This investigative asset captures audio data through the use of sensors positioned at various locations in New York City. The raw data is processed using a mathematical algorithm, then reviewed by an analyst. Should the analyst form the belief that the data supports an inference that a firearm was discharged, an alert is sent to this Department for further investigation. The alerts are visible by any MOS possessing a Department smartphone.

summonsed for the public consumption of alcohol (T. 110-111). Respondent Birchwood took no further action and left the building (T. 111).

At the time of the ShotSpotter alert, Respondent Lance, the Commanding Officer of PSA-2, was in the Langston Hughes Houses responding to another shooting (T. 176). A stray round had apparently entered a [redacted] floor apartment through an air conditioner and struck an adult who was holding a child (*Id.*, 259). While he was waiting at the scene for the Detective Squad to arrive, his operator, Police Officer Jenkins, apprised him that: (1) there had been a ShotSpotter alert for [redacted] Street; (2) Lieutenant Raimo, the PSA-2 Special Operations lieutenant, had called her regarding the alert; and (3) Lieutenant Raimo had requested that Respondent Lance respond to the location (T. 178, 183-184). Once the Detective Squad personnel arrived at the Langston Hughes houses, Respondent Lance proceeded to [redacted] Street (T. 178). As he traveled to the location, Respondent Lance had a telephone conversation with Lieutenant Raimo, who advised him that he was on another line with Sergeant Jetti, the PSA-2 Field Intelligence Officer (T. 184).

When Respondent Lance arrived at [redacted] Street, he met Lieutenant Raimo and Respondent Birchwood, as well as Police Officers Epps and Suero (T. 187-188). Lieutenant Raimo advised him that two to three people, whom he believed to have been connected with the ShotSpotter alert, were inside [redacted] (T. 188). Lieutenant Raimo also advised Respondent Lance of a conversation he had with Sergeant Jetti, in which Jetti advised that: (1) a confidential informant had told him that additional shots had been fired by two men subsequent to police officers, who investigated the same two men running into [redacted] approximately 25 minutes earlier, departing the building; (2) the two men who fired the subsequent shots fled back into [redacted] and (3) there were still firearms inside the apartment (T. 189, 191). Respondent Lance was also aware that there had previously been a police-involved shooting

inside the apartment which resulted in the death of an individual on New Year's Eve 14 years earlier (T. 208). Respondent Lance then spoke with Respondent Birchwood, who briefed him on his earlier encounter inside the lobby and his discussions with the men who had left [redacted]

[redacted]

At approximately 0030 hours, both Respondents went to [redacted] and knocked on the door. Person A, the lessee, opened the apartment door and had an extensive discussion with Respondent Birchwood, which Respondent Lance eventually joined. Approximately 48 minutes, 45 seconds of the discussion with Respondents were captured on a video recording which was admitted into evidence as CCRB Exhibit 1. The following is a summary of the events depicted on the video:

00:00	Respondents Lance and Birchwood are standing in hallway with the apartment door open. Multiple individuals are standing inside the apartment holding their cell phones and recording the police officers.
00:25	Video is obstructed by an individual stepping in front. Respondent Birchwood says, "Everybody's got to go."
01:11	Unidentified male says, "Hey, I'm leaving but I want to make sure my family's safe, there's kids in here." Unidentified female says, "We don't feel safe because of you," pointing at Respondents. "We've come out before; go get a warrant."
01:44	Apartment door closes over and Respondent Birchwood says, "Don't do that." Unidentified female says that Respondent Birchwood's foot is preventing the door from closing.
02:15	Person A asked Respondents, "Why do you have your feet in my door?" Respondent Birchwood responds, "Because we're not done here." "We're freezing your apartment."
03:54	Unidentified female replies, "You have your foot in an apartment that you don't have a warrant for."
05:01	Respondent Birchwood says, "You're yelling at me...are we going to talk and have a conversation?"
05:59	Respondent Lance approaches apartment door and engages in conversation with unidentified female.
06:09	Unidentified female says, "Ain't no children in the house." Respondents reply, "We just saw them."

06:29	Respondent Lance says, "What I want is the information on the children in the house." Unidentified female responds, "You don't need to know that. Get ACS here."
06:44	Respondent Lance asks, "Do you have a JD after your name?"
09:10	Respondent Birchwood says, "Pull up the Patrol Guide."
09:22	Respondent Birchwood says, "This is public housing." Unidentified female responds, "Right…but you're inside of an apartment door."
09:27	Apartment door starts to close and Respondent Birchwood reaches his arms out to prevent the door closing while saying. "Do not!" A struggle to keep the door open ensues.
09:32	Screen goes dark and a man can be heard yelling "There are fucking kids in here! Chill the fuck out!"
09:43	Respondents and other officers enter the apartment.
10:23	Respondent Lance, while inside the apartment, says "I want to see the children that live here," while others in the apartment repeatedly ask "Where is the warrant?"
11:43	Female officer enters what appears to be the living room and female bystanders begin asking for the female officer to take off her uniform and fight them and using profanity.
12:00	Respondents and other officers inside the apartment stand around. Video footage shows two officers standing in the living room. Two more officers are standing in the apartment doorway. Respondent Lance and another officer speak to Person A near the kitchen.
22:00	Unidentified Police Officer is seen filling out a Domestic Incident Report next to Respondent Lance, who is talking to Person A tells adults in the
24:33	kitchen and living room area, "Come get your kids."
	Respondent Lance steps further into the hallway, going out of view of the
25:04	video.
	Unidentified female says, "Ya'll just want to search this."
26:40	Person A says, "Everybody give [the police] your name and leave my
28:29	house."
	Person A says, "I don't even care if you search."
31:07	

At issue in this case is: (1) whether Respondents entered the premises without sufficient legal authority; and (2) whether Respondent Lance searched the premises without sufficient legal authority. The following is a summary of the relevant trial testimony.

1. Person A

Person A testified that she has lived in [redacted]. [redacted] since 1982 (T. 34). On December 31, 2016, Person A held a gathering at her apartment to

memorialize her [redacted] who died in 2003[2] (T. 36). Person A testified that there were "quite a few" persons present and described the mood of the gathering as festive, as far as she could discern from her bedroom (T. 37, 58). Person A testified that she was watching television in her bedroom with three of her grandchildren, two of whom were 9 and 10 years old, when someone inside the apartment came to her room and informed her that police were at her door (T. 38, 59, 92-93).

Person A testified that when she went to her door and asked the police officers what was going on, Respondent Birchwood informed her that there had been a shooting outside and that the police had been told that those responsible for the shooting had run into her apartment (T. 38-39). Person A denied that anyone had run into her apartment (T. 38). She conceded on cross-examination that she heard eight gunshots in rapid succession at about the stroke of midnight, but denied that the gunshots frightened her (T. 79, 82). According to Person A, Respondent Birchwood then expressed his desire to enter the apartment to search for the person who ran into her apartment, but she told him that he could not because he did not have a warrant (T. 39-40, 41, 48). Respondent Lance was present as Person A and Respondent Birchwood had this exchange (T. 41-42; CCRB Ex. 1, 0:13). When Person A told Respondent Birchwood that he would need a warrant, he replied that unless she permitted him to search her apartment, he would call ACS[3] (T. 42). Person A repeated that the officers would have to obtain a warrant before she would allow them inside the apartment (T. 43).

According to Person A, she and Respondent Birchwood continued their exchange for approximately 30 minutes, during which another person inside the apartment began recording the encounter (T. 43). She conceded on cross-examination that the interior of the apartment was

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[2] Ms. Person A asserted that her [redacted] was killed in a police-involved shooting of which Respondent Lance was aware.

[3] Administration for Children's Services.

poorly lit during her conversation at the apartment door (T. 65). During her discussion with Respondents, [redacted] who was wearing an ankle bracelet, yelled, "Yo, chill the fuck out, man. there's kids in here" (T. 67). There then came a point where Person A said, "Enough is enough, you do not have a warrant," and attempted to close the apartment door; Respondent Birchwood placed his foot in the doorway and pushed back against the door until he pushed it open and entered the apartment (T. 43). According to Person A. approximately five police officers then entered the apartment, illuminating the living room area with flashlights (T. 44).

Person A testified that Respondent Lance. who had also entered the apartment, then told her that everyone in the apartment was going to "get ACS cases" if she did not permit the police to search it (T. 44, 88). She agreed that she interpreted that statement as a threat (T. 89, 91). After the police had been in her apartment for approximately 30 minutes, Respondent Lance then asked her whether there were children on the premises: Person A affirmed that there were and brought them from her bedroom to the vestibule near the kitchen (T. 45-46). Person A later admitted on cross-examination that Respondent Lance did not raise the issue of an ACS case until after the children had been produced (T. 92). Person A asserted that Respondent Lance only asked her to see the children on one occasion (T. 69). According to Person A. Respondent Lance also said, "Once we get this information. we're going to leave" (T. 70). When she brought them out. the police asked for their names and ages. as they appeared to fill out some paperwork (T. 46). Person A claimed that even after the officers completed their paperwork, they remained in her apartment for another 30 minutes discussing a possible ACS case with her (T. 86-87).

Person A asserted that the police eventually left her apartment after approximately 1-2 hours (*Id.*, 71). Person A denied that she ever granted Respondents consent to enter or search

her apartment (T. 52). She acquiesced that the police never searched her bedroom, nor any other room in the apartment, and did not go through any drawers (T. 78-79, 83-84). The police officers who entered the apartment spent most of their time standing around without moving any objects or conducting visual searches with their flashlights under furniture (T. 84). Finally, Person A denied ever smelling the scent of marihuana inside her apartment that evening (T. 96-97).*2. Lieutenant Omar Birchwood*

Respondent Birchwood testified that five to ten minutes after he left [redacted] for the first time, he received a communication from Lieutenant Raimo, his immediate supervisor that evening (T. 111). In this communication, Lieutenant Raimo advised him that Sergeant Jetti, the PSA-2 Field Intelligence Officer, had been contacted by a confidential informant; the informant told Sergeant Jetti that police had just chased two men into [redacted] Street, [redacted] (*Id.*). According to the informant, the two men fired two shots after the police left the apartment and left two firearms inside it (*Id.*). Lieutenant Raimo directed Respondent Birchwood to return to the location and advised that he would contact the Commanding Officer (T. 113). Lieutenant Raimo further directed that upon their arrival, they would attempt to obtain consent for a search of [redacted] (*Id.*).

Respondent Birchwood testified that it only took him "a couple of minutes" to return to [redacted] Street, where he met Lieutenant Raimo, Respondent Lance, Sergeant Turner, and several other police officers (T. 113). Respondent Birchwood waited for additional officers to arrive, then knocked on the door to [redacted] approximately 30 minutes after he left the first time; when the door was opened, he asked to speak with the leaseholder (T. 113-114, 136). Shortly thereafter, Person A came to the apartment door (T. 114). Respondent Birchwood explained to Person A his purpose for being at the apartment and requested her consent to enter and search for weapons; Person A declined to grant consent, offering the rationale that she had

young children inside (*Id.*, 137). Once Respondent Birchwood was able to look through the open doorway into [redacted] he observed a number of people on the premises, including two of the males he had chased earlier that morning (*Id.*). He further observed that people were drinking and noticed the smell of marihuana (*Id.*).

Respondent Birchwood continued his efforts to obtain consent to enter and search from Person A, a portion of which was captured on the video recording in evidence (CCRB Ex. 1). Respondent Birchwood eventually abandoned his request for consent and said, "All right, well—just bring the children to the door so we [can] make sure they are okay, and we will be on our way" (T. 115, 116). Person A, as well as an unidentified Black male and an unidentified Hispanic female, stated that they would not bring the children to the door (T. 115-118). Respondent Birchwood testified that he repeatedly asked for the children to be brought to the door for another 15-20 minutes (T. 117). He stated that during this period, the occupants of the apartment were aggressively yelling at him and using profanity (*Id.*). According to Respondent Birchwood, the only illumination in the apartment came from the kitchen light (*Id.*).

The unidentified Black male eventually tried to push the apartment door closed (T. 118). Respondent Birchwood said, "Don't do that," then pushed back against the door, causing it to swing open into the apartment (*Id.*, 138). As the door opened, Respondent Birchwood testified that he fell forward into the apartment, after which the other police officers entered (*Id.*). He then demanded that the adults in the apartment, "Bring the children here right now" (*Id.*). At the time he made this demand, Respondent Birchwood was standing near the doorway to the kitchen (T. 119, 121). After approximately 10 minutes, Person A brought two children to the hallway near the kitchen (T. 117, 120). During this 10 minute period, the occupants of the apartment were shouting at the police officers (T. 119). Once a police officer completed a Domestic

Incident Report, Respondent Birchwood and his fellow police officers left the apartment (T. 119).

Respondent Birchwood explained that his reasons for demanding the production of the children were: (1) his observation of drinking and possible use of marihuana on the premises; (2) the information relayed in the ShotSpotter alert; (3) his belief that persons unknown had run into the apartment carrying firearms; and (4) the informant's assertion that firearms were inside the apartment after he and his fellow officers had left it the first time (T. 120). Based upon "the totality of the circumstances," Respondent Birchwood believed that he needed to ensure the well-being of any children inside the apartment (*Id.*, 158).

Respondent Birchwood conceded on cross-examination that he prevented the apartment door from being closed and that he had neither the consent of the lessee nor a search warrant at the time he entered [redacted] (T. 128-29, 154). He considered applying for a search warrant and spoke to a supervisor on the scene but took no further steps in that regard (*Id.*). Respondent Birchwood acquiesced that at the point he requested to see the children in the apartment, he did not believe he possessed probable cause to search for firearms inside the apartment (T. 163). Respondent Birchwood testified that the tip from the informant, as relayed to him by Lieutenant Raimo, did not contain any information about who was carrying the firearms; what type of firearms were possessed; where in the apartment the firearms might be found; or the basis of the informant's knowledge (T. 133-134). Respondent Birchwood conceded further that he could not state definitively that the smell of marihuana came directly from [redacted] as the building generally has that scent (T. 141). While he was inside [redacted] he did not see any blood, any injured parties, or hear any children screaming (T. 141-142).

3. Deputy Inspector Jesse Lance

When Respondent Lance first approached the door of [redacted] he observed that Respondent Birchwood was in conversation with someone inside the apartment (T. 194-195). During the conversation, he heard one of the occupants mention small children being inside the apartment (T. 195). Upon hearing this assertion, Respondent Lance then asked the occupants of the apartment to bring the children out so that he could ensure their safety (T. 195-196). From his vantage point, Respondent Lance could see that there were more than 10 people inside the darkened apartment, but did not see a male wearing a green jacket (T. 196, 230). While he was at the apartment door standing next to Respondent Birchwood, Respondent Lance recalled a mention of guns before the discussion turned to the presence of children inside the apartment (T. 197). He explained to the occupants of the apartment that he was concerned for the children's safety because of the "shots fired" call at that location, the smell of marihuana and the ankle bracelet[4] being worn by a male at the apartment door (T. 198, 211, 233). During this conversation, which continued for approximately 10 minutes, Respondent Lance asked Person A to produce the children (T. 202). After about 10 minutes, the male at the door who was wearing the ankle bracelet said, "There's fucking kids in the apartment," then attempted to push the apartment door closed (T. 203). Respondent Birchwood warned, "Don't do that," and pushed back against the door; he and Respondent Lance pushed the door open and stepped into the apartment (T. 204-205). Respondent Lance estimated that the total amount of time spent at the apartment door was 15-20 minutes (T. 227, 229).

As he entered the apartment, Respondent Lance approached the kitchen area, which was to the left of the living room area (T. 205). In this area, he continued to express his concern

[4] The parties agreed that the ankle bracelet was of the type worn by individuals who are subject to court-monitoring for various reasons.

about the welfare of the children to Person A (*Id.*). During the time that he was speaking to Person A, he gave no orders to search the apartment, its occupants or any closed compartments (T. 206). Respondent Lance testified that he did not believe he had probable cause to search the apartment at that point or to have applied for a search warrant (T. 207, 214-216, 218). Person A eventually brought the children from her bedroom to the kitchen area, where an officer prepared a Domestic Incident Report and some unspecified ACS paperwork (*Id.*). While Respondent Lance and his police officers were inside the apartment, various individuals made threatening statements to them and invited them to take their uniforms off, even making reference to "head shots" (T. 211 212). Respondent Lance saw no marihuana or firearms inside the apartment (T. 231). Respondents and their team remained inside the apartment for approximately 30-45 minutes before departing (T. 235-239).

Respondent Lance conceded that he did not receive a description of the individuals who reportedly fired gunshots and then fled into [redacted] (T. 222-223). He conceded further that while he did not know the confidential informant's basis of knowledge for asserting that the individuals fled into the apartment, the informant was the only source of information for that factual assertion (T. 224). Respondent Lance asserted that the reason he and his team took measured, as opposed to aggressive, action to determine whether the children inside the apartment were safe was the unpredictable environment he perceived inside the apartment: some occupants appeared to be intoxicated and others were making threats toward the police officers (T. 253-254). According to Respondent Lance, a more forceful approach was likely to provoke a belligerent, and possibly violent, reaction from the occupants (*Id.*).

Under questioning from the Tribunal, Respondent Lance asserted that while his initial objective when he went to Apartment 1H was to obtain consent to search it for firearms, he understood that when consent was refused, he had to abandon that objective. As a secondary

concern, he sought to ensure the safety of the children therein, while cognizant that the conditions inside the apartment which caused him to be concerned for the children's safety would likely remain after he and his police officers departed (T. 259-260).

Disciplinary Case No. 2017-17623, Disciplinary Case No. 2017-17622

Entry Without Sufficient Legal Authority

I find that CCRB has failed to meet its burden of proof by a preponderance of the credible, relevant evidence, that Respondents entered [redacted] without legal authority.

"[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not be reasonably crossed without a warrant (*People v. Garvin*, 30 N.Y.3d 174, 180 [2017], *quoting Payton v. New York*, 445 U.S. 573, 590 [1980]). The New York Court of Appeals has "deemed it irrelevant whether [a] defendant . . . stand[s] outside [his] home or . . . 'in the doorway'" and has "upheld a threshold arrest" (*Garvin*, 30 N.Y.3d at 181-182; *see Payton v. New York, supra: but see United States v. Allen*, 813 F.3d 76, 81-82 [2d Cir. 2016]["where law enforcement officers have summoned a suspect to the door of his home, and he remains inside the home's confines, they may not effect a warrantless 'across the threshold' arrest in the absence of exigent circumstances"]).

The Fourth Amendment, however, allows the police to conduct investigations, even if at the threshold of a home. As noted in the following federal cases, "A police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do'" (*Allen*, 813 F.3d at 84 [*citing Kentucky v. King*, 563 U.S. 452, 469 (2011)]). "*Payton* does not hold or suggest that the home is a sanctuary from reasonable police investigation" (*United States v. Gori*, 230 F.3d 44, 51[2d Cir. 2000]).

At issue here is whether a law enforcement officer conducting an investigation who places his foot in the doorway of a dwelling, without actually entering the home, commits an

entry in violation of the *Payton* rule. While the Tribunal was unable to identify any New York cases on point, other jurisdictions have opined that this act is problematic in the context of the Fourth Amendment (*see Lineberger v. Tou-Ber Yang*, 2016 U.S. Dist. LEXIS 140581 [W.D.N.C. 2016][1983 complainant's right to be free from unreasonable searches was violated when. . . "rather than permitting [him] to close the door and terminate the encounter as [he] had the right to do, [officer] plac[ed] his foot in the threshold of the door, [and] entered [the] residence, or at least the curtilage of the residence"]; *Cupello v. State*, 27 N.E.3d 1122 [Ind. Ct. App. 2015]["that constable unlawfully entered [a] dwelling by placing his foot within the threshold of the apartment door without lawful justification"]; *Seidentop v. State*, 337 P.3d 1 [Al. Ct. App. 2014]["The primary question in this appeal is whether the officer acted unlawfully when he stuck his foot across the threshold to prevent [defendant] from closing the front door of the residence. The answer to that question is yes"]).

While Fourth Amendment jurisprudence determining the suppression of evidence provides a guide for the resolution of misconduct such as charged in this case, it is not always dispositive. In order to establish misconduct, CCRB must prove that Respondents entered [redacted] without lawful authority. The undisputed evidence in the record establishes that Respondent Birchwood placed his foot in the doorway at 01:44 on CCRB Ex. 1 and kept it there until 09:43, when he and Respondent Lance entered the apartment. Although Respondent Birchwood may have breached the parameters of the apartment within the meaning of the Fourth Amendment, I find that under these unique facts, his actions were reasonable and in good faith, given the circumstances he faced (*see United States v. Lovelock*, 170 F.3d 339, 343-344 [2d Cir. 1999]["What a citizen is 'assured by the *Fourth Amendment* . . . is not that no government search of his house will occur' in the absence of a warrant . . . 'but that no search will occur that is unreasonable'"][*quoting Illinois v. Rodriguez*, 497 U.S. 177, 183 [1990]).

Respondents had a reasonable belief, based upon the ShotSpotter alert and the information passed onto Sergeant Jetti by one of his registered informants, that a firearm or firearms, which had recently been discharged, were present inside the apartment. Respondent Birchwood, in response to the original ShotSpotter alert, had followed two suspicious individuals to this apartment and let them go. Shortly after Respondent Birchwood left the location, Sergeant Jetti received information from a registered informant, which specified that the two individuals Respondent Birchwood had let go had returned to the apartment and had fired two additional gunshots. Once at the door of the apartment, Respondents observed that the lighting inside the apartment was limited and the occupants were verbally belligerent. Person A did not cooperate with Respondents' attempts to investigate whether or not there were, in fact, firearms on the premises. Her son sought to physically prevent any investigation from continuing by attempting to close the apartment door.

Respondents' desire to ensure that they were not subjected to an inordinate risk of harm as they pursued their investigation at the entrance of the apartment was reasonable; I find that Respondent Birchwood's placement of his foot in the doorway was an attempt to effect that end. Despite the arguable technical violation of the *Payton* rule, CCRB has not established evidence of a bad faith motive or ignorance of available facts which would be considered negligent; such a warrantless entry would not constitute actionable misconduct (*see Disciplinary Cases No. 2015-14067, 2015-14068* [October 20, 2016]).

Accordingly, I find Respondent Lance Not Guilty of Specification 1 in *Disciplinary Case No. 2017-17623*; I further find Respondent Birchwood Not Guilty of Specification 1 in *Disciplinary Case No. 2017-17622*.

Search Without Sufficient Legal Authority

I find that CCRB has failed to meet its burden of proof by a preponderance of the credible, relevant evidence, that Respondent Lance searched [redacted] without legal authority.

Subject to certain limited exceptions, a warrantless search of an individual's home is *per se* unreasonable and hence unconstitutional (*People v. Sanders*, 26 N.Y.3d 773 [2016]; *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 [1971]). One such exception to the warrant requirement is a subset of exigency searches pertaining to emergencies (*Mincey v. Arizona*, 437 US 385, 393 [1978]). "[T]he [Constitution] 'is not a barrier to a police officer seeking to help someone in immediate danger'" (*People v. Molnar*, 98 N.Y.2d 328, 331[2002]). The exception has three requirements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched (*Molnar*, 98 N.Y.2d at 332; *see also United States v. Yancey*, 2007 U.S. Dist. LEXIS 101467 (W.D.N.Y. 2007)(citing Federal exigent circumstances standard set forth in *Minnesota v. Olson*, 495 U.S. 91, 100 [1990]).

There is no dispute that at the time Respondent Birchwood pushed back the apartment door, he did not have a search warrant for the premises. It is also undisputed that Respondents did not have probable cause to believe that there existed at that time an exception to the search warrant requirement, which would have permitted them to conduct a warrantless search of the

apartment for the presence of firearms. Finally, it is undisputed that no attempt to obtain a search warrant was ever initiated by either Respondent.

What Respondents did have, however, was a report of shots fired in close proximity to a specific location, which was corroborated by Person A's concession that she heard the gunshots. Respondents were also aware that a registered informant had asserted that two men, with whom Respondent Birchwood interacted at the apartment after the ShotSpotter alert, had fired additional shots minutes later and were present in that apartment again. Respondents personally observed a poorly-lit apartment in which there were belligerent occupants. Finally, one or two of the occupants declared that there were children in the apartment, then attempted to close the apartment door.

I find that it was reasonable for Respondents to believe that there were children present in an apartment in which firearms, which had been recently discharged, were present. It is noteworthy that Respondent Lance had just left the scene of an innocent bystander in a [redacted] floor apartment being struck by errant gunfire while holding a child in his arms, making it less likely that this was a contrived rationalization for entering the apartment.

I find, therefore, that the above-described circumstances objectively constituted an emergency, which Respondents reasonably believed required action to protect the safety of the children involved, if not to mitigate the threat itself. While Person A was within her rights to deny consent to enter the apartment, her denial, coupled with the attempt to close the apartment door created an untenable obstacle to investigating the status of the children Respondents reasonably believed to be present. In the view of the Tribunal, the act of Respondents pushing the apartment door open and entering it over Person A's objection was not unreasonable under these unique circumstances.

Once Respondents entered the apartment, they conducted what amounted to a protective sweep, taking actions designed only to ensure the safety of persons present (*see Maryland v. Buie*, 494 U.S. 325, 327 [1990]["A 'protective sweep' is a quick and limited search of premises . . . conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person may be hiding"]; *People v Harper*, 100 A.D.3d 772, 774 [2d Dep't 2012]). Despite their belief that weapons were present in the apartment, they neither searched any persons present, nor did they search any drawers or closed containers for any such weapons.

Respondents displayed commendable forbearance in continuing the dialogue with Person A with a view toward having her voluntarily bring the children to them so that they could ensure their well-being, rather than to flood the apartment with police officers and conduct a room by room search, virtually ensuring that a melee would ensue.

As discussed above with respect to Specification 1, even if I were to find that Respondent Lance searched the apartment without legal justification, I further find that CCRB has not established evidence of a bad faith motive or ignorance of available facts which would be considered negligent, such that this limited search would not constitute actionable misconduct (*see Disciplinary Cases No. 2015-14067, 2015-14068* [October 20, 2016])

While CCRB cites the cases of *People v. Mormon*, 100 A.D.3d 782 (2d Dept. 2012) and *People v. Garrett*, 256 A.D.2d 588 (2d Dept. 1998) for the proposition that the emergency exception to the warrant requirement does not apply in this case, both cases may be distinguished on their facts.

In *Mormon*, the police made a warrantless entry into a location of an alleged shooting 45 minutes after their arrival and two hours after the shooting was alleged to have occurred. Their professed rationale for entering the location was to establish the whereabouts of the

complainant's children. In that case, the court found the investigation into the status of the children "minimal," as the investigator did not recall whether the complainant answered his question regarding the location of her children (*Mormon*, 100 A.D.3d at 783). In this case, at least one, or perhaps two, persons inside the apartment declared that there were children inside. Another person claimed that there were no children on the premises. Another person declined to answer a request to see the children, asserting that the police had no need for that information, yet suggested that they call ACS. This array of factual assertions, taken at face value, made it more likely than not that children were, in fact, on the premises.

Similarly, in *Garrett*, the court found that the emergency exception did not apply when the police made a warrantless entry into an apartment utilizing an Emergency Services Unit and the threat of a forcible entry. In that case, the police were acting upon "ambiguous and uncorroborated information relayed by the members of a volunteer association, who were responding to a day-old complaint" of children screaming (*Garrett*, 256 A.D.2d at 589). Here, the police were conducting an investigation at an apartment where shots had been fired nearby less than an hour earlier, as indicated by the ShotSpotter system, and minutes after a second discharge of a firearm was alleged to have taken place, according to an informant.

Based upon the foregoing, I find Respondent Lance Not Guilty of Specification 2 in *Disciplinary Case No. 2017-17623*.

Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED
APR 26 2019
JAMES P. O'NEILL
POLICE COMMISSIONER