INVESTIGATION REPORT AND RECOMMENDATIONS

CITY OF AURORA, COLORADO

Pursuant to a City Council Resolution
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MEMBERS OF THE INDEPENDENT REVIEW PANEL

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TABLE OF CONTENTS

Page

I. REPORT SUMMARY 1

The Decision to Stop Mr. McClain 2

The Decision to Frisk Mr. McClain 3

The Decision to Arrest Mr. McClain by Physically Restraining and Moving Him 3

The Decision to Apply Force in Response to the Threat or Perceived Threat that Mr. McClain Reached for an Officer's Gun 4

The Application of a Second Carotid Hold when Mr. McClain Was on the Ground 5

The Continuous Use of Pain Compliance and the Contrast Between the Officers' Assertions and Mr. McClain's Audible Statement 5

Aurora Fire's Delay in Treating Mr. McClain and Lack of a Transition Plan 6

Aurora Fire's Diagnosis of Excited Delirium and Administration of Ketamine 7

The Aurora Police Department's After-Incident Investigations 7

Key Recommendations 8

II. INVESTIGATION SCOPE AND METHODOLOGY 10

A. Scope of the Investigation 10

B. Other Investigations and Litigation 11

C. Mechanics of the Investigation 12

1. The Panel 12

2. Audio, Video, and Documentary Evidence 13

3. Interviews 14

D. Independence of the Investigation 15

III. EVENTS LEADING TO THE INVESTIGATION 15

IV. INVESTIGATION FACTUAL FINDINGS 17

A. Events of August 24, 2019 18

1. 911 Call 18

2. Dispatching Aurora Police in Response to 911 Call 20

3. Officers Arrive on Scene and Make Contact with Mr. McClain 21

4. Officers Move Mr. McClain onto the Grass and Bring Him to the Ground 28

5. Officers Twice Apply Carotid Control Holds to Mr. McClain in Rapid Succession 33
6. Officers Handcuff Mr. McClain 38
7. Officers Restrain a Handcuffed Mr. McClain and Await Aurora Fire 41
8. Mr. McClain Tells Officers He Cannot Breathe 46
9. Aurora Fire Arrives on Scene 47
10. Aurora Fire Administers Ketamine 56
11. Mr. McClain is Transferred to a Gurney and the Ambulance 58
12. Mr. McClain is Transported to the Hospital 61
B. The Aurora Police Department's Investigation of Mr. McClain's Death 63
1. Investigation by Major Crime/Homicide Unit 63
2. Major Crime/Homicide Unit's Findings 66
3. Review by the Aurora Police Department Force Review Board 68
C. Aurora Fire's Review 70
V. OBSERVATIONS AND RECOMMENDATIONS 70
A. The Police Encounter with Mr. McClain Occurred Against the Broader Context of National and Local Attention to Police Reform 70
B. The Aurora Police Department's Encounter with Elijah McClain 73
1. Force Is Justified if It Is Objectively Reasonable 73
2. Terry Stop and Initial Use of Force Against Mr. McClain 74
3. The Decision to Frisk Mr. McClain 84
4. Force Used to Move Mr. McClain from the Sidewalk 87
5. Force in Response to Assertion that Mr. McClain Reached for an Officer's Gun 91
6. Use of Force Once Mr. McClain Was on the Ground 93
7. Use of Pain Compliance Techniques to Restrain Mr. McClain 97
8. Recommendations 99
9. Use of the Carotid Hold 105
C. Medical Events Following the Arrival of Aurora Fire 106
1. Delays in Clear Transition of Care for Mr. McClain from Aurora Police to Aurora Fire 107
2. Lack of Clear Communication and Possible Information Loss Between Aurora Police and Aurora Fire 108

3. Delays in Assessment by EMTs 110
4. Failure to Obtain Appropriate Equipment 114
5. Inaccurate Estimation of Mr. McClain's Weight.....116
6. Cognitive Errors in Medical Decision Making.....117
7. Updates to Aurora Fire Protocols 122
8. Areas of Commendation 126
9. Additional Recommendations/Future Directions 127
D. Conduct of After-Incident Investigation.....129
VI. AREAS OF CONCERN 134
A. The City Should Assess the Role of Implicit or Unconscious Bias in Policing 134
1. Research on Implicit Bias 135
2. Research on Implicit Bias in Policing and Provision of Medical Care 138
B. Crisis Intervention and Encounters with Persons Perceived to be in Crisis 142
C. Independence and Separate Authority of Medical Personnel 149
D. EMS Use of Ketamine 151
VII. CONCLUSION 152

I. REPORT SUMMARY

At 10:43 P.M. on August 24, 2019, twenty-three-year-old Elijah McClain was approached by Aurora Police officers and told to stop while he was walking home in northwest Aurora. He was wearing a ski mask, a jacket, and long pants. A passerby had called 911 and reported a "suspicious" person who appeared to be walking and waving his arms, but reported seeing no weapons and not being in any fear of harm. Three Aurora Police officers responded. At 11:01 P.M., eighteen minutes after he was first told to stop, Mr. McClain was lifted, unconscious, onto a gurney and then transported to the hospital. He never recovered. Mr. McClain was not armed during the encounter, nor had any suspected crime been reported when Aurora Police officers stopped him that evening.

In July 2020, the City Council of the City of Aurora (the "City Council" and the "City," respectively) commissioned this independent investigation into the actions that occurred before, during and shortly after those eighteen minutes that led to Mr. McClain's death. Our conclusions are contained in this Investigation Report and Recommendations (the "Report"). We examined the 911 call that set the events of that evening in motion, the police response, the ensuing struggle, the application of two "carotid control holds" to Mr. McClain's neck, his struggle to breathe, and the decision to administer a dose of the sedative ketamine to him after he was handcuffed and on the ground. We also examined the police and fire departments' responses to Mr. McClain's death. Based on our review of the events on August 24, 2019, we make several recommendations to the City for changes in the policies and practices of the Aurora Police Department[1] and Aurora Fire Rescue.[2] The recommendations are intended to lessen the chance of another tragedy like this one from happening again. The Report does not attempt to assign legal responsibility for Mr. McClain's death or determine his cause of death. Other investigations and litigation are underway for those purposes.

This Report is the independent work of the three-member panel of policing, constitutional law, and emergency medical experts (referred to in this Report as the "Panel"). The Panel does not represent the family or estate of Mr. McClain, the Aurora Police or Fire departments, the officers or any individuals involved in the incident, or the City. The scope and objectives of the investigation were established by a resolution of the City Council, and funding was provided by the City. The City facilitated the Panel's requests for information, but did not limit or control our investigation, findings, recommendations or the contents of the Report. None of the Panel members had a prior or existing relationship with the City of Aurora, Mr. McClain's family, the Police or Fire Rescue departments, or the officers and other individuals involved. This Report is solely the work of the Panel, aided by its pro bono counsel, Latham & Watkins LLP. No one other than the Panel members and their counsel have reviewed this Report prior to its submission in completed form to the City Council.

As the basis for its findings, the Panel relied on footage from the body worn cameras of the Aurora Police officers who responded to the scene, videotaped statements by the officers, the officers' follow-up reports and handwritten notes from personnel on the scene, the 911 call

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[1] Hereinafter referred to as "Aurora Police" or the "Department," interchangeably.

[2] Hereinafter referred to as "Aurora Fire" or "Aurora EMS," interchangeably.

audiotapes, the computer-aided dispatch ("CAD") records from that night, other departmental reports and summaries of the incident, Aurora Police and Fire policies and training materials, patient care reports, and the coroner's autopsy report. We also interviewed Aurora Police and Aurora Fire personnel. Our requests to interview the officers and fire personnel involved in the incident were declined. A more thorough description of our process and the materials reviewed is contained below.

The following is a summary of the Report.

The Decision to Stop Mr. McClain

At 10:29 P.M. on August 24, 2019, Aurora Police Department 911 dispatchers received a call from an individual who reported seeing a man in a black mask walking southbound on Billings Street. The caller stated that the man "put his arms up" when the caller passed him, and that the man "look[ed] sketchy" and that "[h]e might be a good person or a bad person." The dispatcher asked the caller for a description, and the caller said that he thought the individual was a "Black male" dressed in a black ski mask, brown long-sleeved shirt, and black sweatpants. The caller said that neither he nor anyone else was in danger. Asked whether any weapons were involved or mentioned, the caller said "no." Before hanging up, the caller stated that the man was walking toward a gas station at Billings Street and Colfax Avenue.

At approximately 10:42 P.M., Aurora Police Officer Nathan Woodyard was the first to arrive on Billings Street and make visual contact with Mr. McClain, who was dressed as described by the 911 caller. Mr. McClain could be seen with a phone in one hand, a bag in the other, and earbuds in his ears. After parking across the street from Mr. McClain, who was walking northbound toward his home, Officer Woodyard stepped out of his vehicle, quickly began approaching Mr. McClain, and ordered him to "stop." Within ten seconds of exiting his patrol car, Officer Woodyard placed his hands on Mr. McClain. Mr. McClain had no observable weapon and had not displayed violent or threatening behavior. No crime had been reported. The officers later said they stopped Mr. McClain because he was overdressed and wearing a mask, in an area one officer referred to as "high crime," and a caller had reported his unusual behavior.

To justify an investigatory stop (known as a *Terry* stop), an officer must have "reasonable, objective grounds" and an "articulable" or "reasonable suspicion of criminal activity," and the stop must rely on "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." In interviews with the Aurora Police Department's Major Crime/Homicide Unit ("Major Crime") investigators, none of the officers articulated a crime that they thought Mr. McClain had committed, was committing, or was about to commit. They provided the following reasons, none of which under the prevailing case law is sufficient to establish reasonable suspicion: Mr. McClain was acting "suspicious," was wearing a mask and waving his arms, and he was in an area with a "high crime rate." One officer asserted that his refusal to stop was consistent with someone who "either just committed a crime" or someone who is "concealing something whether it be a weapon or drugs," but declining to submit to a consensual stop cannot serve as the basis of reasonable suspicion.

Upon review of the evidence available to the Panel, Officer Woodyard's decision to turn what may have been a consensual encounter with Mr. McClain into an investigatory stop — in

fewer than ten seconds — did not appear to be supported by any officer's reasonable suspicion that Mr. McClain was engaged in criminal activity. This decision had ramifications for the rest of the encounter.

The Decision to Frisk Mr. McClain

Joined immediately by Officers Jason Rosenblatt and Randy Roedema, Officer Woodyard made the decision to frisk Mr. McClain for weapons. The officers surrounded Mr. McClain, with one officer holding each of Mr. McClain's arms. Mr. McClain, according to the officers, was "tensing up" and they asked him repeatedly to "relax," cooperate, and "stop tensing up." One officer told him, "this isn't going to go well." Mr. McClain explained that he just wanted to go the direction he was heading and that he did not want to talk to the police officers. He told the officers that when stopped he was stopping his music to listen. He repeatedly asked them to let go of him and reiterated that he was only trying to go home. The back and forth lasted several seconds before the officers decided to move Mr. McClain from a rocky area to some nearby grass, with one officer telling him they were going to "lay [him] down."

Once a lawful *Terry* stop has been undertaken, a frisk is authorized only where "a reasonably prudent man, in the circumstances, would be warranted in the belief that his safety or that of others is in danger." In the post-incident interviews with Major Crime investigators, Officer Woodyard explained that he wanted to frisk Mr. McClain "based on him having a ski mask on, on Colfax in the middle of the night and it was causing people to call in."[3] He also said both that he "felt safe making an approach, he didn't have any weapons or anything I could see in his hand"[4] and that "I didn't want to stop this guy by myself, because pretty suspicious area tied with his actions and I didn't want to contact somebody who I thought had weapons by myself."[5] Major Crime investigators never asked Officer Woodyard to explain how these factors led to his conclusion that Mr. McClain might be armed, or the apparent contradiction in his two statements. In dispatching the call, the dispatcher transmitted to the officers the 911 caller's report that there were no known weapons involved.

The "reasonable suspicion" that an individual is armed and dangerous, required to conduct a pat-down search, is an objective test that considers the facts and circumstances at the time. Based on the record available to the Panel, we were not able to identify sufficient evidence that Mr. McClain was armed and dangerous in order to justify a pat-down search. The Panel also notes that one officer's explanation that Aurora officers are trained to "take action before it escalates" does not meet the constitutional requirement of reasonable suspicion to conduct either a *Terry* stop or a frisk.

The Decision to Arrest Mr. McClain by Physically Restraining and Moving Him

Still less than one minute from when Officer Woodyard first exited his vehicle and commanded Mr. McClain to "stop," the officers decided to physically move him to a grassy area

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[3] Woodyard Interview at 6:25.

[4] Woodyard Interview at 6:03.

[5] Woodyard Interview at 28:12.

nearby in case they needed to take him to the ground. Officers Rosenblatt and Woodyard, who were each holding one of Mr. McClain's arms, attempted to move him several steps onto the grass, and Officer Rosenblatt stated "we're going to lay you down, okay, come on." This decision likewise cannot be justified by the record available to the Panel.

When officers use "forceful techniques," a lawful investigatory *stop* requiring reasonable suspicion of a crime generally becomes an *arrest*, requiring the officers to have probable cause that a crime was committed by the subject. Since Officer Woodyard's order to him to stop, the only facts that had changed were Mr. McClain's attempt and stated intention to keep walking in the direction he had been going and his "tensing up." In the Panel's view, none of these facts would be sufficient to establish probable cause of a crime.

The Decision to Apply Force in Response to the Threat or Perceived Threat that Mr. McClain Reached for an Officer's Gun

During the struggle by the three officers to move Mr. McClain to the grassy area, Officer Roedema can be heard saying "he grabbed your gun, dude," and then Officer Roedema or another officer said "stop, dude."[6] According to Officer Woodyard's interview with Major Crime, Officer Roedema's statement "he grabbed your gun" "changed the situation."[7] Officer Woodyard, holding Mr. McClain's left arm, told investigators that when he heard that, his objective changed to "take him down to the ground as hard as [he] could."[8]

In the moments following Officer Roedema's statement, the three officers quickly took Mr. McClain to the ground. Believing he was in position, Officer Rosenblatt attempted to apply a "carotid control hold" (or "carotid hold") to Mr. McClain's neck just before they went to the ground. In a "carotid control hold," an officer applies simultaneous pressure to the left and right sides of a subject's neck to deprive the brain of oxygen and induce unconsciousness. It differs from a choke hold, which can restrict the subject's breathing and is considered more dangerous. Positioned behind Mr. McClain just as he was being taken to the ground, Officer Rosenblatt applied the first carotid hold. However, Officer Rosenblatt stated that he released the hold after approximately one second and once they were on the ground after realizing that it was not going to be effective.

Officers may use lethal force to protect themselves and others from a person who poses a significant threat of death or serious physical injury to the officer or others. At the time, Aurora Police Department policy permitted the use of the carotid control hold if officers reasonably feared for their lives or safety. By the time Officer Rosenblatt's carotid hold ended, Mr. McClain had been taken to the ground. This use of force likely ended the threat of Mr. McClain reaching for and obtaining an officers' gun.

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[6] Rosenblatt Body Cam at 1:09; Roedema Body Cam 1 at 1:23.

[7] Woodyard Interview at 7:17.

[8] Woodyard Interview at 7:34.

The Application of a Second Carotid Hold when Mr. McClain Was on the Ground

In the seconds after the officers took Mr. McClain to the ground, body worn camera footage shows Officers Woodyard and Rosenblatt struggling with Mr. McClain on the ground. The officers later explained that, at this point, Officer Rosenblatt pinned one of Mr. McClain's arms to the ground while Officer Roedema applied a "bar hammer lock" to Mr. McClain's other arm. Positioned behind Mr. McClain, who was lying on his side, Officer Woodyard attempted to apply a carotid control hold. Although it is unclear precisely how long Officer Woodyard applied the hold, on the body worn camera footage an officer can be heard asking "Is he out?" and two other officers responding "no," and "not yet." Officer Roedema said he saw Mr. McClain's eyes "roll back and his head starting to go limp," and he instructed Officer Woodyard to release the hold. Seconds later, at 10:45 P.M., the officers radioed to request support from Aurora Fire. By the time officers confirmed Mr. McClain was "not yet" "out," all three officers' body worn cameras had either dropped to the ground or had stopped recording, and so for nearly two minutes after Officer Woodyard asked, "is he out?" the record includes only body worn camera audio footage of the events that transpired.

An officer's authority to use force depends on whether the officer reasonably perceived he was in danger at the precise moment that force was used, and must be calibrated to the amount of resistance from the subject. Once he was lying on the ground, Mr. McClain's ability to reach an officer's gun or other weapons was limited by the fact that Officer Woodyard was on the ground behind him, with his gun and pepper spray pinned beneath him. If Mr. McClain was no longer presenting a threat of harm to the officers, there would have been no justification for Officer Woodyard to apply a carotid hold. The video footage at this moment does not clearly show what was happening. In their post-incident interviews, none of the officers were asked about the threat posed once Mr. McClain was on the ground. Officer Woodyard explained the danger he perceived when he heard Officer Roedema's statement "he grabbed your gun" but the questioning by Major Crime investigators did not distinguish between the threat when Mr. McClain was standing, and when he was on the ground. The record therefore does not provide evidence of the officers' perception of a threat that would justify Officer Woodyard's carotid hold, which caused Mr. McClain to either partially or fully lose consciousness.

The Continuous Use of Pain Compliance and the Contrast Between the Officers' Assertions and Mr. McClain's Audible Statement

The body worn camera audio, limited video, and Major Crime's interviews with the officers tell two contrasting stories. The officers' statements on the scene and in subsequent recorded interviews suggest a violent and relentless struggle. The limited video, and the audio from the body worn cameras, reveal Mr. McClain surrounded by officers, all larger than he, crying out in pain, apologizing, explaining himself, and pleading with the officers. Video is limited because the body worn cameras for Officers Roedema, Rosenblatt, and Woodyard were dislodged during the encounter, and other officers' body worn cameras did not show Mr. McClain for much of the time, leaving only audio available at times to tell the story.

The responding officers applied pain compliance techniques and restraints to Mr. McClain continuously from the first moments of the encounter until he was taken away on a gurney. These included arm bars, wrist locks, and officers applying their knees to Mr. McClain's large muscle

groups and joints. The officers also sat or kneeled on Mr. McClain, and one officer threatened to have a dog bite him. The officers can be heard telling Mr. McClain to "stop," "stop dude," "stop fighting," and "dude, just stop fighting." They described his behavior as "violent," "fight[ing]" and "struggling," and repeatedly remarked on his "incredible strength," "crazy strength" and "superior strength." The vast majority of this treatment occurred after Mr. McClain was handcuffed and lying on the ground.

The audio of the incident records Mr. McClain crying out in pain, apologizing, vomiting, and at times sounding incoherent. His words were apologetic and confused, not angry or threatening. He became increasingly plaintive and desperate as he struggled to breathe. He told officers he had his ID, that his name was Elijah McClain, and that "I was just going home…I'm an introvert and I'm different. Going home…I'm just different. I'm just different. That's all. That's all I was doing. I'm so sorry." As Mr. McClain said this, one of the officers described him by radio to a dispatcher as "still fighting." Mr. McClain continued, saying he opposed violence, begged "forgive me," and said "you all are phenomenal, you are beautiful. Forgive me." As the officers waited for paramedics to arrive, Mr. McClain vomited and can be heard continually complaining about the pain and his difficulty breathing, saying "Ow. I'm so sorry. I'm so sorry," "Ow, that really hurt. You guys are too strong," and "It's just that I can't breathe correctly because …" as his voice trailed off. For long periods of time, only occasional grunts and moans but no words can be heard from Mr. McClain.

It is not clear from the record whether Mr. McClain's movements, interpreted by the officers as resisting, were attempts to escape or simply an effort, voluntary or involuntary, to avoid the painful force being applied on him, to improve his breathing, or to accommodate his vomiting.

Aurora Fire's Delay in Treating Mr. McClain and Lack of a Transition Plan

As detailed below, emergency medical services ("EMS") personnel from Aurora Fire arrived at the scene at approximately 10:53 P.M. but stood back and did not render aid to Mr. McClain for several minutes, until a paramedic administered ketamine. During this period, Mr. McClain could be heard moaning, gagging, responding to the officers' statements, exclaiming in pain, and struggling to breathe. Emergency personnel were also informed that police had applied a carotid control hold. Despite his apparent distress and the fact that a carotid control hold had been applied, the body worn camera footage does not reflect any attempt by Aurora Fire to examine or question Mr. McClain before the administration of ketamine. Further, prior to the injection of ketamine, there was no physical contact by any of the Aurora Fire or EMS personnel captured in the footage or reported during post-incident interviews. While trained medical personnel can learn a great deal from simple observation, more is required for effective clinical decision making, including talking to and touching the patient and measuring vital signs. Other simple diagnostic procedures also could have been employed. Instead, Aurora Fire appears to have decided to sedate Mr. McClain without conducting anything more than brief visual observation.

There also was no clear transition of care or command from Aurora Police to Aurora Fire. Even after the ketamine was administered, Aurora Fire deferred to the police officers in decisions regarding Mr. McClain's care. The failure to have clear rules governing transitions of care and transitions of command authority has the potential to create major problems in patient care and conflict between departments.

Aurora Fire's Diagnosis of Excited Delirium and Administration of Ketamine

The decision to administer ketamine was made by Aurora Fire Paramedic Jeremy Cooper, who had arrived on the scene around 10:53 P.M., observed Mr. McClain on the ground, and determined that his behavior was consistent with "excited delirium," a syndrome characterized by increasing excitement with wild agitation and violent, often destructive behavior. Aurora Fire Lt. Peter Cichuniec advised Falck Rocky Mountain[9] to draw up a 500 milligram dose of ketamine based on his inaccurate estimation that Mr. McClain weighed about 190 pounds. At 10:59 P.M. or 11:00 P.M., Paramedic Cooper administered the ketamine to Mr. McClain. At the time of the injection, Mr. McClain had not moved or made any sounds for about one minute.

Aurora Fire appears to have accepted the officers' impression that Mr. McClain had excited delirium without corroborating that impression through meaningful observation or diagnostic examination of Mr. McClain. As stated above, during the time that Aurora Fire was on the scene, Mr. McClain's behavior in the presence of EMS should have raised questions for EMS personnel as to whether excited delirium was the appropriate diagnosis.

Aurora Fire protocols permitted the administration of ketamine for a patient with symptoms of excited delirium and where there were concerns regarding the patient's or others' safety. Aurora EMS determined it was appropriate to administer ketamine to Mr. McClain despite the fact that he did not appear to be offering meaningful resistance in the presence of EMS personnel. In addition, EMS administered a ketamine dosage based on a grossly inaccurate and inflated estimate of Mr. McClain's size. Higher doses can carry a higher risk of sedation complications, for which this team was not clearly prepared.

The Aurora Police Department's After-Incident Investigations

The Aurora Police Department's Major Crime/Homicide Unit investigation of the death of Mr. McClain raised serious concerns for the Panel and revealed significant weaknesses in the Department's accountability systems. First, the interviews conducted by Major Crime investigators failed to ask basic, critical questions about the justification for the use of force necessary for any prosecutor to make a determination about whether the use of force was legally justified. Instead, the questions frequently appeared designed to elicit specific exonerating "magic language" found in court rulings. Major Crime's report was presented to the District Attorney for Colorado's 17th Judicial District (the "District Attorney") and relied on by the Force Review Board, but it failed to present a neutral, objective version of the facts and seemingly ignored contrary evidence.

Second, the incident was never referred to Internal Affairs investigators, whose role it is to protect the integrity of the Department by determining whether officers' conduct complies with policy. Current policies prevent Internal Affairs from self-starting investigations and instead require approval from the Chief of Police to open an inquiry. This places the Chief in a difficult and potentially compromised role, and limits the independence of Internal Affairs to investigate potential failures to comply with Department policy.

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[9] Hereinafter referred to as "Falck," "Falck Ambulance," and "Falck EMS," interchangeably.

Finally, the review by the Aurora Police Department's Force Review Board was cursory and summary at best. Without a detailed examination of the justification for the use of force throughout the incident, important opportunities to identify problems and reform practices were lost.

Key Recommendations

Review Training and Supervision of Officers. The Panel recommends that the Aurora Police Department undertake a thorough review of its training and supervision of officers with respect to ascertaining reasonable suspicion and probable cause in conducting *Terry* stops, frisks, and arrests. The speed at which these officers acted to take Mr. McClain into custody, their apparent failure to assess whether there was reasonable suspicion that a crime had been committed, and the unity with which the three officers acted suggest several potential training or supervision weaknesses. The Panel also strongly recommends that every *Terry* stop and every frisk be thoroughly documented.

Use of Force/De-Escalation. The Panel recommends that the Department undertake a thorough review of its use of force policy. The review should assess whether it reflects community values that force be minimized and avoided when possible, and should ensure that officers have adequate guidance on force avoidance strategies and the obligation to apply them.

In addition, the Aurora de-escalation policy would be significantly strengthened if it included more specific explanation that de-escalation is required in every encounter where possible, and how verbal techniques, positional withdrawal, and the use of delay can help control situations to avoid the need to use force.

Transition from Aurora Police Department to Aurora Fire. We recommend implementation of a simple model or template and accompanying training for all agencies that handle patient information and care (*e.g.*, Aurora Police, Aurora Fire, and Falck) on best practices for patient transitions. In particular, a template would have increased utility here to ensure that non-medical personnel provide all necessary information to EMS during the patient handoff.

Build Culture of Patient Advocacy. The Panel recommends that the City conduct a careful review of the culture within Aurora Fire to ensure that it prioritizes the safety of the subject consistent with the safety of the officers and medical personnel. In particular, the City should undertake an analysis of EMS personnel attitudes and perceptions surrounding all aspects of patient safety during a call for service, including whether or not the EMS personnel feel empowered as advocates for patients.

Training to Complete EMS Assessment. We recommend a thorough review of Aurora Fire's protocols, policies, and trainings related to patient sedation to ensure that a complete pre-sedation assessment by paramedics is completed. This assessment should include cardiac and respiratory monitoring whenever feasible, and require that a consistent process be developed and used to ensure a verbalized pre-sedation double check for diagnosis/protocol, estimated weight, equipment inventory, and a plan for expedited post-sedation monitoring.

After-Incident Review. The Panel urges the City to consider overhaul of the post-incident review process to ensure that inadequacies are identified and addressed in policy, training, and supervision. In particular:

- The Panel strongly urges the City to assess the training and supervision of Major Crime detectives as it relates to the investigation of potential criminal misconduct by police officers. Remaining objective and independent while investigating a fellow officer presents unique challenges. Both detectives and supervisors need special training to ensure that any investigation is both fair and complete.

- The Panel believes this case should have been referred to Internal Affairs for review, and strongly urges the City to consider the important role of Internal Affairs in reviewing all officer-involved deaths. While Major Crime's role is to determine whether a crime was committed, the role of Internal Affairs is to protect the integrity of the agency by ensuring compliance with policy. The current policy requiring that the Chief open Internal Affairs investigations places the Chief in a difficult position and limits the likelihood of review by the Department for compliance with policy.

- The Panel urges the City to reform the Force Review Board process to foster more critical and objective analysis of uses of force. The Force Review Board's failure to examine this incident in detail and to look at each use of force against Mr. McClain, separately and with care, is a lost opportunity. The Force Review Board should be a critical part of a continuous assessment and learning process, and every incident should be interrogated for what it can teach the Department to avoid negative outcomes in the future.

The Panel also addressed four areas of concern that we identified during the investigation. These are:

Implicit Bias. The national debate concerning the role of law enforcement in communities of color includes a robust discussion of implicit or unconscious bias. In looking at this single incident, the Panel has insufficient information to determine what role, if any, bias played in Aurora Police officers' and EMS personnel's encounter with Mr. McClain. However, research indicates that factors such as increased perception of threat, perception of extraordinary strength, perception of higher pain tolerance, and misperception of age and size can be indicators of bias. We urge that the City assess its efforts to ensure bias-free policing, implicit or otherwise.

Crisis Intervention. The Panel does not conclude whether or not Mr. McClain was experiencing a mental health or behavioral health crisis. However, in the course of our review, we identified deficiencies in the City's response capacity for those types of calls. We urge the City of Aurora to review its crisis response programs and training and increase mental health resources. The conduct of these officers and the failure to afford Officer Roedema the opportunity to apply his crisis intervention training suggest a departmental culture in need of reform surrounding interactions with persons with disabilities, mental health disorders, or in behavioral crisis. It is our recommendation that the Aurora Police Department incorporate evidence-based best practices into their training programs on dealing with suspicious individuals who are not involved in criminal activity or presenting an immediate threat to themselves or others. This is in line with the changes

that the Aurora Police Department has already made in its policies on dealing with suspicious person calls.

Independence and Separate Authority of Medical Personnel. The Panel makes no findings as to the nature of the relationship between Aurora Police and Fire in this particular incident. However, in the Panel's experience, frequent co-response of both the police and EMS, similarity in uniform colors and designs, and the inevitable collegiality between departments that respond together routinely, may inadvertently indicate that EMS is an "arm" of the police department rather than an independent and wholly separate agency. We recommend that Aurora Police and Fire leadership review and provide additional guidance to field personnel and communication staff on the proper use of law enforcement support for EMS and vice versa.

Administration of Ketamine. Since this incident, the City has placed a moratorium on the use of ketamine by emergency medical staff and there is an active debate among public officials on the use of ketamine in law enforcement settings. As the review of the sedative is underway, we urge the City to avoid replacing ketamine with other medications that that pose a greater risk to patients and to medical staff.

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II. INVESTIGATION SCOPE AND METHODOLOGY

A. Scope of the Investigation

On August 24, 2019, Elijah McClain encountered Aurora Police officers and was subject to the use of force, including two carotid holds, by Aurora Police officers and the administration of a sedative, ketamine, by members of Aurora Fire. Mr. McClain suffered a cardiac arrest shortly after, and although resuscitated, he was declared brain dead in the hospital several days later. Mr. McClain's encounter with police started with a call about a suspicious person. At no time prior to, or since, his encounter with Aurora Police was Mr. McClain accused of committing a crime justifying why the officers chose to stop him.

Following an internal police department investigation and a review by the District Attorney,[10] the community remained concerned about the events leading to the death of Mr. McClain.[11] In response, on July 20, 2020, the City Council passed a resolution that authorized an independent review of the actions of the Aurora Police Department and Aurora Fire.[12] That resolution mandated: (1) an examination of the facts surrounding the Aurora Police Department's and Aurora Fire's contact with Mr. McClain; (2) an examination of all relevant and related Aurora Police and Fire department policies, procedures, and practices to include "those related to calls for service, police contact with individuals, use of force, calls for medical assistance, ketamine use,

[10] The District Attorney for Colorado's 17th Judicial District serves Adams and Broomfield counties. *See District Attorney*, Adams Broomfield DA, http://adamsbroomfieldda.org/?page_id=2 (last visited Feb. 21, 2021).

[11] City Council for the City of Aurora, Resolution (July 20, 2020).

[12] City Council for the City of Aurora, Resolution (July 20, 2020).

and administrative incident reviews"; and (3) a final report setting forth the findings and recommendations for best practices for the City of Aurora's consideration as it moves forward.[13]

Consistent with the mandate of the City Council's resolution, our investigation had a three-part focus: *first*, the facts surrounding the Aurora Police Department's and Aurora Fire's[14] contact with Mr. McClain on August 24, 2019 and the subsequent administrative reviews of that contact; *second*, police and fire department policies, procedures, and practices related to Mr. McClain's death and the actions of the police and fire personnel involved; and *third*, recommendations that the City can consider going forward, including possible prospective changes to police and fire department policies and procedures. Our investigation considered best practices on issues such as use of force, officer trainings, pre-hospital care, and excited delirium, as well as the policies, procedures, and protocols in effect in law enforcement, fire rescue, and EMS agencies across the country.

B. Other Investigations and Litigation

We conducted our investigation amid a number of parallel investigations examining both the death of Mr. McClain and/or, more generally, the patterns and practices of the Aurora Police Department and Aurora Fire, by the U.S. Department of Justice, the Federal Bureau of Investigation, the Office of the Colorado Attorney General, the Colorado Department of Public Health and Environment, and the City of Aurora.[15] In addition, in August 2020, Mr. McClain's family filed a civil suit against the City and individual police and fire personnel involved in the death of Mr. McClain.[16] The Panel informed attorneys for the McClain family and attorneys for the City personnel involved in the incident of the pendency of this investigation, but did not otherwise discuss the facts of Mr. McClain's death or the ongoing litigation with either party. The attorneys for the family were offered the opportunity to share any information that they wished the Panel to consider.

While our review overlaps in some respects with these investigations, our investigation was limited in scope to factual findings regarding the police and fire departments' contact with Mr. McClain, a review of relevant policies and procedures, and recommendations for best practices. Given that it was outside the mandate of this investigation to determine whether there where violations of law or policy or questions of civil liability, the Panel did not evaluate the information available in the context of standards of proof or admissibility of evidence in making any of our findings. Further, we did not seek to make any determinations regarding Mr. McClain's

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[13] City Council for the City of Aurora, Resolution (July 20, 2020).

[14] Aurora Fire provides fire and EMS response to the greater Aurora area. Falck Ambulance is a private ambulance company and the exclusive provider of EMS transport services for Aurora, Colorado. As noted above, the Aurora City Council's resolution mandated an examination of the actions of Aurora Fire personnel, including those who provided EMS services. A review of the actions of Falck personnel was outside the scope of this investigation.

[15] City Council for the City of Aurora, Resolution (July 20, 2020).

[16] Jennifer McRae, *Elijah McClain's Family Files Federal Lawsuit Against Aurora, Others Involved in Death*, CBS Denver (Aug. 11, 2020, 5:09 P.M.), https://denver.cbslocal.com/2020/08/11/aurora-elijah-mcclain-family-police-death-lawsuit/.

cause of death, whether police or fire personnel violated state or federal law, or whether police or fire personnel violated department policies.

C. Mechanics of the Investigation

1. The Panel

The independent review panel comprised Mr. Jonathan Smith, Mr. Roberto Villaseñor, and Dr. Melissa Costello. Mr. Smith, who led the Panel, is the Executive Director of the Washington Lawyers' Committee for Civil Rights and Urban Affairs and former head of special litigation for the Civil Rights Division of the U.S. Department of Justice. In his role at the Department of Justice, Mr. Smith led or participated in numerous reviews of police department practices across the country, including among others the review of the Ferguson, Missouri police department in 2014. Prior to his government service, Mr. Smith was the Executive Director of the Legal Aid Society of the District of Columbia, the Public Justice Center in Baltimore, and the D.C. Prisoners' Legal Services Project.

Mr. Villaseñor served as the Panel's law enforcement expert. He is a Founding Partner in 21CP Solutions, which advises law enforcement agencies and communities on effective policing in the 21st century. He is a former chief of the Tucson Police Department, from which he retired in 2015 after a 35-year career. In 2014, Mr. Villaseñor was appointed to the President's National Task Force on 21st Century Policing, and in 2015, he was appointed to the Arizona Criminal Justice Council. Mr. Villasenor has advised several communities after controversial events involving lethal interactions with police and is currently a member of the federally appointed monitoring team for the city of Baltimore.

Dr. Costello served as the Panel's medical and EMS expert. She is a practicing emergency medicine physician and EMS medical director based in Mobile, Alabama. After graduating from Georgetown University and the University of Alabama at Birmingham School of Medicine, she completed residency training in Emergency Medicine at Johns Hopkins in Baltimore, Maryland. She is board certified in Emergency Medicine and subspecialty board certified in Emergency Medical Services. Dr. Costello has a Master of Science in Healthcare Delivery with a focus on patient safety and process improvement. She has served or led several national committees and task forces dealing with EMS, pre-hospital care policy, and law enforcement medical support for the American College of Emergency Physicians, the National Association of EMS Physicians, and others.

The law firm of Latham & Watkins LLP served as pro bono counsel to the Panel. The firm provided legal advice and counsel to the Panel and assisted with the investigation and review of the available record. The Panel is immensely grateful for the important contributions of Latham & Watkins to this Report.

2. *Audio, Video, and Documentary Evidence*

The City provided to the Panel the materials comprising the Aurora Police Department's case file related to its investigation into the events leading to Mr. McClain's death.[17] The case file included, among other things, an audio recording of the 911 call; footage from officers' body worn cameras[18]; video recorded interviews of certain Aurora Police and Fire personnel; reports and narratives submitted by officers present at the scene; other contemporaneous records related to Aurora Police and Fire personnel's dispatch and response that evening, including records documenting the administration of ketamine and Mr. McClain's subsequent medical condition and treatment; and reports related to the Aurora Police Department's investigation. In addition, throughout the course of its investigation, the Panel requested and reviewed additional documents and materials from the City, including documents related to the events that led to Mr. McClain's

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[17] The District Attorney for Colorado's 17th Judicial District serves Adams and Broomfield counties. *See District Attorney*, Adams Broomfield DA, http://adamsbroomfieldda.org/?page_id=2 (last visited Feb. 21, 2021).

[18] The Aurora Police Department's body worn camera policy requires, among other things, that on-duty officers activate their body worn cameras when "[c]ontacting a citizen or addressing an incident unless such activation is not feasible. In most circumstances, [the officer's] camera equipment should be recording the entirety of a contact or incident." *Directives Manual: Body-Worn Camera*, Aurora Police Dep't at 16.4 (revised Dec. 11, 2019). Chief Wilson confirmed to the Panel that this requirement was in place on August 24, 2019. Panel's Interview with Aurora Police Chief Vanessa Wilson (Feb. 3, 2021). Chief Wilson also stated her expectation that officers activate their body worn camera whenever they are responding to a call, although she acknowledged that the current policy may lack clarity. Panel's Interview with Aurora Police Chief Vanessa Wilson (Feb. 3, 2021).

The Aurora Police Department's case file included body worn camera footage from officers who were at the scene and, later, at the hospital. In certain instances, the Panel observed that the records provided did not include body worn camera footage associated with certain Aurora Police officers who arrived on scene. *See* Follow Up Report No. 15, General Offense Report at 37 (no body worn camera footage provided for Officer Erica Marrero although Officer Marrero reported that she and Officer Dittrich arrived on scene and "made [their] way over [to] the officers who had the suspect…asked if there was anything they needed."); Green Body Cam at 1:22 (no body worn camera footage provided for an unidentified female officer, although she appears on Officer Green's body worn camera shining a flashlight on Mr. McClain); Follow Up Report No. 19, General Offense Report at 43 (no body worn camera footage provided for Officer Jordan Mullins-Orcutt, who reported arriving on scene where he "observed a male party detained," picked up a red cell phone on the ground nearby, and "laid it next to the male party prior to [his] departure").

In addition, the Panel observed instances when body worn camera de-activated (and in some cases subsequently re-activated). *See* Root Body Cam at 00:00 (body worn camera deactivates as Officer Root approaches the scene); Nunez Body Cam 1 and Body Cam 2 (body worn camera reflects an eight minute gap between the two videos); Rosenblatt Body Cam at 14:00 (body worn camera de-activates as Officer Rosenblatt walks away from Mr. McClain and towards Officer Woodyard); Rosenblatt Body Cam at 7:50 (Officer Roedema states that he de-activated his body worn camera because "it's split in half.").

The City confirmed to the Panel that we were provided with all body worn camera footage related to the events leading to Mr. McClain's death, with one exception described further below. Because we were not able to interview the officers involved, we were not able to determine the why any officers' body worn cameras failed to activate or de-activated.

The footage that was not provided to the Panel was that for Officer Kyle Dittrich, who arrived on scene with his partner, Officer Erica Marrero, as noted above. Follow Up Report No. 15, General Offense Report at 37. The City explained that Officer Dittrich's body worn camera footage was inadvertently mislabeled and therefore not retained following the expiration of a default footage retention period.

death and policies, procedures, and training materials relevant to the Panel's investigation.[19] The Panel notes that it requested documents relevant for a comprehensive review of Aurora Fire's treatment and internal evaluation of the care given to Mr. McClain.[20] However, many of these documents (including all of the medical records from his hospitalization) could not be obtained due to various quality assurance protections and patient privacy restrictions under Colorado law.[21]

3. Interviews

As noted above, the case file included seven video recorded interviews with certain Aurora Police and Fire personnel who were involved in the events leading to Mr. McClain's death. These interviews were conducted by Detective Matthew Ingui of the Aurora Police Department's Major Crime/Homicide Unit, which led the Aurora Police Department's investigation into Mr. McClain's death. The seven individuals interviewed were: Officer Nathan Woodyard, Officer Jason Rosenblatt, Officer Randy Roedema, Lt. Peter Cichuniec, Paramedic Jeremy Cooper, Firefighter ("FF") Austin Bradley, and FF Daniel DeJesus. The Panel separately requested interviews with these seven individuals; other Aurora officers who were present on the evening of August 24, 2019; Aurora Fire and Falck personnel; and Detective Ingui. These interview requests were declined. Because this Panel was not able to interview any individuals involved in the events leading to Mr. McClain's death, the statements made by those individuals to Major Crime investigators were, in some cases, the Panel's only source of information regarding certain events. As a result, we refer to these statements throughout this Report.

In addition, in connection with the Panel's mandate to investigate Aurora Police and Fire department policies, procedures, and practices related to Mr. McClain's death, the Panel interviewed police, fire, and 911 dispatch personnel from the Aurora Police Department and the Public Safety Communications ("PSC") Department. From the Aurora Police Department, the Panel interviewed current Chief of Police Vanessa Wilson, current Deputy Chief of Police Darin Parker, three representatives of the Aurora Police Department Training Academy, and a representative from Aurora Police's Crisis Response Team. From Aurora Fire, the Panel interviewed current Chief Fernando Gray. Finally, from PSC, the Panel interviewed the dispatcher who took the 911 call on the evening of August 24, 2019 and five representatives from that division, including operations and training personnel.

The Panel also sought to interview Division Chief Marcus Dudley, who we understand oversaw Major Crime's investigation into Mr. McClain's death; however, he left the Department

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[19] After noting that body worn camera footage indicated that officers were holding or using cell phones on the evening of August 24, 2019, the Panel requested cell phone data for the officers involved in the events leading to Mr. McClain's death. However, the Panel was informed that the City does not issue devices to officers, that City policy permits imaging personal cell phones only in criminal investigations, and that no phones were imaged in this case.

[20] *The Elijah McClain Case*, City of Aurora, Colo., https://www.auroragov.org/residents/public_safety/a_new_way__our_plan_to_restore_trust/the_elijah_mc_clain_case.

[21] Colo. Rev. Stat. § 25-3.5-904.

while our investigation was ongoing and we were unable to schedule an interview with him before that time.

D. Independence of the Investigation

The City engaged this Panel to conduct an independent investigation into the actions of Aurora Police and Fire personnel involved in the death of Mr. McClain. The Panel does not, and will not, represent the family of Mr. McClain, Aurora Police Department, Aurora Fire, or any individual Aurora Police or fire employees in any matter related to the death of Mr. McClain. No member of this Panel has a historical or current relationship to the Aurora Police Department, Aurora Fire, any individual Aurora Police or fire employees, or any member of the McClain family or their counsel.

In addition, although the City retained this Panel, we note that the City Council resolution authorizing this investigation mandated the complete independence of both the investigation and this Report.[22] No City official or employee controlled or directed any portion of our investigation or the contents of this Report. After the Report was completed, the Panel provided the City with an oral briefing regarding the Report's structure and focus on February 18, 2021, but did not share an advance copy of the Report or detail any of the Panel's findings.

III. EVENTS LEADING TO THE INVESTIGATION

Mr. McClain's death generated substantial concern within the Aurora community almost immediately after it occurred.[23] Both the Aurora Police and Fire departments investigated the actions of their respective personnel on the evening of August 24, 2019 and concluded that their actions were in line with policy.[24] The District Attorney also declined to bring charges against the Aurora Police officers, stating that "there is no reasonable likelihood of success of proving any

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[22] *See* City Council for the City of Aurora, Resolution (July 20, 2020) ("No City official or employee will have control of the substance of the investigation or final report."); Allison Sherry, *Aurora City Council has approved an independent probe into Elijah McClain's death*, Denverite (July 20, 2020, 9:51 P.M.), https://denverite.com/2020/07/20/aurora-city-council-has-approved-an-independent-probe-into-elijah-mcclains-death/ ("The role of city manager will be to be a contact administrator in this. There won't be any official employee control.").

[23] *See* City Council for the City of Aurora, Resolution (July 20, 2020) ("Mr. McClain's death garnered significant local community concern when it happened, with many local citizens expressing anger about the incident and Mr. McClain's death at City Council meetings between September 2019 and into February 2020[.]"); *see also*, Joint Press Release, Aurora Fire Rescue and Aurora Police Department, Joint Press Release from APD and AFR Regarding a Critical Incident in the 1900 Block of Billings St (updated Sept. 30, 2019) (acknowledging "the need for transparency through this entire investigation and [] appreciat[ing] the seriousness of this matter and confirming that "[f]rom the beginning, Chief Metz ordered an investigation at a level consistent with officer-involved shootings…").

[24] *See, e.g.*, Press Release, Aurora Fire Rescue, Preliminary Review of Billings St. Incident (Aug. 28, 2019); *see also The Elijah McClain Case*, City of Aurora Colo., https://www.auroragov.org/news/whats_new/city_leaders_guiding_changes_to_policing/timeline_of_events_in_the_elijah_mc_clain_case.

state crimes" by Aurora Police personnel.[25] Following the District Attorney's decision, Aurora Police Department's Force Review Board commenced its own review of the death of Mr. McClain, and the Aurora City Council coordinated with the Aurora chapter of the National Association for the Advancement of Colored People ("NAACP") to host a community meeting to discuss Mr. McClain's death and community concerns.[26]

In February 2020, the Force Review Board announced its findings that Aurora Police officers had a lawful basis to initiate contact with Mr. McClain on August 24, 2019 and that the force applied complied with departmental policy and training.[27] Following this announcement, the City announced its intent to retain an independent investigator and the Aurora City Council resolved to establish a Community Policing Task Force, which would "inform [the] Council about the status of police and community relations within the City, and…study and make recommendations related to police operations especially in terms of critical incident management, training, transparency, and oversight."[28]

The City initially engaged an outside investigator to conduct an independent review of the death of Mr. McClain,[29] but his review was stalled by the COVID-19 pandemic. While that review was pending, the Minneapolis police officer-involved death of George Floyd on May 25, 2020 sparked worldwide protests and drew renewed attention to the death of Mr. McClain.[30]

The Aurora City Council and others expressed concerns as to whether the initial investigator met the standard of neutrality the City and public demanded given his background as a former law enforcement official.[31] In response to these concerns, the Aurora City Manager cancelled the initial review.[32] The Aurora City Council then passed the July 2020 resolution

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[25] Declination Letter from 17th Judicial District, Adams and Broomfield Counties District Attorney (Nov. 22, 2019), Press Packet 112219 – Ingui, M., General Offense Report at 371 (noting that "this review [wa]s limited to a determination of whether state criminal charges should be filed against the involved officers").

[26] *The Elijah McClain Case*, City of Aurora Colo., https://www.auroragov.org/residents/public_safety/a_new_way__our_plan_to_restore_trust/the_elijah_mc_clain_case.

[27] *The Elijah McClain Case*, City of Aurora Colo., https://www.auroragov.org/residents/public_safety/a_new_way__our_plan_to_restore_trust/the_elijah_mc_clain_case.

[28] City Council for the City of Aurora, Resolution (Feb. 10, 2020).

[29] *The Elijah McClain Case*, City of Aurora Colo., https://www.auroragov.org/residents/public_safety/a_new_way__our_plan_to_restore_trust/the_elijah_mc_clain_case.

[30] City Council for the City of Aurora, Resolution (July 20, 2020).

[31] City Council for the City of Aurora, Resolution (July 20, 2020).; *The Elijah McClain Case*, City of Aurora Colo., https://www.auroragov.org/residents/public_safety/a_new_way__our_plan_to_restore_trust/the_elijah_mc_clain_case.

[32] *The Elijah McClain Case*, City of Aurora Colo., https://www.auroragov.org/residents/public_safety/a_new_way__our_plan_to_restore_trust/the_elijah_mc_clain_case; City Council for the City of Aurora, Resolution (July 20, 2020).

authorizing a new review of the death of Mr. McClain and the City engaged the Panel to conduct this investigation.

IV. INVESTIGATION FACTUAL FINDINGS

Elijah McClain was a twenty-three-year old Black resident of Aurora, Colorado. He was five feet and seven inches tall and weighed 140 pounds.[33] At the time he encountered Aurora Police officers on August 24, 2019, Mr. McClain was within a few blocks of his home.[34] He had just made a purchase at a nearby convenience store and was walking towards his home wearing earbuds connected to his phone. We set forth below a detailed timeline regarding what led the Aurora Police to identify and stop Mr. McClain that night, and the events that occurred thereafter. This timeline primarily relies on body worn camera footage from officers who responded to the 911 call and interviews conducted in connection with an investigation into Mr. McClain's death led by Major Crime. We incorporate below statements made by the Aurora Police and Fire personnel involved to Major Crime investigators. For clarity, these were statements made to Aurora Police Department investigators and others in connection with the police department's investigation into Mr. McClain's death, and not to this Panel. As explained above, we were not able to interview any Aurora Police or Fire personnel involved in the events that led to Mr. McClain's death, and this timeline therefore draws from the videos, documents, and other evidence made available to us for purposes of this investigation.

Aurora Police officers first saw Mr. McClain walking along the street at approximately 10:42 P.M., and made physical contact with Mr. McClain less than ten seconds after exiting their vehicles around 10:43 P.M. By approximately 10:45 P.M., Aurora Police officers had taken Mr. McClain to the ground, applied two carotid control holds to him — at least one of which was successful — and begun applying pain compliance techniques. By 10:46 P.M., Mr. McClain had told officers that he could not breathe as they attempted to handcuff him. Mr. McClain had

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[33] McClain, E. – Autopsy - Lampson, General Offense Report at 104.

[34] Aurora Police Department records reflect that Mr. McClain resided at 14185 E. Montview Boulevard. General Offense Information, General Offense Report at 3. The below image, as captured from Google Maps, reflects that Mr. McClain was approximately 0.3 miles from his residence when he was stopped by Aurora Police officers.

vomited by approximately 10:48 P.M. Aurora Fire personnel first approached Mr. McClain at or around 10:53 P.M., and had administered 500 milligrams of ketamine to Mr. McClain by approximately 10:59 or 11:00 P.M. Mr. McClain went into cardiac arrest at approximately 11:04 P.M. The events leading to the medical crisis that resulted in Mr. McClain's death occurred rapidly, within an eighteen-minute period of time.

A. Events of August 24, 2019

1. 911 Call

At 10:29 P.M. on August 24, 2019, 911 dispatchers received a call from an individual who stated that he was at Billings Street and Evergreen Avenue, and that there was a man in a mask walking southbound on Billings Street.[35] The caller reported that the man "put his hands up" and "d[id] all these kinds of signs" when the caller passed him.[36] The caller said that the man "look[ed] sketchy" and that "[h]e might be a good person or a bad person."[37]

The dispatcher replied that she would "put a call in so officers can go see what's going on"[38] and told the caller, who stated that he was still on the scene, not to "approach [the man]."[39] The dispatcher asked the caller whether any weapons were involved or mentioned, and the caller responded "no."[40] When asked for a physical description of the man, the caller told the dispatcher that he thought the individual was a Black male dressed in a black ski mask, brown long-sleeved shirt, and black sweatpants.[41] He stated that he did not know the man's age.[42] The dispatcher asked the caller whether he or anyone else was in danger, and he told her "no."[43] The dispatcher then told the caller that she was dispatching officers to check the area and locate the man,[44] and again stated that the caller should not "approach the person" or "disturb anything at the scene."[45] Before ending the call, the caller told dispatch that the man was walking toward a gas station on Billings Street and Colfax Avenue.[46] The call lasted approximately four minutes.

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[35] 911 Call at 1:19, 1:37; 19-32866 - Call & Radio with Timestamps at 0:00.

[36] 911 Call at 1:57.

[37] 911 Call at 2:01.

[38] 911 Call at 2:12.

[39] 911 Call at 2:29.

[40] 911 Call at 2:33.

[41] 911 Call at 2:43.

[42] 911 Call at 2:48.

[43] 911 Call at 3:30.

[44] The Panel interviewed the dispatcher who took this 911 call. The dispatcher advised that dispatch does not have the discretion to decline to send an officer to respond to a call if the caller uses the word "suspicious." Panel's Interview with 911 Dispatcher (Aug. 24, 2019).

[45] 911 Call at 3:35.

[46] 911 Call at 3:46.

Additional details regarding the caller's observations were developed during Major Crime's investigation following Mr. McClain's death. The seventeen-year-old caller told Major Crime investigators that he was driving to his girlfriend's home when he saw Mr. McClain running out from a grassy area near an apartment complex.[47] The caller said that he was not sure whether Mr. McClain was running "because the sprinklers were on."[48] The caller also said that he pulled over in his vehicle, approximately fifteen feet from Mr. McClain, but didn't get out because "it was sketchy" and Mr. McClain "had a mask on."[49] He reported that, while pulled over, he saw Mr. McClain point at him and "do[] all kinds of things with his hands" through his rearview mirror, but that Mr. McClain at no point attempted to get into the caller's vehicle.[50] The caller said that he then made a U-turn and flashed his lights at Mr. McClain to see if Mr. McClain was okay, and that Mr. McClain walked past his car toward the gas station.[51] The caller reported that the caller then made another U-turn and again pulled over.[52] The caller said that as Mr. McClain was walking, he continued to "do things with his arms," make "signals" with his hands, and point at the caller's car.[53] According to the caller, Mr. McClain was at one point close enough to touch the caller's vehicle, but Mr. McClain did not touch the car, did not look at the car "at all," and did not say anything to him.[54] The caller told investigators that as Mr. McClain approached the gas station, he started to act "crazier" and was "doing 360s."[55] The caller stated that once Mr. McClain arrived at the gas station, the caller observed Mr. McClain holding the door for other people.[56]

The caller stated that he observed Mr. McClain for approximately fifteen minutes, from when Mr. McClain "ran from the apartments" until the time he entered the gas station.[57] According to the caller, he called 911 approximately halfway through this encounter. When asked by Major Crime investigators how he would describe Mr. McClain's behavior, the caller responded with "weird" and "suspicious" and was "doing all these kinds of symbols with his hands."[58] At the end of Detective Ingui's interview with the 911 caller, the caller asked Detective Ingui if Mr. McClain

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[47] Aug. 26, 2020 Interview with 911 caller at 1:32.

[48] Aug. 26, 2020 Interview with 911 caller at 2:17.

[49] Aug. 26, 2020 Interview with 911 caller at 2:42.

[50] Aug. 26, 2020 Interview with 911 caller at 2:44.

[51] Aug. 26, 2020 Interview with 911 caller at 3:22.

[52] Aug. 26, 2020 Interview with 911 caller at 3:34.

[53] Aug. 26, 2020 Interview with 911 caller at 3:42.

[54] Aug. 26, 2020 Interview with 911 caller at 3:46, 5:36.

[55] Aug. 26, 2020 Interview with 911 caller at 5:12.

[56] *See* Interview – Ingui, M., General Offense Report at 289; Aug. 26, 2020 Interview with 911 caller at 4:40.

[57] Aug. 26, 2020 Interview with 911 caller at 4:30.

[58] Aug. 26, 2020 Interview with 911 caller at 4:58.

had been caught and if he was a "bad person."[59] Detective Ingui replied that yes, he was caught, and "I don't know if he was a bad person, but he got the help that he needed."[60]

2. Dispatching Aurora Police in Response to 911 Call

At 10:32 P.M., while talking to the 911 caller,[61] the Aurora Police Department dispatcher transmitted a message through Aurora Police's CAD that read as follows[62]:

08/24/19 22:32:03	cad18	314530	**EVENT CREATED** - **Type:** SUSPO-129C01 - SUSPICIOUS PERSON, **Location:** N BILLINGS ST/E EVERGREEN AVE AURORA, **Agency:** AP, **Group:** 2, **Beat:** 12, **Status:** P, **Priortiy:** 2
08/24/19 22:32:03	cad18	314530	**EVENT REMARK** - = Problem: MALE WALKING SB ON BILLINGS HAS MASK ON AND WHEN RP PASSED HIM HE STARTED WAVING HIS ARMS ----- No known wpns invl. ----- 2nd pty caller on scene. ----- Suspicious because: NOTES ----- In progress. ----- SUSPICIOUS person
08/24/19 22:32:47	cad18	314530	**EVENT UPDATED** - **Revision Number**: 2,
08/24/19 22:32:47	cad18	314530	**EVENT REMARK** - Person 1: Description - Suspect, Race - BLACK, Sex - MALE, Clothing - BLACK SKI MASK BROWN LONG SLEEVE SHIRT BLACK SWEATPANTS

According to Aurora Police Department policies, "[p]riority 2" calls are those that "are urgent in nature requiring a quick police response that have a potential, but no imminent, risk of personal injury."[63] For calls of this priority level, the standard operating procedure is to dispatch the two closest available officers to the scene "as soon as possible."[64]

At 10:33 P.M., the CAD updated to reflect that the Black male was "NOW AT BILLINGS/COLFAX."[65] A few seconds later, the dispatcher requested Aurora Police Unit 312, operated by Officer Nathan Woodyard, "to cover on a suspicious party at Evergreen Avenue and Billings, Evergreen Avenue and Billings and last seen at Colfax and Billings. It's a black male wearing a black ski mask and brown long sleeve shirt. Black sweatpants. Was waving his arms when the [911 caller] passed him, thinks that's strange."[66] Around 10:34 P.M., Officers Randy Roedema and Jason Rosenblatt (operating Police Unit 218) were dispatched to the scene.[67] Officer

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[59] Aug. 26, 2020 Interview with 911 caller at 6:34.

[60] Aug. 26, 2020 Interview with 911 caller at 6:34. As described further below in Section IV.A.3, the caller gave a substantially similar account to Officer Alicia Ward during a follow-up call Officer Ward conducted while on the scene. Ward Body Cam 2 at 0:30. When Officer Ward asked the caller whether he saw Mr. McClain do "anything else criminal", the caller responded that he had not. Ward Body Cam 3 at 3:32.

[61] *See* 911 Call at 3:33 (dispatcher informs 911 caller, "We have this call in"); 911 Call at 3:49 (in response to 911 caller's description of the direction Mr. McClain was walking, dispatcher says "Yep, I let them know that").

[62] APD CAD Report – Ingui, M., General Offense Report at 493.

[63] Master Police Guide at 1; SOP 300 – Police Dispatching at 2.

[64] Master Police Guide at 2; SOP 300 – Police Dispatching at 3.

[65] APD CAD Report – Ingui, M., General Offense Report at 493.

[66] CAD Audio Transcript at 22:33:56.

[67] APD CAD Report – Ingui, M., General Offense Report at 493.

Roedema was in the driver's seat and Officer Rosenblatt was operating the computer from the passenger seat.[68]

3. Officers Arrive on Scene and Make Contact with Mr. McClain

Officer Woodyard arrived on Billings Street, near the location reported by the 911 caller, at or around 10:42 P.M.[69] While driving down Billings Street, Officer Woodyard stated he observed a man walking northbound on Billings Street from Colfax Avenue wearing a ski mask, brown sweater, and black pants.[70] He transmitted over police radio that he had identified the individual described, and drove further down Billings Street to turn around and wait for a second police unit to arrive.[71] Officer Woodyard noted that the "[p]arty [wa]s carrying a bag."[72] Officers Rosenblatt and Roedema arrived a few seconds later.[73]

Officer Woodyard pulled up to Mr. McClain just after 10:43 P.M.[74] Body worn camera footage shows Mr. McClain walking, presumably northbound,[75] on the sidewalk with a white grocery-style bag in his left hand and a cell phone in his right.[76] Mr. McClain was dressed in a

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[68] Roedema Interview at 5:31.

[69] APD CAD Report – Ingui, M., General Offense Report at 494.

Security camera footage from a gas station at the corner of Colfax Avenue and Billings Street reflects Mr. McClain's activities in the minutes prior to his contact with Aurora Police officers. This security camera footage was reviewed by Major Crime investigators during the course of its investigation, and this information was not available to officers at the time they made contact with Mr. McClain.

The footage shows that Mr. McClain arrived at the gas station's convenience store at approximately 10:34 P.M. Summary Report – Ingui, M., General Offense Report at 516. The footage shows Mr. McClain wearing a brown jacket, black pants, and a black ski mask. Gas Station Footage, Ch. 1 at 6:28; Ch. 2 at 9:36. When Mr. McClain arrived at the convenience store, he held the door open for two customers, and then walked inside. Gas Station Footage, Ch. 12 at 10:56, Ch. 3 at 8:48. Footage shows that Mr. McClain walked directly to a refrigerator containing beverages and removed three cans. Gas Station Footage, Ch. 1 at 6:30; Ch. 2 at 9:36; Ch. 3 at 9:05. Mr. McClain then walked to the register and waited in line to pay. Gas Station Footage, Ch. 1 at 6:50; Ch. 12 at 11:35; Ch. 2 at 9:56. He paid for the three drinks with cash, bowed to the customer behind him in line, and walked out of the store at approximately 10:37 P.M. Gas Station Footage, Ch. 11 at 1:32. As he walked out of the store, Mr. McClain was holding a white plastic bag in his left hand and moving his right arm up and down in small movements, almost parallel with the ground, in what appears to be a dancing or waving motion. Gas Station Footage, Ch. 3 at 10:50.

[70] Officer Woodyard Interview – Ingui, M., General Offense Report at 360-61; *see also* APD CAD Report – Ingui, M., General Offense Report at 494 ("EVENT REMARK – 312 – OUT WITH MALE NB ON BILLINGS FROM COLFAX" AND "EVENT REMARK – 312 – PARTY IS CARRYING A BAG.").

[71] Officer Woodyard Interview – Ingui, M., General Offense Report at 360.

[72] APD CAD Report – Ingui, M., General Offense Report at 494.

[73] Officer Rosenblatt Interview – Ingui, M., General Offense Report at 354.

[74] APD CAD Report – Ingui, M., General Offense Report at 494; Woodyard Body Cam at 00:30.

[75] It is difficult to discern from the body worn camera footage in which direction Mr. McClain was walking, but as noted above, Officer Woodyard reported observing a man walking northbound on Billings Street. Woodyard Body Cam at 0:30.

[76] Woodyard Body Cam at 0:30.

brown zip-up jacket or sweatshirt, black pants, sneakers, and a black ski mask.[77] Officer Woodyard had parked and was positioned northwest of Mr. McClain, across the street and a number of yards in front of him. One to two seconds after stopping his car, Officer Woodyard stepped out of his car, and at 10:43:23 P.M. called to Mr. McClain, "Do me a favor stop right there."[78] Mr. McClain did not stop and continued walking northbound on the sidewalk.[79] Officers Roedema and Rosenblatt's police car was parked behind Mr. McClain and to the south.[80] Mr. McClain continued to walk as Officer Woodyard called for Mr. McClain to "stop" several times in rapid succession.[81] Mr. McClain did not respond and continued walking in the same direction and at the same pace as when Officer Woodyard arrived.[82] Later during the encounter, as described further below, Mr. McClain asserted that he was listening to music and attempting to stop it to listen when the encounter started.[83]

As Officer Woodyard approached Mr. McClain, Mr. McClain continued walking and told Officer Woodyard, "I have a right to walk to where I'm going."[84] As he did so, body worn camera footage reflects that Mr. McClain lifted his right arm to point down the street, and a cell phone is visible in his right hand.[85] Officer Woodyard responded, "I have a right to stop you because you're being suspicious" as he grabbed Mr. McClain's arms and began to try to turn him around.[86] Mr. McClain said, "Well okay" or "Whoa okay."[87] Less than ten seconds had elapsed between the moment Officer Woodyard first exited his car to approach Mr. McClain and when he began to physically restrain Mr. McClain.

At the same time that Officer Woodyard approached Mr. McClain, Officers Rosenblatt and Roedema approached Mr. McClain from behind.[88] Reaching Mr. McClain less than five seconds after Officer Woodyard made physical contact with Mr. McClain, Officer Rosenblatt grabbed Mr. McClain's other arm.[89] Officer Woodyard repeatedly directed Mr. McClain to turn around, and Mr. McClain said "let go of me," "stop," and later (as described further below), "you guys started to address me, and I was stopping my music to listen. Now, let go of me."[90] Officer Roedema

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[77] Woodyard Body Cam at 0:30.

[78] Woodyard Body Cam at 0:30.

[79] Woodyard Body Cam at 0:30.

[80] Woodyard Body Cam at 0:30.

[81] Woodyard Body Cam at 0:30.

[82] Woodyard Body Cam at 0:34.

[83] Woodyard Body Cam at 1:07.

[84] Woodyard Body Cam at 0:34.

[85] Woodyard Body Cam at 0:35. Officer Woodyard also later told Major Crime investigators that Mr. McClain "didn't have any weapons or anything that [he] could see in [McClain's] hand" Woodyard Interview at 6:03.

[86] Woodyard Body Cam at 0:36.

[87] Woodyard Body Cam at 0:38.

[88] Woodyard Body Cam at 0:34, 0:40.

[89] Rosenblatt Body Cam at 0:22.

[90] Woodyard Body Cam at 0:42, 1:07.

was steps behind Officer Rosenblatt, and faced Mr. McClain as the other two officers held each of Mr. McClain's arms.[91]

None of Officers Woodyard, Rosenblatt, or Roedema asserted that they had reason to believe Mr. McClain had committed a crime at the time that he was stopped. We summarize below the officers' explanations for stopping and making physical contact with Mr. McClain.

1. While the officers were still restraining Mr. McClain and approximately five minutes after they first encountered Mr. McClain, Sgt. Dale Leonard arrived. Sgt. Leonard asked Officers Woodyard, Roedema, and Rosenblatt, "Do we have anything other than him being suspicious?"[92] One of the officers responded "no."[93] Either the same officer or another officer then said, "No, I mean, I tried to stop him and he started walking away."[94] Another officer added, "When we showed up, he was wearing a ski mask and walking so...I mean."[95] Sgt. Leonard responded, "Okay, so he's on something obviously," and the officer agreed.[96] At Sgt. Leonard's instruction, Officer Alicia Ward contacted the 911 caller[97] and while still on the phone with the caller, told Sgt. Leonard that "all [the caller] said is the same thing that's in the notes, that he saw a guy...[in a] mask, and that [Mr. McClain] was like throwing his hands up."[98] Officer Ward added that the caller "said he didn't feel threatened or anything," and "just thought it was weird."[99] Officer Ward informed Sgt. Leonard that the caller was still on the phone if Sgt. Leonard wanted to ask additional questions.[100] Sgt. Leonard declined but instructed Officer Ward to have the caller explain, as best the caller could, "what was going on and why we got called."[101] Sgt. Leonard pressed Officer Ward to have the caller explain "if there was anything criminal," although Sgt. Leonard noted that it "doesn't look like there was."[102] Officer Ward agreed that it did not sound like the caller observed anything criminal,

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[91] Roedema Body Cam 1 at 0:39.

[92] Leonard Body Cam 1 at 1:25.

[93] At many points throughout the events described in this Report, a conversation or statement may be audible on the video footage but it is not clear who is speaking. Where possible in such cases, we have identified who is speaking based on voice comparison to other footage in which the speaker is visible; which voice is loudest and therefore closest the camera; or through context. In cases where we could not determine which person was speaking, as here, we identify the speaker to a more limited extent.

[94] Roedema Body Cam 2 at 2:18; Leonard Body Cam 1 at 1:25.

[95] Leonard Body Cam 1 at 1:34.

[96] Roedema Body Cam 2 at 2:31; Leonard Body Cam 1 at 1:38. Notably, the Autopsy Report states that Mr. McClain's "[b]lood toxicology was negative for all substances other than marijuana and ketamine." Adams County Autopsy Report – Ingui, M., General Offense Report at 202.

[97] *See* Ward Narrative/Remarks, General Offense Report at 7 ("Sgt[.] Leonard…instructed me to call the [reporting party]. I spoke to the [reporting party]…over the phone.").

[98] Ward Body Cam 2 at 1:58; Leonard Body Cam 2 at 2:34.

[99] Leonard Body Cam 2 at 3:01.

[100] Leonard Body Cam 2 at 3:04.

[101] Leonard Body Cam 2 at 3:07.

[102] Leonard Body Cam 2 at 3:12.

but confirmed that she would "get more details."[103] Approximately four minutes later, Officer Ward followed up with Sgt. Leonard and informed him that the caller "just thought it was weird, because [Mr. McClain] was wearing the mask, and [Mr. McClain] was doing all the gestures."[104] Sgt. Leonard replied, "Well, it is obviously, yeah, and he's acting crazy, okay."[105] Officer Ward responded, "Yeah. That's all though," and Sgt. Leonard instructed Officer Ward to "make sure [she] document[ed] that part."[106]

2. In another conversation approximately five minutes after Sgt. Leonard arrived, Officer Roedema explained to K-9 Officer Matthew Green, "We got called to a suspo. He was out here walking around with a ski mask on… He started to kind of like walk away from us, so these two wrap him up, and then in the mix of them wrapping him up, pushing him against the wall right here, he reached for [Officer Rosenblatt's] gun, dude."[107]

3. Separately, in connection with Major Crime's investigation, Officer Woodyard told investigators that he waited to stop Mr. McClain until he saw the other officers approaching because it was a "pretty suspicious area" and "tied with [Mr. McClain's] actions" he "didn't want to contact somebody who [he] thought had weapons by [him]self."[108] He explained that he "felt safe making an approach" upon seeing the other two officers walking up to Mr. McClain.[109] He noted, "[Mr. McClain] didn't have any weapons or anything I could see in his hand."[110] Officer Woodyard also told Major Crime investigators that he wanted to pat Mr. McClain down "based on him having a ski mask on Colfax in the middle of the night, and it was causing people to call in"[111] and he "thought that he might have weapons on him."[112] He did not explain why these circumstances led him to believe Mr. McClain may have been armed.

4. When asked by Major Crime investigators to confirm that he was able to see Mr. McClain's hands and whether Mr. McClain had anything with him, Officer Woodyard stated that Mr.

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[103] Leonard Body Cam 2 at 3:15.

[104] Leonard Body Cam 2 at 6:40.

[105] Leonard Body Cam 2 at 6:40.

[106] Leonard Body Cam 2 at 6:48.

Officer Ward later filed a report with General Offense information and an accompanying narrative. In that narrative, Officer Ward noted that she spoke to the 911 caller who "informed me he saw a black male walking with a black ski mask on. [The caller] last saw the male going into the gas station at E Colfax Ave and N Billings St. The male was wearing sweats, with a brown long sleeve shirt or sweater. The male had walked from the apartments north of the gas station and has also been running at some point. [The caller] saw the male making a lot of hand gestures while he walked. [The caller] believed the male wearing the ski mask was suspicious. [The caller] was not sure if the male had any weapons, but did not see any." Ward Narrative/Remarks, General Offense Report at 7.

[107] Green Body Cam at 1:38.

[108] Woodyard Interview at 28:08.

[109] Woodyard Interview at 5:55.

[110] Woodyard Interview at 6:03.

[111] Woodyard Interview at 6:25.

[112] Woodyard Interview at 6:35.

McClain had a plastic bag in one hand and did not see a weapon in Mr. McClain's other hand.[113] Officer Woodyard did not make any other mention of the plastic bag, nor did he explain any basis for concern that Mr. McClain had a weapon.[114] Officer Woodyard did not state that he had reason to believe that Mr. McClain had committed a crime. Officer Woodyard also said that even if he had not been dispatched on the call, he likely would have stopped Mr. McClain "just to check on his welfare, and see what he was up to because it's pretty suspicious abnormal behavior."[115] Officer Woodyard said that his intent in grabbing Mr. McClain's arm was to gain a "position of advantage" in order to "transition to a rear wrist lock cuffing technique or simply guide somebody for a cursory searching technique."[116]

5. Officer Rosenblatt also told Major Crime investigators that he found it "strange" that Mr. McClain continued walking and did not comply with Officer Woodyard's direction that he stop.[117] He explained that he grabbed Mr. McClain's arms to "make sure he couldn't reach for anything."[118] He said he made physical contact with Mr. McClain because Mr. McClain was walking away and not listening to Officer Woodyard's commands, and because Mr. McClain's hands were "tucked in a little bit," which Officer Rosenblatt described as a "red flag" because he was unable to see Mr. McClain's hands as he approached him from behind.[119] Officer Rosenblatt explained, "I couldn't see his hands, and that's just how we're trained. Control the hands, you know. Not a big deal."[120] Officer Rosenblatt also did not state that he suspected Mr. McClain of having committed a crime nor did he offer any basis to suspect that Mr. McClain was armed.

6. Officer Roedema told Major Crime investigators that the fact that Mr. McClain was wearing all dark clothing and a jacket and ski mask during the summer in a high crime area at 10:30 P.M. made him suspicious.[121] He added that he "[didn't] think [they] had much [to think that Mr. McClain was suspicious] just upon initial contact."[122] Officer Roedema said that he

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[113] Woodyard Interview at 27:27.

[114] We note that a Major Crime detective's notes from a briefing on the incident indicated that at "Officer Woodyard stated the suspect was carrying a bag and asked for more cars. Additional officers responded emergent." Initial Response – Jokerst, S, General Offense Report at 120. The CAD indicates the description of the bag occurred at 10:43:06. APD CAD Report – Ingui, M., General Offense Report at 494. It is not clear whether Officer Woodyard's statement that Mr. McClain was carrying a bag was in fact connected to the request for more cars, however, as in the dispatch audio there is no audible request for additional cars until later, when an officer asked for "more units," saying "we're fighting him." Use of Force Summary – Ingui, M., General Offense Report at 465.

[115] Woodyard Interview at 29:19.

[116] Woodyard Interview at 12:55.

[117] Rosenblatt Interview at 7:21.

[118] Rosenblatt Interview at 21:44.

[119] Rosenblatt Interview at 7:24.

[120] Rosenblatt Interview at 8:01.

[121] Roedema Interview at 54:15. Aurora Police records included the weather report for August 24, 2019 at Denver International Airport, which shows that at 10:58 P.M., the temperature was 67 degrees with 12 mph winds. Weather – Ingui, M., General Offense Report at 488. Denver International Airport is approximately 16 miles (driving) from where the officers encountered Mr. McClain.

[122] Roedema Interview at 50:00.

assumed Officers Rosenblatt and Woodyard "took control" of Mr. McClain because he was "refusing all orders" and continuing to walk, which was "another suspicious thing…you got to kind of take in account."[123] When asked whether Mr. McClain's behavior was "normal," Officer Roedema told Major Crime investigators that Mr. McClain's failure to comply with Officer Woodyard's order to stop was consistent with someone who "either just committed a crime and they're trying to get away from police [or someone who is] concealing something whether it be a weapon or drugs; and/or they have a warrant."[124] When asked, Officer Roedema also told Major Crime investigators that he believed "maybe [Mr. McClain] was concealing a weapon."[125] Officer Roedema noted that Mr. McClain's jacket was "slightly unzipped at the top" and he was pulling his hands close to his chest, so he could have reached inside his jacket for a concealed weapon.[126] Officer Roedema also described seeing a "grocery bag in [Mr. McClain's] hands" and explained, "I don't know what was in that…bag. I never ever took a look, but I know there was something heavy in that bag. So it could've been a weapon; it could've been a soda…but the way he was holding that bag and refusing to let it go, that gave me the impression that there's something in that bag, or he's trying to grab something in his jacket."[127]

7. Officer Roedema also explained to Major Crime investigators that "based off of the other departments [he's] gone to, and…people that [he] know[s] that work in other departments," he believed that in Aurora, officers "tend to take control of an individual whether that be… a[n] escort position, a twist lock, whatever it may be, we tend to…control it before it needs to be controlled."[128] He added, "We take action before it escalates, and we have to use more force, more action, whatnot. So I feel by controlling his arms, we are able to use less force in the entire situation because we already had a general control of him."[129] In addition, Officer Roedema said he believed that had Mr. McClain complied with the officers' orders to stop, the "whole situation, probably, would've been different…we probably still would've deemed that he was…on some type of drug and maybe seek medical attention in a different manner."[130]

Over a thirty-second period after Officer Woodyard first made physical contact with Mr. McClain, body worn camera audio reflects that the officers repeatedly instructed Mr. McClain to "relax" and "stop tensing up," and asked him to cooperate.[131] Mr. McClain told them "no," and asked the officers to let go of him or to leave him alone at least seven times.[132] One officer told

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[123] Roedema Interview at 18:34.

[124] Roedema Interview at 55:07.

[125] Roedema Interview at 54:12.

[126] Roedema Interview at 54:21.

[127] Roedema Interview at 54:37.

[128] Roedema Interview at 51:50.

[129] Roedema Interview at 51:48.

[130] Roedema Interview at 50:31.

[131] Woodyard Body Cam at 0:42.

[132] Woodyard Body Cam at 0:46.

him that "this isn't going to go well."[133] Mr. McClain responded, "I am an introvert, please respect the boundaries that I am speaking" and "stop, stop, I'm going home."[134] Officer Woodyard warned Mr. McClain that if he didn't relax, Officer Woodyard would "have to change this situation," and Officer Roedema told Mr. McClain they would not leave him alone because "we're gonna talk to you."[135]

The footage from the officers' body worn camera does not clearly show what transpired next. However, Officers Woodyard and Rosenblatt told Major Crime investigators that when they tried to take hold of Mr. McClain, Mr. McClain tensed his arms and pinned them to his chest.[136] Officer Woodyard said he then "held [Mr. McClain's] hands to [Mr. McClain's] chest while trying to talk to him."[137] Officer Roedema's body worn camera footage shows Officers Rosenblatt and Woodyard each held one of Mr. McClain's shoulders or arms as they spoke.[138] Although Mr. McClain's arms are not visible in body worn camera footage, neither he nor the other two officers appeared to be actively struggling, and neither their voices nor ambient sounds suggest a physical struggle.[139]

Officer Roedema told Major Crime investigators that Mr. McClain was "kind of pulling away from" the other two officers.[140] Officer Rosenblatt acknowledged to Major Crime investigators that in some cases, individuals tense up when officers first grab them, and noted that officers are trained to deal with such circumstances.[141] Officer Rosenblatt told Major Crime investigators that he "immediately realized that [Mr. McClain] was very strong, especially for his size" as he tried to pull Mr. McClain's arms away from his body.[142] Officer Rosenblatt explained that the officers were trying to talk to Mr. McClain and "de-escalate him," but Mr. McClain "[wasn't] really getting the message" and "start[ed] saying things."[143] Officer Rosenblatt could not recall what Mr. McClain was saying, but told Major Crime investigators that he thought Mr. McClain was "agitated" from the tone of his voice.[144] Officer Woodyard told Major Crime investigators that Mr. McClain was saying "we had to respect his rights or something similar to

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[133] Woodyard Body Cam at 0:45.

[134] Woodyard Body Cam at 0:50.

[135] Woodyard Body Cam at 0:58.

[136] Rosenblatt Interview at 8:06; Woodyard Interview at 13:30.

[137] Woodyard Interview at 6:16.

[138] Roedema Body Cam 1 at 0:43.

[139] Roedema Body Cam 1 at 0:42.

[140] Roedema Interview at 19:33.

[141] Rosenblatt Interview at 8:50.

[142] Rosenblatt Interview at 8:09. Officer Woodyard similarly described Mr. McClain's resistance to his attempts to get Mr. McClain into a position of control as "incredibly strong," recalling that he tried to pull Mr. McClain's hand down toward his waist and was unable to do so. Woodyard Interview at 16:19.

[143] Rosenblatt Interview at 8:26.

[144] Rosenblatt Interview at 9:05.

that."[145] Officer Roedema recalled only that Mr. McClain repeated that he was an introvert several times and that he wasn't a normal person.[146]

4. Officers Move Mr. McClain onto the Grass and Bring Him to the Ground

Officer Rosenblatt told Major Crime investigators that, at this point, he and Officer Woodyard made eye contact and he determined that they should move away from the bed of rocks they were standing on and onto the grass in case they needed to "take [Mr. McClain] down."[147] Officer Roedema similarly told Major Crime investigators that the three officers "signaled through eye contact" before Officer Woodyard said they should move Mr. McClain to the grass.[148] Officer Roedema did not explain whether the officers' eye contact signaling related to moving Mr. McClain to the grass or something else.[149] Officer Woodyard explained to Major Crime investigators that Mr. McClain did not "relax or release himself or allow me to attempt to do a search, and I thought, at that point, we might be trying to take him down to the ground to get him in handcuffs or to get him in a better position to conduct a search."[150] Officer Woodyard also told Major Crime investigators that, in his experience conducting pat-downs, "most of the time [people] do exactly what we say…I'm able to guide them, get them in a position, tell them to relax and conduct a search."[151]

Body worn camera footage shows that approximately eight or nine seconds after Officer Woodyard warned Mr. McClain that he may "have to change this situation," Officer Roedema pulled the plastic bag out of Mr. McClain's hands and threw it to the ground.[152] As he did so, Mr. McClain was explaining to the officers, "You guys started to address me, and I was stopping my music to listen. Now let go of me."[153] At the same time, Officer Roedema's body worn camera footage reflects that Officers Rosenblatt and Woodyard, who were each holding one of Mr. McClain's arms, pulled Mr. McClain forward several steps onto the grass while Mr. McClain tried to stay where he was.[154] At the same time as (or a fraction of a second after) the officers first

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[145] Woodyard Interview at 13:38.

[146] Roedema Interview at 8:01.

[147] Rosenblatt Interview at 9:15.

[148] Roedema Interview at 8:19.

[149] In their interviews with Major Crime Investigators, the officers also recalled that one of them explicitly suggested to the others that they move to the grass. *See* Rosenblatt Interview at 9:24 ("So I told Woody 'hey let's go over to the grass.'"); Woodyard Interview at 7:00 ("Officer Rosenblatt suggested we move off the rocks."); Roedema Interview at 20:14 ("Officer Woodyard was like 'hey let's move him to the grass,' just in case we have to drop him, he's gonna fall on grass versus concrete, to avoid injury.").

[150] Woodyard Interview at 6:38.

[151] Woodyard Interview at 15:53.

[152] Woodyard Body Cam at 1:07; Roedema Interview at 20:30 ("I took the bag and I just threw it on the ground."). Officer Roedema told investigators that he grabbed the bag from Mr. McClain because they were "giving commands to drop the bag and he didn't drop the bag," Roedema Interview at 20:25, but no such commands are audible on any of the three officers' body worn camera footage.

[153] Woodyard Body Cam at 1:07. Body worn camera video clearly shows Mr. McClain's earbuds later in the struggle. Rosenblatt Body Cam at 10:08.

[154] Roedema Body Cam 1 at 1:04.

began attempting to pull on Mr. McClain's arms, Officer Rosenblatt said, "Let's get over to the grass"[155] and then, "We're gonna lay you down, okay, come on," sounding strained.[156] As the officers discussed moving Mr. McClain to the grass and laying him down, Officer Woodyard's body worn camera was jostled and then fell to the ground.[157] Approximately forty-five seconds had elapsed since Officer Woodyard first told Mr. McClain to stop walking.

Over approximately the next ten seconds, the officers moved Mr. McClain across a grassy area to the side of a building, over a distance that Officer Roedema later estimated to be approximately ten to fifteen feet from the original point of contact.[158] Officer Rosenblatt was on Mr. McClain's right side while Officer Woodyard was on Mr. McClain's left.[159]

Approximately two seconds after Officer Rosenblatt said "let's get over to the grass," and as the officers and Mr. McClain neared the wall of the building, Officers Woodyard and Rosenblatt turned Mr. McClain around so that his back was to the side of the building and Officer Woodyard pushed Mr. McClain backwards until Mr. McClain's back was against the wall.[160] As the officers turned him, Mr. McClain began saying, "It's not going to be an arrest. It's not going to be an arrest. I intend to take my power back. I intend to be centered."[161] Officer Rosenblatt said, "It's not, dude" or "Stop, dude."[162] Once Mr. McClain was against the wall, Officer Rosenblatt appears to have continued grabbing or trying to control Mr. McClain's hand or hands, and was directly in front of Mr. McClain and facing him; Officer Woodyard appears to have done the same as he stood at Mr. McClain's left side and with his back toward the wall.[163] Officer Roedema's body worn camera footage indicates that Officer Roedema was initially a few feet away from Mr. McClain and Officers Woodyard and Rosenblatt, but said "you guys" as Officer Woodyard was pushing Mr. McClain back toward the wall and then moved closer once Mr. McClain was against the wall.[164] Although the body worn camera footage is not entirely clear — Mr. McClain's head can

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[155] Roedema Body Cam 1 at 1:06; Rosenblatt Body Cam at 0:55; Woodyard Body Cam at 1:14.

[156] Rosenblatt Body Cam at 0:56; Roedema Body Cam 1 at 1:10.

[157] Woodyard Body Cam at 1:13. *See also* Roedema Cam 1 at 1:15 (showing Officer Woodyard, Officer Rosenblatt, and Mr. McClain when Officer Woodyard's camera became dislodged). From this point until the camera was picked up approximately five minutes later, just before 10:50 P.M., *see* Woodyard Body Cam at 6:12, the camera was pointed toward the sky and a building and did not capture relevant video footage. However, the camera continued to capture audio footage.

[158] Roedema Body Cam 1 at 1:08; Roedema Interview at 21:37.

[159] Roedema Body Cam 1 at 1:10.

[160] Roedema Body Cam 1 at 1:13.

[161] Rosenblatt Body Cam at 0:57.

[162] Rosenblatt Body Cam at 1:04.

[163] Roedema Body Cam 1 at 1:15. Both Officer Rosenblatt and Officer Woodyard told Major Crime investigators that at this point, Mr. McClain was still holding his arms to his chest and they were trying to grab his wrists or arms. Rosenblatt Interview at 10:22; Woodyard Interview at 17:52.

[164] Roedema Body Cam 1 at 1:17.

Shortly after the struggle with Mr. McClain and while still on scene, Officer Rosenblatt described to Sgt. Leonard that the officers "cornered [Mr. McClain] against the wall" because he started "going crazier," "saying stuff and [] holding his arms in." Rosenblatt Body Cam at 12:29. Later that evening, Officer Rosenblatt initially told Major

be seen behind the officers, but the rest of his body is obscured — the body worn camera footage suggests that Officer Rosenblatt may have then taken Mr. McClain's cell phone from Mr. McClain's hand.[165]

As soon as Officer Roedema approached the group, either Officer Rosenblatt or Woodyard said to the other officers, "We're just going to go forward with him, okay?"[166] A different officer replied, "okay," as either Officer Roedema or Officer Woodyard grabbed Mr. McClain's wrist or hand.[167] One second later, an officer said, "go."[168] At the same time, Officer Rosenblatt's body worn camera was dislodged and dropped to the ground.[169]

The footage is not clear as to what happened next, but Officer Rosenblatt appeared to move abruptly, and coupled with a shift in the inflection of Mr. McClain's voice, the footage suggests that Mr. McClain was being moved by the officers.[170] Approximately two seconds later, body worn camera audio reflects that Officer Roedema said, "he grabbed your gun, dude" and then Officer Roedema or another officer said, "stop, dude!"[171] Approximately one minute had elapsed since Officer Woodyard first exited his vehicle and called to Mr. McClain to stop walking.[172]

It is not clear from the footage whether the officers began to bring Mr. McClain to the ground before or after Officer Roedema's statement that Mr. McClain was grabbing for an officer's gun. In addition, none of the body worn camera footage captured clear visuals of Mr. McClain and the officers at the moment that Officer Roedema stated that Mr. McClain grabbed another officer's gun. We were therefore unable to independently confirm whether or not this occurred in the sequence of events. However, all three officers stated that they brought Mr. McClain to the ground after (and because of) Officer Roedema's statement that Mr. McClain had reached for Officer Rosenblatt's gun. Specifically:

1. Officer Roedema told Major Crime investigators that "almost immediately" after the officers had Mr. McClain against the wall, Mr. McClain's "hands c[a]me through" the officers' grip,

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Crime investigators that he did not remember how the group got to the wall of the building because his intent was only to take Mr. McClain off the rocks and onto the grass; however, he later then recalled that they reached the wall because they kept walking backward as Officer Woodyard unsuccessfully attempted to apply a "figure four" hold to Mr. McClain. Rosenblatt Interview at 9:58, 21:53.

[165] Roedema Body Cam 1 at 1:16.

[166] Roedema Body Cam 1 at 1:19; Rosenblatt Body Cam at 1:06.

[167] Roedema Body Cam 1 at 1:21.

[168] Roedema Body Cam 1 at 1:22; Rosenblatt Body Cam at 1:08.

[169] Rosenblatt Body Cam at 1:08. For the next five minutes until Officer Rosenblatt picks up the camera again, Rosenblatt Body Cam at 6:02, the video footage from his body worn camera shows only alternating views of darkness and the grass where the camera dropped. However, the camera continues to capture audio footage.

[170] Roedema Body Cam 1 at 1:22. However, because the footage is not clear, it is possible that rather than being moved by the officers, Mr. McClain may have been struggling with them.

[171] Rosenblatt Body Cam at 1:09; Roedema Body Cam 1 at 1:23.

[172] Woodyard Body Cam at 0:30, 1:28.

and he grabbed for Officer Rosenblatt's gun.[173] He stated that he witnessed Mr. McClain reach for the pistol grip of the gun with his thumb going down along the Officer Rosenblatt's holster.[174] He stated that, at this point, he let everyone know that Mr. McClain was going for the gun.[175] Officer Roedema stated that once Mr. McClain reached for the gun, his "goal was to prevent [Mr. McClain] from grabbing Officer Rosenblatt's gun and to get him to the ground as quick as possible."[176] He grabbed Mr. McClain's head and pulled it down with both hands, and when Mr. McClain bent over, "shove[d] him down," at which point Mr. McClain "fell to the ground on the grass."[177] Officer Roedema explained that, at that point, Mr. McClain was no longer touching Officer Rosenblatt's gun because as soon as Officer Roedema grabbed Mr. McClain's head, Mr. McClain's "hands went back" and he started to "brace himself with one hand and…push us with the other hand, to try to get away from us," at which point Officer Roedema "follow[ed] through with it, and we put him to the ground."[178]

2. When asked to describe Mr. McClain's "level of resistance," Officer Roedema said, "He was completely disobeying all orders given. He was wanting to get away from us. He appeared to be extremely freaked out. He was pushing against us. I don't recall him, ever, attempting to, like, strike us in any manner, but the way his body was — he was very, very combative where he was just pushing us and just trying to get us off of him, everything like that. And, for him to grab a gun, that means he's, in my opinion, he's in a combative mode where he's thinking, 'Okay, if I get that gun, I'm going to further this.'"[179]

3. Officer Rosenblatt also told Major Crime investigators that he remembered trying to grab Mr. McClain's arms, but Mr. McClain was holding his hands tightly to his chest and that at some

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[173] Roedema Interview at 22:03. Officer Roedema also told Officer Matthew Green, who arrived on the scene a few minutes after the officers pulled Mr. McClain to the ground, that "in the mix of [Officers Woodyard and Rosenblatt] wrapping [Mr. McClain] up, pushing him against the wall…he reached for Rosey's gun, dude, so…" Green Body Cam at 1:55.

[174] Roedema Interview at 8:53. Aurora Police Directive 8.1, "Uniform and Attire Requirements," specifies that officers' duty belts include, among other things, a "[s]ecurity holster." *Directives Manual: Uniform and Attire Requirements*, Aurora Police Dep't at 8.1.2.m (revised Dec. 19, 2019). Chief Vanessa Wilson confirmed to the Panel that this requirement would have been in place on August 24, 2019. Panel's interview with Aurora Police Chief Vanessa Wilson (Feb. 3, 2021). Photographs of Officers Woodyard and Rosenblatt, taken after the officers' interaction with Mr. McClain and prior to their interviews with Major Crime, indicate that they were wearing duty belts that evening. *See* Use of Force Summary – Ingui, M., General Offense Report at 429, 433 (reflecting that the officers were photographed prior to their interviews); 424-25 (photographs). However, none of the records provided to the Panel indicate whether and what type of security holsters were utilized by Officers Woodyard, Roedema, and Rosenblatt that evening (nor was the Panel able to interview the officers to learn this information).

[175] Roedema Interview at 9:13.

[176] Roedema Interview at 22:34.

[177] Roedema Interview at 22:23.

[178] Roedema Interview at 23:41.

[179] Roedema Interview at 24:08. When asked by Major Crime investigators how he felt when Mr. McClain reached for the gun, Officer Roedema stated that he "feared for [his] life that, if he grabbed that gun, it was going to be a different situation where either he was gonna shoot at us, or we're gonna have to shoot at him." Roedema Interview at 23:18.

point, Officer Rosenblatt lost his grip on Mr. McClain's right hand.[180] Officer Rosenblatt said that he then heard someone advise that Mr. McClain was "reaching for [a] gun," and that Mr. McClain went from a "standing position" to a position where his head "came forward."[181] It was Officer Rosenblatt's belief that "somebody pulled him down like that 'cause I don't know why he would just go down by himself…"[182] Officer Rosenblatt said that, at the time, he did not know whose gun Mr. McClain had reached for[183] and that, at that point, the situation changed from "a non-compliant person to somebody who is willing to do anything to get away," which "really concerned" him.[184] Separately, several minutes after the incident and while still on scene, Officer Rosenblatt explained to other officers that he heard Officer Roedema say that Mr. McClain had gone for his gun and, as a result, the officers "pulled him down." [185] He also told those officers that Mr. McClain "pulled his arm free" though he did not "remember feeling it because [he] was focused on [Mr. McClain]."[186]

4. Officer Woodyard told Major Crime investigators that he had control of Mr. McClain's left arm and Officer Rosenblatt had Mr. McClain's right arm[187] and that at some point after the group moved to the grass, one of Mr. McClain's hands broke free and "[went] down."[188] Officer Woodyard said that Officer Roedema had been "talking to [Mr. McClain]" and told the officers that Mr. McClain was "going for your gun."[189] Officer Woodyard told Major Crime investigators that he did not know if Officer Roedema was referring to his gun or to Officer

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[180] Rosenblatt Interview at 10:24.

[181] Rosenblatt Interview at 10:39.

[182] Rosenblatt Interview at 11:43.

[183] Rosenblatt Interview at 11:27.

[184] Rosenblatt Interview at 10:56. When Officer Rosenblatt was asked by Major Crime investigators how he felt when he heard Officer Roedema state that Mr. McClain was reaching for a gun, Officer Rosenblatt stated that he felt that Mr. McClain was "really trying to hurt [him]" and was "trying to kill [him]." Rosenblatt Interview at 23:58. Officer Rosenblatt also stated that he "was in fear for [his] life" and that he realized that the situation was "potentially a lethal force situation." Rosenblatt Interview at 33:35.

[185] Rosenblatt Body Cam at 12:54.

[186] Rosenblatt Body Cam at 12:54.

Officer Rosenblatt had also asked Officer Roedema, approximately seven minutes earlier, whether Mr. McClain "ha[d] a good grip on it [referring to the gun]." Dunson Body Cam at 6:53; Rosenblatt Body Cam at 5:20. Officer Roedema responded with a demonstration for Officer Rosenblatt, reaching with his right arm across towards Officer Rosenblatt's right hip and making two grabbing or pulling motions at what appeared to be Officer Rosenblatt's gun. Dunson Body Cam at 6:55; Rosenblatt Body Cam at 5:22.

[187] Woodyard Interview at 6:19.

[188] Woodyard Interview at 7:05.

[189] Woodyard Interview at 7:16.

Rosenblatt's gun,[190] but that it "changed the situation" and he "tried to take him down to the ground as hard as [he] could."[191]

5. *Officers Twice Apply Carotid Control Holds to Mr. McClain in Rapid Succession*

Immediately after Officer Roedema said Mr. McClain had reached for a gun, footage from Officer Roedema's body worn camera shows Officer Rosenblatt, Officer Woodyard, Mr. McClain and possibly also Officer Roedema struggling, although the darkness of the scene and the movement of the camera make it difficult to clearly discern the events unfolding. As described below, Officers Woodyard, Roedema, and Rosenblatt told other officers at the scene and Major Crime investigators that at some point in the minute or so following Officer Roedema's warning that Mr. McClain was going for a gun, first Officer Rosenblatt and then Officer Woodyard applied carotid control holds to Mr. McClain as they took him to the ground and struggled with him there.[192]

Officer Roedema's body camera did not capture clear footage of the officers pulling Mr. McClain to the ground because of the rapid and sudden movement at this point in the incident. The body worn camera footage reflects the following within less than a minute after Officer Roedema told Officers Rosenblatt and Woodyard that Mr. McClain had reached for one of their guns, at around 10:44 P.M.:

1. In the two seconds after Officer Roedema said Mr. McClain went for a gun, body worn camera audio reflects that one officer said "Fuck," and another officer yelled, "Stop, dude!"[193] Approximately two seconds later, the footage shows Officer Rosenblatt standing and holding or grabbing Mr. McClain, who was grunting, groaning, or speaking indiscernibly.[194] Officer

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[190] Body worn camera footage from the incident captured Officer Woodyard telling Sgt. Leonard that Mr. McClain "tried to grab [his] gun." Officer Roedema then corrected him, stating, "it was actually Rosenblatt's gun…" Roedema Body Cam 2 at 1:55.

[191] Woodyard Interview at 7:20, 7:35.

When asked how he felt when he heard that Mr. McClain was going for a gun, Officer Woodyard replied that he felt "kind of sick" and "a little bit" scared. Woodyard Interview at 14:40, 15:20. He also told Major Crime investigators that he thought the officers on scene "were in danger of receiving great bodily harm or being killed." Woodyard Interview at 30:35.

[192] A 2019 Aurora Police Department presentation on the carotid control hold explains that, in a carotid control hold, "[p]ressure is applied to the carotid arteries on the **sides** of a suspect's neck [emphasis in original]. No significant frontal pressure or compression is applied to the delicate structures at the front of the neck, and the subject retains the ability to breath[e]." APD 2019 In-Service Carotid Hold – Ingui, M., General Offense Report at 215. The presentation also notes that a carotid control hold "[r]estricts the flow of oxygenated blood to the brain, rendering a subject unconscious" and "[t]his does not restrict the flow of *all* oxygenated blood." APD 2019 In-Service Carotid Hold – Ingui, M., General Offense Report at 215 (emphasis in original). A carotid control hold is "[d]ifferent from a bar arm choke which applies pressure to the front of the throat, possibly damaging small bones and cartilage there (potentially killing the subject by closing the airway), and creating a violent fight or flight response." APD 2019 In-Service Carotid Hold – Ingui, M., General Offense Report at 218.

[193] Woodyard Body Cam at 1:28; Roedema Body Cam 1 at 1:23.

[194] Roedema Body Cam 1 at 1:28.

Rosenblatt went to the ground several seconds later.[195] Although not reflected in the footage, Officer Rosenblatt's account to Major Crime investigators (described below) suggests that these several seconds immediately before and after Officer Rosenblatt went to the ground included the moment at which Officer Rosenblatt applied the first carotid hold, which he said was not effective.[196]

2. Less than five seconds after Officer Rosenblatt can first be seen holding or grabbing Mr. McClain, a patting or tapping sound is audible on the body worn camera footage followed by an officer, sounding breathless or strained, radioing, "Give us some more—give us some more units, we're fighting him."[197] Officer Roedema's body worn camera footage shows Officers Rosenblatt and Woodyard struggling with Mr. McClain on the ground; as they did so, one of them was laying on the ground on his right side behind Mr. McClain while the other was kneeling over Mr. McClain's upper body.[198] From the movement and positioning of his body worn camera, Officer Roedema also appears to have been on the ground and in physical contact with Mr. McClain during this period.[199] Mr. McClain is not clearly visible on the footage.

3. As the officers and Mr. McClain struggled, an officer's hat was knocked off and an officer yelled again, "Stop dude!" and another officer asked, "You got him?"[200] Approximately three seconds later, Officer Rosenblatt repeated, "Stop, dude," and another officer then stated, "Alright, we've got his arms. We've got his arms."[201] An officer responded, "You got his arms?" and Officer Rosenblatt replied, "Yep, we've got his arms."[202]

4. Approximately one second later, Officer Woodyard asked, "Is he out?" and the other officers replied "no" and "not yet."[203] Body worn camera audio reflects a patting sound as Officer Woodyard spoke, although the video footage does not show either Mr. McClain or the officers.[204] Several seconds later, Officer Rosenblatt said "Let go of your arms, dude!"; another officer then said "let go" together with other words that are not discernible from the

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[195] Roedema Body Cam 1 at 1:30.

[196] Rosenblatt Interview at 11:41 (explaining that he began attempting to apply a carotid control hold beginning while he was still standing and after fully applying it for about a second, released it after they had gone down to the ground and he realized the hold would not be successful).

[197] Woodyard Body Cam at 1:38; Dispatch Audio with Timestamps at 8:02.

[198] Roedema Body Cam 1 at 1:37.

[199] Roedema Body Cam 1 at 1:30-1:51.

[200] Roedema Body Cam 1 at 1:37.

[201] Roedema Body Cam 1 at 1:43.

[202] Roedema Body Cam 1 at 1:43; Rosenblatt Body Cam at 1:30; Woodyard Body Cam at 1:50.

[203] Roedema Body Cam 1 at 1:48; Rosenblatt Body Cam at 1:34; Woodyard Body Cam at 1:52.

[204] Roedema Body Cam 1 at 1:50, Rosenblatt Body Cam at 1:34. Officer Roedema's camera shut off at this point in time for approximately thirteen seconds. Roedema Body Cam 1 at 1:51, Roedema Body Cam 2 at 0:00. When the camera began recording again, it captured video footage, but as with other body worn cameras did not capture audio until after the first thirty seconds. The video footage appeared to show that the camera was in Officer Roedema's hand, and then on the ground for nearly three minutes, and so did not capture any relevant footage during this period. Roedema Body Cam 2 at 0:00 – 2:55.

body worn camera audio.[205] Approximately seven seconds had elapsed since Officer Woodyard first asked, "is he out?"[206]

5. Based on the officers' accounts to Major Crime investigators, detailed below, this seven-second period was likely the period of time during which Officer Woodyard was applying, and then released, the second carotid control hold, although we could not confirm this from the footage.[207] Officers Woodyard and Rosenblatt estimated for Major Crime investigators that Officer Woodyard applied the carotid hold for between five and ten seconds.[208]

6. Less than a second after one of the officers said "let go," Officer Roedema stated, "I got him, I got him, I got him in a bar hammer."[209] Officer Roedema later told Major Crime investigators that as he said "I got him," he threw his entire body onto Mr. McClain and attempted to "hook [his] legs around [Mr. McClain's] waist and hook [his] feet in the inside of [Mr. McClain's] knees to sprawl [Mr. McClain] out," succeeding at getting "one leg in" before Mr. McClain was "back to fighting."[210]

7. Less than a second after Officer Roedema said he had Mr. McClain in a bar hammer, one of the officers said, "pull his other arm out…nice and slow…slow it down" as another officer said, "get his arm."[211] Immediately after this statement, at 10:45:03 P.M., Officer Rosenblatt radioed, "We're gonna have fire start."[212] Officer Rosenblatt later told Major Crime investigators that he called for Aurora Fire "at the point of when [Mr. McClain] lost consciousness."[213] Approximately sixteen seconds had elapsed since Officer Woodyard first asked, "is he out?"[214] Approximately one minute and forty seconds had elapsed since Officer Woodyard first exited his vehicle and called for Mr. McClain to stop walking.[215]

The officers also gave the following accounts of their attempts to apply carotid holds to Mr. McClain:

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[205] Rosenblatt Body Cam at 1:39; Woodyard Body Cam at 1:58.

[206] Woodyard Body Cam at 1:53, 2:00.

[207] Officer Roedema told investigators that after seeing Mr. McClain's head and eyes start to roll back, he "gained further control of the arm bar" and then told Officer Woodyard "let go" and "he's good," and then, "I got him." Roedema Interview at 10:00. This is consistent with the audio footage, in which someone can be heard saying "let go" and then less than a second later, "I got him." Rosenblatt Body Cam at 1:39. Officer Woodyard also said that at some point after he asked if Mr. McClain was "going out," Officer Roedema told him to release pressure, which is consistent with this timing. Woodyard Interview at 8:31.

[208] Woodyard Interview at 18:25; Rosenblatt Interview at 31:28.

[209] Rosenblatt Body Cam at 1:42.

[210] Roedema Interview at 10:16.

[211] Rosenblatt Body Cam at 1:45.

[212] Dispatch Audio with Timestamps at 9:40; Woodyard Body Cam at 2:09.

[213] Rosenblatt Interview at 13:43.

[214] Woodyard Body Cam at 1:53, 2:09.

[215] Woodyard Body Cam at 0:30, 2:09.

1. Officer Rosenblatt told Major Crime investigators that, after Officer Roedema said that Mr. McClain was reaching for a gun, he believed that "somebody pulled [Mr. McClain] down… and, um, I realized I was in a good spot to attempt a carotid hold. So, uh, I attempted a carotid hold."[216] He explained that he and Mr. McClain were standing when he applied the hold, but then "almost immediately" went to the ground, after which point he released the hold because he realized the hold was not effective and he did not want to risk injuring Mr. McClain.[217] Officer Rosenblatt confirmed that he had been able to apply "the full carotid" and that he did so for approximately one second.[218] According to Officer Rosenblatt, there was then more "movement," which resulted in Mr. McClain lying "sideways" on his right side with Officer Woodyard behind him.[219] Similarly, Officer Woodyard told Major Crime investigators that he and Mr. McClain were lying on their right sides and that Officer Woodyard's chest was up against Mr. McClain's back.[220] Officer Woodyard's gun and pepper spray were pinned underneath Officer Woodyard.[221] Officer Roedema told Major Crime investigators that at this point, while on the ground, Mr. McClain was fighting the officers and "swinging his arms pretty hard."[222]

2. The officers told Major Crime investigators that at this point as he laid behind Mr. McClain, Officer Woodyard applied a second carotid hold.[223] Specifically, Officer Woodyard said he reached around Mr. McClain and applied his right hand against his own left bicep.[224] Officer Woodyard then put his left hand against his own head with his palm facing in, and began to apply pressure to the sides of Mr. McClain's neck.[225] Officer Woodyard explained that he

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[216] Rosenblatt Interview at 11:43. Later during the interview, Officer Rosenblatt also told Major Crime investigators that he had received training on the application of the carotid control hold one day prior to the officers' contact with Mr. McClain and confirmed that it was "fairly fresh." Rosenblatt Interview at 34:03. When asked about the criteria necessary for the application of a carotid hold, Officer Rosenblatt responded, "Um, so other means are not feasible, um which is one of the big things. Limbs were going everywhere, and I didn't want to hit another officer. Things like that. Or they're not accessible which is another problem because I don't want — sometimes you don't want to pull out another weapon in the middle of a fight because it can easily be taken care of — or taken away from you, especially if he's grabbing for something then he can potentially grab for that as well." Rosenblatt Interview at 34:34.

[217] Rosenblatt Interview at 19:57.

[218] Rosenblatt Interview at 24:10, 31:07. Separately, Officer Rosenblatt also told Sgt. Leonard approximately two and a half minutes after the struggle with Mr. McClain that he had attempted an unsuccessful carotid hold. Leonard Body Cam 1 at 1:39; Rosenblatt Body Cam at 3:52; Follow Up Report No. 5, General Offense Report at 19. He later explained to Sgt. Leonard that he had released the hold because he was "in a bad position" to perform the hold and "didn't want to hurt [Mr. McClain's] neck." Rosenblatt Body Cam at 13:28.

[219] Rosenblatt Interview at 12:12.

[220] Woodyard Interview at 7:40.

[221] Woodyard Interview at 7:48.

[222] Roedema Interview at 9:30.

[223] Rosenblatt Interview at 12:24; Woodyard Interview at 8:04; Roedema Interview at 9:35, 28:16.

[224] Woodyard Interview at 8:12.

[225] Woodyard Interview at 8:16.

decided to apply the carotid hold "because [they] were laying on the ground and [Mr. McClain] had reached for an officer's weapon."[226]

3. Officer Rosenblatt later stated to Major Crime investigators that, as Officer Woodyard applied the carotid control hold, Mr. McClain tried to "grab [Officer Woodyard] with his arm."[227] Officer Woodyard also told Major Crime investigators that as he applied the carotid hold, Mr. McClain was "still fighting" and "resisting all [of the officers'] orders [and] any of our attempts to try and get him under control by other means."[228] Officers Roedema and Rosenblatt told Major Crime investigators that as Officer Woodyard was applying the carotid hold, Officer Rosenblatt "pin[ned] [one of Mr. McClain's arms] to the ground"[229] while Officer Roedema had Mr. McClain's other arm in a "bar hammer lock" behind Mr. McClain's back.[230]

4. Officer Woodyard told Major Crime investigators that as he was applying the carotid hold, he was communicating with Officers Rosenblatt and Roedema, who were facing Mr. McClain, about whether Mr. McClain was unconscious.[231] Officer Roedema said that as he saw Mr. McClain's eyes "starting to roll back and his head starting to go limp," he "forced [Mr. McClain's] body to the ground and tightened up on the arm bar" and at the same time told Officer Woodyard to release the hold.[232] All three officers told Major Crime investigators that Officer Woodyard immediately released the carotid hold upon being told to do so by Officer Roedema.[233]

5. Officers Woodyard and Rosenblatt told Major Crime investigators that after Officer Woodyard released the carotid hold, they heard Mr. McClain make a snoring noise.[234] However, Officers Rosenblatt and Roedema also told Major Crime investigators that they did not believe or were not certain that Mr. McClain had been rendered fully unconscious;[235] Officer Rosenblatt described Mr. McClain as "maybe like somewhere between being out and being incoherent."[236] Officer Rosenblatt reported that when Mr. McClain "lost consciousness," he radioed to request

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[226] Woodyard Interview at 8:05.

[227] Rosenblatt Interview at 12:38.

[228] Woodyard Interview at 18:34.

[229] Rosenblatt Interview at 12:48.

[230] Roedema Interview at 9:51; Rosenblatt Interview at 12:48.

[231] Woodyard Interview at 8:31.

[232] Roedema Interview at 28:21.

[233] Roedema Interview at 28:33; Woodyard Interview at 8:44; Rosenblatt Interview at 12:56.

[234] Rosenblatt Interview at 13:14, Woodyard Interview at 9:02.

[235] Rosenblatt Interview at 13:14; Roedema Interview at 10:34. The officers similarly told Sgt. Leonard two to three minutes after Officer Woodyard applied the carotid hold that Mr. McClain had been snoring, but they did not believe he had become fully unconscious. Leonard Body Cam 1 at 0:51. Officer Green also wrote in a later report that while on the scene, the officers told him that the carotid hold "did not appear to have an effect, or the appropriate effect, so it was released, and other means were taken to subdue the subject." Follow Up Report No. 63, General Offense Report at 100-01.

[236] Rosenblatt Interview at 13:24.

Aurora Fire because they had "put on a carotid" and "need[e]d to make sure that Fire [arrived] as soon as possible."[237]

6. Officers Handcuff Mr. McClain

In the one to two minutes after Officer Woodyard released the carotid hold, the officers attempted to place Mr. McClain in handcuffs. According to the officers' accounts to Major Crime investigators, at the time Officer Woodyard released the carotid hold, Officer Roedema's entire body was on top of Mr. McClain with one of his feet hooked on the inside of McClain's knee.[238] Officer Roedema had placed Mr. McClain's left arm in a "bar hammer lock" or "arm bar" behind Mr. McClain's back as Officer Woodyard was applying the carotid hold, and "because of [Mr. McClain's] resistance" after the hold was applied, he "cranked" on the arm bar "pretty significantly," pulling Mr. McClain's hand up so that his elbow was at one point parallel to his head and causing Mr. McClain's shoulder to "pop about three times."[239] Officer Woodyard said that as Officer Roedema was applying the arm bar to Mr. McClain's left arm, Officer Woodyard tried to pull Mr. McClain's right hand out from underneath his body.[240]

The officers described struggling with Mr. McClain as they attempted to handcuff him. Officer Woodyard told Major Crime investigators that, several seconds after he began trying to pull Mr. McClain's right hand from underneath his body, Mr. McClain "began to fight and twist and pull."[241] Officer Rosenblatt reported that after the carotid was applied, the officers "struggled a little bit more" with Mr. McClain, who was "coming onto his side" as they tried to handcuff him; Officer Rosenblatt noted that Mr. McClain's attempt to come to his side was not anything more than "normal resisting."[242] Officer Rosenblatt also told Major Crime investigators that he was in control of Mr. McClain's right arm and Mr. McClain was "half in and half out" of consciousness while the officers attempted to handcuff him.[243] Officer Roedema, however, told Major Crime investigators that Mr. McClain managed to "push up with all three [officers] on his back" and "break free of the arm bar."[244] Officer Roedema said that he then "slowly regained the arm bar" and "grabbed [Mr. McClain's] shirt to pull his arm tighter into his spine."[245] Officer Roedema

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[237] Rosenblatt Interview at 13:44. Neither the body worn camera footage nor the officers' statements to Major Crime investigators indicate that Aurora Fire was summoned for any other reason. We also note that while Officer Rosenblatt referred here to Mr. McClain having "lost consciousness," the other statements in his interview and to Sgt. Leonard suggest that he was referring to the time when Mr. McClain was snoring and/or being in between incoherence and unconsciousness.

[238] Roedema Interview at 10:16.

[239] Roedema Interview at 10:42, 35:49, 57:03.

[240] Woodyard Interview at 9:08.

[241] Woodyard Interview at 9:18.

[242] Rosenblatt Interview at 14:06.

[243] Rosenblatt Interview at 14:21.

[244] Roedema Interview at 11:12. Officer Rosenblatt similarly recalled that "there was a point where… three of us were trying to gain control and then he did a push-up," but he did not more specifically describe when this occurred. Rosenblatt Interview at 19:16.

[245] Roedema Interview at 11:18.

described Mr. McClain as "fairly slim," with a height between five feet five inches and five feet eight inches, and weighing between 160 and 170 pounds; he observed it was "very abnormal" for someone of Mr. McClain's size to be able to lift that much weight.[246]

Officers Roedema and Rosenblatt told Major Crime investigators that Officer Rosenblatt pulled out and threatened to use his taser as they struggled to handcuff Mr. McClain, but did not ultimately use it.[247] Officer Roedema also recalled that as they struggled with Mr. McClain, Mr. McClain's mask came off and Officer Roedema could see that there was vomit inside it.[248] Officer Woodyard stated that he was ultimately able to place Mr. McClain into handcuffs, and then the officers rolled him onto his side into the recovery position.[249] Officer Rosenblatt stated that they put Mr. McClain into this position because after performing a carotid, "you don't want to put any compression on the back of the chest or anything like that."[250]

Because all three officers' body worn cameras had fallen to the ground at this point, as noted above, there is no video of these events and the audio is at times difficult to understand. However, the audio indicates that, during the one to two minutes beginning around 10:45 P.M., Mr. McClain repeatedly told the officers he could not breathe while the ambient sounds and dialogue suggest that officers struggled to place Mr. McClain in handcuffs, at one point threatening to tase him. More specifically:

1. For the twenty seconds after Officer Rosenblatt radioed at 10:45:03 P.M. for dispatchers to send Aurora Fire to the scene, the officers continued to communicate with one another and/or Mr. McClain about getting control of Mr. McClain's arms as they attempted to handcuff him, sounding strained or out of breath at times.[251] They instructed Mr. McClain, or possibly each other, to "bring your arm out" and "let go of your arm," and an officer said breathlessly, "I can't get it, I can't get it."[252] Another officer appears to have then asked, "What's going on?" followed by another stating, "There we go."[253] The body worn camera audio reflects strained sounds and hard breathing, followed by an officer stating, "I've got his other arm" and another officer confirming.[254] Three seconds later, an officer instructed another to "cuff that arm."[255]

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[246] Roedema Interview at 59:41. Officer Rosenblatt estimated Mr. McClain's height as five feet nine or five feet ten inches or shorter, and described him as "skinny." Rosenblatt Interview at 18:58. He told Major Crime investigators that Mr. McClain had "strength of not just him" and more than he would expect from someone of Mr. McClain's size, describing him as "very powerful." Rosenblatt Interview at 18:49.

[247] Rosenblatt Interview at 30:33; Roedema Interview at 11:27.

[248] Roedema Interview at 12:04.

[249] Woodyard Interview at 9:40.

[250] Rosenblatt Interview at 14:32.

[251] Rosenblatt Body Cam at 1:50.

[252] Rosenblatt Body Cam at 1:52.

[253] Rosenblatt Body Cam at 1:54.

[254] Rosenblatt Body Cam at 2:06.

[255] Rosenblatt Body Cam at 2:09

2. Approximately five seconds after an officer confirmed he had control of one of Mr. McClain's arms, the same or another officer said, "He's flipping, he's flipping!"[256] Mr. McClain cried out or groaned, and Officer Woodyard said, "Dude, just stop fighting."[257] Mr. McClain responded, "I'm stopping, I'm sorry" or "I'm sorry, I'm sorry."[258]

3. Two seconds later, Officer Rosenblatt called, "Taser taser taser, in a second,"[259] and Officers Woodyard and Roedema told Mr. McClain that he would be tased if he didn't "stop fighting."[260] Body worn camera audio reflects that Mr. McClain was crying or speaking indiscernibly.[261] An unidentified officer said, "I've got his arm," and Mr. McClain moaned and said, "Forgive me" and "I'm sorry."[262]

4. Over the following seven seconds, the officers continued to communicate about gaining control of Mr. McClain's arms, and Mr. McClain can be heard speaking with a strained voice, although his words are not discernible.[263]

5. Officer Rosenblatt then said, "Stop dude!" Mr. McClain responded, "I can't breathe," sounding strained.[264] Officer Roedema said, "All right, get off his chest."[265] McClain cried forcefully, "I can't breathe, please!"[266] The body worn camera audio reflects that McClain continued to groan and officers responded by telling him to relax.[267] Mr. McClain responded, "Okay! I can't breathe!"[268] It was just after 10:46 P.M.; one minute had elapsed since Officer Rosenblatt radioed for Aurora Fire.

6. Over the next twenty seconds, the officers continued to communicate about placing Mr. McClain in handcuffs and then placing him into a recovery position, at times sounding out of breath. One officer asked, "Where is his other hand?" to which another officer replied, "I got it right here. It's in a bar hammer."[269] Two officers instructed Mr. McClain to "stop!" and

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[256] Rosenblatt Body Cam at 2:10.

[257] Rosenblatt Body Cam at 2:16.

[258] Rosenblatt Body Cam at 2:18.

[259] Rosenblatt Body Cam at 2:20.

[260] Rosenblatt Body Cam at 2:22. As noted above, the officers stated that they did not end up using the taser. Rosenblatt Interview at 30:33; Roedema Interview at 11:27.

[261] Rosenblatt Body Cam at 2:24.

[262] Rosenblatt Body Cam at 2:26; Roedema Body Cam 2 at 0:35.

[263] Rosenblatt Body Cam at 2:30.

[264] Rosenblatt Body Cam at 2:37.

[265] Rosenblatt Body Cam at 2:40.

[266] Rosenblatt Body Cam at 2:42.

[267] Rosenblatt Body Cam at 2:43.

[268] Rosenblatt Body Cam at 2:46; Woodyard Body Cam at 3:04.

[269] Rosenblatt Body Cam at 2:54; Roedema Body Cam 2 at 1:03. It is not clear whether the "bar hammer" discussed here is the same hold as that referenced by Officer Roedema over one minute earlier, *see* Rosenblatt Body Cam at 1:42 ("I got him, I got him, I got him in a bar hammer."), or a successive bar hammer hold.

Mr. McClain immediately responded, "Alright! I can't breathe, please stop!"[270] Approximately one or two seconds later, Mr. McClain groaned or said, "It hurts!"[271] Mr. McClain cried out or groaned again.[272] While not visible on the body worn camera footage, audio from the footage and the officers' later statements to Major Crime investigators indicate that this was the point at which officers successfully completed placing handcuffs on Mr. McClain.[273]

7. Immediately after Mr. McClain was handcuffed, one of the officers stated that he would straddle Mr. McClain and "figure-four his legs."[274] Officer Rosenblatt responded, "recovery position, trust me."[275] Mr. McClain cried out again.[276] An officer then stated, "I have his legs."[277]

7. Officers Restrain a Handcuffed Mr. McClain and Await Aurora Fire

Additional officers began to arrive on scene less than twenty seconds after Mr. McClain was handcuffed.[278] Sgt. Dale Leonard appeared to be the first to arrive, between 10:46 and 10:47 P.M.[279] The Aurora Police Department's CAD, body worn camera footage, and officers' subsequent statements to Major Crime investigators reflect that Officers James Root, Kyle Dittrich, Erica Marrero, Alicia Ward, Rachel Nunez, Darren Dunson, and Matthew Green arrived

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[270] Rosenblatt Body Cam at 2:58, Woodyard Body Cam at 3:16.

[271] Rosenblatt Body Cam at 3:04.

[272] Rosenblatt Body Cam at 3:06.

[273] Roedema Body Cam 2 at 1:13. Officer Rosenblatt told Major Crime investigators that they placed Mr. McClain in the recovery position after he was handcuffed. Rosenblatt Interview at 14:25. Officer Roedema also told Major Crime investigators that Mr. McClain became "completely verbal" again once he was handcuffed, which is consistent with this timing. Roedema Interview at 11:54.

[274] Rosenblatt Body Cam at 3:05; Roedema Body Cam 2 at 1:15.

[275] Rosenblatt Body Cam at 3:08. Officer Rosenblatt later told Major Crime investigators that he did not want to place Mr. McClain in a figure-four position because after a carotid is applied, "you don't want to put any compression on the back of the chest or anything like that. You want to try to get him in the recovery position so they can recover." Rosenblatt Interview at 14:32.

[276] Rosenblatt Body Cam at 3:12.

[277] Rosenblatt Body Cam at 3:13.

[278] Roedema Body Cam 2 at 1:15, 1:32.

[279] APD CAD Report – Ingui, M., General Offense Report at 494 (status "DU" for Unit CR26, corresponding to Sgt. Leonard); Leonard Body Cam 1 at 0:32. While Mr. McClain's hands are not visible on body worn camera footage, Sgt. Leonard's written report stated that Mr. McClain "appeared to have handcuffs on" when Sgt. Leonard first approached the scene. Follow Up Report No. 5, General Offense Report at 18.

within one or two minutes of Sgt. Leonard.[280] Shortly after their arrival, Officers Dunson, Marrero, and Dittrich were informed that they were not needed and they left the scene.[281]

Body worn camera footage shows that during the approximately thirteen minutes between when Mr. McClain was handcuffed and when he was injected with ketamine, at least two officers at a time restrained Mr. McClain on the ground, with Mr. McClain primarily lying on his left side and other officers standing nearby. Body worn camera footage reflects that Officer Roedema restrained Mr. McClain from a position behind Mr. McClain's back and near Mr. McClain's shoulder throughout this period.[282] Officer Roedema explained to Major Crime investigators that once Mr. McClain was handcuffed, Mr. McClain "kept fighting trying to pull away from us" and, as a result, Officer Roedema placed his knee on the back of Mr. McClain's tricep to "enhance pain compliance" and pin Mr. McClain to the ground.[283] At the same time, Officer Roedema said he put Mr. McClain's right hand in a "twist lock" or "wrist lock" and held him in that position until Aurora Fire arrived.[284] For much of this thirteen-minute period, Officer Rosenblatt was positioned at Mr. McClain's lower body.[285] Officer Rosenblatt told Major Crime investigators that he

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[280] See APD CAD Report – Ingui, M., General Offense Report at 494 (status "AR" for Units 316A and Unit 313, corresponding to Officer Dunson and Officers Dittrich and Marrero, respectively); Ward Narrative/Remarks, General Offense Report at 7; Nunez Body Cam 1 at 0:13; Root Body Cam at 0:00; Dunson Body Cam at 6:40.

The CAD reflects that Officer Green was en route as of 10:43:18 P.M., but it is not clear when he first arrived on scene. Officer Green's body worn camera reflects that he was already on scene when it was turned on. *See* Green Body Cam at 0:00. Officer Green later submitted a follow-up report, in which he stated that "On 8/25/19 [sic] at approximately 2243 hours, I, Ofc. Green … responded to the area of E Colfax Ave / N Billings St, regarding officers fighting with a suspect… Upon my arrival, I observed two officers on the ground, appearing to be trying to control someone on the ground with them. There were at least 1-2 other officers standing up, trying to help where needed. As I got to where the officers were, I remembered one of them aired something about a gun being involved, so I asked if they had recovered the gun. I was advised the suspect never had a gun, but in fact, attempted to disarm one of the officers. The officers [sic] gun was not removed from the holster and there was no gun involved/introduced by the suspect. I then assisted with picking up a body camera and a set of handcuffs which fell off/out during the fight." Follow Up Report No. 63, General Offense Report at 100.

[281] Approximately four minutes after Officer Dunson arrived on the scene, a voice can be heard on Officer Dunson's body camera saying, "we're good, we contacted the RP [reporting party] and we got that covered," to which Officer Dunson replied, "we'll just leave it with them if they don't need us." Officer Dunson then walked away and turned off his body camera. Dunson Body Cam at 10:20. In a follow-up report, Officer Dunson explained that "[w]hen I arrived, officers on scene had an unknown black male detained with his wrists handcuffed behind his back. This party was communicating with the officers on scene. Once I was told I was not needed, I left this location." Follow Up Report No. 22, General Offense Report at 47.

Similarly, Officer Marrero explained in a follow-up report that when she and Officer Dittrich arrived on scene, "the situation was already under control. We made our way over [to] the officers who had the suspect in custody. We asked if there was anything they needed at the time, they told us everything was under control…Since we were told the situation was under control we cleared the call and went back into service." Follow Up Report No. 15, General Offense Report at 37.

[282] Green Body Cam at 4:51. While Mr. McClain is not visible on the body worn camera footage at all times, the footage indicates that Officer Roedema remained in the same place throughout most, if not all, of this period. *See generally* Rosenblatt Body Cam at 6:13 – 11:50; Green Body Cam at 0:00 – 9:02.

[283] Roedema Interview at 12:56.

[284] Roedema Interview at 13:04.

[285] Leonard Body Cam 2 at 0:32; Rosenblatt Body Cam at 6:12.

"straddled" Mr. McClain's legs and "pinned him there" for "a while."[286] As discussed below, K-9 Officer Matthew Green, Officer Alicia Ward, and Sgt. Leonard also participated in restraining Mr. McClain.

Throughout this thirteen-minute period, body worn camera footage and audio reflects that the officers ordered Mr. McClain to stop moving or fighting, and at times used pain compliance techniques. During those struggles, Mr. McClain apologized, sought to explain himself, vomited, and repeatedly told them he was in pain.[287] More specifically:

1. At 10:46:31 P.M., approximately thirteen seconds after Mr. McClain was handcuffed, Officer Roedema or Officer Rosenblatt radioed dispatch, "We got him detained, he's still fighting us on the ground."[288] Body worn camera footage reflects that Sgt. Leonard arrived on scene at this time and approached the three officers and Mr. McClain.[289] When Sgt. Leonard arrived, the officers were kneeling on the ground; Mr. McClain is not visible on the footage.[290]

2. As Sgt. Leonard was approaching the group and one of the officers was radioing that Mr. McClain was detained on the ground, body worn camera audio reflects that Mr. McClain told the officers two times, "I have my ID right here."[291] He continued, "my name is Elijah McClain" and "I was just going home… I'm an introvert and I'm different. Going home...I'm just different. I'm just different. That's all. That's all I was doing. I'm so sorry."[292] Mr.

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[286] Rosenblatt Interview at 14:51.

[287] We note that Officer Roedema told Major Crime investigators that after the officers handcuffed Mr. McClain, he was "completely verbal" but "wasn't making sense." Roedema Interview at 11:55. He also said, "He was mumbling some stuff…he was talking, but I don't believe it was, like, a normal conversation[.]" Roedema Interview at 25:43.

Officers Woodyard and Rosenblatt were also asked by Major Crime investigators what, if any, statements Mr. McClain made during the encounter. Officer Rosenblatt stated, "I don't recall what he was saying. Um, but I remember thinking he's not in his right mind. Kind of thing that was kind of just like, you know when you're contact with people you, you know, there's some things that people say that are normal, and there's some that, that aren't. Um, at first, he was sa-, saying some normal things just of, of, you know, I didn't do anything. And then, after that, he kind of started — he would, he would just like shotgun things out of his mouth, like, he was — he just couldn't contain words, kind of." Rosenblatt Interview at 27:07. When asked by Major Crime investigators whether Mr. McClain's behavior was consistent with "people who've either been under the influence of an illegal, illicit drug or alcohol," Officer Rosenblatt agreed. Rosenblatt Interview at 28:00. Officer Woodyard recalled, "I'm not a drug recognition expert, uh, but I've had, uh, altercations before with people on drugs. Um, and the amount that he was able to resist us, um, and his inability to, to follow orders, leads me to believe he might have been on some kind of drug." Woodyard Interview at 19:34. Mr. McClain's autopsy report reflects that his blood toxicology was negative for all substances except marijuana and ketamine. Adams County Autopsy Report – Ingui, M., General Offense Report at 201-202.

[288] Rosenblatt Body Cam at 3:19; Roedema Body Cam 2 at 1:28; 19-32866 - Call & Radio with Timestamps at 11:23.

[289] Leonard Body Cam 1 at 0:32; Roedema Body Cam 2 at 1:32.

[290] Leonard Body Cam 1 at 0:35.

[291] Rosenblatt Body Cam at 3:14; Roedema Body Cam 2 at 1:24.

[292] Rosenblatt Body Cam at 3:15.

McClain's voice was high-pitched at this point and he was breathing rapidly. The officers did not respond to Mr. McClain's statements.

3. At the same time Mr. McClain was speaking, as described above, the three officers began describing to Sgt. Leonard what had occurred over the preceding minutes. As soon as Sgt. Leonard approached, one of the officers informed him that that they had to "use a carotid" hold.[293] Sgt. Leonard asked if Mr. McClain was "out"[294] — one officer said "yeah," another officer said, "no," and another responded that he "heard some snoring" but that Mr. McClain "didn't lose consciousness."[295] Officer Woodyard then told Sgt. Leonard, "He tried to grab my gun."[296] A few seconds later, Officer Roedema stated, "It was actually Rosenblatt's [gun]. He reached for your gun, dude."[297] Officer Rosenblatt then explained, "That's where I tried [a] carotid…"[298] At this point, Mr. McClain cried out, "I have no gun...I don't do that stuff...I don't do any fighting. Why are you attacking me?"[299] Mr. McClain continued, "I don't believe in guns. I don't even kill flies. I don't eat meat. I — and I'm not [sic] a vegetarian...I don't judge people for anything…I respect all life. Forgive me. All I was trying to do was become better. I'll do it...I'll do it...I'll do better to help all life...I will do anything I have to…Sacrifice my identity...I'll do it...I'll do it...You all are phenomenal, you are beautiful...Forgive me…"[300]

4. At the same time Mr. McClain was speaking[301], Officers Rosenblatt and Roedema described to Sgt. Leonard the circumstances of the stop and the subsequent carotid hold. As discussed above in Section IV.A.3, Sgt. Leonard asked the officers, "Do we have anything other than him being suspicious?"[302] An unidentified officer responded, "No. No, I mean, I tried to stop him and he started walking away."[303] Another unidentified officer added, "When we showed

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[293] Leonard Body Cam 1 at 0:42.

[294] Leonard Body Cam 1 at 0:50.

[295] Leonard Body Cam 1 at 0:52.

[296] Leonard Body Cam 1 at 0:58.

[297] Leonard Body Cam 1 at 1:03.

[298] Leonard Body Cam 1 at 1:07.

[299] Leonard Body Cam 1 at 1:08.

[300] Leonard Body Cam 1 at 1:19; Rosenblatt Body Cam at 4:03. As Mr. McClain was speaking, Officer Roedema appeared to shut his body camera off. Roedema Body Cam 2 at 3:27. Photos of his body worn camera collected later show that it was split open, with wires exposed. *See* Amir, Laverne – DSC_3607.JPG, Amir, Laverne – DSC_3608.JPG, Amir, Laverne – DSC_3609.JPG, Amir, Laverne – DSC_3610.JPG, Amir, Laverne – DSC_3611.JPG, Amir, Laverne – DSC_3612.JPG, and Amir, Laverne – DSC_3613.JPG. Officer Roedema appeared to explain to Officer Rosenblatt that this had occurred "because he was hitting at us." Roedema Body Cam 2 at 3:09. Officer Roedema suggested several minutes later that the camera splitting in half was the reason he shut it off. Roedema Body Cam 2 at 3:07; Rosenblatt Body Cam at 7:43.

[301] We note that in certain instances, Mr. McClain made sounds or statements that did not make sense. *See, e.g.*, Roedema Body Cam 2 at 3:12.

[302] Leonard Body Cam 1 at 1:25.

[303] Leonard Body Cam 1 at 1:28.

up, he was wearing a ski mask and walking so...I mean."[304] Sgt. Leonard replied, "Okay so he's on something, obviously," and the officers agreed.[305]

5. During this exchange, Sgt. Leonard relayed over radio that any units not already on scene should slow down, stating that "we're overkill here."[306] Officer Root arrived around this time,[307] with Officer Ward arriving shortly thereafter.[308] Sgt. Leonard directed Officer Ward to call the person who made the initial 911 call and determine "what the story was on the front end."[309] Officer Ward returned to her car with Officer Root and called the 911 caller.[310]

In his interview with Major Crime investigators, Officer Rosenblatt described Mr. McClain as vacillating between being calm and compliant and trying to resist and "get away," stating that Mr. McClain would attempt to "get up or try to move or pull his legs in or something like that."[311] Officer Roedema told Major Crime investigators that he repeatedly directed Mr. McClain to "stop" because Mr. McClain kept "flailing his legs" and "trying to sit up."[312] Officer Roedema further stated he would direct Mr. McClain to stop, and then after "releas[ing] some…of the tension off of the wrist lock or whatnot…[and Mr. McClain] would lay there for…a couple seconds and then he'd go right back to it…trying to sit up and kick and then [Officer Roedema would say] 'stop'…and [Officer Roedema] would control his wrist, control his arm" while another officer sat on Mr. McClain's legs.[313] Officer Roedema indicated that Mr. McClain continued to struggle until the ketamine injection was administered.[314] When asked by a Major Crime detective whether Mr. McClain responded to the pain compliance techniques, Officer Roedema said "no," noting that when he applied the arm bar maneuver that caused Mr. McClain's shoulder to "pop," as described above, Mr. McClain "was able to pull his arm out and then push himself up."[315] With respect to the pain technique Officer Roedema applied on Mr. McClain's biceps and triceps, he said Mr. McClain responded "partially, but not…too much."[316] Officer Roedema further explained that as soon as Mr. McClain would comply and he would "ease up a little bit" as he had been trained to do, Mr. McClain would "go right back to doing what he's doing."[317]

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[304] Leonard Body Cam 1 at 1:35.

[305] Leonard Body Cam 1 at 1:38.

[306] Leonard Body Cam 1 at 1:32.

[307] Leonard Body Cam 1 at 1:35; Root Body Cam at 0:00.

[308] Leonard Body Cam 1 at 1:50; Ward Narrative/Remarks, General Offense Report at 7.

[309] Leonard Body Cam 1 at 1:59.

[310] Root Body Cam at 0:35.

[311] Rosenblatt Interview at 14:58.

[312] Roedema Interview at 25:27.

[313] Roedema Interview at 26:01.

[314] Roedema Interview at 26:50.

[315] Roedema Interview at 35:35.

[316] Roedema Interview at 36:02.

[317] Roedema Interview at 36:26.

As described above, the audio and limited video footage from officers' body worn camera, including Mr. McClain's statements and officers' reactions, suggest that Mr. McClain was moving and that officers would warn him to stop, restrain him, or use measures that caused Mr. McClain to cry out in pain. However, because Mr. McClain was only occasionally visible in the body worn camera footage, we are unable to determine the extent to which Mr. McClain was in fact moving, and whether those movements were "fighting," attempting to get away, or motivated by another reason, such as a need to vomit, an attempt to get into a more comfortable position, or a response to officers' pain compliance techniques.

8. Mr. McClain Tells Officers He Cannot Breathe

After being placed in handcuffs, Mr. McClain repeatedly expressed pain and the inability to breathe. At around 10:48 P.M., as Mr. McClain continued to speak indiscernibly, an officer noted, "I think he threw up."[318] Mr. McClain then said, "Ow. I'm so sorry. I'm so sorry."[319] Mr. McClain's words are at times indiscernible on body worn camera audio, but the audio does reflect that Mr. McClain said, "Ow! Ow, that really hurt...You guys are very strong…Teamwork makes the dream work…I peed on myself...Ow that hurts."[320] Body worn camera audio suggests that Mr. McClain continued to cry and speak indiscernibly.

Several seconds later, body worn camera audio reflects that Mr. McClain said, "That was heavy."[321] Mr. McClain groaned and the audio suggests that he was hiccupping or gagging.[322] Around this time, an officer picked up Officer Rosenblatt's body worn camera, which Officer Rosenblatt reattached to his person.[323] Footage from his camera indicates that he was holding Mr. McClain's lower body and facing Officer Roedema, who was holding Mr. McClain's arms and upper body.[324] Officer Roedema told Mr. McClain to "stop" and Mr. McClain responded, "Oh yeah I'm sorry, I wasn't trying to do that, it's just that I can't breathe correctly because—" before his voice trailed off.[325] Mr. McClain then groaned and the audio suggests that he vomited.[326] Body worn camera footage shows that Mr. McClain was lying on his side, with his arms handcuffed

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[318] Woodyard Body Cam at 5:26; Rosenblatt Body Cam at 5:05.

[319] Woodyard Body Cam at 5:27.

[320] Dunson Body Cam at 6:48; Rosenblatt Body Cam at 5:08; Woodyard Body Cam at 5:32; Roedema Body Cam 2 at 3:18. Later body worn camera footage from Officers Woodyard and Rosenblatt reflect that Officer Roedema told them a body worn camera lying in the grass was "mine. It was recording. I just shut it off because it's split in half." Woodyard Body Cam at 8:02; Rosenblatt Body Cam at 7:43.

[321] Woodyard Body Cam at 6:21.

[322] Woodyard Body Cam at 6:23.

[323] Rosenblatt Body Cam at 6:01.

[324] Rosenblatt Body Cam at 6:05.

[325] Woodyard Body Cam at 6:24.

[326] Woodyard Body Cam at 6:24. At this moment, Officer Roedema stated, "move your camera dude." Rosenblatt Body Cam at 6:30. It is not clear from the evidence to whom Officer Roedema directed this statement or its circumstances. Officer Woodyard's body worn camera footage reflects that it was adjusted after Officer Roedema made this statement, from pointing towards the grass to pointing towards a building. Woodyard Body Cam at 6:40. Officer Rosenblatt's body worn camera footage reflects that it was adjusted after Officer Roedema made this statement, keeping Mr. McClain in view but shifting slightly to the left. Rosenblatt Body Cam at 6:21.

behind him. Officer Roedema, who can be seen holding a body worn camera in his right hand, was pressing down on Mr. McClain's upper arm.[327] Mr. McClain then went silent.

Body worn camera footage and audio reflected that Mr. McClain had been speaking or crying almost continuously from the time he was handcuffed until after he seemed to vomit, as described above, between 10:49 and 10:50 P.M. From that point forward, however, and as described in further detail below, Mr. McClain spoke only occasionally.

9. Aurora Fire Arrives on Scene

The EMS Patient Care Report reflects that FF Austin Bradley, Lt. Peter Cichuniec, Paramedic Jeremy Cooper, and FF Daniel DeJesus arrived on Aurora Fire Engine 2 around this time, at approximately 10:50 P.M.[328] However, they appeared to have parked south from the scene because police cars were blocking the street,[329] and body worn camera footage indicates that they did not actually approach Mr. McClain and the officers surrounding him until approximately two to three minutes later.[330]

FF Bradley stated that, prior to arrival, he was not told "what had happened to the person on the ground" and that all he knew was that Mr. McClain "was in an agitated state, and he was restrained, and due to him being restrained and being agitated," firefighters and EMS were called to the scene.[331] Lt. Cichuniec and FF DeJesus told investigators that prior to arriving on the scene, they received information from dispatch that there was a "man running around in a mask…not making sense, waving his arms at cars and people."[332] Paramedic Cooper also stated that "I was advised by PD that [Mr. McClain] had vomited at some point prior to arrival, only because I heard them tell another officer arriving on scene to not kneel in [it]."[333] In addition, although the body worn camera footage indicates that, at minimum, both FF DeJesus[334] and FF Bradley[335] were informed of the carotid control hold (see below), Paramedic Cooper told Major Crime investigators that he was not told by police what arrest control techniques had been used, aside from officers

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[327] Rosenblatt Body Cam at 6:30.

[328] Aurora Fire Department - EMS Patient Care Report, General Offense Report at 344; APD CAD Report – Ingui, M., General Offense Report at 495.

[329] Aurora Fire Department - EMS Patient Care Report, General Offense Report at 344-345; 19-32866 - Call & Radio with Timestamps at 16:02-17:28; Dunson Body Cam at 9:44.

[330] Rosenblatt Body Cam at 9:46; Leonard Body Cam 2 at 2:41; Green Body Cam at 2:10; Dunson Body Cam at 8:08, 10:41.

[331] Bradley Interview at 6:50.

[332] Cichuniec Interview at 6:35; DeJesus Interview at 3:20.

[333] Cooper Interview at 29:36. However, neither FF DeJesus nor Lt. Cichuniec reported that they were advised by officers that Mr. McClain vomited before fire personnel arrived on scene, though Lt. Cichuniec reported that he personally observed evidence that Mr. McClain vomited at some point before fire personnel arrived on the scene. Cichuniec Interview at 44:40. FF DeJesus reported that he was never told by officers that Mr. McClain vomited, DeJesus Interview at 16:26, although body worn camera footage reflects that Sgt. Leonard informed him of this fact. Leonard Body Cam 2 at 2:40.

[334] Leonard Body Cam 2 at 2:38; Dunson Body Cam at 10:40.

[335] Green Body Cam at 3:07.

handcuffing Mr. McClain, nor that Mr. McClain may have lost consciousness prior to their arrival on the scene.[336] Similarly, Lt. Cichuniec told Major Crime investigators that the officers had not told him anything about what had been "done to [Mr. McClain] on the ground" or that they had used arrest control techniques or force to detain him.[337] Major Crime investigators did not ask either FF DeJesus or FF Bradley whether they were told what arrest control techniques were used or if they were aware Mr. McClain had lost consciousness.

The Aurora Fire personnel who responded to the scene observed the officers restraining Mr. McClain but did not examine or assist him until after the ketamine was administered. FF Bradley confirmed to Major Crime investigators that he wasn't directed to do "anything besides stand there" until after he got into the ambulance.[338] FF DeJesus said that the Aurora Fire personnel did not evaluate Mr. McClain at the scene, explaining that they let the police "do their thing" because Mr. McClain was struggling and they "didn't have any need to touch him at that point."[339] Paramedic Cooper told Major Crime investigators that they were "pretty much hands off" and only there to "assist if [officers] needed it."[340] However, he said that on several occasions he directed the officers to roll Mr. McClain onto his side so that he could look at his airway and face to monitor his breathing.[341]

Body worn camera footage and interviews by Major Crime investigators of officers and fire personnel reflect the following sequence of events around the time that Aurora Fire arrived and then approached the scene:

1. Just after 10:50 P.M., Mr. McClain, who was laying on his left side, groaned or vomited again.[342] One of the officers instructed another, "If you can bend his knees a little bit, so he can balance himself."[343] Officer Rosenblatt noted, "He's kicking around a little bit, so I'm just going to sit on him."[344]

2. About five seconds later, just before 10:51 P.M., Sgt. Leonard asked Mr. McClain whether he had taken any drugs.[345] Mr. McClain did not respond at first, and then responded slowly, "Uh, Mary?"[346] It is not clear whether Sgt. Leonard heard or understood him because Sgt. Leonard

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[336] Cooper Interview at 26:41.

[337] Cichuniec Interview at 10:55.

[338] Bradley Interview at 26:45.

[339] DeJesus Interview at 6:00.

[340] Cooper Interview at 21:15. We note that the EMS Patient Care Report, prepared by Lt. Cichuniec, stated that they "[a]ttempted to check pt's pulse and we weren't able to due to him fighting and having hand cuffs on." Aurora Fire Department - EMS Patient Care Report, General Offense Report at 346.

[341] Cooper Interview at 26:02.

[342] Rosenblatt Body Cam at 6:54.

[343] Rosenblatt Body Cam at 6:55.

[344] Rosenblatt Body Cam at 6:59.

[345] Leonard Body Cam 2 at 0:35.

[346] Leonard Body Cam 2 at 0:43; Rosenblatt Body Cam at 7:14.

continued to ask Mr. McClain whether he had taken drugs.[347] Mr. McClain did not respond further, but body worn camera footage shows that Mr. McClain looked up at Sgt. Leonard, who was standing above and behind Mr. McClain's back.[348]

3. Approximately thirty seconds later, body worn camera footage reflects that Mr. McClain rolled forward, and Officer Rosenblatt asked him, "You gotta throw up dude?"[349] Mr. McClain responded, "Yeah."[350] Officer Rosenblatt told Mr. McClain, "Throw up right there, okay? Don't throw up on me though." Mr. McClain responded, "Okay."[351]

4. Less than ten seconds later, between 10:52 and 10:53 P.M., body worn camera footage shows that Mr. McClain tried to lift his upper body. Officer Rosenblatt told Mr. McClain, "Hey, dude, relax."[352] An unidentified officer noted, "I think he's trying to puke" and Officer Rosenblatt replied, "Oh okay, get it out, dude."[353] Body worn camera footage indicates that Mr. McClain appeared to vomit.[354] Officer Roedema continued holding Mr. McClain's upper right arm while Officer Rosenblatt said, "Get it out."[355] The footage then shows that Mr. McClain was lying on his side and not moving.[356]

5. Approximately forty seconds later, Aurora Fire personnel walked up to the scene. While body worn camera footage only briefly shows the conversation, Sgt. Leonard informed FF DeJesus,

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[347] Leonard Body Cam 2 at 0:47.

In a follow-up report, Sgt. Leonard stated, "I was increasingly concerned that this party needed medical treatment as soon as possible. I bent over near his head and I was asking him what drugs, or what it was he had taken, or was using, so that we could help him. His eyes were open and he appeared awake, but it was obvious that he was not comprehending what I was asking or not understanding what I was asking and he showed no response verbally or physically to what I was asking of him." Follow Up Report No. 5, General Offense Report at 20.

[348] Leonard Body Cam 2 at 0:59.

[349] Leonard Body Cam 2 at 1:35; Rosenblatt Body Cam at 8:04.

[350] Leonard Body Cam 2 at 1:37; Rosenblatt Body Cam at 8:06.

[351] Leonard Body Cam 2 at 1:39; Rosenblatt Body Cam at 8:05.

Officer Jordan Mullins-Orcutt submitted a follow-up report indicating that he arrived on scene around this time. He described, "Upon arrival I observed a male party detained. He was laying on his side, conscious and talking while being attended to by initial responding [o]fficers. Officers were asking him if he could tell them what he may have ingested and ensuring him [sic] that he wasn't in trouble [and] that they only wanted to help him. The male party mentioned feeling sick so [o]fficers rolled him further forward so he could avoid getting sick on himself and he could keep his airway clear. The male party began throwing up. The male party then began asking about his telephone, [and] I looked around and observed a red telephone in close proximity. I asked if [] his telephone was red, which another [o]fficer asked him as he was closer, and he responded yes. I picked up the telephone and placed [it] into a plastic property bag. I laid it next to the male party prior to my departure. I was advised that I was no longer needed on scene and was requested to go back into service to help clear pending calls." Follow Up Report No. 19, General Offense Report at 43-44.

[352] Rosenblatt Body Cam at 8:18.

[353] Rosenblatt Body Cam at 8:20.

[354] Rosenblatt Body Cam at 8:21.

[355] Rosenblatt Body Cam at 8:19.

[356] Rosenblatt Body Cam at 8:30.

the first and one of the most junior members of the Aurora Fire team to arrive, that Mr. McClain "was put into a carotid and he did lose consciousness. He's throwing up right now and he's obviously on something. We're gonna have to have him transported."[357] The other Aurora Fire personnel arrived on scene a few seconds later.[358] Specifically, the body worn camera footage shows Paramedic Cooper and other unidentifiable Aurora Fire personnel approaching Sgt. Leonard as Sgt. Leonard told FF DeJesus that a carotid had been performed, but Paramedic Cooper had not yet reached Sgt. Leonard and we could not determine whether he would have been able to hear what was said.[359]

6. FF Bradley and Lt. Cichuniec told Major Crime investigators that, upon arrival, they noted the presence of many police cars at the scene.[360] FF Bradley, Paramedic Cooper, and Lt. Cichuniec also told Major Crime investigators that they observed Mr. McClain on the ground, in handcuffs, and resisting the officers.[361] FF Bradley described Mr. McClain as being "in an agitated state," and "resisting arrest as much as possible,"[362] while FF DeJesus told Major Crime investigators that Mr. McClain was "inaudibly kind of screaming stuff," and because the police officers were holding Mr. McClain down, he was unable to conduct an evaluation.[363]

7. Seconds before Sgt. Leonard began telling FF DeJesus that Mr. McClain had been placed in a carotid hold, body worn camera audio reflects that Officer Roedema said to Mr. McClain, "Don't move dude, just stay on your side," and then asked Rosenblatt to help roll him, before saying to Mr. McClain, "There you go, just like that."[364] Officer Roedema then said, "Don't get up, dude. It's not going to be good for you. I'm telling you right now."[365] At the same time, Mr. McClain's upper body became briefly visible on the footage. He did not appear to be moving or making any sounds.[366] Officer Rosenblatt then shifted position, obscuring Mr. McClain from view.

8. Two seconds later, Officer Green told Mr. McClain, "Dude, if you keep messing around, I'm going to bring my dog out, and he's going to dog bite you, you understand me? Keep messing around."[367] Officer Green was standing next to Mr. McClain at this time, although Mr. McClain is not visible on any of the body worn camera footage. The body worn camera audio did not reflect any sounds suggesting movement or vocalizations by Mr. McClain. In addition, body worn camera footage shows that, during Officer Green's statement, Officer Roedema

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[357] Leonard Body Cam 2 at 2:38; Dunson Body Cam at 10:40.

[358] Green Body Cam at 2:11-2:20.

[359] Dunson Body Cam at 10:40.

[360] Cichuniec Interview at 8:14; Bradley Interview at 5:28.

[361] Cichuniec Interview at 8:37; Bradley Interview at 6:11; Cooper Interview at 9:22.

[362] Bradley Interview at 6:23.

[363] DeJesus Interview at 4:30.

[364] Rosenblatt Body Cam at 9:04; Green Body Cam at 2:11.

[365] Rosenblatt Body Cam at 9:04; Green Body Cam at 2:11.

[366] Rosenblatt Body Cam at 9:11.

[367] Rosenblatt Body Cam at 9:15.

was looking away from Mr. McClain and Officer Green and towards other officers on the scene while adjusting his badge on his chest with his right hand, leaving only his left hand on Mr. McClain.[368] At the same time, body worn camera footage shows Officer Rosenblatt cleaning both of his hands with a wipe.[369] Neither officer's conduct suggested any movement or resistance from Mr. McClain during this time.

9. As Officer Green finished speaking, Paramedic Cooper approached Mr. McClain and stood near his feet.[370] Less than ten seconds later, FF Bradley approached, standing behind Officers Rosenblatt and Roedema.[371] Paramedic Cooper told Major Crime investigators that Mr. McClain was "hyper aggressive," and reported watching Mr. McClain for one minute before deciding that his behavior was consistent with excited delirium.[372]

10. Less than twenty seconds after Officer Green threatened to have his dog bite Mr. McClain, Officer Roedema said, "Don't do it dude" and Officer Rosenblatt stated, "Relax, bro."[373] Officer Roedema added, "Chill out."[374] Officer Rosenblatt then stated, "You already lost this one, just relax."[375] Mr. McClain is not visible on body worn camera footage, and the body worn camera audio did not reflect any sounds suggesting movement or vocalizations by Mr. McClain. However, approximately six seconds later, Mr. McClain's head became briefly visible in Officer Rosenblatt's body worn camera footage, suggesting that Mr. McClain lifted or otherwise moved his upper body.[376] Officers Rosenblatt and Roedema stated "dude" and "come on," and Mr. McClain's head then disappeared out of view.[377]

11. Body worn camera footage reflects that Aurora Fire personnel were standing around the Aurora Police officers and Mr. McClain at this time. Paramedic Cooper and FF Bradley stood near Mr. McClain's head,[378] while FF DeJesus stood near his feet.[379] After observing for a few seconds, Paramedic Cooper asked if Mr. McClain spoke English.[380] Officer Roedema replied to Paramedic Cooper, "He speaks English, but he's, he's definitely on something."[381] Sgt. Leonard then told FF Bradley that Mr. McClain had been unresponsive to his questions and

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[368] Green Body Cam at 2:18.

[369] Green Body Cam at 2:20.

[370] Leonard Body Cam at 2:50.

[371] Green Body Cam at 2:33.

[372] Cooper Interview at 12:52.

[373] Rosenblatt Body Cam at 9:36.

[374] Rosenblatt Body Cam at 9:39.

[375] Rosenblatt Body Cam at 9:39.

[376] Rosenblatt Body Cam at 9:48.

[377] Rosenblatt Body Cam at 9:50; Green Body Cam at 2:50.

[378] Green Body Cam at 2:52.

[379] Green Body Cam at 3:07.

[380] Green Body Cam at 2:57.

[381] Green Body Cam at 2:59.

stated, "We put him out with a carotid twice, at least once successfully."[382] FF Bradley replied, "Okay."[383] During this exchange, Lt. Cichuniec and Paramedic Cooper were each standing no more than a few feet away from Sgt. Leonard, with Lt. Cichuniec standing behind FF Bradley and Paramedic Cooper standing behind Officer Roedema.[384] However, both were looking down at Mr. McClain, and it is not clear whether they heard this information.

12. Just after 10:53 P.M., as Sgt. Leonard was speaking to FF Bradley, body worn camera footage appears to show Mr. McClain thrashing or trying to roll.[385] Officer Roedema quickly leaned over Mr. McClain and put his knee into Mr. McClain's side.[386] Mr. McClain said, "Ow! Okay okay okay!" and again, "Okay okay okay!"[387] Sgt. Leonard instructed Mr. McClain to "stop messing around" while Officer Roedema said, "Chill out! You've already been told several times to stop!"[388] Mr. McClain rolled back slightly, looked up at the officers, and told them, "I can't sense myself!"[389] Body worn camera footage appears to show Officer Roedema lifting and then pushing down on Mr. McClain, although Mr. McClain's body is not fully visible in the footage. Mr. McClain cried, "Ow!"[390] As he observed these events, Paramedic Cooper said to the officers, "We'll just leave him there until the ambulance gets here, and then we'll just put him down to the gurney."[391]

13. Body worn camera audio suggests that after being lifted or moved by Officer Roedema, Mr. McClain began crying and gagging.[392] An officer then told Mr. McClain, "Stop!" while Mr. McClain groaned in pain and moved one of his legs.[393] Officer Roedema told Mr. McClain, "Dude, chill out!"[394] Body worn camera shows that Officer Roedema then pushed his knee into Mr. McClain's back and restrained him by pressing down on Mr. McClain's upper arm for several seconds.[395]

14. Several seconds later Mr. McClain rolled, or was rolled, onto his stomach as he cried "Ah, ow!"[396] As Mr. McClain groaned, Officer Roedema applied a wrist lock to Mr. McClain by

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[382] Leonard Body Cam 2 at 3:30; Green Body Cam at 3:07.

[383] Leonard Body Cam 2 at 3:35.

[384] Leonard Body Cam 2 at 3:35.

[385] Rosenblatt Body Cam at 10:04.

[386] Rosenblatt Body Cam at 10:04.

[387] Rosenblatt Body Cam at 10:06.

[388] Rosenblatt Body Cam at 10:09.

[389] Rosenblatt Body Cam at 10:07.

[390] Rosenblatt Body Cam at 10:16; Green Body Cam at 3:20; Leonard Body Cam 2 at 3:48.

[391] Green Body Cam at 3:22.

[392] Rosenblatt Body Cam at 10:26.

[393] Rosenblatt Body Cam at 10:32.

[394] Rosenblatt Body Cam at 10:35.

[395] Rosenblatt Body Cam at 10:38.

[396] Rosenblatt Body Cam at 10:44.

taking hold of Mr. McClain's shoulder or elbow with one hand while pulling one or both of Mr. McClain's handcuffed hands up and back with his other hand.[397] Officer Roedema then rolled Mr. McClain back onto his side.[398] Officer Roedema again put his knee in Mr. McClain's back and resumed pressing down on Mr. McClain's top arm with his body weight. Mr. McClain cried, "Stop, please!" and Officer Roedema responded, "Well stop fighting us!"[399] Mr. McClain replied, "I'm trying!" and then, "I can't feel…please help me," as he cried indiscernibly before falling silent.[400] The Panel's review of the body worn camera footage did not identify any further comprehensible or coherent speech by Mr. McClain after this point, although at times Mr. McClain continued to groan, cry out, or make other sounds over the next several minutes.

15. Body worn camera footage suggests that FF Bradley bent down toward the ground in the direction of Mr. McClain's head two times during this interval, on one occasion pulling Mr. McClain's earbuds out of the way and on the other squatting down near Mr. McClain's head for several seconds as Officer Roedema applied the wrist lock described above.[401] Paramedic Cooper continued to stand and observe, but not intervene, while officers pressed down on Mr. McClain's side, for an interval of approximately 30-40 seconds[402] until an unidentified firefighter asked Paramedic Cooper: "Do you need narcs?"[403] Paramedic Cooper requested ketamine.[404]

16. Approximately ten seconds later, between 10:54 and 10:55 P.M., Paramedic Cooper informed Officer Roedema that "when the ambulance gets here, we're going to go ahead and give him some ketamine."[405] Officer Roedema replied, "Perfect, dude, perfect."[406] Officer Roedema

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[397] Rosenblatt Body Cam at 10:44.

At this point, body worn camera audio also captured Sgt. Leonard speaking over the phone to a supervisor about the events that ensued. He stated that Mr. McClain was in custody because "of nothing really criminal . . .officers made contact with him, he starts acting crazy, they go hands on with him, he attacked them, Rosenblatt ended up trying to put a carotid on the guy, Woodyard was able to put the carotid on him, and put him out, they were able to get him into handcuffs. We are still struggling with him and we have fire on scene…. I just wanted to let you know that we did apply the carotid tonight…" Body worn camera footage indicates that Sgt. Leonard was standing in close proximity to at least Paramedic Cooper, FF Bradley, and Aurora police officers during this conversation. Leonard Body Cam 2 at 4:00. However, the body worn camera footage reflects that Paramedic Cooper was watching Mr. McClain, who was speaking at this time, and as a result it is not clear if he heard Sgt. Leonard's comments. Leonard Body Cam 2 at 4:18.

[398] Rosenblatt Body Cam at 10:44.

[399] Rosenblatt Body Cam at 10:51.

[400] Rosenblatt Body Cam at 10:51.

[401] Rosenblatt Body Cam at 10:32, 10:50.

[402] Rosenblatt Body Cam at 11:09.

[403] Green Body Cam at 4:12.

[404] Green Body Cam at 4:14. Paramedic Cooper told Major Crime investigators that he had Lt. Cichuniec relay to Falck personnel, who had not yet arrived on scene, that the fire personnel "would need ketamine as well as [Falck's] gurney and soft restraints." Cooper Interview at 20:50.

[405] Green Body Cam at 4:24.

[406] Green Body Cam at 4:26.

continued, "Whatever he's on, he has incredible strength"[407] and Officer Rosenblatt added, "Yeah, crazy strength," to which Paramedic Cooper appears to have replied, "Yeah, that's why we [unintelligible] ketamine."[408] Officer Roedema also told Paramedic Cooper how Officer Roedema had held Mr. McClain in a "bar hammer" and Mr. McClain's "arm was above his head and he was still fighting" the officers.[409]

17. A few seconds later, Officer Green replaced Officer Rosenblatt in restraining Mr. McClain's feet by grabbing Mr. McClain's legs.[410] Approximately ten seconds later, Officer Roedema patted Mr. McClain and asked, "You all right?" and Mr. McClain did not respond.[411] Body worn camera footage reflects that all four Aurora Fire personnel were standing several feet away, facing Mr. McClain.[412]

18. Between 10:55 and 10:56 P.M., one of the officers stated: "I was trying to keep him on his side, dude, but he keeps fighting us, so."[413] A firefighter then walked over and shined a flashlight on Mr. McClain, and said, "He's breathing."[414] Body worn camera footage indicates that Mr. McClain was lying with his face partially down, rolled partially onto his stomach with his hands cuffed behind him and his right shoulder up, with Paramedic Cooper, FF Bradley, FF DeJesus, and Lt. Cichuniec standing above Mr. McClain approximately two to three feet away.[415] About seven seconds later, Mr. McClain pulled his right elbow up, rolled off his stomach, and moved his arms up slightly while coughing.[416] Officer Roedema told him, "Stop dude, don't do it."[417]

19. Several seconds later, then Officer Green then replied, "My knee's on his elbow dude, he ain't going anywhere."[418] Body worn camera audio indicates that Officer Roedema was then asked if he needed relief from restraining Mr. McClain.[419] Officer Roedema replied that he was "good" and he was going to pat Mr. McClain down to see if he "ha[d] anything."[420] Throughout this time, Aurora Fire personnel continued to stand over Mr. McClain and shine a

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[407] Green Body Cam at 4:30.

[408] Green Body Cam at 4:35.

[409] Rosenblatt Body Cam at 11:34.

[410] Green Body Cam at 4:47.

[411] Green Body Cam at 5:06.

[412] Green Body Cam at 5:12.

[413] Green Body Cam at 5:15.

[414] Green Body Cam at 5:15.

[415] Green Body Cam at 5:16.

[416] Green Body Cam at 5:23.

[417] Green Body Cam at 5:25.

[418] Green Body Cam at 5:42.

[419] Green Body Cam at 5:44.

[420] Green Body Cam at 5:47.

flashlight down at him, while Officer Roedema searched Mr. McClain,[421] who appeared to be lying on his side and not moving.[422]

20. Around this time, Falck Ambulance arrived on scene, although this is not captured on any body worn camera footage.[423] Falck's report indicates that, at the time of their arrival, Mr. McClain was "prone on [the] ground in the grass just next to a sidewalk with handcuffs behind his back on [sic] and at least 3 APD officers on top of pt. completely physically restraining him. Pt. was not able to move due to APD restraining torso and legs. Length of time pt. was restrained by APD was not relayed. APD had pt. restrained due to pt. being combative towards them. Pt. was not screaming and unable to tell if pt. was fighting APD officers."[424]

21. Body worn camera footage indicates that, approximately one minute after he began searching Mr. McClain, between 10:56 and 10:57 P.M., Officer Roedema rolled Mr. McClain from one side, onto his stomach, and then onto his other side.[425] Officer Roedema said to Mr. McClain, "Don't do it!"[426], although body worn camera footage does not show Mr. McClain moving. Body worn camera footage reflects that Mr. McClain moaned or gagged while Aurora Fire personnel continued to stand over him.[427] Body worn camera footage also reflects that Sgt. Rachel Nunez arrived on scene around this time.[428]

22. A few seconds later, Officer Ward kneeled down to join Officers Green and Roedema in restraining Mr. McClain.[429] Officer Roedema said that he was going to move so "we're not kneeling in his…right in his puke."[430] Body worn camera footage indicates that, a few seconds later, the officers rolled Mr. McClain back onto his left side, and Officer Roedema stated his intent to "drop [his] knee right in [Mr. McClain's] tricep, then he can't move."[431] Mr. McClain started gasping and coughing, while Sgt. Leonard told the officers to "make sure he can breathe. Keep him to the side."[432] Officer Roedema replied, "He can breathe, I just have his

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[421] Officer Roedema noted, "I'm just going to pat him down, make sure he doesn't have anything, because we haven't gotten that far yet." Green Body Cam at 5:47.

[422] Green Body Cam at 5:50.

[423] CAD Audio Transcript at 32:00; APD CAD Report – Ingui, M., General Offense Report at 496.

[424] Falck Patient Care Report at 6.

[425] Green Body Cam at 6:22.

[426] Green Body Cam at 6:27.

[427] Green Body Cam at 6:34.

[428] Nunez Body Cam 1 at 0:00. In a follow-up report, Sgt. Leonard recalled that "Sgt[.] Nunez arrived on scene at some point, and I coordinated with her what I knew and what I believed needed to be addressed and together we began directing officers['] actions and contacting other supervisors to include Captain Redfearn and Duty Lt. Swart." Follow Up Report No. 5, General Offense Report at 19.

[429] Ward Body Cam 2 at 1:04.

[430] Green Body Cam at 6:42.

[431] Green Body Cam at 6:54; Ward Body Cam 2 at 1:13.

[432] Green Body Cam at 7:00; Ward Body Cam 2 at 1:23.

arm pinned beneath his back, that's it."[433] Over the next several seconds, body worn camera reflects that Mr. McClain was wheezing or breathing heavily, and at times was coughing and gasping.[434] During this time, Sgt. Leonard told Mr. McClain, "Don't move your feet! Nope! Don't do that!"[435] Sgt. Leonard walked closer to the group, and Officer Roedema said, "Take his foot and angle it outwards and put pressure on his ankle."[436] Sgt. Leonard replied "Yeah, that works… except I don't think he's going to feel anything."[437] Officer Roedema then noted, "He almost did a push up with all three of us on his back."[438]

10. Aurora Fire Administers Ketamine

Between 10:57 and 10:58 P.M., body worn camera footage indicates that Lt. Cichuniec and Falck Paramedic Ryan Walker wheeled the gurney over toward Mr. McClain.[439] Officers Roedema and Ward can be seen holding Mr. McClain's arms behind his back while an unidentified individual told Paramedic Cooper that the ketamine was being drawn up.[440] Paramedic Cooper responded that "once he gets that, I'm going to hit him in the right shoulder."[441] At the same time, body worn camera footage shows that Mr. McClain lifted his head and did not speak but made a guttural noise suggesting that he was in distress.[442] Officer Green then asked, "You want shoulder or ass?"[443] Paramedic Cooper replied, "Either way, doesn't matter."[444] Officer Green replied: "Ass is right here man."[445] The officers and a paramedic then partially removed Mr. McClain's jacket and exposed his upper right arm. Mr. McClain continued to groan and make guttural cries

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[433] Green Body Cam at 7:06; Ward Body Cam 2 at 1:25; Nunez Body Cam 1 at 0:33.

[434] Green Body Cam at 7:10; Ward Body Cam 2 at 1:31; Nunez Body Cam 1 at 0:42.

[435] Leonard Body Cam 2 at 7:40. In a follow-up report, Sgt. Leonard recalled that "[d]uring these moments when AFR was trying to treat [Mr. McClain], [o]fficers were holding him and trying to control him so he could be treated. Ofc. Green was holding his legs and I could see the male raising and flailing his lower legs and I was very concer[n]ed that he would kick Ofc[.] Green and I told Ofc. Green this. He was preoccupied with what he was doing, so to protect him, I placed my foot over the subject[s]s ankle(s), to hold them down so he could not kick Ofc. Green." Follow Up Report No. 5, General Offense Report at 20. Because Mr. McClain's lower body was not visible in the body cam footage, we were not able to confirm whether Mr. McClain was "raising and flailing his lower legs" during this period.

[436] Green Body Cam at 7:14.

[437] Leonard Body Cam 2 at 7:46.

[438] Green Body Cam at 7:23; Ward Body Cam 2 at 1:34; Nunez Body Cam 1 at 0:54.

[439] Nunez Body Cam at 0:44.

[440] Green Body Cam at 7:29; Ward Body Cam 2 at 1:49; Nunez Body Cam 1 at 1:00.

[441] Green Body Cam at 7:32; Ward Body Cam 2 at 1:52; Nunez Body Cam 1 at 1:03.

[442] Green Body Cam at 7:37; Ward Body Cam 2 at 1:57; Nunez Body Cam 1 at 1:07.

[443] Green Body Cam at 7:38; Ward Body Cam 2 at 1:56; Nunez Body Cam 1 at 1:07.

[444] Green Body Cam at 7:38; Ward Body Cam 2 at 1:57; Nunez Body Cam 1 at 1:08.

[445] Green Body Cam at 7:38.

over the next several seconds, and appeared to thrash as he cried out before he went silent and still again.[446]

As they waited for the Falck paramedics to return from the ambulance with the ketamine,[447] body worn camera reflects that officers continued to apply pressure to Mr. McClain's side (Officer Ward near Mr. McClain's head, and Officer Roedema near his waist), while Aurora Fire personnel continued to stand above Mr. McClain and observe with a gurney nearby.[448] After waiting approximately thirty seconds, just after 10:58 P.M., Sgt. Leonard asked, "What's taking so long here?"[449] Body worn camera footage shows that paramedics stood above Mr. McClain while Officers Green, Ward, and Roedema continued to hold Mr. McClain on his side.[450] Several seconds later, Paramedic Cooper asked, "Mind sticking your head in the ambulance and making sure he's drawing up the ketamine?"[451] Body worn camera footage shows that Falck Paramedic Walker then walked to Paramedic Cooper and handed him a syringe.[452] Body worn camera audio reflects that Paramedic Cooper confirmed with Falck Paramedic Walker that they were administering "500 of ketamine" and confirmed the expiration date on the vial.[453] Around the same time, Officer Roedema instructed Officer Ward to put her knuckles in a particular place on Mr. McClain's body but not to put pressure "until [Mr. McClain] moves."[454]

Seconds after Falck Paramedic Walker handed over the ketamine, between 10:59 P.M. and 11 P.M., body worn camera footage shows that Paramedic Cooper kneeled down and injected Mr. McClain, who was lying partially on his side and partially on his stomach, with ketamine in his right shoulder.[455] At the same time, Officer Roedema instructed Officer Ward, who had her hand on Mr. McClain's head, "Just drive it right behind his ear if he fights."[456] The body worn camera footage reflects that Mr. McClain had not moved or made any sounds in the approximately one minute prior to the administration of the ketamine.[457] In addition, at the time of the injection, Mr. McClain was neither moving nor making any sound, although the body worn camera footage indicates that his chest was rising and falling.[458]

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[446] Green Body Cam at 7:40; Ward Body Cam 2 at 2:01; Nunez Body Cam 1 at 1:10.

[447] Lt. Cichuniec explained that Falck supplied the ketamine because Aurora Fire's supply was on backorder. Cichuniec Interview at 1:08:04.

[448] Green Body Cam at 8:00.

[449] Green Body Cam at 8:09; Nunez Body Cam 1 at 1:39.

[450] Green Body Cam at 8:09; Ward Body Cam 2 at 2:19; Nunez Body Cam 1 at 1:42.

[451] Green Body Cam at 8:34; Nunez Body Cam 1 at 2:04.

[452] Nunez Body Cam 1 at 2:13.

[453] Green Body Cam at 8:41; Ward Body Cam 2 at 3:01.

[454] Green Body Cam at 8:38.

[455] Green Body Cam at 8:51.

[456] Green Body Cam at 8:53; Ward Body Cam 2 at 3:12.

[457] Green Body Cam at 8:52.

[458] Green Body Cam at 8:54; Ward Body Cam 2 at 3:15.

Lt. Cichuniec told Major Crime investigators that he advised Falck of the 500 milligram dosage amount, which Lt. Cichuniec based on calculations of five milligrams per kilogram and his estimation that Mr. McClain weighed 85 kilograms (or approximately 190 pounds).[459] Lt. Cichuniec explained to Major Crime investigators that he was taught three ketamine doses — 300 milligrams for "small," 400 milligrams for "medium," and 500 milligrams for "large" — and he chose a 500 milligram dosage because (i) his weight-based calculation suggested a dosage over 400 milligrams; (ii) "because of his agitated state and his signs and symptoms of excited delirium"; (iii) because "he was over the 400, and with a 5 cc syringe," there were "no increments on there to measure exactly"; and (iv) because of "the training we got that if he falls above [the weight corresponding to 400 milligrams], we're not going to go down, because then we have to call in for additional if it doesn't work." [460]

11. Mr. McClain is Transferred to a Gurney and the Ambulance

After Paramedic Cooper injected Mr. McClain with ketamine, the body worn camera footage reflects that Paramedic Cooper stood up and explained, "We'll give that a minute or two, see if that works, and, once it is, we'll go ahead, if you guys are okay with it, we'll uncuff him. We'll go up with the right arm, down with the left, and we'll just restrain everything, but we'll give that a minute or two."[461] Officer Roedema then called to Officers Woodyard and Rosenblatt and told them, "Once this medicine kicks in, we're going to uncuff him, put him on their bed, and then we're going to restrain him, soft point him to the bed."[462] Body worn camera footage then shows that Falck Paramedic Walker walked to stand beside Paramedic Cooper, and body worn camera audio indicates that Paramedic Cooper then informed Falck Paramedic Walker, "Just to fill you in, we were contacted, he was walking down the street wearing like a wrestling mask or something like that. It took all these guys to get him down and even then [unintelligible]...no pain compliance...[unintelligible] still fighting, still fighting when we got here. He's super diaphoretic, he's tachycardic. He's having excited delirium, and that's why we hit him with five of the ketamine. We had no idea [unintelligible] he has allergies or so we're going to give him maybe

[459] Cichuniec Interview at 15:42. According to an autopsy report, Mr. McClain actually weighed 140 pounds. Adams County Autopsy Report – Ingui, M., General Offense Report at 195.

[460] Cichuniec Interview at 1:09:38, 15:56, 17:00.

[461] Green Body Cam at 9:04; Ward Body Cam 2 at 3:24.

[462] Nunez Body Cam 2 at 2:47; Ward Body Cam 2 at 3:37; Green Body Cam at 9:16.

another minute. It looks like it's starting to kick in."[463] An officer confirmed that Mr. McClain sounded as though he was snoring.[464]

During the period after the ketamine was administered but before the officers determined that the ketamine had taken effect, only the back of Mr. McClain's head is visible on the body worn camera and the audio does not indicate that he was moving or making any sounds other than potentially coughing.[465] However, FF Bradley recalled to Major Crime investigators that, after the ketamine was administered, Mr. McClain was "initially still agitated, still resisting arrest" and that it took approximately two to three minutes for the ketamine to take effect.[466] FF DeJesus similarly recalled that, "Up until the medication kicked in [Mr. McClain] was still being combative and resisting [the officers]."[467] Lieutenant Cichuniec told Major Crime investigators that after the ketamine was administered, Mr. McClain "wasn't fighting as much. He was starting to ramp down…APD was able to control him."[468]

Between 11:00 and 11:01 P.M., after the officers concluded the ketamine was beginning to take effect, Paramedic Cooper discussed uncuffing Mr. McClain and asked if Mr. McClain was in custody.[469] Body worn camera audio indicates that two officers responded: "I'm sure he will be."[470] During this exchange, the body worn camera footage shows that Mr. McClain was lying on his side, breathing deeply and rapidly.[471] Approximately ninety seconds had elapsed since Paramedic Cooper injected Mr. McClain with ketamine.

Paramedic Cooper then asked, "Alright, how is he? Does he seem a little..."[472] Officer Roedema appeared to move closer to Mr. McClain and body worn camera audio reflects a sound

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[463] Green Body Cam at 9:53; Nunez Body Cam 2 at 3:50; Ward Body Cam 2 at 4:13.

Paramedic Cooper's statements are consistent with the Falck Ambulance report, see Falck Patient Care Report at 6; FF Cooper Interview – Ingui, M., General Offense Report at 279, although body worn camera footage does not reflect when either Aurora Fire or Falck took Mr. McClain's vital signs. The only times the body worn camera footage indicates Aurora Fire interaction with Mr. McClain were when (i) FF Bradley bent toward Mr. McClain, off-camera, and (ii) when Paramedic Cooper injected Mr. McClain with ketamine. In addition, we note that the Falck Patient Care Report stated that Mr. McClain "had not been seen by Falck medic prior to administration of [k]etamine due to darkness as well as multiple APD officers being on top of [him]." Falck Patient Care Report at 6; FF Cooper Interview – Ingui, M., General Offense Report at 279.

[464] Green Body Cam at 10:23.

[465] Green Body Cam at 9:50; Ward Body Cam 2 at 3:40.

[466] Bradley Interview at 9:37.

[467] DeJesus Interview at 9:35.

[468] Cichuniec Interview at 1:05:26.

[469] Green Body Cam at 10:27; Ward Body Cam 2 at 4:47.

[470] Ward Body Cam 2 at 4:49; Green Body Cam at 10:29.

[471] *See* Ward Body Cam 2 at 3:45-4:00.

[472] Green Body Cam at 10:37.

suggesting that someone tapped Mr. McClain.[473] Officer Green then confirmed, "Yup."[474] Paramedic Cooper instructed the officers to move Mr. McClain to his side and uncuff him.[475] An officer replied, "Let's get him on the gurney first if we can."[476]

Approximately one or two seconds later, several officers and paramedics began to lift Mr. McClain, who appeared limp.[477] Sgt. Nunez observed to Sgt. Leonard that Mr. McClain was "out."[478] In a report submitted later that evening, Sgt. Nunez described seeing a "reddish-colored substance coming from [Mr. McClain's] mouth and possibly his nose area that looked like throw up"[479] at this time. Approximately ten seconds later, body worn camera footage shows officers huddled around Mr. McClain while Mr. McClain was held in an upright sitting position on a gurney.[480] At this point in time, Mr. McClain's face became visible on the body worn camera footage and appeared slack.[481] Body worn camera footage indicates that FF DeJesus assisted in holding Mr. McClain while an unidentified officer removed the handcuffs from Mr. McClain's wrists and Officer Roedema held Mr. McClain's hands behind his back; Mr. McClain then fell backwards onto the gurney while officers or paramedics withdrew their hands.[482] Body worn camera footage shows what appears to be vomit or other fluid falling from Mr. McClain's mouth immediately before he was allowed to fall backward.[483] Body worn camera footage reflects that, approximately twenty seconds later, at around 11:02 P.M., an unidentified individual stated, "Let's get him inside and then suction him."[484]

After approximately one minute, body worn camera footage shows that Aurora Fire and Falck personnel began to wheel Mr. McClain to the ambulance.[485] Body worn camera footage

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[473] Green Body Cam at 10:41; Ward Body Cam 2 at 5:00.

[474] Green Body Cam at 10:43; Ward Body Cam 2 at 5:03. At the same time, body worn camera footage reflects that Sgt. Leonard asked Officer Woodyard, who was standing with Officers Rosenblatt and Nunez, if he was alright. Nunez Body Cam 2 at 4:00. Officer Woodyard responded, "Yeah, fine. Just—I'm physically fine. Just this situation is a little frustrating, so. It is what it is." Nunez Body Cam 2 at 4:00.

[475] Nunez Body Cam 2 at 4:15.

[476] Green Body Cam at 10:48; Ward Body Cam 2 at 5:07; Nunez Body Cam 2 at 4:18.

[477] Nunez Body Cam 2 at 4:22.

[478] Nunez Body Cam 2 at 4:35.

[479] Ward Narrative/Remarks, General Offense Report at 8.

[480] Ward Body Cam 2 at 5:30.

[481] Green Body Cam at 11:03.

[482] Ward Body Cam 2 at 5:38.

[483] Nunez Body Cam 2 at 4:50. *See also* Aurora Fire Department – EMS Patient Care Report, General Offense Report at 346 (describing "excessive emesis…pink in color"); Falck Patient Care Report at 6 (describing "pink frothy emesis").

[484] Ward Body Cam 2 at 6:12; Nunez Body Cam 2 at 5:12.

[485] Green Body Cam at 11:59; Ward Body Cam 2 at 6:19; Nunez Body Cam 2 at 5:31.

reflects that Mr. McClain was loaded into the ambulance approximately twenty seconds later, between 11:02 and 11:03 P.M.[486]

12. Mr. McClain is Transported to the Hospital

No police officers were present in the ambulance that transported Mr. McClain to the hospital. Therefore, body worn camera footage did not clearly capture what happened in the ambulance from the period encompassing Mr. McClain's move to the ambulance or his transport to the hospital. However, portions of the footage did capture brief moments of Mr. McClain's medical care, and Aurora Fire personnel's interviews with Major Crime investigators, together with documentary records, indicate the following sequence of events:

1. FF DeJesus entered the ambulance, with Lt. Cichuniec entering behind him.[487] Lt. Cichuniec told Major Crime investigators that he was concerned about Mr. McClain's airway because he was vomiting, and wanted to suction Mr. McClain's airway.[488] At this time, Lt. Cichuniec, FF Bradley, and FF DeJesus noticed that Mr. McClain was not breathing.[489]

2. FF DeJesus told Major Crime investigators that Lt. Cichuniec asked him to verify the lack of a pulse at Mr. McClain's carotid artery.[490] FF DeJesus explained to Major Crime investigators that he began chest compressions after finding no palpable pulse.[491] FF DeJesus recalled that Aurora Fire personnel completed approximately four two-minute rounds of CPR, at which time Paramedic Cooper decided to transport Mr. McClain to the hospital.[492] FF DeJesus explained that once Paramedic Cooper decided to transport Mr. McClain to the hospital, FF DeJesus exited the ambulance to retrieve any kits left at the scene and return them to the fire engine.[493]

3. Aurora Police Department's CAD reflects an instruction to "ADVISE Aurora Police Department OF COR-0"[494] at approximately 11:04 P.M., although the EMS Patient Care Report first records cardiac arrest at 11:07 P.M.[495] Body worn camera footage indicates that

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[486] Nunez Body Cam 2 at 5:49.

[487] DeJesus Interview at 10:43.

[488] Cichuniec Interview at 21:37.

[489] Cichuniec Interview at 23:01; DeJesus Interview at 11:00; Bradley Interview at 12:55.

[490] DeJesus Interview at 11:10

[491] DeJesus Interview at 11:13.

[492] DeJesus Interview at 13:24.

[493] DeJesus Interview at 13:42.

[494] The Aurora Police Department records provided to the Panel for review indicate that Aurora Police and Fire personnel use the term "COR" or "core" to refer to a patient's cardiac arrest. *See, e.g.,* FF Cichuniec Interview – Ingui, M., General Offense Report at 272 ("Cichuniec advised he did not see the drugs [but] he heard the drugs were being administered and advised it was (epinephrine) … (a first-round drug) when you have a 'core' cardiac arrest").

[495] Background Event Chronology - P190289597 at 2; Aurora Fire Department – EMS Patient Care Report, General Offense Report at 345. Sgt. Dale Leonard's follow-up report, filed after the incident, reflects that when he "heard over the radio that the party was a core-0 [he] checked the back of the ambulance and observed rescue personnel working on the male." Follow Up Report No. 5, General Offense Report at 20.

an intravenous pressure bag was already in place and that cardiopulmonary resuscitation ("CPR") was in progress at or around 11:07 P.M. One of the personnel involved in the resuscitation can be heard noting "27 seconds left," at this time, suggesting the duration remaining on the two-minute compression timer for CPR.[496] Sgt. Leonard's follow-up report, filed after the incident, reflects that when he "heard over the radio that the party was a [COR]-0 [he] checked the back of the ambulance and observed rescue personnel working on the male."[497]

4. Aurora Fire's EMS Patient Care Report reflects that after Mr. McClain went into cardiac arrest, Mr. McClain's blood pressure, pulse, and respiration, and heart rhythm were tested every two minutes.[498] The report recorded no blood pressure, no pulse, and no respiration, at any of the tested intervals.[499] Aurora Fire's EMS Patient Care Report also reflects that the following actions were taken in the ambulance: (i) bag-valve-mask ventilation; (ii) OPA insertion; (iii) oral intubation; (iv) intraosseus line establishment; and (v) two rounds of epinephrine administration.[500]

5. The ambulance arrived at the hospital at approximately 11:17 P.M.,[501] and Paramedic Cooper informed hospital staff that ketamine had been administered.[502] Lt. Cichuniec told Major Crime investigators that, upon arrival, he believed he had located a heart rhythm but that it "took too long to check if they had a pulse associated with it."[503]

Officers John Haubert and Stephanie Nghiem met the ambulance upon its arrival at the hospital, and their body worn camera video footage captured both the ambulance's arrival[504] and Mr. McClain's transfer out of the ambulance.[505] Aurora Fire personnel wheeled Mr. McClain into the hospital doors at approximately 11:20 P.M., and into a treatment room approximately thirty seconds later.[506] The body worn camera footage reflects that FF Bradley was performing CPR during this time period,[507] but stopped for a short period of time when the gurney was being

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[496] Leonard Body Cam 3 at 3:44.

[497] Follow Up Report No. 5, General Offense Report at 20.

[498] Aurora Fire Department – EMS Patient Care Report, General Offense Report at 345.

[499] Aurora Fire Department – EMS Patient Care Report, General Offense Report at 345.

[500] Aurora Fire Department – EMS Patient Care Report, General Offense Report at 345.

[501] Aurora Fire Department – EMS Patient Care Report, General Offense Report at 344; Haubert Body Cam at 0:09.

Officer Stephanie Nghiem submitted a follow-up report on August 25, 2019, stating that at approximately 11:08 P.M. a sergeant asked that she meet "the victim of a previous incident in the emergency bay once they arrived in the ambulance… I waited in the bay until the ambulance arrived at approximately [11:15 P.M.]." Follow Up Report No. 18, General Offense Report at 41.

[502] Cooper Interview at 41:47.

[503] Cichuniec Interview at 28:54.

[504] Haubert Body Cam at 0:09.

[505] Haubert Body Cam at 1:21; Nghiem Body Cam 0:34.

[506] Nghiem Body Cam at 1:08; 1:40.

[507] Nghiem Body Cam at 0:32.

unloaded off the ambulance.[508] Hospital personnel confirmed that Mr. McClain had no pulse at approximately 11:21 P.M.,[509] but identified a return of circulation at approximately 11:22 P.M., and found he had a palpable pulse at 11:24 P.M.[510] Aurora Fire personnel exited the treatment room at approximately 11:23 P.M.[511] Mr. McClain received medical care at the hospital and was ultimately declared brain dead on August 27, 2019.[512] Mr. McClain was autopsied on September 3, 2019.[513] On October 18, 2019, the autopsy concluded that Mr. McClain died of undetermined causes.[514]

B. The Aurora Police Department's Investigation of Mr. McClain's Death

1. Investigation by Major Crime/Homicide Unit

Aurora Police Department's investigation began the night of Mr. McClain's encounter with the Aurora Police. Body worn camera footage indicates that at approximately 11:07 P.M., Sgt. Leonard told other officers, "So there's a pretty good chance we're going to [Major Crime]. He just COR'ed."[515] Sgt. Leonard then walked toward two officers, one of whom was Officer Roedema, and said, "Hold tight. I need you guys to just be separate, because we're probably going to [Major Crime]."[516] Officer Green's follow-up report similarly recounted that "[w]hile still on scene, trying to make sure everyone was ok [sic] and figure out where to go with the investigation, we were made aware that the suspect 'cored out' while in the ambulance. The ambulance was still on scene at the time. Because of the seriousness of this information, all officers then stopped discussing any details about the incident and began separating ourselves from each other…We

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[508] Nghiem Body Cam at 0:46.

[509] Nghiem Body Cam at 2:29.

[510] Nghiem Body Cam at 3:54; 5:09. In her follow-up report, Officer Nghiem noted that when the ambulance arrived, "the unknown male was unconscious, not breathing, and had no pulse. Medics were currently conducting CPR. The male was being transported into one of the emergency rooms and I stood by while he was being treated. While I was there, I updated APD Dispatch the unknown male had a pulse at [11:26 P.M.]." Follow Up Report No. 18, General Offense Report at 41.

Officer Haubert similarly stated in his follow-up report that "[t]he unidentified male did get a pulse back and CPR was stopped." Follow Up Report No. 1, General Offense Report at 13.

[511] Nghiem Body Cam at 4:15.

[512] Use of Force Investigation Summary – Ingui, M., General Offense Report at 429.

[513] Use of Force Investigation Summary – Ingui, M., General Offense Report at 429.

Under "Circumstances of Death," the autopsy report noted, "This 23-year-old male went unresponsive during a police involved interaction. CPR was initiated and he was transported to a local hospital. Imaging studies of the brain showed decreased ventricular size and anoxic brain injury. Imaging studies of the neck were negative and studies of the heart showed a small left ventricle… He developed acute kidney injury in the hospital which was addressed but he had a second cardiac arrest on August 25, 2019 at 0300 Hours." Adams County Autopsy Report – Ingui, M., General Offense Report at 194.

[514] Adams County Autopsy Report – Ingui, M., General Offense Report at 193. The coroner described "[c]ontributing [f]actors" as "[i]ntense [p]hysical [e]xertion and a [n]arrow [l]eft [c]oronary [a]rtery."

[515] Leonard Body Cam 3 at 3:03.

[516] Leonard Body Cam 3 at 3:55.

were then advised to be transported and/or drive to [Aurora Police] Headquarters, so we could be interviewed by detectives."[517]

Sgt. Stephen Jokerst was working as a supervisor of Major Crime on the evening of August 24, 2019. In a follow-up report, he recalled that at approximately 11:30 P.M., he was contacted by telephone by Lt. Hershel Stowell regarding "an in-custody death that had occurred at 1768 North Billings Street."[518] Sgt. Jokerst reported that, after receiving this information, he notified Major Crime Detectives Matthew Ingui and Nicholas Huber and Major Crime Investigator David Sutherland.[519] In addition, Sgt. Jokerst explained that Lt. Howell notified Lt. Matthew Clark of the Denver Police Department Major Crime Homicide Unit pursuant to a memorandum of understanding between the Aurora and Denver Police Department.[520] Denver Police Department records indicate that Denver Sgt. Scott Hagan tasked Detectives Joseph Trujillo and Bruce Gibbs with responding to Aurora Police Department Headquarters to assist with Aurora Police Department's investigation.[521]

Sgt. Jokerst, Detective Ingui, and Detective Huber arrived on-scene at approximately 12:55 A.M. on August 25, 2019.[522] They received a briefing from Sgt. Nunez, after which Detective Ingui was tasked as the lead investigator.[523] Detectives Ingui and Huber then went to Aurora Police Department Headquarters.[524] Aurora Police records indicate that Major Crime's investigation, led by Detective Ingui, included the steps described further below.

Interviews. With respect to Aurora Police personnel, Major Crime investigators interviewed Officers Woodyard, Rosenblatt, and Roedema. Detectives Ingui and Gibbs conducted interviews of Officers Woodyard and Rosenblatt early on the morning of August 25, 2019. Specifically, Officer Rosenblatt's interview began at or around 2:41 A.M. and lasted for approximately 46 minutes.[525] Officer Woodyard's interview began at or around 3:31 A.M. and lasted for approximately 38 minutes.[526] Officer Roedema, after speaking to his attorney, deferred

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[517] Follow Up Report No. 63, General Offense Report at 102.

[518] Follow Up Report No. 70, General Offense Report at 120.

[519] Follow Up Report No. 70, General Offense Report at 120.

[520] Follow Up Report No. 70, General Offense Report at 120.

[521] See Denver Police Department General Offense Hardcopy, General Offense Report at 184.

[522] Follow Up Report No. 70, General Offense Report at 120; Follow Up Report No. 73, General Offense Report at 142.

[523] Follow Up Report No. 70, General Offense Report at 120-21.

[524] Follow Up Report No. 70, General Offense Report at 121.

[525] Officer Erica Marrero escorted Office Rosenblatt to Aurora Police headquarters and remained with him until Officer Rosenblatt's attorney arrived. Officer Marrero transported Officer Rosenblatt to another District so that he could return home after his interview with Major Crime. *See* Follow Up Report No. 15, General Offense Report at 36.

[526] Officer Kyle Dittrich was instructed to return to the scene and escort Officer Woodyard to Aurora Police headquarters. In a follow-up report, Officer Dittrich stated that he remained with Officer Woodyard "at all times" except for when Officer Woodyard spoke with a psychologist, a union representative, an attorney, and Major Crime. After Major Crime finished interviewed Officer Woodyard, Officers Dittrich and Marrero transported Officer

his interview until Tuesday, August 28, 2019. Detective Ingui and Trujillo interviewed Officer Roedema at or around 10:07 A.M. that day, and the interview lasted for approximately 62 minutes. None of the officers had reviewed their body worn camera footage prior to their interviews. No other Aurora Police officers were interviewed.[527]

With respect to the Aurora Fire personnel involved, Major Crime investigators interviewed Lt. Cichuniec, Paramedic Cooper, and FFs Bradley and DeJesus. Specifically, Detective Ingui and Sgt. Hagan interviewed FF Bradley on September 9, 2019. The interview began at or around 2:08 P.M. and lasted for approximately 37 minutes.[528] Detective Ingui and Sgt. Hagan interviewed Lt. Cichuniec and Paramedic Cooper on September 11, 2019. Lt. Cichuniec's interview began at or around 12:44 P.M. and lasted for approximately 77 minutes.[529] Paramedic Cooper's interview began at or around 2:08 P.M. and lasted for approximately 58 minutes.[530] Detectives Ingui and Kari Johnson (Denver Police Department) interviewed FF DeJesus on September 23, 2019. The interview began at or around 1:57 P.M. and lasted for approximately thirty minutes.[531] Aurora Fire's Medical Director, Dr. Eric Hill did not participate in any of these interviews, nor did Major Crime interview him.

In addition, on August 25, 2019, Detective Ingui spoke with the gas station clerk whose shift began at 9 P.M. the prior evening and who recalled "a black ma[l]e who entered the store wearing a mask within an hour or so of her starting her shift."[532] On August 26, 2019, Detective Ingui and Investigator Sutherland interviewed the 911 caller at the caller's residence.[533]

Woodyard home. *See* Follow Up Report No. 12, General Offense Report at 31; Follow Up Report No. 15, General Offence Report at 37.

[527] Officer Green was escorted to Aurora Police headquarters by Officer Cory Mankin, and met with his attorney. In a follow-up report, Officer Green explained that "[w]hile waiting to be interviewed by an Aurora Police Major Crime Unit Detective, I was advised by Commander Dudley I was not going to be interviewed by detectives, based on my involvement. I was advised to complete this report, to document my involvement and actions." Follow Up Report No. 63, General Offense Report at 100; *see also* Follow Up Report No. 14, General Offense Report at 34.

Sgt. Leonard was also advised by Captain Redfearn to "transport [him]self to Headquarters, Chief's Conference Room, and [he] did so." Follow Up Report No. 5, General Offense Report at 21.

His assigned police escort, Officer Karen Johnson, met him at Aurora Police headquarters. She wrote in a follow-up report that "After [a] meeting… Sergeant Leonard explained that he was no longer needed, and I witnessed Commander Dudley speak with him about completing a report and the[n] needing nothing further from him." Follow Up Report No. 10, General Offense Report at 27. In his follow-up report, Sgt. Leonard explained that "I was advised by Commander Dudley that I needed to write my supplemental report and that I would not be on administrative leave and that all I needed to complete here right now was a urine sample to IA, which I did a short time later." Follow Up Report No. 5, General Offense Report at 21.

As noted above, we requested an interview with Commander Dudley, but he retired while our investigation was ongoing and we were not able to schedule an interview with him before that time.

[528] Bradley Interview at 2:08.

[529] Cichuniec Interview at 3:15.

[530] Cooper Interview at 4:01.

[531] DeJesus Interview at 1:07.

[532] Summary Report – Ingui, M., General Offense Report at 514.

[533] Summary Report – Ingui, M., General Offense Report at 515.

Review of Video Footage. Detective Ingui's records also indicate that he reviewed body worn camera footage from Officer Woodyard, Officer Rosenblatt, Officer Roedema, Officer Green, and Sgt. Leonard. Detective Ingui's reports do not make clear when he reviewed this footage (for example, before or after interviews with the officers), or if he reviewed any other officers' body worn camera.[534]

Detective Ingui also reviewed footage from the gas station that Mr. McClain visited prior to his contact with the Aurora Police Department. Detective Ingui obtained this footage on August 27, 2019 and began reviewing this footage on August 28, 2019.

Review of Policies and Procedures. Investigation records suggest that Major Crime investigators received and reviewed the following: Aurora Fire's policy on "Agitated/Combative Patient Protocol, Transport of the Handcuffed Patient, and medications";[535] Aurora Fire's "ketamine-in-service" presentation;[536] Aurora Police's Carotid Control Hold presentation; and Aurora Police Department Directives 5.04 (Reporting and Investigating the Use of Tools, Weapons and Physical Force) and 05.08 (Less Lethal Devices, Weapons and Techniques).[537]

2. Major Crime/Homicide Unit's Findings

Detective Ingui presented a PowerPoint of Major Crime's investigation to the Adams County District Attorney's Office on October 21, 2019.[538] He received a declination letter from the Adams County District Attorney on November 22, 2019.[539]

In addition to the PowerPoint presentation, Aurora Police Department records included an investigation report prepared by Detective Ingui.[540] The report included a "Case Synopsis," summaries of interviews conducted by Major Crime, and Detective Ingui's "Summary of the Investigation." The Summary appears to set forth Detective Ingui's conclusions as to the events of August 24, 2019. The Summary concluded as follows regarding the officers' efforts to initially detain Mr. McClain[541]:

> An Inter-Agency investigation, conducted by the Aurora Police Department Major Crime Homicide Unit and the Denver Police Department Homicide Unit, indicates that Officers Roedema, Rosenblatt, and Woodyard were in the process of lawfully contacting a suspicious person at 1768 Billings Street, reference a call for service

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[534] We note that additional body worn camera footage made available to us in Aurora Police Department records, including that of Officer Haubert, Officer Nghiem, Sgt. Nunez, Officer Root, and Officer Ward, was relevant to our own factual findings.

[535] Summary Report – Ingui, M., General Offense Report at 515.

[536] Summary Report – Ingui, M., General Offense Report at 519.

[537] Summary Report – Ingui, M., General Offense Report at 519.

[538] Summary Report – Ingui, M., General Offense Report at 519.

[539] Summary Report – Ingui, M., General Offense Report at 519.

[540] Use of Force Investigation Summary – Ingui, M., General Offense Report at 421.

[541] Use of Force Investigation Summary – Ingui, M., General Offense Report at 470.

> involving a unidentified black male wearing a ski mask, dark clothing, pointing and waving his hands at vehicles. The [o]fficers believed the subject Elijah McClain was possibly armed and were attempting to check on his well-being.
>
> Upon contact with McClain, who was wearing a ski mask and matched the clothing description and general area of the initial 911 call, [o]fficers attempted to get him to stop. Officer Woodyard attempted to get McClain to stop multiple times (yelling stop) without success. Officers Woodyard and Rosenblatt attempted to explain to McClain why they wanted to talk with him and determine if he needed any medical assistance. McClain continued to disobey lawful orders, and Officers Woodyard and Rosenblatt attempted to physically stop him and check him for potential weapons.
>
> Officers Woodyard and Rosenblatt immediately noted the physical strength and resistance by McClain who immediately pulled his arms to his chest and refused to allow officers to pat him down. McClain was carrying a plastic bag (grocery style bag) with unknown contents in his hands, which caused further concern for the officers. Throughout this contact Officers tried to verbally deescalate their contact with McClain who was hyper-aggressive and refused all orders.

The Summary stated the following regarding the officers' efforts to move Mr. McClain to the grass and the subsequent application of the carotid control hold[542]:

> Officers Woodyard and Rosenblatt started to escort McClain off the landscaping rocks onto the grass to lessen any injuries if a fight was to ensue. As Officers Woodyard and Rosenblatt transitioned from the landscaping rocks to the grass in attempt to pat down McClain for weapons, Officer Roedema observed McClain attempt to disarm Officer Rosenblatt by reaching for his firearm. McClain's actions resulted in all three officers attempting to take him to the ground to control him and stop his violent assault. Officers Roedema, Rosenblatt and Woodyard were giving verbal orders and struggled continuously in a violent encounter with McClain while attempting to place him into handcuffs.
>
> Officer Rosenblatt attempted to place McClain in a carotid control hold and due to his positioning and McClain's continued attempt to resist and get away Officer Rosenblatt was unsuccessful. Officer Woodyard who was positioned on the other side of McClain was able to successfully place McClain into a carotid control hold and was in constant communication with Officer Roedema asking if he was going unconscious. Officer Roedema advised Officer Woodyard to release the hold and he immediately released the hold and they were able to place McClain into handcuffs. Officer Roedema described hearing a snoring-like sound and watched McClain's eyes roll back and other physical signs of going unconscious. Both Officers Roedema and Woodyard believed McClain never went fully unconscious.

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[542] Use of Force Investigation Summary – Ingui, M., General Offense Report at 470-71.

> Officers Roedema, Woodyard, and Rosenblatt continued to struggle with the violently resisting McClain through their entire encounter even after he was placed into handcuffs. Officers called for medical assistance for McClain per Aurora Police Department policy for the application and use of the carotid control. Officers requested assistance from the Aurora Fire Department and Station 2 responded to the scene along with Falck ambulance personnel.

In addition, the Summary noted that "All three of the involved [o]fficers['] accounts were consistent, [and] the audio from their body worn cameras confirmed the struggle between the [o]fficers and McClain. The body worn cameras of all three [o]fficers were knocked off during the violent struggle with McClain."[543] The Summary did not include any other discussion of the officers' contact with Mr. McClain.

3. Review by the Aurora Police Department Force Review Board

Aurora Police Department's Force Review Board ("FRB") began its own review of the death of Mr. McClain following the District Attorney's decision not to bring charges.[544] The Aurora Police Department informed us that the FRB did not conduct its own investigation, but relied on the evidence gathered and materials prepared in connection with the investigation led by Detective Ingui.[545] The FRB met on January 28, 2020 for the purpose of reviewing Mr. McClain's death "to ensure compliance with Standard Operating Procedures, Department Directives and applicable law."[546]

The FRB noted as follows regarding the officers' actions in initially stopping Mr. McClain:

> On August 24, 2019 at about 10:32 P.M., officers were dispatched to the area of Billings St. and East Evergreen St. on a report of a suspicious male wearing a ski mask[;] the male was described as acting weird. Officers arrived into [sic] the area and located a male subject wearing a ski mask, brown coat and black pants, holding a plastic bag…The officers gave Mr. McClain repeated commands to stop but Mr. McClain did not respond and continued walking. The officers approached Mr. McClain and again gave him verbal commands to stop. Mr. McClain verbally refused. 'I have a right to go where I am going[.]' The officers went hands-on to gain control of Mr. McClain. Mr. McClain immediately began to struggle and tense

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[543] Use of Force Investigation Summary – Ingui, M., General Offense Report at 471.

[544] *The Elijah McClain Case*, City of Aurora Colo., https://www.auroragov.org/residents/public_safety/a_new_way__our_plan_to_restore_trust/the_elijah_mc_clain_case; *see also* Aurora Police Department Incident Report – Case Summary at 5 (reflecting that materials were first requested for review on November 27, 2019).

[545] *See* Email from Harry Glidden (September 30, 2020) (in response to our request for "any additional materials/notes/minutes [] reviewed and/or prepared in connection with the Force Review Board's separate review," Chief Glidden informed us that "[n]o additional notes, minutes or other material w[ere] reviewed by the FRB in the EM case. The police reports and body worn camera videos were the only things reviewed."); *see also* Email from Danelle Carrel (October 28, 2020) (confirming "Nothing additional to provide per Harry Glidden."; Aurora Police Department Incident Report – Case Summary at 7 ("The FRB is provided the entire investigation and all material related to the case").

[546] Aurora Police Department Incident Report – Case Summary at 7.

> up. Officer[s] maintained communication with Mr. McClain asking him to relax and to stop tensing up.[547]

The FRB also stated the following regarding the officers' efforts to move Mr. McClain to the grass and the subsequent application of the carotid control hold:

> The officers were positioned in a pile of landscape rocks and chose to move Mr. McClain a few feet away from the rocks onto a grassy area. This was done in the event the contact escalated causing them to go to the ground. As the officers moved Mr. McClain to the grassy area, the struggle to control him intensified to the point an officer yell[ed], 'he's going for your gun[.]' The [o]fficers took Mr. McClain to the ground and successfully applied a carotid control hold, this allowed officers to gain control and place Mr. McClain in handcuffs.[548]

The FRB's case summary listed the "Reason for Force" as "Necessary for Subjects Safety; Necessary to Defend Officer; Necessary to Effect Arrest; Necessary to Prevent a Crime."[549] The case summary listed the following types of force and their effectiveness for each of Officers Roedema, Rosenblatt, and Woodyard:

- Officer Roedema: "Control Techniques Twist locks, takedowns, throws, etc. Successful."[550]
- Officer Rosenblatt: "Control Techniques Twist locks, takedowns, throws, etc. Successful; Carotid Control Hold Unsuccessful."[551]
- Officer Woodyard: "Control Techniques Twist locks, takedowns, throws, etc. Successful; Carotid Control Hold Successful."[552]

The FRB concluded that "[b]ased on all the available information… the officers were called to the area to investigate a suspicious person. Officers had a lawful reason to contact Mr. McClain. The force applied during the altercation to include the carotid control hold was within policy and

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[547] Aurora Police Department Incident Report – Case Summary at 7-8.

[548] Aurora Police Department Incident Report – Case Summary at 8.

[549] Aurora Police Department Incident Report – Case Summary at 1.

[550] Aurora Police Department Incident Report – Case Summary at 3.

[551] Aurora Police Department Incident Report – Case Summary at 3.

[552] Aurora Police Department Incident Report – Case Summary at 4.

consistent with training."[553] The FRB closed the case as "policy compliant" on January 31, 2020.[554]

C. Aurora Fire's Review

Aurora Fire conducted a preliminary review of the events leading to Mr. McClain's death shortly after the incident occurred. On August 28, 2019, Aurora Fire announced that it had completed "its preliminary review, in conjunction with the EMS Medical Director, of the treatment provided to Elijah McClain" and concluded that "the actions of responders were consistent and aligned with established protocols set by medical doctors outside of the city."[555]

We requested documents related to this review, but were informed that these documents could not be provided based on restrictions under Colorado law.[556] As a result, we were unable to learn any additional information regarding this review.

V. OBSERVATIONS AND RECOMMENDATIONS

A. The Police Encounter with Mr. McClain Occurred Against the Broader Context of National and Local Attention to Police Reform

The Panel has reached factual conclusions based on the record available to us and proposed policy recommendations consistent with the experience of other law enforcement, fire, and EMS agencies and emerging or established evidence-based best practices. While the national and local conversation on policing did not play a role in the Panel's factual conclusions — and the Panel was careful to rely solely on the body worn camera footage, Major Crime's interviews, and other documentation — it is impossible to ignore the broader context in which the Panel is conducting this investigation.

The death of Elijah McClain occurred against the backdrop of long-standing concerns in communities of color in Aurora regarding the conduct of the Aurora Police Department. Prior police-involved deaths resulted in protest, litigation, and settlements, including the shooting deaths

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[553] Aurora Police Department Incident Report – Case Summary at 8.

[554] Aurora Police Department Incident Report – Case Summary at 1, 8.

In our interview with Chief Wilson, she explained that following the FRB's investigation and findings, she separately asked whether Officer Green, the K-9 officer, had been disciplined. Panel's Interview with Aurora Police Chief Vanessa Wilson (Feb. 3, 2021). She learned that then-Chief Metz had given Officer Green a written reprimand, which does not constitute formal discipline. Panel's Interview with Aurora Police Chief Vanessa Wilson (Feb. 3, 2021). Chief Wilson explained that Officer Green has since been formally disciplined and removed from the K-9 unit. Panel's Interview with Aurora Police Chief Vanessa Wilson (Feb. 3, 2021).

[555] *The Elijah McClain Case*, City of Aurora, Colo., https://www.auroragov.org/residents/public_safety/a_new_way__our_plan_to_restore_trust/the_elijah_mc_clain_case.

[556] Colo. Rev. Stat. § 25-3.5-904.

of Jamaal Bonner in 2003[557] and Naeschylus Vinzant in 2015.[558] Press reports have highlighted other allegations of police misconduct, including reports that members of the Aurora Police Department:

- pointed a gun at a handcuffed man in the back of his cruiser[559];
- beat a woman who had been reluctant to give officers keys to a car she used to transport her boyfriend to the hospital after he suffered a gunshot wound[560];
- forcefully handcuffed an unconscious man and dragged him down the stairs, breaking his wrist and injuring his back, in the context of responding to a call for medical help after the man suffered a seizure[561];
- threw a man to the ground in response to a noise complaint[562];
- hog-tied and carried a woman out of her house by her wrists during a child welfare check, dislocating her shoulder[563];
- forcibly removed a man wearing a hoodie and sweatpants from a coffee shop, without any justification[564]; and

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[557] Carlos Illescas, *$610,000 settles police shooting*, Denver Post (May 8, 2016, 12:54 A.M.), https://www.denverpost.com/2007/02/07/610000-settles-police-shooting.

[558] Noelle Phillips, *Aurora announces historic $2.6 million settlement in police shooting of unarmed black man*, Denver Post (Jan. 4, 2017, 11:16 P.M.), https://www.denverpost.com/2016/11/07/aurora-announces-historic-2-6-million-settlement-in-police-shooting-of-unarmed-black-man/.

[559] Kirk Mitchell, *Aurora Policeman placed on paid leave*, Denver Post (May 8, 2016, 8:08 A.M.), https://www.denverpost.com/2005/08/10/aurora-policeman-placed-on-paid-leave/.

[560] Cleve R. Wootson Jr., *This woman drove her injured boyfriend to the hospital – then claims she was attacked by police*, Wash. Post (Sept. 7, 2017, 12:57 P.M.), https://www.washingtonpost.com/news/post-nation/wp/2017/09/07/this-woman-drove-her-injured-boyfriend-to-the-hospital-then-claims-she-was-attacked-by-police/.

[561] *Aurora Man Demands Justice After Police Incident Last Winter*, CBSN Denver (Oct. 25, 2011, 11:50 A.M.), https://denver.cbslocal.com/2011/10/25/aurora-man-demands-justice-after-police-incident-last-winter/comment-page-1/.

[562] Elise Schmelzer, *Aurora Police slamming Latino man into ground during noise complaint investigation is latest racial use of force incident, lawsuit claims*, Denver Post (Nov. 20, 2018, 5:53 P.M.), https://www.denverpost.com/2018/11/20/aurora-police-lawsuit-use-of-force/.

[563] Diane L. Redleaf, *During a Routine Child Services Check, Cops Hog-tied a Mom and Carried Her Out 'Like a Pig Upside Down'*, Reason (Sept. 24, 2020, 9:00 A.M.), https://reason.com/2020/09/24/aurora-police-hogtied-child-services-abuse/printer/.

[564] *ACLU Sues Aurora Police for Ousting Black Man in Hoodie from Coffee Shop*, ACLU (Sept. 27, 2017), https://www.aclu.org/press-releases/aclu-sues-aurora-police-ousting-black-man-hoodie-coffee-shop. He was told, "Your kind of business is not welcome here."

- beat and tased a man, who was having a seizure, for not responding to police officers' directions.[565]

Each of these incidents involved a person of color.

Between 2003 and 2018, the City settled at least eleven police brutality cases for a total of $4.6 million.[566] The ACLU and other civil rights advocates have pushed for reforms.[567]

The death of Elijah McClain accelerated community concerns. Police response to protests concerning Mr. McClain's death received criticism and impacted trust and legitimacy after police officers responded in riot gear and deployed pepper spray during a largely peaceful demonstration that included community members who had gathered to play violins in memory of Mr. McClain.[568] In another incident, prosecutors declined to bring charges against a man who accelerated through a crowd of demonstrators protesting Mr. McClain's death, furthering community concerns about the fairness of Aurora's justice system.[569] Additional incidents since Mr. McClain's death have further exacerbated community tensions, including Aurora Police officers taking a photograph that reportedly showed them "simulat[ing]… a carotid hold" at a memorial site for Mr. McClain[570] and Aurora Police officers holding a Black woman and four children at gunpoint in a parking lot.[571]

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[565] Elise Schmelzer, *Aurora Police beat, shocked man who was having a seizure, federal lawsuit says*, Denver Post (Sept. 6, 2019, 6:13 P.M.) https://www.denverpost.com/2019/09/06/aurora-police-excessive-force-andre-williams/.

[566] Elise Schmelzer, *Aurora Police slamming Latino man into ground during noise complaint investigation is latest racial use of force incident, lawsuit claims*, Denver Post (Nov. 20, 2018, 5:44 P.M.), https://www.denverpost.com/2018/11/20/aurora-police-lawsuit-use-of-force/.

[567] Jennifer Lee Kovaleski, *ACLU: Aurora PD has disturbing pattern of officers accused of violating the rights of black people*, ABC Denver7 (Dec. 21, 2017, 8:32 P.M.), https://www.thedenverchannel.com/news/crime/aclu-aurora-pd-has-disturbing-pattern-of-officers-accused-of-violating-the-rights-of-black-people; Lance Hernandez, *Aurora settles $285,000 police brutality lawsuit without admitting liability*, ABC Denver7 (Dec. 12, 2020, 12:17 P.M.), https://www.thedenverchannel.com/news/local-news/aurora-settles-285-000-police-brutality-lawsuit-without-admitting-liability.

[568] Meredith Deliso, *City of Aurora sued over police response to 'violin vigil' following Elijah McClain death*, ABC News (July 24, 2020, 12:18 A.M.), https://abcnews.go.com/US/city-aurora-sued-police-response-violin-vigil-elijah/story?id=71951197; Elisa Schmelzer, *Aurora Police chief defends officers' actions during Elijah McClain protest*, Denver Post (June 30, 2020, 6:00 A.M.), https://www.denverpost.com/2020/06/30/elijah-mcclain-protest-aurora-police-response/.

[569] Elise Schmelzer, *No criminal charges for Jeep driver who sped through crowd of Aurora protesters*, Denver Post (Sep. 23, 2020, 4:50 P.M.), https://www.denverpost.com/2020/09/23/aurora-protest-jeep-driver-charges/.

[570] Findings, Conclusions & Order at 1, *In the Matter of Disciplinary Proceedings Against: Jason Rosenblatt*, Civil Serv. Comm'n (City of Aurora, CO Feb. 9, 2021). The Panel understands that two of the three officers pictured in the photograph were terminated, and the third resigned; additionally, Officer Rosenblatt was terminated as a result of his text message response to the photograph. As discussed above in Section II.A, the Panel's mandate was to examine the events leading to Mr. McClain's death and as a result, this incident was outside the scope of our investigation.

[571] Madeline Holcombe, *The Black children who had guns drawn on them in a stolen vehicle mix-up are traumatized, the mother says*, CNN (Aug. 6, 2020, 7:02 A.M.), https://www.cnn.com/2020/08/06/us/aurora-police-draw-guns-girls-traumatized/index.html.

The City and State recently enacted critical reforms in response,[572] but the extent to which those reforms can heal community trust still remains to be seen.

The Panel did not attempt to fully review or catalogue the history of community police tensions, the record of police misconduct, or efforts at reform, nor does the Panel attempt to address them in this Report. Instead, consistent with our mandate, this history informed the need for the Panel to make robust recommendations and to address our Report to both public officials and members of the community. It is our humble hope that this Report will become a part of the broader discussion in Aurora regarding the role and conduct of police in the community, and how to achieve public safety through a partnership between all of the City's institutions and those who live in the City.

B. The Aurora Police Department's Encounter with Elijah McClain

The Panel has not reached conclusions about whether the conduct of officers in their interaction with Mr. McClain were within policy or violated the law. Other investigations and civil litigation are underway to make those determinations. However, for the Panel to make and explain its recommendations, it is necessary to review the incident against the legal and policy framework governing police interactions with the public. The following provides observations and recommendations concerning the decision to stop Mr. McClain and the use of force during the encounter.

During the approximately eighteen minutes from the time that Mr. McClain was stopped and placed into custody to the moment that he was placed on a gurney to be transported to the hospital, some level of force or the threat of force was used nearly constantly against him. To facilitate an understanding of the encounter and the Panel's recommendations, we discuss the various decisions made by the officers throughout this incident as follows:

- The *Terry* stop and the use of force against Mr. McClain;
- The decision to frisk Mr. McClain;
- The use of force to move Mr. McClain from the sidewalk;
- The use of force in response to an officer's assertion that Mr. McClain reached for an officer's gun;
- The use of force once Mr. McClain was taken to the ground; and
- The use of pain compliance techniques to restrain Mr. McClain.

1. Force Is Justified if It Is Objectively Reasonable

Police officers are among the few public officials authorized to use force, including deadly force, in their official capacity. Conducting stops and arrests "necessarily carries with it the right

[572] Saja Hindi, *Colorado among first in U.S. to pass historic police reforms following protests*, Denver Post (June 13, 2020, 5:40 P.M.), https://www.denverpost.com/2020/06/13/colorado-police-reform-bill-passes-legislature/.

to use some degree of physical coercion or threat thereof to effect it."[573] However, while the authority to use force is broad, it is not unlimited. Force, to be constitutional, must be objectively reasonable.[574] Any use of force is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[575]

In *Graham v. Connor*, the Supreme Court explained that the "'reasonableness' of a particular seizure depends not only on when it is made, but on how it is carried out."[576] In articulating what have become known as the *Graham* factors, the Court created a nonexclusive list of considerations for objective reasonableness: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[577]

In addition to the constitutional limitations placed on police officers regarding the use of force, the policies of the Aurora Police Department provide further guidance to officers as to when force is appropriate. The version of Directive 5.3 in place at the time that Aurora Police officers encountered Mr. McClain instructed officers as follows[578]:

> 5.3 USE OF PHYSICAL FORCE
>
> Use of physical force is defined as the application of physical force by members of the Department. Members will only use reasonable and appropriate force; and only when legally justified. When practicable officers will attempt to de-escalate their use of force and/or the situation so that lesser force, or possibly no force, is required. It is understood that the policies regarding use of force may not cover every situation. At the discretion of the Chief of Police, any deviation from these policies will be evaluated on a case-by-case basis.

2. Terry *Stop and Initial Use of Force Against Mr. McClain*

a. The Decision to Stop Mr. McClain

Officer Woodyard responded to a suspicious person call, located Mr. McClain, and observed him briefly while waiting for back up.[579] Mr. McClain wore a ski mask covering a portion of his face and was walking on the sidewalk with a bag hanging from one hand and his

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[573] *Graham v. Connor*, 490 U.S. 386, 396 (1989).

[574] *Graham*, 490 U.S. at 397. The Court held that claims of excessive force claims that arise "in the context of an arrest or investigatory stop of a free citizen" are analyzed under the Fourth Amendment's prohibitions on unreasonable seizures. *Graham*, 490 U.S. at 394.

[575] *Graham*, 490 U.S. at 396.

[576] *Graham*, 490 U.S. at 395.

[577] *Graham*, 490 U.S. at 396.

[578] *Directives Manual: Use of Physical Force*, Aurora Police Dep't at 5.3 (Jan. 1, 2016).

[579] Officer Woodyard Interview – Ingui, M., General Offense Report at 360.

phone visible in the other.[580] He was wearing earbuds.[581] The 911 dispatcher informed officers of "a black male wearing a black ski mask and brown long sleeve shirt. Black sweatpants. Was waving his arms when the [911 caller] passed him, thinks that's strange."[582] The dispatcher also transmitted via CAD "[n]o known wpns invl."[583]

Officer Woodyard turned on his vehicle's lights, parked across the street from Mr. McClain, called for him to stop, and approached him.[584] Mr. McClain did not stop and responded to Officer Woodyard, "I have a right to walk to where I'm going."[585] Within ten seconds of exiting his vehicle, and within eight seconds of when he first instructed Mr. McClain to stop, Officer Woodyard began to physically restrain Mr. McClain: he grabbed Mr. McClain by the arm, and almost immediately thereafter Officer Rosenblatt grabbed Mr. McClain's other arm.[586] Officer Woodyard never asserted that he suspected Mr. McClain of criminal behavior or that any criminal behavior had occurred prior to the stop. The officers did not give any reason to justify their stop of Mr. McClain, other than the fact that they thought he was overdressed, that he wearing a ski mask, that there was a call about his unusual behavior, and that he was seen an area with a "high crime rate."[587]

b. Police Officers May Undertake a Stop of a Person if They Have Reasonable Suspicion that the Person is Engaged in Criminal Activity

In *Terry v. Ohio*, the Supreme Court set forth the standard governing a police officer's authority to stop an individual on the street. The Court held that any police restraint on movement, including a mere stop that does "not eventuate in a trip to the station house and prosecution for crime" implicates the Fourth Amendment's prohibitions on "unreasonable searches and seizures."[588] A stop even without an arrest is a seizure that constitutes "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."[589] Significantly, *Terry* was decided in 1968 at a time not unlike today, when social unrest had drawn public attention to the relationship between police and communities of color. And the Court's opinion noted the argument that unrestrained police power

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[580] Woodyard Body Cam at 0:30.

[581] Woodyard Body Cam at 0:35.

[582] 911 Call at 4:25.

[583] APD CAD Report – Ingui, M., General Offense Report at 493.

[584] Woodyard Body Cam at 0:30.

[585] Woodyard Body Cam at 0:30.

[586] Woodyard Body Cam at 0:36; Rosenblatt Body Cam at 0:22.

[587] Roedema Interview at 16:45; Rosenblatt Interview at 6:15; Woodyard Interview at 4:40. We note that Detective Ingui questioned Officer Woodyard about Mr. McClain not stopping when Officer Woodyard instructed to him to do so. *See, e.g.*, Woodyard Interview at 27:52. But as discussed below in Section V.B.2, walking away from a voluntary encounter cannot give rise to reasonable suspicion.

[588] *Terry v. Ohio*, 392 U.S. 1, 16 (1968); U.S. Const., amend. IV.

[589] *Terry*, 392 U.S. at 17.

to stop and restrain individuals "can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities."[590]

Importantly, such stops — known as *Terry* or investigative stops — differ from consensual encounters. Law enforcement officers can approach any individual and engage them without implicating the Fourth Amendment so long as a reasonable person would understand that they are free to leave should they chose to do so.[591] An encounter converts from consensual interaction to a seizure, governed by the Fourth Amendment, when a reasonable person no longer feels free "to disregard the police and go about his business."[592] The officers' conduct and later statements to the Major Crime investigators established that Mr. McClain was no longer free to "go about his business" when they began to physically restrain him.[593]

To justify an investigatory stop, an officer must have "reasonable, objective grounds" and an "articulable" or "reasonable suspicion of criminal activity,"[594] and the stop must rely on "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[595] Reasonable suspicion requires "some minimal level of objective justification" of criminal activity that is "more than an inchoate and unparticularized suspicion or hunch."[596] In evaluating whether an officer had reasonable suspicion, courts "must look at 'the totality of the circumstances' of each case to see whether the detaining officer ha[d] a 'particularized and objective basis' for suspecting legal wrongdoing."[597]

Thus, while flight may be a factor considered by a police officer in determining whether there is reasonable suspicion for a *Terry* stop, walking away from a police officer when told to stop, standing alone, is not sufficient.[598] For example, in *United States v. Marcelino*, the court

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[590] *Terry*, 392 U.S. at 12.

[591] *Florida v. Royer*, 460 U.S. 491 497–98 (1983) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street…[i]f there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.").

[592] *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *United States v. Lopez*, 443 F.3d 1280, 1286 (10th Cir. 2006) (holding that a consensual stop became a detention when officers took identification to another location to run warrant check).

[593] Woodyard Body Cam at 0:36; Rosenblatt Body Cam at 0:22; Woodyard Interview at 6:10; Roedema Interview at 19:14; *see, e.g.*, *Hodari D.*, 499 U.S. at 626 ("[T]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement."); *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

[594] *Royer*, 460 U.S. at 498–99, 512.

[595] *Royer*, 460 U.S. at 500.

[596] *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984); *Terry*, 392 U.S. at 27) (internal quotation marks omitted).

[597] *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *see also United States v. Davis*, 636 F.3d 1281, 1290-91 (10th Cir. 2011).

[598] *See, e.g.*, *Royer*, 460 U.S. at 497–98 (holding that when an officer approaches an individual without probable cause, "t]he person approached…need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way"); *see also* K. Henning, *The Reasonable Black Child: Race, Adolescence, And The Fourth Amendment*, 67 Am. U. L. Rev. 1513, 1554 (2018) ("A black youth's flight from the police is just

found that a suspect in a high crime area who "walked away" from the officers who repeatedly called out to him was not a sufficient basis for reasonable suspicion.[599] The court held, "[i]n the instant case, I do not find that the defendant's conduct constituted 'flight.' Rather, I find that the defendant's conduct was consistent with going about one's business. Where an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business."[600]

Courts have also recognized that the wearing of a ski mask or other face covering can be a factor justifying a *Terry* stop, but have required other indicia of criminal conduct. For example, in *United States v. Roberson*, the Fifth Circuit found reasonable suspicion sufficient to support an investigatory stop where: police were advised that men wearing bandanas were possibly involved in a robbery and subsequently identified men wearing bandanas on their faces; people near the men looked "frantic and frightened"; the defendant avoided eye contact with officers; and the defendant's conduct suggested he was planning an escape.[601] In *Whitlock v. Greenlee*, the court similarly found that reasonable suspicion existed where an individual was wearing a "ski mask

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as likely to reflect a personal desire to avoid contact with a corrupt system as it is to be consciousness of guilt. Given the myriad of negative direct and indirect contacts young black males have with the police, it is no surprise that black boys have an especially low opinion of the police, particularly in socioeconomically disadvantaged communities where friction between the police and citizens is common. Research shows that while youth in general have less favorable views about the police than adults, black youth have even less favorable attitudes toward the police than white youth. Unlike white youth, who tend to see police misconduct as an aberration, black male youth experience that misconduct as ubiquitous.").

[599] *United States v. Marcelino*, 736 F. Supp. 2d 1343, 1351 (N.D. Ga. 2010). Officers also cited the individual's "loose baggy clothing in colors [that] indicat[ed] gang membership" as supporting reasonable suspicion, but the court did not credit this explanation because "the Government did not present any evidence to show that black and silver loose baggy clothing are tied to or represent membership in a particular gang," and when asked, the officers could not point to any specific gang that wore those colors. *Marcelino*, 736 F. Supp. 2d at 1349-50.

[600] *Marcelino*, 736 F. Supp. 2d at 1349-50; *see also Hiibel v. Sixth Judicial Dist. Court of Nev*., 542 U.S. 177, 187-89 (2004) (holding that statute requiring a suspect to disclose his name during a valid *Terry* stop was consistent with Fourth Amendment).

In addition, we note that at this moment of tension between law enforcement and communities of color, Justice Stevens' observations in *Illinois v. Wardlow* (concurring in part, dissenting in part) are particularly apt:

> Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.

Illinois v. Wardlow, 528 U.S. 119, 132-34 (2000); *see also Alberty v. United States*, 162 U.S. 499, 511 (1896) ("It is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury; not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves.").

[601] *United States v. Roberson*, 496 F. App'x 390, 393–94 (5th Cir. 2012).

and leaning against a vehicle at approximately 4:30 A.M." and campus police had previously received a report of a man, with a ski mask and gun, standing next to a car.[602]

Courts have also considered an individual's presence in a high crime neighborhood, but only in combination with other indications of criminal activity. For example, the Supreme Court has held that without more, an officer's observation of routine or pedestrian activity in high crime neighborhoods does not amount to reasonable suspicion of criminal conduct.[603] In *Brown v. Texas*, the Supreme Court found no reasonable suspicion where the officer observed two men walking in an alley "in a neighborhood frequented by drug users."[604] Rather, because the officer provided "no indication…that it was unusual for people to be in the alley," the Court found that the "activity was no different from the activity of other pedestrians in that neighborhood," and thus did not establish reasonable suspicion.[605]

But even a combination of these factors may not be enough to create reasonable suspicion without some indication that a crime has been, or is about to be, committed. In *United States v. Davis*, the Tenth Circuit found that officers lacked "specific, articulable and objective factual basis to believe that the person stopped [wa]s engaged in criminal activity" and suspected of possessing an illegal firearm, where the basis of that suspicion was "(1) Davis' car being parked outside a known criminal establishment; (2) Davis' actions in exiting the car when he saw the officers, making and then breaking eye contact, and refusing to stop when directed; (3) Davis' keeping his hands in his pockets; and (4) the officers' knowledge of Davis' prior criminal record."[606] The court found that the fact that "he continued walking in *the same direction and same manner"* insufficient to justify the stop.[607]

Colorado law tracks the federal constitutional limits on the use of investigative stops.[608] Under Colorado law, a "peace officer may stop any person who **he reasonably suspects is committing, has committed,**[609] **or is about to commit a crime** and may require him to give his name and address, identification if available, and an explanation of his actions."[610]

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[602] No. 1:10CV958, 2013 WL 6247259, at *6 (M.D.N.C. Dec. 3, 2013), report and recommendation adopted, 2014 WL 820299 (M.D.N.C. Mar. 3, 2014).

[603] *Wardlow*, 528 U.S. at 124 ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." (citation omitted)).

[604] *Brown v. Texas*, 443 U.S. 47, 52 (1979).

[605] *Brown v. Texas*, 443 U.S. at 52.

[606] *United States v. Davis*, 94 F.3d 1465, 1468-70 (10th Cir. 1996).

[607] *Davis*, 94 F.3d at 1470 (emphasis in original).

[608] *Eddie's Leaf Spring Shop & Towing LLC v. Colo. Pub. Utilities Comm'n*, 218 P.3d 326, 333 (Colo. 2009) ("The Colorado and U.S. Constitutions are generally coextensive with regard to warrantless searches and seizures.").

[609] We note that the Fourth Amendment may prohibit investigatory stops for completed misdemeanors. *See United States v. Moran*, 503 F.3d 1135, 1141–43 (10th Cir. 2007) (adopting case-by-case balancing approach).

[610] Colo. Rev. Stat. § 16-3-103(1) (emphasis added).

c. The Officers' Articulable and Reasonable Suspicion to Justify a Stop Is Not Clear from the Record Available

Officer Woodyard converted what could have appropriately been a consensual interaction with Mr. McClain into an investigative stop within ten seconds from exiting his vehicle and instructing Mr. McClain to stop, when he and Officer Rosenblatt seized Mr. McClain by grabbing his arms.[611] Absent further explanation from Officer Woodyard regarding his rationale for making the stop, the only information available to this Panel reflects that there was a 911 call for a suspicious person, wearing a ski mask who was waving his arms in a bizarre manner, and who Officer Woodyard described as wearing what he thought was heavy clothing for a summer night.[612]

Indeed, Sgt. Leonard's response when he arrived on scene is striking.[613] Sgt. Leonard immediately asked the basis for the stop and was told that Mr. McClain was "suspicious," and subsequently Sgt. Leonard speculated that Mr. McClain was "on something."[614] Sgt. Leonard then took the additional step of asking that another officer, Officer Alicia Ward, contact the 911 caller and ask that the caller explain "if there was anything criminal," although Sgt. Leonard noted that it "doesn't look like there was."[615] After speaking with the 911 caller, Officer Ward told Sgt. Leonard that the caller "just thought it was weird, because [Mr. McClain] was wearing the mask, and [Mr. McClain] was doing all the gestures."[616] Sgt. Leonard instructed Officer Ward to "make sure [she] document[ed] that part."[617]

Moreover, in their interviews with Major Crime, none of the officers involved identified a suspected crime before they stopped Mr. McClain. Officer Woodyard was, in fact, never asked about his justification for stopping Mr. McClain. During the interview, Detective Ingui elicited from Officer Woodyard that he found Mr. McClain "suspicious"[618] but it is far from clear that Officer Woodyard found Mr. McClain to be suspicious of criminal conduct. Rather, Officer Woodyard instead revealed that Mr. McClain's conduct raised concerns in Officer Woodyard's mind about Mr. McClain's welfare[619]:

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[611] The seizure may have occurred when Officer Woodyard told Mr. McClain to stop, but it is difficult to determine, given that only seconds elapsed between the initiation of the encounter and the officers taking hold Mr. McClain. Mr. McClain's continuing to walk and his explanation that he "had the right" to continue walking suggest that he had not been seized until the officers physically put hands on him. *See Hodari D.*, 499 U.S. at 626 ("The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.").

[612] 911 Call at 1:57, 2:43. Notably, Officer Woodyard did not observe Mr. McClain waving his arms as was reported to the 911 operator.

[613] *See supra*, Section IV.A.3; Section IV.A.7.

[614] Leonard Body Cam 1 at 1:25.

[615] Leonard Body Cam 2 at 3:12.

[616] Leonard Body Cam 2 at 6:40.

[617] Leonard Body Cam 2 at 6:48.

[618] Woodyard Interview at 29:24.

[619] Woodyard Interview at 28:25.

> DETECTIVE INGUI: And specific to the, the call, um, you described a suspicious person or suspicious occurrence is what it was aired as?
>
> OFFICER WOODYARD: Yes.
>
> DETECTIVE INGUI: Um, did they — did the reporting party describe anything besides the clothing?
>
> OFFICER WOODYARD: Um, they described that he was waving his arms around. But, uh, other than that and his clothing, not that I can remember.
>
> DETECTIVE INGUI: Okay. But they didn't — but they were concerned enough by his —
>
> OFFICER WOODYARD: By his actions and appearance, to call us to try and contact him.
>
> DETECTIVE INGUI: And, uh, was that consistent with your concerns?
>
> OFFICER WOODYARD: Yeah.
>
> DETECTIVE INGUI: Okay, so other than being summoned to it, his behavior was — would it be consistent with someone — or did you believe he was acting in a manner that was, uh, other than normal?
>
> OFFICER WOODYARD: Yeah. Uh, if I wasn't dispatched to that call, um, I probably would've stopped and just — uh, to check on his welfare and see what he was up to because it's pretty suspicious abnormal behavior.

Separately, Officer Roedema told Major Crime investigators that Mr. McClain's failure to follow Officer Woodyard's order to stop was consistent with someone who "either just committed a crime and they're trying to get away from police [or someone who is] concealing something whether it be a weapon or drugs; and/or they have a warrant[.]"[620] Contrary to Officer Roedema's assertion, the body worn camera footage reflects that Mr. McClain did not flee but instead kept walking in the same direction that he was heading.[621] As discussed above, an individual's efforts to go about his or her business is not sufficient to establish reasonable suspicion and justify a *Terry* stop. To find that walking away from a voluntary encounter necessarily creates reasonable suspicion for a *Terry* stop nullifies the very notion of a voluntary encounter.

Officer Roedema also justified the stop by asserting that the area in which the officers stopped Mr. McClain as having a "high crime rate."[622] While presence in a high crime area is not alone enough to establish reasonable suspicion, it also does not appear that Mr. McClain was, in fact, in a high crime area. The City provided the Panel with an August 2019 "crime and incidents"

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[620] Roedema Interview at 55:25.

[621] Woodyard Body Cam at 0:30; Rosenblatt Body Cam at 0:17. Similarly, as discussed above, Officer Rosenblatt explained that he grabbed Mr. McClain's arms to "make sure he couldn't reach for anything." Rosenblatt Interview at 21:44. He said he made physical contact with Mr. McClain because Mr. McClain was walking away and not listening to Officer Woodyard's commands, and because Mr. McClain's hands were "tucked in a little bit," which Officer Rosenblatt described as a "red flag" because he was unable to see Mr. McClain's hands as he approached him from behind. Rosenblatt Interview at 7:24.

[622] Roedema Interview at 16:51.

heat map for Aurora Police Department District 2, which uses nine different colors comprising a scale of "activity" levels to illustrate the incidence of crimes and incidents across the district[623]:

[623] Aurora Police Dep't Crime & Incidents Map, District 2, August 2019.

Zooming in, the heat map shows that the blocks around where Mr. McClain was stopped (outlined in dashed red lines) range from the lowest activity level to one shade above the "medium" activity level, as indicated below[624]:

The failure to meaningfully explore the basis of the stop in the interviews by Major Crime significantly hinders the resolution of this issue. Moreover, as we discuss below, the speed at which the officers acted and the failure to engage Mr. McClain without force raise serious questions about training, supervision, and culture. A more probing interview by Major Crime would have benefitted the Department, the officers involved, and the public in understanding the basis for the stop.

In addition, the conclusory nature of the District Attorney's findings on this issue similarly left open important questions. The District Attorney for Adams & Broomfield Counties concluded that, based on the "totality of the facts known to the officer[s]," the officers had a "reasonable basis to not only stop and question Mr. McClain, but also to pat him down for weapons to ensure a safe contact with him."[625] The District Attorney explained that "[w]hen the officers contacted Mr. McClain, he was walking down the street in an area known for criminal activity, wearing a ski mask and a coat on a warm summer night."[626] He added that "[t]o suggest that the officers had no

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[624] Aurora Police Dep't Crime & Incidents Map, District 2, August 2019.

[625] Letter from Dave Young, Dist. Att'y, Adams and Broomfield Cntys., to Nicholas Metz, Chief, Aurora Police Dep't, at 5 (Nov. 22, 2019), http://adamsbroomfieldda.org/wp-content/uploads/2020/06/ICD-8-24-19.pdf.

[626] Letter from Dave Young, Dist. Att'y, Adams and Broomfield Cntys., to Nicholas Metz, Chief, Aurora Police Dep't, at 6 (Nov. 22, 2019), http://adamsbroomfieldda.org/wp-content/uploads/2020/06/ICD-8-24-19.pdf. We also note that the District Attorney's letter states that the temperature was "reported to be approximately 80 degrees." Letter from Dave Young, Dist. Att'y, Adams and Broomfield Cntys., to Nicholas Metz, Chief, Aurora Police Dep't, at 6 (Nov. 22, 2019), http://adamsbroomfieldda.org/wp-content/uploads/2020/06/ICD-8-24-19.pdf. Aurora Police records included the weather report for August 24, 2019 at Denver International Airport, which shows that at 10:58

basis to contact Mr. McClain discounts the experience and direct observations of the law enforcement officers, as well as a citizen's observations of suspicious activities that caused a report to law enforcement in the first place."[627]

The District Attorney's review failed to assess the conduct of the officers against well-established legal standards and did not reflect the rigor of a police investigation that one would expect of any other inquiry into whether a crime had been committed. The report from Major Crime, upon which the District Attorney relied, did not state the factors Officer Woodyard considered or whether they were articulable, specific, and objectively reasonable because he was never asked to, in fact, articulate them. In addition, it appears that the District Attorney failed to consider Colorado's statutory requirement that "the officer must have a reasonable suspicion that the individual has committed, or is about to commit, a crime."[628] Neither the officers nor the District Attorney identified any crime that Mr. McClain was suspected of committing or about to commit prior to the officers' command that Mr. McClain stop walking. Finally, the scant criteria that the District Attorney applied does not appear to be supported by the jurisprudence. Parsing the District Attorney's statement, it appears that he relied on two factors: (1) Mr. McClain was in a high crime area at the time of the stop — which, as discussed above, is not factually supported by the Aurora Police Department's heat map of the area; and (2) Mr. McClain was wearing a ski mask and a coat on a warm summer night. His legal analysis did not include the 911 caller's description that Mr. McClain was waving his arms and acting oddly. It is unclear whether the District Attorney discounted this description or otherwise concluded that it was not relevant to the reasonable suspicion determination. In any event, although both factors in the District Attorney's analysis have been considered by courts assessing the propriety of investigatory stops, neither the neighborhood nor the ski mask by themselves or together are sufficient to create reasonable suspicion without more. Our concerns about the District Attorney's review should not be read to conclude that the Panel determined that anyone should, or should not, have been charged with a crime. Rather, prosecutors play a key role in police accountability systems and a prosecutor's review is an important part of the accountability process. Letters declining to prosecute provide guidance to police officers and impact future conduct. To ensure police practices consistent with the Constitution and the laws of Colorado, it is critical that a prosecutor conduct and include a thorough and accurate assessment in any report he or she publishes.

d. Aurora Has Promulgated a New Policy to Address Consensual and *Terry* Stops

The Panel notes that, since this incident, the Aurora Police Department has promulgated a new policy to provide guidance to officers regarding how to respond to suspicious person calls and to emphasize the line between consensual and *Terry* stops. This new policy is important and

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P.M., the temperature was 67 degrees with 12 mph winds. Weather – Ingui, M., -General Offense Report at 488. Denver International Airport is approximately 16 miles (driving) from the scene where Aurora Police officers stopped Mr. McClain.

[627] Letter from Dave Young, Dist. Att'y, Adams and Broomfield Cntys., to Nicholas Metz, Chief, Aurora Police Dep't, at 6 (Nov. 22, 2019), http://adamsbroomfieldda.org/wp-content/uploads/2020/06/ICD-8-24-19.pdf.

[628] Colo. Rev. Stat. § 16-3-103.

addresses key concerns of the Panel about the interaction with Mr. McClain. Aurora policy now requires[629]:

> APD Member Response to Suspicious Calls
>
> Upon arrival and locating the suspicious person, the responding members should take some time to observe the suspicious person unless there is something going on that requires immediate contact. Members should not rely solely on the reporting party's description to justify a contact. Members should use their training and observation skills to determine if the person is acting suspiciously in that the person was, is, or seems to be about to engage in criminal activity.
>
> Additional contact with the reporting party may be necessary to clarify details. If the observed person is not acting suspiciously, the members should add notes to the call on their observations, to include the lack of any indication of past, current, or prospective criminal activity. The officer may end the call. The officer may also contact that person to offer help, assistance, or other resources appropriate for the situation, but the contact must be consensual, and the individual does not need to engage with the officer and should be free to leave at all times unless new information not available to the officer during the first observation becomes apparent.
>
> During consensual contacts, the subject being contacted must feel that they are: (1) free to leave at any time, and (2) free not to cooperate with the member. In a consensual contact a member may ask for consent to search the subject for weapons. The manner in which the consent is sought – giving orders, demanding answers, displaying a weapon, using a harsh tone, telling the subject to stop doing X or to move to some other location – might indeed turn the encounter into a de facto detention or arrest. Absent consent, a pat down search for weapons is not legal without specific facts or information making it reasonable for the member to suspect that the person may be armed and dangerous.

3. *The Decision to Frisk Mr. McClain*

a. Police Officers May Undertake a Frisk of a Person if They Have Reasonable Suspicion that the Person is Both Engaged in Criminal Activity and Armed and Dangerous

Terry and subsequent cases interpreting *Terry* separately analyze the Fourth Amendment implications for a stop and a frisk, noting that each require independent justification. The Colorado constitution[630] has been interpreted to be identical to the Fourth Amendment on this issue.[631] "[T]o

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[629] *Directives Manual: Suspicious Calls*, Aurora Police Dep't at 8.48 (June 9, 2020).

[630] Colo. Const. art. II, § 7 ("The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.")

[631] *See Eddie's Leaf Spring Shop & Towing LLC*, 218 P.3d at 333 ("[t]he Colorado and U.S. Constitutions are generally coextensive with regard to warrantless searches and seizures."); *see also People v. Rushdoony*, 97 P.3d 338, 344 (Colo. App. 2004) (citing *Terry*, a Colorado Supreme Court case) and Colo. Rev. Stat. § 16–3–103(2) (2003) as support for the rule that "When a police officer conducting a valid investigatory stop has a reasonable, articulable basis to suspect that the person with whom he is dealing may be armed and dangerous, the officer may conduct a patdown search of that person for weapons.").

proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous."[632] The Supreme Court has consistently described this analysis as different from and in addition to the "reasonable suspicion of criminal activity" required to initiate a *Terry* stop: a *Terry* stop does not per se authorize a *Terry* frisk.[633] As the Supreme Court noted in *Terry*: "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."[634]

Once a lawful *Terry* stop has been undertaken, a frisk is authorized only where "a reasonably prudent man, in the circumstances, would be warranted in the belief that his safety or that of others was in danger."[635] The Tenth Circuit Court of Appeals has held that "the reasonable suspicion required to justify a pat-down search represents a 'minimum level of objective justification,' and 'need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.'"[636]

The objective articulable bases for suspecting that an individual is armed and dangerous may include circumstantial factors such as presence in a high crime area,[637] wearing excessive clothing,[638] and the individual's nervousness or evasiveness.[639] In the absence of circumstances suggesting the individual was involved in a crime associated with violence or other narrow situations presenting an elevated risk to officer safety, however, jurisprudence suggests that there must also be at least some direct evidence suggesting that the individual may be armed, violent, or concealing a weapon. This may include, for example, a known history of crimes involving weapons, a report that the suspect is armed, furtive motions that reflect concealment of a weapon, a refusal to show hands, or a visible bulge in clothing consistent with a weapon.[640]

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[632] *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009).

[633] *See, e.g., Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009).; *accord United States v. Hughart*, 645 F. App'x 678, 683 (10th Cir. 2016) ("[A] frisk is not the foregone conclusion of a lawful stop, and officers are required to have reasonable, articulable suspicion that an individual is armed and dangerous before performing a patdown for weapons." (citing *Terry*, 392 U.S. at 27)); *see also People v. Sherman*, 197 Colo. 442, 444 (1979) ("A valid stop does not automatically justify a subsequent frisk.").

[634] *Terry*, 392 U.S. at 24-25.

[635] *Terry*, 392 U.S. at 27; *see also Rushdoony*, 97 P.3d at 344 (an officer must have "a reasonable, articulable basis to suspect that the person with whom he is dealing may be armed and dangerous.").

[636] *United States v. Rice*, 483 F.3d 1079, 1083 (10th Cir. 2007) (citations omitted).

[637] *See, e.g., United States v. Gurule*, 935 F.3d 878, 887 (10th Cir. 2019), as revised (Oct. 10, 2019), cert. denied, 140 S. Ct. 1285 (2020).

[638] *United States v. Hood*, 774 F.3d 638, 643 (10th Cir. 2014).

[639] Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.6(a) (6th ed. 2020).

[640] Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.6(a) (6th ed. 2020) (explaining that where an officer suspects that an individual is involved in criminal activity relating to a type of crime where the offender is not necessarily likely to be armed, "there must be, as Justice Harlan noted in *Terry*, 'other circumstances' present" and listing circumstances illustrative of the circumstances courts have deemed sufficient to justify a frisk.).

For example:

- In *United States v. Gilmore*, officers responded to a suspicious person call.[641] Two witnesses the officers spoke with before approaching the suspect described him as intoxicated, and the dispatcher reported the suspect was "suspicious" and "disoriented," but the court noted that "none of these reports contained information suggesting that Defendant was armed and dangerous."[642] Upon arrival, the officers observed that the suspect was wearing two coats and carrying a plastic bag.[643] Rejecting the officer's explanation that he frisked the suspect in part because several vehicle break-ins had occurred nearby and there was a significant gang population in the area, the court concluded that the frisk was unjustified because the officer "did not state any particularized facts that would lead a reasonable officer to believe that Defendant was a gang member, that he suspected Defendant had been breaking into vehicles, or that a suspect breaking into vehicles would be armed and dangerous" and the individuals who called the police had not reported concern of "any danger."[644]

- In *United States v. Hood*, the Tenth Circuit found a frisk was justified in part because the individual officers caught running from the scene of a reported burglary was wearing a jacket during summer.[645] However, central to the court's holding was more direct evidence suggesting the individual may have been armed: he was "frantically fumbling in his pockets," appeared to be lying on top of and grasping for something after he was ordered to the ground, and when asked, told officers he did not know whether he had a firearm underneath him.[646]

b. Officer Woodyard's Articulable and Reasonable Suspicion to Frisk Is Not Evident in the Record Available

Officer Woodyard's stated reason for taking hold of Mr. McClain was to conduct a frisk.[647] As with the justification for the stop, Officer Woodyard did not provide an adequate justification for attempting to conduct a frisk during his interview with Major Crime. During the interview with Major Crime, he stated:

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[641] *United States v. Gilmore*, 945 F. Supp. 2d 1211, 1219–20 (D. Colo. 2013), *aff'd on other grounds*, 776 F.3d 765 (10th Cir. 2015). While the district court concluded that the pat-down was not justified under a reasonable suspicion analysis, it ruled that officers nevertheless did not violate the Fourth Amendment because the frisk was justified under Colorado's Emergency Commitment Statute. That statute permits officers to conduct a pat-down in certain circumstances when taking an individual into custody whom an officer has "probable cause to believe…is sufficiently intoxicated as to be a danger to himself or others[.]" *Gilmore*, 945 F. Supp. 2d at 1220-23. On appeal, the Tenth Circuit affirmed that the search was constitutional because of the Emergency Commitment Statute. The Tenth Circuit did not review the district court's conclusion with respect to the officers' reasonable suspicion that the individual was armed and dangerous.

[642] 945 F. Supp. 2d 1211 at 1219.

[643] 945 F. Supp. 2d at 1215.

[644] 945 F. Supp. 2d at 1219-20.

[645] *Hood*, 774 F. 3d at 643-44.

[646] *Hood*, 774 F.3d at 641-42, 644.

[647] Woodyard Interview at 6:25, 12:55, 14:40.

> Um, at this time, uh, Officers Rosenblatt and Roedema, uh, they are to the south of him and they're walking up, so I felt safe making an approach, he didn't have any weapons or anything I could see in his hand. Um, and then when I went up to try and grab him, my position of advantage was his wrist and elbow, he tightened his arms up and put them to his chest. So, I held his hands to his chest while trying to talk to him. Um, Officer Rosenblatt grabbed his right arm and I had his left. I'm trying to tell him to calm down and wanted to pat him down for weapons based on him having a ski mask on, on Colfax in the middle of the night, um, and it was causing people to call in. Um, I thought that he might have weapons on him.[648]

Later in the interview, Officer Woodyard indicated that he felt Mr. McClain was armed even before the stop had occurred. He stated that he waited for back-up before stopping Mr. McClain "because I didn't want to stop this guy by myself, because, pretty suspicious area tied with his actions and I didn't want to contact somebody who I thought had weapons by myself."[649] Beyond circumstantial factors such as the time of night; location in what he perceived to be a high crime area, Mr. McClain's attire in a ski mask and what Officer Woodyard perceived to be unnecessarily warm clothing for the weather, and the fact that a caller had reported someone waving his arms and acting "suspicious," Officer Woodyard did not articulate any other evidence to explain why he believed Mr. McClain was armed. Despite the fact that Officer Woodyard had readily stated earlier in the interview that he did not observe weapons on Mr. McClain ("I felt safe making an approach, he didn't have any weapons or anything I could see in his hand"[650]) and the dispatcher had conveyed that there were no known weapons involved,[651] Major Crime investigators never asked Officer Woodyard to explain the basis for his conclusion that Mr. McClain might be armed and why he felt justified in frisking him.

The Panel has given significant attention in this Report to the question of the appropriateness of the decision to stop and the decision to frisk Mr. McClain because all other uses of force flowed from those events. The officers' decision to physically restrain Mr. McClain and prevent him from going along his way set in motion the officers' escalated uses of force that followed.

4. Force Used to Move Mr. McClain from the Sidewalk

As an initial matter, the officers increased their use of force when they decided to move Mr. McClain from the rocks upon which they were standing. Officer Woodyard made the decision to use force to move Mr. McClain to the grass out of concern that a struggle would ensue as he initiated the frisk.[652] Within a few seconds, the encounter escalated.

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[648] Woodyard Interview at 6:04.

[649] Woodyard Interview at 28:02.

[650] Woodyard Interview at 6:04.

[651] APD CAD Report – Ingui, M., General Offense Report at 493.

[652] Woodyard Interview at 6:40.

Less than a minute elapsed between the moment that the officers encountered Mr. McClain and when they decided to physically move him onto the grass. Body worn camera footage revealed the following dialogue[653] as the officers maneuvered Mr. McClain up against a nearby building[654]:

> OFFICER WOODYARD: Hey, do me a favor and stop right there. Hey, stop right there. Stop. Stop.
>
> ELIJAH MCCLAIN: I have a right to walk where I'm going.
>
> OFFICER WOODYARD: Stop, stop I have a right to stop you 'cause you're being suspicious.
>
> ELIJAH MCCLAIN: Whoa, okay.
>
> OFFICER WOODYARD: Turn around. Turn around.
>
> ELIJAH MCCLAIN: No, actually...your hands...let go of me...stop.
>
> OFFICER WOODYARD: Turn around. Stop.
>
> ELIJAH MCCLAIN: Stop, stop, let go of me.
>
> OFFICER: Stop tensing up, dude. Stop tensing up, bro. Stop tensing up.
>
> ELIJAH MCCLAIN: Let go of me.
>
> UNIDENTIFIED OFFICER: This isn't going to go well dude.
>
> OFFICER ROEDEMA: Stop.
>
> UNIDENTIFIED OFFICER: Stop tensing up.
>
> UNIDENTIFIED OFFICER: Listen to me bro.
>
> ELIJAH MCCLAIN: Let go of me. No, let go of me.
>
> OFFICER ROSENBLATT: This isn't going to go well.
>
> OFFICER ROEDEMA: Chill out.
>
> ELIJAH MCCLAIN: No, I am an introvert.
>
> OFFICER WOODYARD: Stop tensing up.
>
> ELIJAH MCCLAIN: Please respect the boundaries that I am speaking.
>
> UNIDENTIFIED OFFICER: We're trying to. Relax.
>
> OFFICER WOODYARD: Stop tensing up. Stop tensing up. Relax.
>
> ELIJAH MCCLAIN: Stop. Stop. I'm going home.
>
> UNIDENTIFIED OFFICER: Relax, or I'm going to have to change this situation.
>
> UNIDENTIFIED OFFICER: Dude, hey, relax.

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[653] Given that multiple individuals were speaking over each other, and it was not always clear who was speaking at any one time, the Panel notes that the following dialogue reflects our best efforts to capture the dialogue recorded in the officers' body worn camera footage.

[654] Woodyard Body Cam at 0:29.

ELIJAH MCCLAIN: Leave me alone. Leave me alone.

UNIDENTIFIED OFFICER: Dude, stop.

UNIDENTIFIED OFFICER: Relax buddy.

OFFICER ROEDEMA: Sir, can you please cooperate?

UNIDENTIFIED OFFICER: We don't wanna do this, all right.

ELIJAH MCCLAIN: No and can you leave me alone?

OFFICER ROEDEMA: No, we're gonna, we're gonna talk to you.

ELIJAH MCCLAIN: [INDISCERNIBLE] First off, you guys started to address me, and I was stopping my music to listen. Now, let go of me.

UNIDENTIFIED OFFICER: Get over there…[INDISCERNIBLE]

OFFICER ROSENBLATT: Let's get over to the grass. Gonna lay you down.

All three officers told Major Crime investigators that they decided to move Mr. McClain away from the hard surface to a grassy, softer area because they decided they were going to have to use greater force against Mr. McClain and that there was a possibility that they would to go to the ground.[655] Officer Woodyard explained to Major Crime investigators that Mr. McClain didn't "relax or release himself or allow me to attempt to do a search, and I thought, at that point, we might be trying to take him down to the ground to get him in handcuffs or to get him in a better position to conduct a search."[656] Officer Roedema similarly recounted that Officer Woodyard suggested they move Mr. McClain to the grass "in case we have to take him down that way he's not falling on concrete."[657] However, as indicated above, body worn camera footage suggests that Officer Rosenblatt may have already formulated an intent to take Mr. McClain to the ground at the time he began moving him onto the grass, as he can be heard telling Mr. McClain "we're gonna lay you down" at approximately the same time he began attempting to move him.[658]

a. When More than Minimal Force is Used, an Investigative Stop Becomes an Arrest, Which Must Be Supported by Probable Cause

Officers need only reasonable suspicion to conduct a *Terry* stop. While conducting a *Terry* stop or frisk, a police officer is authorized to use a limited amount of force to effectuate that stop or frisk, so long as "such steps are reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop."[659] However, if officers use more force than is necessary to protect officer safety and maintain the status quo, the *Terry* stop is transformed into an arrest.[660] Once a *Terry* stop transforms into an arrest, officers must have probable cause that

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[655] Rosenblatt Interview at 9:15; Roedema Interview at 8:19; Woodyard Interview at 6:38.

[656] Woodyard Interview at 6:42.

[657] Roedema Interview at 8:42.

[658] Rosenblatt Body Cam at 0:54.

[659] *United States v. Mosley*, 743 F.3d 1317, 1329 (10th Cir. 2014) (citation omitted).

[660] *Gallegos v. City of Colorado Springs*, 114 F.3d 1024, 1030 (10th Cir. 1997).

the individual committed a crime in order to continue the detention — a greater level of evidence than the "reasonable suspicion" required to carry out a *Terry* stop.[661] The use of "forceful techniques," which include taking an individual to the ground, generally turn a *Terry* stop into an arrest,[662] although courts have recognized that use of force during a *Terry* stop does not convert it to an arrest when there is both reasonable suspicion and facts that would lead a reasonable officer to fear for her or his safety.[663]

b. There Is Nothing in the Available Record to Demonstrate What the Officers Relied on to Establish Probable Cause to Arrest Mr. McClain to the Extent that the Stop was Converted to an Arrest

In this instance, there are two interrelated questions: did the officers' use of force to move Mr. McClain to the grass transform the investigative stop of Mr. McClain into an arrest and, if so, did the officers have probable cause to make an arrest? While we do not reach a conclusion, there is, again, significant missing information from the Major Crime investigation that would have otherwise assisted our review of this issue.

As with the failure to meaningfully probe whether the officers had reasonable suspicion to conduct a stop, in the Panel's view, Major Crime investigators failed to sufficiently investigate the officers about the facts surrounding their decision to move Mr. McClain.[664] The only change in circumstances between the time that the officers first encountered Mr. McClain and when they began to move him was that (i) Mr. McClain continued to walk after Officer Woodyard called for him to stop, and (ii) Mr. McClain tensed up once the officers grabbed him. The officers were not asked, and did not offer, any basis for believing that Mr. McClain had committed a crime either when they first stopped him or when they decided to move him.[665]

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[661] *Gallegos*, 114 F.3d at 1030; *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." (citations omitted)).

[662] *See Donahue v. Wihongi*, 948 F.3d 1177, 1187 n.12 (10th Cir. 2020) ("The use of…forceful techniques generally exceed the scope of an investigative detention and enter the realm of an arrest." (citation omitted)).

[663] For example, in *Gallegos*, officers responding to a call reporting a prowler used force to take the suspect to the ground when the suspect, who smelled strongly of alcohol, "jerked away and pivoted and faced the officers. With his fists clenched at waist level, Mr. Gallegos positioned himself in a crouched stance, similar to a wrestler's position." *Gallegos*, 114 F.3d at 1026. Thus, the officers had both reasonable suspicion and an overt threat to their safety. *Gallegos*, 114 F.3d at 1030-32.

[664] No officer has asserted that the encounter started as anything other than a *Terry* stop. Under Aurora Police Department Policy, an arrest under these circumstances would be permissible only under the following circumstances:

> Officers may arrest without a warrant only upon the determination that probable cause exists to believe that a crime was committed <u>and</u> that the individual to be arrested committed the crime or for a crime committed in the officer's presence.

Directives Manual: Arrest without a Warrant, Aurora Police Dep't at 6.1.1 (revised Mar. 6, 2019) (emphasis in original).

[665] As discussed above, Officer Roedema did state that Mr. McClain's failure to comply with the officers' orders to stop was consistent with someone who "either just committed a crime and they're trying to get away from police [or

In addition, none of the officers were asked if they considered non-force options before resorting to force (either at the moment they decided to move Mr. McClain or at the moment they decided to first make physical contact with him).[666] This is especially concerning given that Aurora Police Department policy requires the use of non-force options when feasible. Directive 5.3 of the Aurora Police Department manual, as set forth above, provided at the time of the incident that "[w]hen practicable, officers will attempt to de-escalate their force and/or the situation so that lesser force, or possibly no force, is required."[667]

5. *Force in Response to Assertion that Mr. McClain Reached for an Officer's Gun*

After the officers began moving Mr. McClain from the sidewalk, Officer Roedema told the other officers: "[h]e grabbed your gun, dude."[668] Officer Roedema told Major Crime investigators that he saw Mr. McClain reach for Officer Rosenblatt's gun.[669] The officers then struggled to restrain Mr. McClain, attempted and abandoned an initial carotid hold, and wrestled Mr. McClain to the ground.

a. Officers May Use Force to Protect Themselves or Others

While *Graham* identified a list of non-exclusive factors for evaluating officers' use of force, which have been expanded though subsequent judicial decisions, a factor often considered is "whether the suspect poses an immediate threat to the safety of the officers or others."[670] A suspect grabbing or attempting to grab an officer's gun has authorized officers to use force, up to

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someone who is] concealing something whether it be a weapon or drugs; and/or they have a warrant." Roedema Interview at 55:25. However, as we describe in further detail in Section IV.A.3, the Panel notes that the body worn camera footage indicates that Mr. McClain had continued walking at the same pace and in the same direction after Officer Woodyard's initial commands to stop, and Mr. McClain explained to the officers that he had been listening to music and had to stop it to listen to them. As we discuss in Section V.B.2, walking away from a voluntary encounter cannot give rise to reasonable suspicion.

[666] We note that Detective Ingui asked Officer Roedema more generally about his "mindset when you come in contact with the person and the behavior or acting in the way that he was acting"; Officer Roedema replied that he thought "approaching how we did was the best thing," and that "we tried to verbally tell him to stop and then, physically, try to control him." Roedema Interview at 49:40. Officer Roedema then explained, as we discuss above in Section IV.A.3, that "here in Aurora…we tend to, um, control it before it needs to be controlled. And what I mean by that is we take action before it escalates, and we have to use more force, more action." Roedema Interview at 51:40.

[667] *Directives Manual: Use of Physical Force*, Aurora Police Dep't at 5.3 (revised Jan. 1, 2016). Officer Rosenblatt asserted that the officers attempted to de-escalate by "talking to Mr. McClain, but Mr. McClain "[wasn't] really getting the message" and "started saying things." Rosenblatt Interview at 8:26. We note that any effort by the officers to talk to McClain took place after the officers had seized Mr. McClain and applied force against him.

[668] Rosenblatt Body Cam at 1:09; Roedema Body Cam 1 at 1:23.

[669] Roedema Interview at 22:01.

[670] *Graham*, 490 U.S. at 396; *see also*, *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1260-61 (10th Cir. 2008).

and including lethal force,[671] because a suspect who is able to gain control of an officer's weapon poses a grave risk to officers and others.

The Panel notes that, significantly, at the time of this incident a carotid hold was considered less lethal force under Aurora Police Department policy. The version of Directive 5.08 in place at that time, entitled "Less Lethal Devices, Weapons, and Techniques," addressed the use of less lethal weapons and related munitions intended to assist in the "de-escalation of potentially violent confrontations."[672] The Directive required that justification for the use of less lethal force comply with Colorado law and the relevant provisions of Aurora Police Department directives. Carotid holds have since been banned by policy.[673]

Section 5.8.3 of the policy in place at the time related to carotid control holds, and permitted officers to apply a carotid control hold when "met with violent resistance."[674] Section 5.8.3 further allowed use of these holds "when lesser means have been tried unsuccessfully or other means are not feasible."[675] Importantly, Section 5.8.11 required that the Aurora Police Department (i) call Aurora Fire whenever a carotid control hold was applied, and (ii) inform Aurora Fire personnel whether the individual lost consciousness.[676]

A 2019 training presentation, entitled "Carotid Control Hold," set forth additional departmental policies and protocols related to the use of carotid control holds at the time of Mr. McClain's death, including instructions for application of the hold and the risks associated with doing so.[677] The presentation explained that the goal of a carotid control hold is to "obtain voluntary compliance or render the subject unconscious temporarily to gain control," and summarizes the Aurora Police Department directives related to application of this hold.[678] The presentation stated that officers should avoid applying pressure to the back of the subject's neck or head, avoid applying carotid control holds repeatedly to the same individual, and immediately cease application of the hold once the subject is unconscious or is no longer resisting.[679]

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[671] *Blossom v. Yarbrough*, 429 F.3d 963, 967–68 (10th Cir. 2005); *Jacobs v. City of Shreveport*, No. 04-2492, 2006 WL 3247095, at *3, *11 (W.D. La. Nov. 8, 2006); *see also Madrid v. Cates*, No. CV 12-00129-JSL (MLG), 2012 WL 7807341, at *3, *11 (C.D. Cal. Dec. 10, 2012).

[672] *Directives Manual: Less Lethal Devices, Weapons and Techniques*, Aurora Police Dep't at 5.8 (revised June 10, 2019). This Directive also covers other less lethal force such as use of police canines (5.8.8) and use of a department-issued TASER (5.8.10), as well as the mandated provision of medical treatment following officers' use of less lethal force (5.8.11).

[673] *Directives Manual: Carotid Control Hold and Chokeholds (Prohibited)*, Aurora Police Dep't at 5.8.3 (revised June 9, 2020) ("As of June 9, 2020, members are not authorized to use the carotid control hold, or any choke hold that restricts the airway").

[674] *Directives Manual: Carotid Control Hold*, Aurora Police Dep't at 5.8.3 (revised June 10, 2019).

[675] *Directives Manual: Carotid Control Hold*, Aurora Police Dep't at 5.8.3 (revised June 10, 2019).

[676] *Directives Manual: Medical Treatment and Decontamination*, Aurora Police Dep't at 5.8.11 (revised June 10, 2019).

[677] APD 2019 In-Service Carotid Hold – Ingui, M., General Offense Report at 214-34.

[678] APD 2019 In-Service Carotid Hold – Ingui, M., General Offense Report at 220; 225-27.

[679] APD 2019 In-Service Carotid Hold – Ingui, M., General Offense Report at 223-24.

b. Officers Used Force to Wrestle Mr. McClain to the Ground and Away from Officer Rosenblatt's Gun

In response to the threat posed when officers perceived that Mr. McClain reached for a gun, Officer Rosenblatt attempted a carotid hold. When he released the hold after concluding that he could not accomplish it because he was in a "bad position,"[680] Officer Woodyard wrestled Mr. McClain to the ground and away from Officer Rosenblatt.[681]

During Major Crime's investigation, the justification for this use of force was explored extensively and, unlike the use of force used to stop and to search, the basis of this force is well documented. In the view of the officers, once they perceived that Mr. McClain had reached for an officer's weapon, the danger of the situation increased.[682] The Panel notes, however, that the Aurora Police Department requires officers to use a security holster for their weapons.[683] Security holsters, although not 100% effective, are designed with mechanisms that limit or prevent anyone other than the officers from gaining access to the weapon. The officers were never asked and nor did they explain, whether and to what extent the security holster affected their perception of the threat when Officer Roedema stated that Mr. McClain had reached for an officer's gun. We were unable to determine whether all of the officers were carrying security holsters in compliance with the Aurora Police Department policies.

In any event, from the available body worn camera audio and the officers' interviews with Major Crime investigators, it appears that they were able to use measured force to take Mr. McClain to the ground, likely dissipating any threat he may have posed when Officer Roedema asserted that Mr. McClain had reached for an officer's gun.[684]

6. Use of Force Once Mr. McClain Was on the Ground

Though this portion of the incident is not clearly visible in the body worn camera footage, the officers told Major Crime investigators that once Mr. McClain was on the ground, he was lying on his right side with Officer Woodyard's chest up against Mr. McClain's back.[685] Officer

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[680] Rosenblatt Body Cam at 13:30.

[681] Rosenblatt Interview at 12:12 (after Officer Rosenblatt released his attempted carotid hold, there was "movement" which resulted in Mr. McClain lying "sideways" with Officer Woodyard behind him); Woodyard Interview at 7:40 (Officer Woodyard told Major Crime investigators that Mr. McClain was lying on his right side and that Officer Woodyard's chest was up against Mr. McClain's back, with Officer Woodyard's gun and pepper spray were pinned underneath him).

[682] Roedema Interview at 23:58, 24:52; Rosenblatt Interview at 10:39; Woodyard Interview at 7:14.

[683] *Directives Manual: Uniform Components*, Aurora Police Dep't at 8.1.2(m) (revised Dec. 19, 2019).

[684] *See* Roedema Interview at 22:32 (describing how Mr. McClain's hands were no longer on Officer Rosenblatt's gun when Officer Roedema "grab[ed] his head" and "put him to the ground"); Rosenblatt Interview at 12:12 (describing how, after he released his carotid hold, there was then more "movement," which resulted in Mr. McClain lying "sideways" on his right side with Officer Woodyard behind him); Woodyard Interview at 7:40, 7:48 (describing how he and Mr. McClain were lying on their right sides, that Officer Woodyard's chest was up against Mr. McClain's back, and that Officer Woodyard's gun and pepper spray were pinned underneath Officer Woodyard).

[685] Woodyard Interview at 7:45.

Woodyard's gun and pepper spray were pinned underneath him.[686] None of the officers were asked whether, or reported that, Mr. McClain would have been able to reach for an officer's gun at this time — and indeed audio from the body worn camera footage reflects the officers confirming "we've got his arms"[687] at this time. Nonetheless, based on Officer Roedema's assertion of Mr. McClain's earlier attempt to grab a gun, Officer Woodyard decided to apply a second carotid hold.[688] He was successful and held the hold until Mr. McClain's eyes rolled back, and he made snoring sounds.[689]

a. Officers May Use Force to Protect Themselves or Others from a Risk of Serious Harm or Death

A court's determination of whether force is reasonable turns on "whether the officers were in danger at the precise moment that they used force."[690] Police officers must calibrate their use of force to the actual resistance they are experiencing, and as the level of resistance increases or decreases, the level of force authorized increases or decreases accordingly.[691]

The Panel notes that some courts have held that a carotid hold constitutes lethal or deadly force, and can therefore only be applied under circumstances in which lethal force is authorized.[692] Under the Fourth Amendment, lethal force may not be used unless an "officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[693]

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[686] Woodyard Interview at 7:48.

[687] Roedema Body Cam 1 at 1:43; Rosenblatt Body Cam at 1:30; Woodyard Body Cam at 1:48. Officer Woodyard asked whether Mr. McClain was "out" from the application of the carotid control hold shortly thereafter. *See* Roedema Body Cam 1 at 1:47; Rosenblatt Body Cam at 1:34; Woodyard Body Cam at 1:52.

[688] Woodyard Interview at 8:05. We were unable to determine whether Officer Woodyard was aware that Officer Rosenblatt had already attempted an unsuccessful carotid hold several seconds earlier at the time he applied the second hold. After the second carotid hold had been applied and Mr. McClain was restrained on the ground, Officer Rosenblatt informed Sgt. Leonard in Officer Woodyard's presence that he had attempted a carotid hold. Leonard Body Cam 1 at 1:08. However, we did not identify any statements by Officer Woodyard to other officers on the scene or to Major Crime investigators that confirmed whether he was aware of this at the time he applied the second carotid hold.

[689] Roedema Interview at 9:58; Woodyard Interview at 9:03; Rosenblatt Interview at 13:14.

[690] *Sevier v. City of Lawrence*, 60 F.3d 695, 699 (10th Cir. 1995).

[691] *See Emmett v. Armstrong*, 973 F.3d 1127, 1136-37 (10th Cir. 2020); *see also Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) (explaining that the officer had "enough time … to recognize and react to the changed circumstances and cease firing his gun"); *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 666 (10th Cir. 2010) ("It is not objectively reasonable to ignore specific facts as they develop (which contradict the need for this amount of force).").

[692] *See Coley v. Lucas County*, 799 F.3d 530, 541 (6th Cir. 2015) (describing a chokehold as "deadly physical force"); *Nava v. City of Dublin*, 121 F.3d 453, 458 (9th Cir. 1997) (letting stand district court finding that carotid constitutes "deadly force"), *overruled on other grounds by Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999).

[693] *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

b. The Justification for the Carotid Hold is Unclear from the Available Record

The record indicates that Officer Woodyard's application of the carotid hold took place immediately after Mr. McClain was taken to the ground and within approximately twenty-five seconds after he reached for, or was perceived to reach for, Officer Rosenblatt's gun.[694] In his interview with Major Crime investigators, Officer Woodyard provided a more detailed explanation justifying his use of the carotid control hold than for his decision to stop and frisk Mr. McClain. He explained[695]:

> DETECTIVE INGUI: Okay. Um, and then, um, you heard Officer Roedema…say, he's going for your gun or going for a gun?
>
> OFFICER WOODYARD: Yes.
>
> DETECTIVE INGUI: Okay. And how did that physically make you feel?
>
> OFFICER WOODYARD: Um, uh, to be honest kind of sick, um, because it was just a very simple stop of, hey, step — sit tight. Let me search for weapons. But then it turned to I thought he was trying to gain control of one of our weapons to use it against us, possibly.
>
> DETECTIVE INGUI: Okay. Besides sick, how would you — were you? What —
>
> OFFICER WOODYARD: Um —
>
> DETECTIVE INGUI: Emotionally, how did you feel?
>
> OFFICER WOODYARD: Uh, it ran my emotions up. Um, I thought that it got to a point where, um, our verbal orders weren't going to work at all, that we needed to get this person under control immediately, without any delay.
>
> DETECTIVE INGUI: Okay. Um, were you nervous?
>
> OFFICER WOODYARD: Yeah.
>
> DETECTIVE INGUI: Were you scared?
>
> OFFICER WOODYARD: A little bit, yeah.
>
> DETECTIVE INGUI: Okay. So, was there fear within you?
>
> OFFICER WOODYARD: Yes, there was.
>
> DETECTIVE INGUI: Okay. Um, both for your own safety and —

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[694] The exact timing is unclear. *See supra*, Section IV.A.5. However, approximately twenty-five seconds elapsed between Officer Roedema's statement that Mr. McClain was reaching for an officer's gun, *see* Rosenblatt Body Cam at 1:09, and Officer Woodyard's question to the officers regarding whether Mr. McClain was "out," *see* Rosenblatt Body Cam at 1:34.

[695] Woodyard Interview at 14:22.

> OFFICER WOODYARD: For my safety and the officers on scene and for the suspect's safety.[696]

He later returned to the topic and stated[697]:

> DETECTIVE INGUI: Okay. Um, and then, uh, throughout your encounter with him, the — attempted to put hands on to gain control. Um, and the — uh, his behavior, uh, leading up to the applying then the carotid control, again, describe how you felt during that process and what — what you were going — what you thought was going to happen.
>
> OFFICER WOODYARD: Um, I thought he was attempting to access one of our firearms to use on us. Um, that was a situation where I thought that, um, the officers on scene were in danger of receiving great bodily harm or being killed.
>
> DETECTIVE INGUI: Okay.
>
> OFFICER WOODYARD: Um.
>
> DETECTIVE INGUI: How'd it make you feel?
>
> OFFICER WOODYARD: I felt like I was in danger.

Unfortunately, Officer Woodyard was not asked what threat Mr. McClain posed at the moment the carotid hold was applied. Although Officer Woodyard expressed to Major Crime investigators that he experienced fear upon hearing that Mr. McClain had reached for a gun, force was used to dissipate that threat and Mr. McClain was taken to the ground. Officer Woodyard was never asked the precise basis of his fear once the threat of Mr. McClain attempting to, or being perceived to attempt to, seize a gun had been addressed.[698]

Indeed, the Panel observes that at least after Officer Woodyard had applied the carotid, Mr. McClain's communications with the officers were not threatening. Rather, as discussed in further detail in Section IV.A.6 above:

1. Officer Woodyard told Mr. McClain to "just stop fighting," Mr. McClain responded, "I'm stopping, I'm stopping" or "I'm stopping, I'm sorry."[699]

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[696] The leading nature and general quality of the questions posed by Detective Ingui raised concerns for the Panel regarding the rigor of the interrogation and his willingness to probe the responses that he was receiving from the officers involved. Detective Ingui, through counsel, declined our request for an interview.

[697] Woodyard Interview at 30:00.

[698] We also note that a second attempt at a carotid hold is contrary to training. APD 2019 In-Service Carotid Hold – Ingui, M., General Offense Report at 224 ("Avoid applying [a carotid control hold] repeatedly on the same person").

[699] Rosenblatt Body Cam at 2:16.

2. Officers Woodyard and Roedema told Mr. McClain that he would be tased if he didn't "stop fighting."[700] In response, Mr. McClain cried or spoke indiscernibly and then moaned and said, "Forgive me."[701]

3. Officer Rosenblatt told Mr. McClain to "Stop dude!" and Mr. McClain responded, "I can't breathe."[702]

4. Officer Roedema said, "All right, get off his chest."[703] McClain cried and moaned, "I can't breathe, please!"[704]

5. Body worn camera audio reflects that McClain continued to groan and officers responded by telling him to relax.[705] Mr. McClain said, "Okay! I can't breathe!"[706]

7. Use of Pain Compliance Techniques to Restrain Mr. McClain

a. Officers May Use Reasonable Force to Restrain a Resisting Suspect

As discussed above, to address resistance, officers may use force that is objectively reasonable under the circumstances and any use of force must be calibrated to the level of resistance at the time the force is applied.[707] If resistance increases or decreases, what force is objectively reasonable changes as well.[708]

b. It Is Unclear from the Available Information Whether Mr. McClain Had the Opportunity to Respond to Pain Compliance Techniques

From the moment that Aurora Police officers first stopped Mr. McClain up until the time Mr. McClain was placed on the ambulance stretcher, officers applied some form of physical force against him. This force included an attempted carotid hold, a successful carotid hold, and various pain compliance techniques including arm bars, wrist locks, and officers applying their knees to Mr. McClain's large muscle groups. The officers justified the continued use of force on the

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[700] Rosenblatt Body Cam at 2:22.

[701] Rosenblatt Body Cam at 2:24.

[702] Rosenblatt Body Cam at 2:37.

[703] Rosenblatt Body Cam at 2:40.

[704] Rosenblatt Body Cam at 2:42.

[705] Rosenblatt Body Cam at 2:43.

[706] Rosenblatt Body Cam at 2:46.

[707] *See supra*, Section V.B.6.

[708] *See supra*, Section V.B.6.

grounds that Mr. McClain continued to resist officers' commands and showed extraordinary strength.[709]

The audio captured by the body worn camera contains two sharply contrasting narratives — on the one hand, Mr. McClain pleading,[710] apologizing,[711] and expressing pain,[712] and on the other hand, the officers continuing to perceive resistance.[713] Because several officers' body worn cameras became dislodged early in the encounter, there is little video footage available for this period of time. Mr. McClain can be heard gagging and vomiting.[714] At times, he complained that he could not breathe, and an officer was instructed to "get off his chest."[715] It is unclear whether Mr. McClain's movements, interpreted by the officers as resisting, were attempts to escape or simply efforts, voluntary or involuntary, to avoid the painful force being applied on him, to improve his breathing, or to accommodate his need to vomit.

The officers' use of force did not appear to relent even after Mr. McClain was in handcuffs, becoming progressively more ill and less responsive, and surrounded by a large group of officers. Once Mr. McClain was placed in handcuffs, the officers rolled him to his side in order to prevent any obstruction of his airway and allow him to recover, but they continued to lay or crouch on top of him in what appeared to be an attempt to restrict any and all movement.[716] In the Panel's opinion, Major Crime investigators failed to meaningfully investigate the officers' continued use of force after Mr. McClain was restrained, such as through a closer examination of the officers' contentions that Mr. McClain continued to resist. Even once it should have been obvious that Mr. McClain was not able to resist or escape, given both that he was handcuffed and in the presence of multiple officers, the officers continued to use pain compliance techniques. Throughout, there were times when officers could be seen on body worn camera footage adjusting and intensifying arm bars and wrist-locks or pressing down on Mr. McClain's back or side muscle groups, causing him to cry out in pain while they were on top of him.[717] These appeared to be in response to almost any movement on Mr. McClain's part. The officers were still discussing maintaining pressure holds right up until Mr. McClain was injected with ketamine — and even though he did not appear to be moving at that time.[718]

Use of force best practices call for a continuous decision-making model that requires officers to constantly re-evaluate any situation in order to justify any proportional increase or

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[709] *See, e.g.,* Green Body Cam at 4:30, 5:13, 7:22; Use of Force Investigation Summary – Ingui, M., General Offense Report at 470.

[710] *See, e.g.,* Rosenblatt Body Cam at 2:40, 2:59, 3:14, 10:50.

[711] *See, e.g.,* Rosenblatt Body Cam at 2:24, 3:48, 4:22, 5:10, 6:08; Woodyard Body Cam at 5:27.

[712] *See, e.g.,* Rosenblatt Body Cam at 2:37, 5:08, 5:14, 5:34, 10:04, 10:16, 10:45; Woodyard Body Cam at 5:27, 5:32.

[713] *See, e.g.,* Rosenblatt Body Cam at 2:14, 6:58, 10:10, 10:52.

[714] *See, e.g.,* Rosenblatt Body Cam at 6:19, 6:54, 10:33; Green Body Cam at 6:34.

[715] Rosenblatt Body Cam at 2:42.

[716] *See, e.g.,* Rosenblatt Body Cam at 11:30; Green Body Cam at 6:52.

[717] *See, e.g.,* Rosenblatt Body Cam at 10:04, 10:38, 10:45; Green Body Cam at 5:27, 5:45, 6:50, 6:59, 7:16, 8:36.

[718] Green Body Cam at 8:35.

decrease in the type and level of force being used — often called a Critical Incident Decision-Making model.[719] Best practices do not permit that decision to be based solely on the initial circumstances that led to force being used. While force may be justified at one moment in time, it may not be justified during the very next moment. An officer must consider changing factors such as the presence of weapons, the demeanor of the suspect, the number of officers present, and the threat of injury to officers or others if force is not applied. The officers involved in the incident did not appear to re-evaluate the threat as circumstances changed, but instead continued to use force justified by circumstances that had since been addressed. The Critical Incident Decision-Making model "offers an alternative to officers who in the past have been trained to immediately "move in and take control," even when those responses are not appropriate or safe given the circumstances."[720]

8. Recommendations

a. Review Training and Supervision of Officers

The Panel did not conduct a thorough review of the training and supervision of officers. That review will be part of the State of Colorado's patterns and practices investigation. However, the facts of this incident do suggest that the City should take steps to assess whether there is a need to strengthen training and supervision in the following areas:

- **Terry *Stops, Reasonable Suspicion, and Probable Cause***. The speed at which these officers acted to take Mr. McClain into custody, their apparent failure to assess whether there was reasonable suspicion that a crime had been committed, and the unity which with the three officers acted suggest a potential training or supervision weakness. Without assessing other incidents or the training program, the Panel cannot reach a definitive conclusion. Comprehensive training on the Department's new Suspicious Calls Directive[721] will be essential. It is of special concern to the Panel that one of the officers involved was trained in crisis intervention. Best practices would have dictated that the officers would have spent more time observing Mr. McClain rather then immediately placing hands on him without a more particularized and objective basis to suspect that Mr. McClain was involved in criminal activity.

  The Panel also strongly recommends that every *Terry* stop, and every frisk, be thoroughly documented. For each stop, and separately for each frisk, the officer should be required to provide a description of the reasonable suspicion that justified the stop and the separate basis for the search. Each stop report should be subject to peer review and/or a review by a supervisor for policy compliance, appropriateness under the circumstances, and individual or agency improvement.

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[719] A widely used training on the process of continuous assessment is offered by the Police Executive Research Forum. *See Module 2: The Critical Decision-Making Model*, Police Executive Research Forum, https://www.policeforum.org/icat-module-2 (last visited Feb. 19, 2021).

[720] *Guiding Principles on Use of Force*, Police Executive Research Forum at 86 (March 2016), https://www.policeforum.org/assets/guidingprinciples1.pdf.

[721] *Directives Manual: Suspicious Calls*, Aurora Police Dep't at 8.48 (June 9, 2020).

- ***Use of Force***. The unremitting use of force throughout this encounter and what appears to be the failure to allow Mr. McClain to comply after he was taken into custody raises concerns about whether officers have sufficient guidance on the need to reassess the necessity and amount of any use of force once the level of threat and resistance is reduced. Of critical importance will be ensuring that the entire Department receive training on the new policies regarding bystander intervention and officer relief,[722] which we discuss further below.

  In addition, Aurora Police policy requires that "supervisors will assess whether issues or concerns ancillary to the use of force exist including but not limited to body worn camera violations, officer safety[,] or training concerns."[723] The policy further states that the role of the responding supervisor is to "respond to the location of the subject/suspect, check for injuries, ensure medical treatment is provided as needed, photograph any areas when the use of force might have caused injuries (to document no injury exists) and add the photos and their notes, along with any supporting documentation in the Department's electronic tracking system."[724] The efforts by Sgt. Leonard to justify the stop[725] appear at tension with the requirement that the responding supervisor "will not summarize or recite the facts of the incident they did not personally observe, only what witnesses, whom did not do a report, tell the investigating supervisor."[726] We recommend additional policy guidance and training regarding a supervisor's duty when they respond to a scene.

b. Revise Use of Force and De-Escalation Policy

Tension between police officers and members of the community most frequently center around use of force practices. While high profile incidents are often the catalyst for demonstrations and media coverage, it is the multiple, daily, low-level encounters that shape community perception and create an environment of mistrust and illegitimacy.

Force that is lawfully authorized may not be appropriate. In fact, while legal, authorized force may well be contrary to public safety if it undermines the ability of the police department and other public institutions to partner with the community. The mutual trust that is created in this partnership is critical to determine what the community's safety needs are and how to achieve them. It is not unusual for community members to express fear of calling the police for help because they are afraid of the violence police bring into their community. This is an ongoing issue around the country and poses a critical challenge for law enforcement agencies.

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[722] *Directives Manual: Duty to Intervene*, Aurora Police Dep't at 5.9 (revised Oct. 7, 2020); *Directives Manual: Officer Relief Process*, Aurora Police Dep't at 5.10 (June 9, 2020).

[723] *Directives Manual: Incidents that Require Notification and Reporting, Tier Two, Use of Force/Weapons or Injury*, Aurora Police Dep't at 5.4.2.c (revised Nov. 21, 2019).

[724] *Directives Manual: Incidents that Require Notification and Reporting, Tier Two, Use of Force/Weapons or Injury*, Aurora Police Dep't at 5.4.2.c (revised Nov. 21, 2019).

[725] *See* Leonard Body Cam 2 at 3:07 (reflecting Sgt. Leonard telling Officer Ward to ask the 911 caller "if there was anything criminal"); *see also* Leonard Body Cam 2 at 6:40 (reflecting that, after hearing from Officer Ward that the caller "just thought it was weird," Sgt. Leonard replied, "Well, it is obviously, yeah, and he's acting crazy, okay" and instructing Officer Ward to "make sure [she] document[ed] that part").

[726] Leonard Body Cam 2 at 6:40.

In 2015, the President's Task Force on 21st Century Policing discussed the negative effect of inappropriate uses of force on community perceptions.[727] The President's Task Force recommended policies and training on use of force that emphasize de-escalation.[728] Likewise, community members expect that police officers will make concerted efforts to avoid and minimize the use of force and that force will be limited to those circumstances in which alternatives to force cannot be safely applied.[729]

The Panel recommends that the Department undertake a thorough review of its use of force policy. The review should assess whether it reflects community values that force be minimized and avoided when possible and whether officers have adequate guidance on force avoidance strategies and the obligations to apply them. Pursuant to Aurora Police Department Policy at the time of the incident, an officer was simply instructed that he or she could use force as permitted by Colorado statute[730]:

5.3.1 Use of Physical Force

Physical force may be used as allowed by State statutes, CRS 18-1-704 and CRS 18-1-707. These two statutes are copied below from CRS.

18-1-704 Use of physical force in defense of a person:

(1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

(2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; or

(b) The other person is using or reasonably appears about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary as defined in sections 18-4-202 to 18-4-204; or

(c) The other person is committing or reasonably appears about to commit kidnapping as defined in section 18-3-301 or 18-3-302, robbery as defined in section 18-4-301 or 18-4-302, sexual assault as set forth in section 18-3-402, or in section 18-3-403 as it existed prior to July 1, 2000, or assault as defined in sections 18-3-202 and 18-3-203.

(3) Notwithstanding the provisions of subsection (1) of this section, a person is not justified in using physical force if:

(a) With intent to cause bodily injury or death to another person, he provokes the use of unlawful physical force by that other person; or

(b) He is the initial aggressor; except that his use of physical force upon another person under the circumstances is justifiable if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

18-1-707 Use of physical force in making an arrest or in preventing an escape:

(1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:

(a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) To effect an arrest, or to prevent the escape from custody, of a person whom he reasonably believes:

(I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

(II) Is attempting to escape by the use of a deadly weapon; or

(III) Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

(3) Nothing in subsection (2) (b) of this section shall be deemed to constitute justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

Members will attempt to utilize those control techniques and tactics that are departmentally approved. Those control techniques and tactics should employ maximum effectiveness with the minimum force needed to control the incident.

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[727] President's Task Force on 21st Century Policing, "Final Report of the President's Task Force on 21st Century Policing" at 41, President's Task Force on 21st Century Policing, Off. of Cmty. Oriented Policing Servs. (May 2015).

[728] President's Task Force on 21st Century Policing, "Final Report of the President's Task Force on 21st Century Policing" at 87, President's Task Force on 21st Century Policing, Off. of Cmty. Oriented Policing Servs. (May 2015).

[729] *See e.g.*, Scott M. Mourtgos & Ian T. Adams, *Assessing Public Perception of Police Use-of-Force: Legal Reasonableness and Community Standards*, Justice Quarterly (Oct, 2019), https://www.tandfonline.com/doi/abs/10.1080/07418825.2019.1679864.

[730] *Directives Manual: Use of Physical Force*, Aurora Police Dep't at 5.3.1 (Jan. 1, 2016). The Colorado statute largely tracks the ruling in *Graham v. Connor*.

The Panel also notes that officers receive only thirty minutes of de-escalation in service training each year.[731] De-escalation should be part of every component of use-of-force training and be frequently emphasized. In addition, the Aurora de-escalation policy[732] could be significantly strengthened if it included more specific explanation that de-escalation is required in every encounter where possible, and how verbal techniques, positional withdrawal, and the use of delay can help control situations to avoid the need to use force. Moreover, while officers must be given discretion to make decisions in real time as to their own safety and the safety of others, it is critical that Aurora policy make clear that de-escalation is mandatory when possible. Training officers on how to do this will, over time, make de-escalation techniques ingrained and a natural default.

Increasingly across the country police agencies are re-examining their use of force policies and emphasizing the sanctity of life and the need to incorporate de-escalation tactics and a critical thinking model throughout the Use of Force continuum. The *Graham* analysis should be the floor that measures the *legality* of the use of force, but not the ceiling for whether the force applied is *appropriate*. We suggest that Aurora look to cities that have modernized their policies to provide significantly greater guidance to their officers. The newly developed use of force policy for the City of Chicago, for example, places the "sanctity of human life" as a core principle and restricts the use of force to those circumstances that are "objectively reasonable, necessary, and proportional."[733] Each of those terms is defined and officers are given guidance on their application, including[734]:

a.	whether the subject is posing an imminent threat to the *member* or others.
b.	the risk of harm, level of threat or resistance presented by the subject.
c.	the subject's proximity or access to weapons.

De-escalation is mandated, as is intervention of a bystander officer if force is excessive.[735] The policy requires that "[w]hen or if the subject offers less resistance, [] the member will decrease the amount or type of force accordingly."[736]

The Seattle Police Department also has a comprehensive use of force policy that reflects community values that force be avoided when possible and provides significantly greater guidance to officers than that currently in place in Aurora. The policy provides that force can only be used when necessary and that "'[n]ecessary' means that no reasonably effective alternative to the use

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[731] 2020 APD In-Service Schedule.

[732] *Directives Manual: Less Lethal Devices, Weapons and Techniques*, Aurora Police Dep't at 5.8 (Oct. 7, 2020).

[733] *General Order G03-02: Use of Force*, Chicago Police Department at III.B (Feb. 29, 2020) http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-44306f3da7b28a19.pdf?hl=true.

[734] *General Order G03-02: Use of Force*, Chicago Police Department at III.B.1.a (Feb. 29, 2020), http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-44306f3da7b28a19.pdf?hl=true.

[735] *General Order G03-02: Use of Force*, Chicago Police Department at III.B.4 (Feb. 29, 2020), http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-44306f3da7b28a19.pdf?hl=true.

[736] *General Order G03-02: Use of Force*, Chicago Police Department at III.B.3 (Feb. 29, 2020), http://directives.chicagopolice.org/directives/data/a7a57be2-128ff3f0-ae912-8fff-44306f3da7b28a19.pdf?hl=true.

of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended."[737] It requires that officers "should recognize that their conduct prior to the use of force, including the display of a weapon, may be a factor which can influence the level of force necessary in a given situation" and "[o]fficers should continually assess the situation and changing circumstances, and modulate the use-of-force appropriately."[738] The policy specifically recognizes that "[u]ses of force, even if lawful and proper, can have a damaging effect on the public's perception of the Department and the Department's relationship with the community. Both the Department and individual officers need to be aware of the negative effects of use-of-force incidents."[739]

Finally, officers should be given significantly more guidance on when and how to exercise discretion *not* to engage in an enforcement action. Aurora's Directives currently provide[740]:

> Members shall apply non-physical means when possible before resorting to the use of force. When time and space allow, the member should exhaust all available non-physical means to include, but not limited to:
>
> a) Verbal and non-verbal skills
> b) Time (slow the situation down)
> c) Walking away (possibly to return later with additional resources such as CRT, medical professionals, trained clinician or other)

More detail on the application of these techniques and when they should be applied would benefit officers. There are occasions when an officer may have the authority to take someone into custody, but circumstances dictate that there is little or no public safety benefit to doing so. This is especially true in the context of minor offenses that do not threaten public safety. Policy guidance should support officers' judgment in cases where formal police action may not always be the best course and endorse other methods that may be more effective and safer. We encourage Aurora to look to more detailed policies from other jurisdictions for guidance.[741] The policy of St. Paul, Minnesota is a good example[742]:

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[737] *Seattle Police Department Manual, Use of Force Definitions*, Seattle Police Dep't at 8.050 (June 19, 2020), http://www.seattle.gov/police-manual/title-8---use-of-force/8050---use-of-force-definitions#DeanVisser.

[738] *Seattle Police Department Manual, Use of Force Core Principles*, Seattle Police Dep't at 8.000 (Sept. 15, 2019), http://www.seattle.gov/police-manual/title-8---use-of-force/8000---use-of-force-core-principles.

[739] *Seattle Police Department Manual, Use of Force Core Principles*, Seattle Police Dep't at 8.000 (Sept. 15, 2019), http://www.seattle.gov/police-manual/title-8---use-of-force/8000---use-of-force-core-principles.

[740] *Directives Manual: Less Lethal Devices, Weapons and Techniques*, Aurora Police Dep't at 5.8 (revised Oct, 7, 2020).

[741] The de-escalation policy of the Seattle Police Department is an example. *Seattle Police Department Manual, De-Escalation*, Seattle Police Dep't at 8.100 (Sept. 15, 2019), https://www.seattle.gov/police-manual/title-8---use-of-force/8100---de-escalation.

[742] *404.00 Tactical Disengagement*, St. Paul, Minnesota (May 22, 2019), https://www.stpaul.gov/books/40400-tactical-disengagement.

There may be incidents involving a person who is not a threat to officers or others that a responding officer or supervisor believes can be handled more safely through the use of tactical disengagement. This policy recognizes that the legal authority to take a person into custody does not override law enforcement discretion to pursue safer courses of action.

If officers determine that tactical disengagement may be appropriate, they should contact the on-duty patrol supervisor for the incident. The patrol supervisor for the incident must respond to the scene. If, after attempting contact and de-escalation techniques, the patrol supervisor determines that the person is not a known or reasonably believed threat to others and that further interaction with the individual may result in an increased risk to the person, the public, or officers, the on-scene supervisor should develop a plan for tactical disengagement.

Tactical Disengagement Procedures:

If a subject is not responding or cooperative, does not present a known or reasonably believed threat to officers or others, and the on-scene supervisor determines that an immediate arrest is not required, the supervisor should proceed as follows:

1. Verbally brief the watch commander or appropriate district commander for the incident.
2. Attempt to use all appropriate and available department resources to safely resolve the situation.
3. Ensure that the family members, friends, and the subject are provided information about resources and services available to them, as reasonably possible under the circumstances. A list of these resources is available on the intranet and from the Mental Health Unit. Additional basic needs should also be considered.
4. After reasonable attempts are made to contact the subject without resolution, the supervisor should order officers to withdraw from the area.

Under these circumstances, officers should not:

1. Escalate or make forced entry into the location or close distance on the person while attempting tactical disengagement, unless a change in circumstances makes a closer intervention appropriate under the department's general orders.
2. Force entry to arrest the subject for pending misdemeanor charges or misdemeanor warrants. This does not prevent the subject from being charged out of custody.
3. Force entry to enforce civil commitment or emergency examination orders.
4. Require family, friends, or others involved to leave the area.

Reporting Tactical Disengagement:

When officers use tactical disengagement, the on-scene supervisor must create an incident report documenting the following elements:

1. Details of the call
2. Reasons for tactical disengagement
3. Actions taken to deescalate the situation
4. Actions taken to promote safety
5. Follow-up plans and referrals made
6. Flagged address for a safety bulletin

The supervisor for the incident will ensure that officers write appropriate incident reports, including an original report, all supplemental reports, crisis response report, video or digital recordings, victim/witness statements, and any other pertinent documents related to the incident.

Copies of all reports and statements should be forwarded to the Mental Health Unit by the end of the supervisor's shift.

The Panel notes and commends the City of Aurora for amending its policies to clarify the duty of an officer to prevent the unnecessary or unreasonable use of force by fellow officers.[743] Aurora policy, consistent with emerging best practices, provides[744]:

[743] *Directives Manual: Duty to Intervene*, Aurora Police Dep't at 5.9 (revised Oct. 7, 2020). The Panel did not review the City's bystander intervention training, but encourages the City to learn from the experience of other programs. The change in policy alone will not achieve the intended result without training. *See, e.g.*, *Ethical Policing is Courageous*, City of New Orleans, http://epic.nola.gov/home/ (last visited Feb. 18, 2021).

[744] *Directives Manual: Duty to Intervene*, Aurora Police Dep't at 5.9 (revised Oct. 7, 2020).

> Any sworn member who, while acting in his/her official capacity as a law enforcement officer, witnesses another member (regardless of rank or tenure) acting in his/her official capacity, use force that is clearly beyond that which is objectively reasonable, and lawful, given the totality of the circumstances shall, when in a position to do so, safely and immediately intervene to prevent and/or discontinue the use of force.
>
> The action required by the officer will depend on the circumstances of the incident. Appropriate action may include, but is not limited to:
>
> - Verbal or physical intervention;
> - Immediate notification to a supervisor; and
> - A direct order by a supervisor to cease the use of unreasonable force.

In addition, the Department made an important change to policy that requires that officers involved in a "significant physical altercation" be relieved once the altercation has ended by the first available officer who did not go "hands on."[745] This change in policy is a positive step towards ensuring that any subsequent use of force be based on the actual resistance at the time, and not on prior conduct by the person being taken into custody. The implementation of the policy will reduce unnecessary uses of force and be safer for officers and members of the community.

9. Use of the Carotid Hold

On June 9, 2020, the City of Aurora banned the use of carotid and choke holds.[746] This guidance is included in the policy on Less Lethal Uses of Force.[747] We recommend that it be repeated or cross referenced in Directive 5.3, "Use of Force and Deadly Force," and Directive 5.4, "Reporting and Investigating the Use of Force Tools Weapons and Physical Force."

Since Mr. McClain's death, the State Legislature of Colorado has banned the use of choke holds unless lethal force is authorized. The Panel notes that the choke hold and the carotid hold are different uses of force, but often conflated in public discourse surrounding policing. The State has defined a choke hold as:

> A method by which a person holds another person by putting his or her arm around the other person's neck with sufficient pressure to make breathing difficult or impossible and includes, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.[748]

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[745] *Directives Manual: Officer Relief Process*, Aurora Police Dep't at 5.10.1 (June 9, 2020).

[746] *Directives Manual: Carotid Control Hold and Chokeholds (Prohibited)*, Aurora Police Dep't at 5.8.3 (revised June 9, 2020).

[747] *Directives Manual: Carotid Control Hold and Chokeholds (Prohibited)*, Aurora Police Dep't at 5.8.3 (revised June 9, 2020).

[748] Ban Law Enforcement Use of Chokehold, H.B. 1264, 70th Gen. Assemb., Reg. Sess. (Colo. 2016), https://leg.colorado.gov/bills/hb16-1264.

C. Medical Events Following the Arrival of Aurora Fire

Aurora Police officers called for Aurora Fire to come to the scene after the officers twice applied a carotid hold to Mr. McClain. Upon arriving at the scene, medical personnel stated that they observed Mr. McClain struggling as he was restrained by the police.[749] Approximately six to seven minutes after their arrival, paramedics administered the sedative ketamine to Mr. McClain.[750] It was only after the administration of ketamine that medical personnel conducted a hands-on assessment of Mr. McClain, took vital signs, or otherwise evaluated his condition beyond simple observation.[751] Indeed, Paramedic Cooper told Major Crime investigators that they were "pretty much hands off" and only there to "assist if [officers] needed it."[752] Shortly after the administration of ketamine, Mr. McClain's heart stopped, and the emergency medical technicians ("EMTs") performed cardiopulmonary resuscitation ("CPR") and other advanced life support interventions while they transported Mr. McClain to the hospital.[753]

The Panel's review of Mr. McClain's pre-hospital care raises several areas of concern. While the Panel could not determine whether these had an impact on the outcome, these concerns include:

- Delays in a clear transfer of control from police to EMS;
- Lack of clear communication and possible information loss between Aurora Police and Fire;
- Delayed and incomplete assessment of Mr. McClain;
- Failure to obtain appropriate equipment;
- Inaccurate estimation of patient weight; and
- The role of cognitive errors in medical decision making.

We discuss each of these topics below and offer our recommendations to address these concerns together with more general recommendations stemming from the Panel's review of Aurora Fire policies through the course of our investigation.

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[749] Bradley Interview at 6:21; Cichuniec Interview at 8:38; DeJesus Interview at 3:58.

[750] Green Body Cam at 2:10, 8:51.

[751] *See supra*, Sections IV.A.9-10.

[752] Cooper Interview at 21:15.

In addition, FF DeJesus said that the Aurora Fire personnel did not evaluate Mr. McClain at the scene, rather they let the police "do their thing" because Mr. McClain was struggling and the fire personnel "didn't have any need to touch him at that point." DeJesus Interview at 6:00. And FF Bradley confirmed to Major Crime investigators that he wasn't directed to do "anything besides stand there" until after he got into the ambulance. Bradley Interview at 26:45.

[753] Aurora Fire Department - EMS Patient Care Report, General Offense Report at 344.

1. *Delays in Clear Transition of Care for Mr. McClain from Aurora Police to Aurora Fire*

a. Observations and Analysis

As described in Section IV.A.9, body worn camera footage indicates that after arriving on scene, Aurora Fire personnel approached Mr. McClain but stood back for several minutes and observed. At the time of their arrival, Mr. McClain was already in handcuffs, on his side, with two officers kneeling behind his back and restraining him.[754] Several other officers participated in continuing to restrain Mr. McClain.

The EMTs did not assert clear control of the situation and, in the Panel's view, it appears that Mr. McClain remained a police subject until he was sedated. It was not clear from the body worn camera footage which agency was in control until after Mr. McClain was administered ketamine. Indeed, the footage shows that Aurora Fire personnel largely maintained distance and did not intervene even when Mr. McClain made sounds of pain or distress. Even after Aurora Fire sedated Mr. McClain (at which point he should have clearly been a patient within Aurora Fire's control), Paramedic Cooper deferred to the police officers, telling them: "We'll give [the ketamine] a minute or two, see if that works, and, once it is, we'll go ahead, if you guys are okay with it, we'll uncuff him."[755] An Aurora Police officer later instructed that Mr. McClain instead be transferred to the gurney before being uncuffed, and EMS complied.[756]

The Panel was not able to determine whether this interaction, in isolation, indicated collaboration or deference by medical personnel. Had the Panel been able to interview the Aurora Fire personnel that treated Mr. McClain that night, we would have explored this topic. Nonetheless, over the course of our investigation, we were able to observe certain characteristics of the relationship between Aurora Police and Aurora Fire. The body worn camera footage suggests that the Aurora Fire personnel showed a concerning level of deference to the police officers at the scene regarding control of Mr. McClain and that there was no clear transition of care or command. Further, in our interview with Aurora Fire Chief Gray, he noted a widespread sense within Aurora Fire that "the patient is not a patient until the police say they are."[757] We are concerned that this represents a problem of both policy and culture between the two departments. The lack of clarity regarding which department is in control and when has the potential to create major problems for patient care, particularly in cases where there may be disagreement as to disposition or strategy. As discussed below, effective guidance, clear rules, and a culture that emphasizes patient safety would make clear to both Aurora Fire and Police personnel when medical staff should take control and when they must defer to law enforcement.

Based upon the Panel's review, it is not clear whether medical personnel, at all levels, feel both adequately authorized and administratively supported to proactively step in and voice patient safety concerns, in real-time, during a problematic encounter between a subject-patient and law

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[754] Leonard Body Cam 2 at 2:58.

[755] Green Body Cam at 9:04; Ward Body Cam 2 at 3:24.

[756] Green Body Cam at 10:48, 11:13.

[757] Panel's Interview with Aurora Fire Chief Fernando Gray (Feb. 10, 2021).

enforcement. In this situation, a culture of deferring to law enforcement appears to have resulted in medical personnel standing back and neither verbally nor physically intervening until law enforcement clearly yielded command.

These transition failures can compromise EMS providers' ability to adequately care for their patient. Best practices require that EMS play a more active role. "In many instances, police officers don't have the training to recognize when a citizen's medical condition is deteriorating… EMS providers have a professional responsibility to be an advocate for the patient regardless of their station in life — including when the patient is a criminal suspect being restrained or placed under arrest."[758]

b. Recommendation — Build Culture of Patient Advocacy

The Panel recommends that the City conduct a careful review of the culture within the Aurora Fire and Police Departments to ensure that each prioritizes the safety of the subject-patient alongside the safety of the officers, medical personnel, and bystanders. In particular, the City should undertake an analysis of EMS personnel's attitudes and perceptions surrounding all aspects of patient safety during a call for service, including whether or not EMS personnel feel empowered to act as advocates for patients. In addition, we understand from our interview with Fire Chief Gray that Aurora Fire has an internal "duty to act" policy, and we encourage the City to review this policy and determine whether it is adequate to serve its purpose. While the Colorado "Duty to Intervene" statute[759] does not specifically refer to EMS, we recommend that the City review this statute and consider whether Aurora Fire's "duty to act" policy merits any addition of language in line with the spirit of this directive.

2. Lack of Clear Communication and Possible Information Loss Between Aurora Police and Aurora Fire

a. Observations and Analysis

In the Panel's experience, the transition of patient care (also known as the "patient handoff") can be a common source of information loss which creates the potential for patient care errors. This problem can be particularly acute where there is a lack of clarity regarding the rules and authority surrounding the transition. Such ambiguity creates confusion, promotes miscommunication or the failure of communication, and can have a significant impact on patient outcomes.

The Panel's review indicates that a breakdown in communication, possibly caused by uncertainty regarding the transition, occurred in this case. The Panel observed body worn camera footage clearly showing Sgt. Leonard telling FF Bradley (a basic level EMT[760]) that "we put him

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[758] Steve Wirth, *Pro Bono: Dealing with Police Misconduct*, JEMS (2015), https://www.jems.com/administration-and-leadership/pro-bono-dealing-with-police-misconduct/

[759] Colo. Rev. Stat. § 18-8-802.

[760] *See* Bradley Interview at 2:22 (describing the EMT basic role as "the lowest guy" in the hierarchy on the fire truck).

out with a carotid twice… at least once successfully."[761] However, when asked, both Aurora Fire paramedics present at the scene (Paramedic Cooper and Lt. Cichuniec) told Major Crime investigators that they were not told (or were unaware) that Mr. McClain was previously unconscious.[762] FF Bradley was never asked if he knew Mr. McClain had been rendered unconscious by Major Crime investigators or when and if he passed that information on to the paramedics.[763] We note that any informality or absence of procedure governing the transition of care between the officers and EMS personnel could have contributed to a failure to record, document, or otherwise mentally catalogue key parts of the history and left EMS operating with incomplete information.

b. Recommendation — Formalize the Transition Process

To the extent any information loss impacted Mr. McClain's care, formalizing the handoff process may prevent future problems by assisting law enforcement in effectively identifying and communicating clinically important information to EMS. Although the medical literature has not focused on interagency handoffs in the field, the Panel observes that these handoffs can be high risk. In the hospital setting, the Panel's experience reflects that patient handoff is usually performed with the help of a template or "handoff tool" used to protect against missed steps and lost information, where the "handoff tool" can be a paper or electronic checklist, a pocket card, a mental mnemonic, or simply an agreed upon order for giving and receiving information in a structured way.

We recommend implementation of a simple model or template, and accompanying training, for all agencies that handle patient information and care (*e.g.*, Aurora Police, Aurora Fire, and Falck) on best practices for patient transitions. A template would have particular utility here, where a patient handoff is occurring from non-medical law enforcement officers to EMS personnel. It would facilitate a more structured, reliable, and safer handoff of patient care and a clear "start" of EMS authority in decision making. Although the Panel is not aware of any best practice model for formalizing the handoff between law enforcement and EMS, there are several models available for patient handoff between EMS and the hospital that could be adapted. For example, in 2009, the *American Journal of Healthcare Quality* published a comprehensive review of handoff tools detailing 24 different mnemonics used in various healthcare settings to improve communication.[764] While not all will be adaptable to the law enforcement-to-medical personnel handoff, even a simple "who, what, where, when, why, how" format would be an improvement — for example:

- Who is this person?

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[761] Leonard Body Cam 2 at 3:35. Notably, Paramedic Cooper and Lt. Cichuniec appear behind FF Bradley at this time, though it is not clear from the body worn camera footage whether either heard Sgt. Leonard.

[762] Cooper Interview at 26:54; Cichuniec Interview at 35:59.

[763] *See generally* Bradley Interview.

[764] Lee Ann Riesenberg et al., *Systematic review of handoff mnemonics literature*, Am. J. Med. Qual. (2009), https://pubmed.ncbi.nlm.nih.gov/19269930/.

- What prompted the call to police?
- Where are we headed, jail or hospital or mental health?
- When did this start?
- Why was EMS called?
- How have they been handled before we got here?

At minimum, a law enforcement-EMS handoff template should establish the expectation of a brief period, potentially thirty seconds or less, in which the reporter (the officer) and the receiver (EMS) provide each other with undivided attention in order to convey pertinent information and ask questions.

3. Delays in Assessment by EMTs

a. Observations and Analysis

(1) Background on Patient Assessment

Several documents and guidelines form the foundation of the educational content, expected knowledge and skills, and the overall scope of practice for EMTs and paramedics in the United States. These are maintained and periodically updated by the National Highway Traffic Safety Administration and available at EMS.gov. In particular, the following documents and guidelines form the basis for the discussion and recommendations that follow:

- Emergency Medical Services Education Agenda for the Future: A Systems Approach[765];
- Emergency Medical Services Core Content ("EMS Core Content")[766];
- National Emergency Medical Services Scope of Practice Model[767]; and
- National Emergency Medical Services Education Standards ("EMS Education Standards").[768]

Additionally, the National Registry of Emergency Medical Technicians ("NREMT") is a nationwide non-profit organization that certifies EMS providers. NREMT's mission is "to provide a valid, uniform process to assess the knowledge and skills required for competent practice by

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[765] Emergency Medical Services Education Agenda for the Future: A Systems Approach, NHTSA (2000), http://www.nhtsa.dot.gov/people/injury/ems/FinalEducationAgenda.pdf.

[766] Emergency Medical Services Core Content, NHTSA (2005). http://www.nhtsa.dot.gov/people/injury/ems/EMSCoreContent/images/EMSCoreContent.pdf.

[767] National EMS Scope of Practice Model, NHTSA (2007), https://www.ems.gov/pdf/2017-National-EMS-Scope-Practice-Mode_Change-Notices-1-and-2.pdf.

[768] National Emergency Medical Services Education Standards, NHTSA (2009), https://www.ems.gov/pdf/National-EMS-Education-Standards-FINAL-Jan-2009.pdf.

EMS professionals throughout their careers, and to maintain a registry of certification status."[769] NREMT certification exam content derives directly from the documents referenced above, and individuals who pass these exams receive a "National Registry" certification. The State of Colorado does not administer its own EMT certification exams and instead requires National Registry certification for Colorado EMS providers of all levels.[770] The medical personnel that responded to the call involving Mr. McClain included an Aurora Fire engine crew, consisting of two EMTs and two paramedics, and a Falck Ambulance crew that included one paramedic and one EMT. Aurora Fire responds to all 911 medical calls within Aurora but does not transport patients itself; instead, Falck Ambulance exclusively provides EMS transport services in Aurora.[771]

(2) Failure to Conduct a Complete Patient Assessment

Approximately six to seven minutes elapsed from the arrival of the first medical personnel on the scene until EMS personnel administered ketamine to Mr. McClain.[772] For much of this time, EMS personnel stood within a few feet of Mr. McClain. Based on the body worn camera footage, at no point in that period was Mr. McClain questioned by the medical crews. Further, there was no physical contact by any of the medical personnel captured in the footage or reported during post-incident interviews, prior to the injection of the sedation.[773] It also appears that limited medical equipment was brought to Mr. McClain's side prior to sedation.[774]

While a trained and experienced clinician can glean a substantial amount of useful information with simple observation, this observation only constitutes one of the components of effective clinical decision making — as outlined by NREMT and set forth in the EMS Education Standards below[775]:

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[769] *About The National Registry*, Nat'l Registry of Emerg. Med. Techs., https://www.nremt.org/about/about-us (last visited Feb. 20, 2021).

[770] Colo. Dep't Pub. Health & Env't, EMS provider certification, https://cdphe.colorado.gov/emergency-care/emergency-medical-services/ems-providers/ems-provider-certification (last visited Feb. 20, 2021).

[771] Panel's Interview with Aurora Fire Chief Fernando Gray (February 10, 2021); *Welcome to Falck Rocky Mountain*, us.Falck.com, https://us.falck.com/en/us_emergency/partners/falckrockymountain (last visited Feb. 20, 2021).

[772] Rosenblatt Body Cam at 9:46; Leonard Body Cam 2 at 2:41; Green Body Cam at 2:10; Dunson Body Cam at 8:08, 10:41 (showing Aurora Fire arriving around 10:50 P.M. but taking about another two minutes to arrive at the incident due to parking); Green Body Cam at 8:51 (showing Mr. McClain was administered ketamine around 10:59 P.M.).

[773] Although Aurora Fire's EMS Patient Care Report, prepared by Lt. Cichuniec, stated that the EMS personnel "[a]ttempted to check pt's pulse and we weren't able to due to him fighting and having hand cuffs on," Aurora Fire Department - EMS Patient Care Report, General Offense Report at 346, we were not able to identify any attempt to check Mr. McClain's pulse in the body worn camera footage. In addition, we note that Aurora Fire personnel confirmed to Major Crime investigators that they were "pretty much hands off." Cooper Interview at 21:15; *see also, generally, supra* Section IV.A.9.

[774] Green Body Cam at 2:52.

[775] National Emergency Medical Services Education Standards at 20, NHTSA (2009), https://www.ems.gov/pdf/National-EMS-Education-Standards-FINAL-Jan-2009.pdf.

	EMR	EMT	AEMT	Paramedic
Primary Assessment	Simple depth, simple breadth • Primary assessment for all patient situations o Level of consciousness o ABCs o Identifying life threats o Assessment of vital functions • Begin interventions needed to preserve life	**EMR Material PLUS:** Fundamental depth, simple breadth • Primary assessment for all patient situations o Initial general impression o Level of consciousness o ABCs o Identifying life threats o Assessment of vital functions • Integration of treatment/ procedures needed to preserve life	**EMT Material PLUS:** Fundamental depth, foundational breadth • Primary assessment for all patient situations o Initial general impression o Level of consciousness o ABCs o Identifying life threats o Assessment of vital functions • Integration of treatment/ procedures needed to preserve life	**AEMT Material PLUS:** Complex depth, comprehensive breadth • Primary assessment for all patient situations o Initial general impression o Level of consciousness o ABCs o Identifying life threats o Assessment of vital functions • Integration of treatment/ procedures needed to preserve life

As indicated above, other critical components of a complete patient assessment include talking to and touching the patient, identifying life threats, and measuring initial vital signs. To supplement this primary assessment, both EMS Core Content, which "describes what EMS providers must know and how they practice,"[776] and EMS Education Standards[777] recommend additional exam techniques, measurements, and monitoring — often referred to as the secondary assessment — to assist in the rapid development of an accurate and complete clinical picture. A secondary assessment involves the following[778]:

Secondary Assessment	Simple depth, simple breadth • Performing a rapid full body scan • Focused assessment of pain • Assessment of vital signs	**EMR Material PLUS:** Fundamental depth, foundational breadth Techniques of physical examination • Respiratory system o Presence of breath sounds • Cardiovascular system • Neurological system • Musculoskeletal system • All anatomical regions	**EMT Material PLUS:** Complex depth, foundational breadth Assessment of • Lung sounds	**AEMT Material PLUS:** Complex depth, comprehensive breadth Techniques of physical examination for all major • Body systems • Anatomical regions

Although Mr. McClain was restrained by Aurora Police officers when Aurora Fire personnel arrived, this should not have prevented EMS personnel from initiating at least a primary assessment and conducting a brief hands-on evaluation of Mr. McClain's status. In particular, Aurora Fire personnel should have sought to take basic measurements — such as fingerstick glucose, peripheral pulses (rate, basic rhythm, and quality), capillary refill, respirations (rate and quality), body temperature, pulse oximetry, and responsiveness — when doing so would not have interfered with the officers' ability to restrain Mr. McClain, to the extent such control was even necessary.

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[776] National EMS Core Content, NHTSA (2005), https://www.ems.gov/pdf/education/EMS-Education-for-the-Future-A-Systems-Approach/National_EMS_Core_Content.pdf.

[777] National Emergency Medical Services Education Standards, NHTSA (2009), https://www.ems.gov/pdf/National-EMS-Education-Standards-FINAL-Jan-2009.pdf.

[778] National Emergency Medical Services Education Standards at 20, NHTSA (2009), https://www.ems.gov/pdf/National-EMS-Education-Standards-FINAL-Jan-2009.pdf.

At the time that Aurora Fire arrived, Mr. McClain was still speaking and responding to the officers. For example, as noted above, as Aurora Fire looked on, Mr. McClain cried out, "Stop, please!" and Officer Roedema responded, "Well stop fighting us!"[779] Mr. McClain replied, "I'm trying!" and then, "I can't feel…please help me," before falling silent.[780] This indicates that there was at least a brief period of time when he could have interacted with EMS personnel.

We acknowledge that the inability to completely assess a patient is a daily reality in some encounters, particularly for those patients that are nonverbal, uncooperative, or confused. However, Mr. McClain was restrained and at least minimally verbal when the medical personnel arrived. In the Panel's judgment, Aurora Fire personnel should have attempted more assessment than that we were able to observe on the body worn camera footage. Over the next several minutes after their arrival, Mr. McClain continued to groan, cry out, or make other sounds, but eventually was no longer answering or speaking coherently[781] — indicating a potential change in his clinical status. That change of status may have been noted by EMS if they had conducted a better primary assessment at the time of arrival followed by serial assessments as they waited for the arrival of the Falck Ambulance crew. In particular, as noted above, Aurora Fire appears to have decided to sedate Mr. McClain without evaluation beyond the information they received from the officers and visual observation. Repeated and more thorough assessments may have prompted a reconsideration of their presumptive diagnosis and plan. For example:

- A fingerstick glucose measurement would have enabled EMS to evaluate whether Mr. McClain was suffering from abnormal blood sugar levels. Hypoglycemia can cause symptoms similar to excited delirium, including agitation, confusion, failure to comply with instructions, sweating, and lethargy.[782] In contrast, very high blood sugar can cause rapid heart rate and breathing accompanied by confusion and altered mental status.

- Application of a cardiac monitor and measuring of initial vital signs could have revealed abnormal electrocardiogram changes or arrhythmia pointing to an alternate diagnosis for his vomiting and shortness of breath.

- Body temperature is an important objective sign in identifying excited delirium and can be useful in helping to distinguish excited delirium from other potential causes of agitation or confusion.[783] One study of excited delirium fatalities showed "mean core body temperature… was 40.7°C" (105.3°F).[784] And yet, upon arrival to the hospital, Mr. McClain was documented

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[779] Rosenblatt Body Cam at 10:51.

[780] Rosenblatt Body Cam at 10:51.

[781] *See supra*, Section IV.A.9.

[782] Hypoglycemia Clinical Presentation, Medscape (July 23, 2020), https://emedicine.medscape.com/article/122122-clinical.

[783] Deborah C. Mash, *Excited Delirium and Sudden Death: A Syndromal Disorder at the Extreme End of the Neuropsychiatric Continuum*, 7 Frontiers in Physiology (2016).

[784] Deborah C. Mash et al., *Brain biomarkers for identifying excited delirium as a cause of sudden death*, 190(1-3) Forensic Sci. Int. (Sept. 10, 2009).

as having a normal body temperature.[785] Prior to the 2020 emergence of COVID-19, most EMS agencies within the United States did not carry thermometers, and temperature assessment in this case would therefore likely have needed to be tactile. However, the absence of hyperthermia may have prompted consideration of alternative diagnoses to excited delirium.

At minimum, Aurora Fire personnel should have attempted additional assessment prior to proceeding with sedation. Notably, we observed that once they made a decision to sedate Mr. McClain, there was a fairly significant sense of urgency conveyed among all of the personnel at the scene, *e.g.*, "What are we waiting for…" and "What is taking so long?"[786] In a situation where a patient is demonstrating ongoing physical violence or resistance, this level of pressure to proceed may be warranted for the safety of all involved. In the case of Mr. McClain, however, his level of "resistance" was declining, to the extent he was resisting at all, and he appears to have been completely secured by law enforcement. It is not clear if the medics felt pressured to move more quickly than necessary in this case, and we recommend that the City further explore this issue as it looks toward improvements in patient handoff. In this case, slowing down the process could have avoided cognitive errors, which we discuss below, and prompted Aurora Fire personnel to conduct additional assessment prior to sedating Mr. McClain.

b. Recommendations

We recommend that the City reevaluate Aurora Fire's policies, procedures, and trainings surrounding patient assessment. At minimum, Aurora Fire should clarify, codify, and reinforce minimum standards regarding basic patient assessment. In addition, Aurora Fire should clarify, codify, and reinforce minimum standards regarding patient assessment prior to chemical sedation. Finally, law enforcement training should emphasize the importance of allowing medical crews adequate time (when safe to do so) to assess and monitor a patient prior to intervention.

4. Failure to Obtain Appropriate Equipment

a. Observations and Analysis

We were not able to identify internal Aurora Fire policies that require fire personnel to bring specific equipment (*i.e.*, bags, monitor, glucometer, oxygen) to the patient's side during a medical response,[787] and there is currently no widely-recognized best practice guideline for mandating which equipment should initially be carried to the patient. In any event, as noted above,

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[785] Adams County Autopsy Report – Ingui, M., General Offense Report at 203 (noting that "[t]he decedent was not hyperthermic (febrile) upon admission to the hospital"). Other contemporaneous records confirming this assessment were not available to the Panel for review.

[786] Green Body Cam at 8:09; Nunez Body Cam 1 at 1:39.

[787] We note that Aurora Fire Policy 5.4 states that "[w]hen the ambulance is the first unit arriving on scene, the crew should immediately leave the ambulance with the appropriate equipment including stretcher, ALS kits, heart monitor and portable suction device." Aurora Fire Policy 5.4, AFR & Transport Provider On-Scene Coordination. Here, where the ambulance arrived after AFR, the ambulance crew should "confirm that the requisite equipment has been brought to the scene." Aurora Fire Policy 5.4, AFR & Transport Provider On-Scene Coordination. It is not clear whether and what equipment Aurora Fire personnel must bring to the scene separate from the ambulance crew.

it appears from the body worn camera footage that limited medical equipment was brought to Mr. McClain's side prior to sedation, if any.[788]

In the case of Mr. McClain, the presence of additional equipment could have induced a higher level of clinical urgency on the part of the medical crew to begin additional assessment. This assessment may have provided information that indicated a rapidly declining clinical status, assisted in reaching a diagnosis, and/or prompted a reevaluation of the sedation plan.

Strict adherence to protocol,[789] including verification that all equipment required for sedation was present and available beside the patient, could have allowed earlier discovery that a key piece of respiratory monitoring equipment, the capnography monitor, was not in the expected location.[790] While the capnography monitor was ultimately applied in accordance with protocol, the delay in locating this device[791] meant that it was placed after Mr. McClain's cardiac arrest.[792] The data from this device in the several minutes preceding his cardiac arrest may have allowed EMS personnel to anticipate, prepare for, and possibly even prevent Mr. McClain's precipitous decline. In this case, all three paramedics on scene allowed sedation to proceed without all of the appropriate equipment at the side of the patient.

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[788] It is difficult to discern from the body worn camera footage whether there was any equipment. *See* Green Body Cam at 2:52 (showing a member of the medical crew with a bag potentially containing equipment). *See also* Green Body Cam at 8:12-11:00; Nunez Body Cam 1 at 0:10-2:38 (showing the scene generally leading up to and after the ketamine was administered).

[789] *See* Protocol 6010, Agitated/Combative Patient, General Offense Report at 339, which requires the following after the administration of ketamine:

[790] Aurora Fire Department – EMS Patient Care Report, General Offense Report at 346 ("Falck was unable to find capnography as it wasn't with the BVM so straight bagging and suction was performed until the capnography was found.").

Had respiratory monitoring been conducted, the detection of exhaled carbon dioxide provided by this equipment would have "provide[d] a graphic picture of the ventilatory status, give[n] early warning of changes in the patient's cardiopulmonary status, supplie[d] indisputable documentation of the patient's ventilatory status and detect[ed] the presence of pulmonary pathology. Abnormal capnography values can be traced to changes in ventilation, perfusion or metabolism." David A. Wampler, *Capnography As A Clinical Tool*, EMS World (2020), https://www.emsworld.com/article/10287447/capnography-clinical-tool.

[791] Aurora Fire Department – EMS Patient Care Report, General Offense Report at 346 ("Falck was unable to find capnography as it wasn't with the BVM so straight bagging and suction was performed until the capnography was found.").

[792] Aurora Fire Department – EMS Patient Care Report, General Offense Report at 345.

b. Recommendation

We recommend a thorough review of Aurora Fire's protocols, policies, and trainings related to patient sedation to ensure that:

- A complete pre-sedation primary assessment, including cardiac and respiratory monitoring, occurs whenever feasible; and
- Highest priority be given to the completion of a primary assessment and initial vitals following sedation where an assessment is not feasible in advance.

5. Inaccurate Estimation of Mr. McClain's Weight

a. Observations and Analysis

At the time of Aurora Fire's contact with Mr. McClain, Aurora EMS protocols and education provided for an approved dose of ketamine of five milligrams per kilogram.[793] Estimates of Mr. McClain's weight by the various clinicians involved in this case ranged from 85 to 100 kilograms (187 to 220 pounds). This estimation resulted in Mr. McClain's receiving a ketamine dosage of 500 milligrams.[794] However, Mr. McClain weighed 140 pounds (63.5 kilograms) at autopsy — as much as eighty pounds less than some EMS personnel estimates.[795] Neither the Panel, nor the coroner,[796] found conclusive evidence that the ketamine administered to Mr. McClain was a direct cause of, or even contributed to, his death. Specifically, there was no evidence that had the weight estimation been accurate, that the outcome would have been any different. However, as we discuss further below in Section VI.A, this case has broader implications surrounding the causes of inaccurate weight estimations and the attendant risks of weight-based pre-hospital medications, including ketamine.

In addition, Lt. Cichuniec's explanation for how he chose the ketamine dosage for Mr. McClain — discussed above in Section IV.A.10 — suggests that the specific ketamine dosing outlined in Aurora's protocol has been supplanted by an informal dose rounding practice, potentially the result of a training offered to Aurora Fire paramedics.[797] It is unclear whether this informal practice was taught with the knowledge and approval of the medical director.[798] However, the Panel recommends that the practice set forth in the protocol be the same as the process taught to the field clinicians, the same as the clinical practice in the field, and the same as the process expected in the post-hoc quality assurance review of cases.

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[793] See 9175 Medications, General Offense Report at 341; Cooper Interview at 45:26.

[794] Cichuniec Interview at 15:42.

[795] Cichuniec Interview at 15:51; Adams County Autopsy Report – Ingui, M., General Offense Report at 195; Falck Patient Care Report at 1.

[796] Adams County Autopsy Report – Ingui, M., General Offense Report at 193.

[797] Cichuniec Interview at 15:51.

[798] Dr. Hill did not author or deliver the excited delirium training presentation present in Major Crime's records, *see* AFD Ketamine Inservice 1 – Ingui, M., General Offense Report at 290-322, and we were unable to interview him.

b. Recommendations

We recommend that the City explore education and training on accurate weight estimation, including the role implicit bias may play in such a task. This education and training should also emphasize that, when feasible, efforts should be made to verify the actual weight of a patient (*e.g.*, through use of a scale, or review of an individual's hospital record or drivers' license) prior to the administration of any weight-based medication.

In addition, the Panel's investigation reflects that the cognitive shortcut of dose rounding has supplanted the specific ketamine dosing outlined in the weight-based protocol on file with the Colorado Department of Public Health and Environment.[799] In the Panel's experience, consistency between education, execution, and evaluation of protocols is important to mitigate risks associated with poor clinical outcomes, misinterpretation of guidelines, and failure to recognize and remediate protocol deviations. In addition, ideally education on *waivered* medications[800] and protocols would be provided directly by the medical director or a fellow EMS physician. That said, when education is delivered by non-physician clinicians, the educator should be certified and experienced in delivery of the care in the field being taught, and the training should not deviate from the established and documented protocol. Should viable and safe cognitive shortcuts be identified, these should be added to protocols to ensure uniform language and expectations, particularly for state monitored medications. We offer a strong recommendation that the process for waivered medication be consistent from design to post-hoc quality assurance. We also recommend that the City consider amendment of the current waiver language on file with the State of Colorado in cases where safe and effective cognitive shortcuts have created inconsistency between the letter and the spirit of the waiver.

6. Cognitive Errors in Medical Decision Making

a. Observations and Analysis

The body worn camera footage, interviews with Major Crime investigators, and other documentation indicate that Aurora Fire's medical treatment of Mr. McClain was guided by Aurora Fire's "Agitated/Combative Patient Protocol" and Aurora Fire's diagnosis of Mr. McClain as suffering from excited delirium syndrome.[801] Despite controversy in the medical community, excited delirium is a recognized medical condition in the protocols that guide pre-hospital care in Aurora and in the National EMS Education Standards and the Core Content documents discussed

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[799] *See* 9175 Medications, General Offense Report at 341.

[800] The Colorado Department of Public Health and Environment regulates the scope of practice for EMS providers and allows EMS medical directors to obtain permission through a waiver system to expand the standard scope of practice and allow paramedics to administer ketamine outside of the hospital setting. *See CDPHE-facilitated committee reviewing ketamine waiver program*, Colo. Med. Soc'y (Nov. 1, 2020), https://www.cms.org/articles/cdphe-facilitated-committee-reviewing-ketamine-waiver-program.

[801] *See, e.g.*, Cichuniec Interview at 15:00, 1:17:20; Cooper Interview at 12:52, 44:30; *Aurora EMS Protocols: 6010 Agitated/Combative Patient*, Aurora Fire at 99 (2019); 6010 Agitated/Combative Patient Protocol, General Offense Report at 339.

above in Section V.C.3.[802] On the evening of August 24, 2019, Aurora Fire's Agitated/Combative Patient Protocol provided the following decision tree for guidance[803]:

[802] The Panel notes the existence of multiple controversies surrounding excited delirium, including ongoing debate regarding whether excited delirium is a legitimate diagnosis and whether "the diagnosis is…used by law enforcement to legitimize police brutality and to retroactively explain certain deaths occurring in police custody." Joshua Budhu, J. et al., *How "Excited Delirium" Is Misused To Justify Police Brutality*, Brookings Inst. (Aug. 10, 2020), https://www.brookings.edu/blog/how-we-rise/2020/08/10/how-excited-delirium-is-misused-to-justify-police-brutality/. However, these issues are outside of the scope of this Report and excited delirium is a recognized condition in Aurora's current policies and procedures.

[803] *Aurora EMS Protocols: 6010 Agitated/Combative Patient*, Aurora Fire Rescue at 99 (2019); 6010 Agitated/Combative Patient Protocol, General Offense Report at 384.

With excited delirium as their working diagnosis, Aurora Fire personnel proceeded with ketamine sedation in accordance with the Agitated/Combative Patient Protocol.[804] Aurora Fire's Medications protocol also provided the following instructions regarding the administration of ketamine[805]:

9175 MEDICATIONS

KETAMINE

Description

Ketamine is a non-competitive NMDA receptor antagonist which produces complex neuroinhibition resulting in dissociative amnestic and analgesic effects.

Onset & Duration

- Onset: 1-5 minutes with IM administration
- Duration: 15-30 minutes

Indications

- Adult patient with signs of excited delirium where the safety of the patient and/or providers is of substantial concern

Contraindications

- Relatively contraindicated in penetrating eye trauma

Side Effects

- Laryngospasm: very rare adverse reaction causes stridor and respiratory distress. After giving ketamine:
  - Prepare to provide ventilatory support including bag-valve-mask ventilation and suction
  - Apply cardiac monitoring, capnography, and pulse oximetry once sedated
  - Establish IV/IO access
- Emergence Reaction: presents as anxiety, agitation, dysphoria, hallucinations or nightmares. Can present as the ketamine is wearing off. For severe reactions, consider midazolam.
- Nausea and vomiting: always have suction available after ketamine administration. Administer Zofran as needed.
- Hypersalivation: suction is usually sufficient.

Dosage and Administration

Adult:

- 5mg/kg IM (concentration is 500mg/5cc)
- **CONTACT BASE** if additional dose needed. Additional dose will be ½ of the initial dose.

Special Considerations

- Excited delirium is a medical emergency. Expedite a rapid and safe transport once it is safe to do so.
- Once sedated, patient must be placed on cardiac monitor, capnography, and pulse oximetry during transport.
- Apply physical restraints once patient sedated and maintain during transport
- All cases of ketamine use will be reviewed by the Medical Director.

Protocol

- Agitated/Combative Patient

We note that the protocol indicates ketamine use for an "[a]dult patient with signs of excited delirium where the safety of the patient and/or providers is of substantial concern."[806]

Although the Panel reaches no conclusion about whether Mr. McClain had excited delirium, it appears that that the Aurora officers and medical personnel concluded that Mr. McClain was suffering from excited delirium syndrome.[807] However, the Panel's review of the

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[804] *See generally, supra* Section IV.A.9-10; 6010 Agitated/Combative Patient Protocol, General Offense Report at 384.

[805] *Aurora EMS Protocols: 9175 Medications*, Aurora Fire Rescue at 142 (2019); 9175 Medications, General Offense Report at 341.

[806] *Aurora EMS Protocols: 9175 Medications*, Aurora Fire Rescue at 142 (2019); 9175 Medications, General Offense Report at 341.

[807] *See, e.g.*, Cooper Interview at 12:52; Green Body Cam at 10:14; Nunez Body Cam 2 at 3:50.

body worn camera footage raises some questions as to whether the presence or absence of certain symptoms in Mr. McClain's case should have prompted further investigation by the EMS personnel as to whether excited delirium was the appropriate diagnosis.

The Aurora Police officers and fire personnel reported that Mr. McClain had "incredible strength,"[808] was "pouring sweat,"[809] and appeared to be "on something."[810] This apparently led medical personnel to reach a conclusion that they did not confirm through an independent examination.[811] The body worn camera footage does not reflect a clinical examination or assessment of Mr. McClain by Aurora Fire before or after they diagnosed Mr. McClain. Rather, the Panel observes that when the first firefighter arrived on the scene, he was immediately told by officers that Mr. McClain was "obviously on something."[812] And Paramedic Cooper told Major Crime investigators that he observed Mr. McClain for one minute — while remaining "pretty much hands off" — before concluding that Mr. McClain had excited delirium.[813] The body worn camera footage does not reflect any effort by Aurora Fire to test or confirm that diagnosis, and the administration of ketamine appeared to be a foregone conclusion. Based on the Panel's review of Aurora Fire's protocols, had Mr. McClain displayed the described symptoms when the medical staff arrived, and had medical personnel conducted an evaluation to confirm these symptoms, the City's excited delirium protocol would have been the appropriate course of action.[814]

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[808] Green Body Cam at 4:30 (reflecting that Officer Roedema said Mr. McClain "has incredible strength"); s*ee also* Woodyard Interview at 16:19 (referring to Mr. McClain as "incredibly strong").

[809] Cooper Interview at 13:15.

[810] Leonard Body Cam 1 at 1:38; Leonard Body Cam 2 at 2:40, 3:30.

[811] The Panel notes that research has concluded that persons diagnosed with excited delirium can demonstrate the following "pre-hospital" features.

Table 1: ExDS Prehospital Potential Features and Frequencies with 95% Confidence Intervals

FEATURE	FREQUENCY % (95% CI)
Pain Tolerance	100 (83-100)
Tachypnea	100 (83-100)
Sweating	95 (75-100)
Agitation	95 (75-100)
Tactile Hyperthermia	95 (75-100)
Police Noncompliance	90 (68-99)
Lack of Tiring	90 (68-90)
Unusual Strength	90 (68-90
Inappropriately Clothed	70 (45-88)
Mirror/Glass Attraction	10

White Paper Report on Excited Delirium Syndrome, U.S. Dep't of Just., Off. Just. Programs (Sept. 2009), https://www.ojp.gov/library/abstracts/white-paper-report-excited-delirium-syndrome#:~:text=This%20is%20the%20report%20of,as%20well%20current%20and%20emerging.

[812] Leonard Body Cam 2 at 2:38; Dunson Body Cam at 10:40.

[813] Cooper Interview at 12:52, 21:15.

[814] 6010 Agitated/Combative Patient Protocol, General Offense Report at 384.

But in the Panel's view, EMS diagnosis-based protocols and processes can be a double-edged sword. On one hand, protocols can be confining. In the Panel's experience, the mental process of choosing a protocol and executing it from beginning to end can impair the diagnostic flexibility that would allow an experienced clinician to pull from multiple sources to arrive at a correct diagnosis or therapy. But on the other hand, protocols can help mitigate the effect of assumptions, biases, shortcuts, and other cognitive errors that impact clinical decision making.

Based on the limited evidence available to the Panel, we cannot conclude whether cognitive errors played a role in Mr. McClain's medical treatment. However, the Panel observes that the following common cognitive errors can influence medical professionals to take shortcuts in the clinical decision-making process:

- ***Diagnostic Anchoring***. Diagnostic anchoring is defined as "prematurely settling on a single diagnosis based on a few important features of the initial presentation and failing to adjust as new information become available."[815]

- ***Diagnosis Momentum***. Diagnosis momentum occurs "once a diagnostic label has been assigned to a patient by another individual[.] [I]t is very difficult to remove that label and interpret…symptoms with fresh eyes."[816]

- ***Confirmation Bias***. Confirmation bias "is reflected in a tendency to look for confirming evidence to support the [clinician's] hypothesis, rather than look for disconfirming evidence to refute it… [C]onfirmation bias may reflect a selective tendency to…settle…for a satisfactory but not optimal result" and "may seriously compound errors that arise from *anchoring*, where a prematurely formed hypothesis in inappropriately bolstered."[817]

- ***Ascertainment Bias***. With ascertainment bias, clinician thinking "is pre-shaped by expectations or by what the [clinician] specifically hopes to find."[818] In the Panel's view, this is the area in which any previous experiences can color the individual interpretation of facts. While this may often be referred to simply as "clinical experience," and can be extremely valuable as a tool for rapidly arriving at an accurate diagnosis, it can also be the place where any number of inherent biases (gender, sexual identity, race, ethnicity, diagnosis, social, professional, economic, age, weight, etc.) can have positive or negative effects.

The following example illustrates how the above-described cognitive errors can influence healthcare providers' clinical assessment and treatment of medical emergencies. Consider a scenario in which EMS is called for a patient who has "collapsed." EMS personnel's mental expectations, anxieties, and preparations going into this scenario will differ depending on whether

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[815] Justin Morgenstern, *Cognitive Errors in medicine: The common errors*, First10EM (Sept. 22, 2019), https://first10em.com/cognitive-errors/.

[816] Justin Morgenstern, *Cognitive Errors in medicine: The common errors*, First10EM (Sept. 22, 2019), https://first10em.com/cognitive-errors/.

[817] Pat Croskerry, *Achieving Quality in Clinical Decision Making: Cognitive Strategies and Detection of Bias*, Acad. Emerg. Med., 9(11): 1184, 1189 (2002).

[818] Pat Croskerry, *Achieving Quality in Clinical Decision Making: Cognitive Strategies and Detection of Bias*, Acad. Emerg. Med., 9(11):1184, 1187 (2002).

the call is to a nursing home, an elementary school, a high school football field, a doctor's office, or a well-known college "dive bar." While EMS's mental list of possible diagnoses for a "collapse" will contain the same items, the mental ranking of the most likely scenarios will vastly differ depending on the location of the collapsed patient. Although this thinking can help to facilitate accurate diagnosis and care, it may also cloud that diagnosis and administration of care when the facts do not align with medical personnel's expectations.

To the extent cognitive errors may have occurred here, adherence to diagnosis-based protocol and processes by EMS personnel can help guide clinical care and help neutralize the impact of these cognitive errors and biases. In addition, education and training on cognitive errors can assist EMS providers in avoiding potentially problematic cognitive errors that impact patient care.

b. Recommendations

We recommend that the City monitor ongoing developments in the local, state and national debate surrounding the diagnosis and pre-hospital treatment of excited delirium. In connection with these efforts, any policies or protocols relating to excited delirium should be revised to keep sections related to excited delirium distinct, thereby making any revisions easier to implement should further development necessitate them. Aurora Fire should also continue to provide excited delirium education emphasizing early recognition, coordination between agencies, physical restraint for the minimal amount of time necessary, and safe and expeditious delivery of chemical sedation with an emphasis on patient safety.

We also urge Aurora Fire to develop and distribute education on cognitive errors in clinical decision making. In addition, the Panel discusses specific protocol recommendations in more detail below.

7. Updates to Aurora Fire Protocols

As we note above, the Panel reaches no conclusion about whether Mr. McClain had excited delirium. Nonetheless, during the course of our investigation, we reviewed and assessed a wide range of Aurora EMS protocols — including those related to excited delirium — and offer the following recommendations to improve specific protocols even where Mr. McClain's treatment did not necessarily implicate those protocols.

a. Improve Protocol Linking

We have identified a need for better clarity in the Aurora EMS protocols. The initial approach to patients with behavioral complaints should fall under the "Universal Altered Mental Status Protocol" and the flow charts provided in the protocols for the altered mental status patient (4010),[819] the psychiatric/behavioral patient (6000),[820] and the agitated/combative patient (6010).[821] These should refer clearly to each other and to the precedence and importance of a

[819] *Aurora EMS Protocols: 4010 Universal Altered Mental Status*, Aurora Fire Rescue at 76 (2019).

[820] *Aurora EMS Protocols: 6000 Psychiatric/Behavioral Patient*, Aurora Fire Rescue at 97-98 (2019).

[821] 6010 Agitated/Combative Patient Protocol, General Offense Report at 384.

directed medical assessment to determine the absence or presence of an organic cause for altered mental status. The National Model EMS Clinical Guidelines provide an excellent framework for the design of a protocol that gives more specific parameters for patient assessment and clear cross-linking of associated protocols.[822]

b. Implement a Checklist

Often, recalling the specific details within a protocol is difficult in the middle of a call and reliance on memory alone can result in skipped steps particularly in the case of high-acuity low-frequency events. The use of physical checklists for high-risk, low-frequency events in medicine and for procedures with multiple steps is a well-established best practice.[823] The benefit of using checklists and other memory aids is well researched in medicine.[824] In addition, simulation training is valuable to reinforce process and improve patient safety.[825] We strongly recommend implementation of a manual checklist process for sedation that includes incorporating the items discussed further below.

(1) Early Monitoring Including ETCO2 in Agitated Patients

As discussed in Section V.C.4, cardiac and respiratory monitoring should be performed in all cases of suspected excited delirium requiring sedation. In the Panel's experience, cardiac and respiratory monitors would ideally be applied prior to the administration of any medication. However, we recognize that the feasibility of doing so in the field with a combative patient can vary from case to case. Thus, we recommend adjusting written protocol and educational content to place *significant emphasis* on the earliest possible application of cardiac and respiratory monitors as a primary intervention in suspected excited delirium cases. Guidance should include that *all* necessary pieces of equipment required by protocol be accounted for and be at the side of the patient *prior* to the administration of sedation.

(2) Measurement of Fingerstick Glucose

Fingerstick glucose measurement was among the assessments not performed early in this case, as discussed above in Section V.C.3. Aurora Fire protocols for evaluation and sedation of patients should explicitly call for measurement of fingerstick glucose as a primary survey tool and one that is mandatory before proceeding with chemical sedation.

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[822] *National Model EMS Clinical Guidelines: Agitated or Violent Patient/Behavioral Emergency*, Nat. Ass'n of State EMS Officials at 53-54 (Sept. 2017), https://www.ems.gov/pdf/advancing-ems-systems/Provider-Resources/National-Model-EMS-Clinical-Guidelines-September-2017.pdf.

[823] Atul Gawande , *The checklist manifesto: How to get things right*, Metropolitan Books: New York (2009); Shaugh Maxwell, *Use Checklists To Minimize Mistakes In The Field*, JEMS (June 2014). https://www.jems.com/training/use-checklists-minimize-mistakes-field/.

[824] *See* Chulin Chen et al., Use and implementation of standard operating procedures and checklists in prehospital emergency medicine: a literature review, 34 Am. J. Emerg. Med. 2432-2439 (Sept. 2016).

[825] *See, e.g.*, Manish I. Shah MI, et al., *Impact of high-fidelity pediatric simulation on paramedic seizure management*, Prehosp. Emerg Care. (Mar. 8, 2016).

(3) Temperature Assessment and Management

We recommend the addition of non-contact temperature measurement to the protocols for behavioral problems (6000),[826] combativeness (6010),[827] altered mental status (4010),[828] and hyperthermia (5010).[829] In the Panel's experience, as of 2020 the use of non-contact thermometry has become much more widespread in EMS and we encourage its use as a diagnostic tool to aid in the evaluation of patients that may fall within the listed protocols. In addition, we recommend that the hyperthermia treatment protocol be amended to include excited delirium in its list of non-environmental causes for consideration in the treatment pathway. Discovery of markedly elevated temperatures in patients suspected of having excited delirium should prompt aggressive temperature management techniques. Conversely, the absence of hyperthermia, while not entirely precluding excited delirium, should prompt a strong consideration of alternative diagnoses. We further recommend that field personnel consider a discussion with online medical control prior to sedation under the excited delirium section protocol in the absence of hyperthermia.

c. Supplemental Oxygen

In the Panel's experience, there is a demonstrated benefit of supplemental oxygen in all of the conditions that the coroner mentioned as possible causes of death for Mr. McClain.[830] The Panel's experience suggests that in aspiration, hypoxia, asthma attack, cardiac arrhythmia, excited delirium, acute coronary syndrome (myocardial infarction or heart attack), idiopathic drug reaction, and psychiatric illness, early delivery of supplemental oxygen is not harmful and may be beneficial.[831] Supplemental oxygen should be emphasized in the altered mental status and agitation protocols and the City should consider separation of oxygen into a separate and required protocol step.

d. Fluid Bolus

In the Panel's experience, the benefits of fluids — specifically, a one to two liter bolus of room temperature or cooled 0.9% normal saline — in excited delirium are multiple. The primary benefit is that the administration of room temperature or mechanically cooled fluids helps to reduce core body temperature.[832] Given the near-universal presence of hyperthermia in excited delirium, protocols around the country have moved to the inclusion of a one to two liter bolus of room temperature or cooled fluid for this syndrome.[833] Intravenous fluid infusion can also treat

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[826] *Aurora EMS Protocols: 6000 Psychiatric/Behavioral Patient*, Aurora Fire Rescue at 97 (2019).

[827] 6010 Agitated/Combative Patient Protocol, General Offense Report at 384.

[828] *Aurora EMS Protocols: 4010 Universal Altered Mental Status*, Aurora Fire Rescue at 76 (2019).

[829] *Aurora EMS Protocols: 5010 Hypothermia*, Aurora Fire Rescue at 92 (2019).

[830] *See* Adams County Autopsy Report – Ingui, M., General Offense Report at 203.

[831] R. D. Branson & J. A. Johannigman, *Pre-Hospital Oxygen Therapy*, 58 Respiratory Care 86-97 (2012).

[832] Ericka L. Fink et al., *Fever control and application of hypothermia using intravenous cold saline*, 13 Pediatric Critical Care Medicine 80-84 (2012).

[833] *See e.g.*, Protocol Title: Behavior Emergencies/Excited Delirium, NCECC (North Carolina), http://ncecc.net/wp-content/uploads/2012/03/Behavioral-Emergencies-2017-03.pdf*; Flathead County Pre-Hospital Protocols: Excited*

underlying dehydration and begin the aggressive hydration necessary to mitigate effects of elevated myoglobin, creatine phosphokinase, lactate, and potassium that resulting from prolonged exertion.[834] The two liter fluid bolus is already present in the Aurora protocols[835] and we recommend retaining this intervention with the addition of the option to deliver cooled saline (when available) to hyperthermic patients being treated for excited delirium.

e. Correction of Acidosis

In the Panel's experience, metabolic acidosis and the associated electrolyte derangements in excited delirium have a predictable pattern and can be profound. Many jurisdictions recommend the administration of 50-100mEq of sodium bicarbonate either by intravenous bolus or mixed into the saline infusion bags discussed in the previous section.[836] In the Panel's experience, administration of sodium bicarbonate will begin the process of reversing metabolic acidosis, can help treat the hyperkalemia present in the majority of these cases, and can alkalinize the urine to protect the kidney in the case of rhabdomyolysis. In the event of cardiac arrest (particularly bradyasystolic arrest) with suspected excited delirium, we recommend that field personnel consider (and protocol allow) the administration of additional sodium bicarbonate, which may improve patient outcomes. For example, in one case, a patient received 100mEq (2 amps) of sodium bicarbonate when the patient was in cardiac arrest and then an additional 150mEq (3 amps) along with fluids and calcium gluconate after the return of spontaneous circulation to address his pH of <6.8 (despite a normal potassium measurement).[837] Based on the Panel's view of the benefits and relative safety of this intervention, we recommend that Aurora Fire protocols include the administration of 50-100mEq of sodium bicarbonate either intravenous bolus, or mixed with initial bolus of fluids, for excited delirium patients.

Delirium/Violent Patient, Flathead County at 49 (2006), https://flathead.mt.gov/ems/documents/NEWNov17th-FlCoProtocols2017V-1.9112917.pdf; *Maryland Medical Protocols for Emergency Medical Services: Excited Delirium Syndrome*, Maryland Inst. Emerg. Med. Servs. Sys. at 128-129 (2018), http://www.miemss.org/home/Portals/0/Docs/Guideline_Protocols/MD-Medical-Protocols-2018-WEB.pdf?ver=2018-04-11-134820-493; *Emergency Medical Services Manual and Pre-Hospital Treatment Protocols: Excited Delirium*, D.C. Fire & EMS Dep't at 100 (2017) , https://fems.dc.gov/sites/default/files/dc/sites/fems/publication/attachments/DC%20FEMS%202017%20Protocol%20Update%20-%20April%201%2C%202019%20Part%201.pdf; *Medical Operations Manual: Protocol 39 Behavioral Emergencies*, Miami-Dade Fire Rescue/EMS (Nov. 2020), https://mdsceh.miamidade.gov/mobi/moms/protocol%2039.pdf.

[834] Asia Takeuchi et al, *Excited Delirium*, West JEM 77-83 (2011).

[835] *Aurora EMS Protocols: 6010 Agitated/Combative Patient* at 99 (2019).

[836] ACEP Excited Delirium Task Force, "White Paper Report on Excited Delirium Syndrome," Am. Coll. Emerg. Physicians (Sept. 10, 2009).

[837] Patrick J. Maher, et al., *Prehospital resuscitation of a man with excited delirium and cardiopulmonary arrest*, CJEM, 16(01):80-83 (2014).

8. Areas of Commendation

a. Resuscitation Process and Education

One of the specific strengths that came through in the Panel's review was the very brief footage indicating the use of a solid "pit-crew CPR" approach to cardiac arrest management.[838] Unfortunately, we were not given access to monitor printouts, code summaries, or any hospital medical records. Therefore, we are unable to offer a more detailed analysis of the quality of this particular resuscitation, specific procedures, or particular device-use in the field. However, through our review of the available body worn camera footage, interviews, and the patient care reports from Aurora Fire and Falck, we were able to identify the use of the "puck" to measure compression depth and rate, use of a CPR timer, precedence of intraosseous placement over intravenous placement, the staging of airway procedures, and the verifications of successful intubation and adequate resuscitations via respiratory monitoring.[839] All of these have been definitively linked in studies to increased neurologically-intact survival from out-of-hospital cardiac arrest.[840]

Aurora Fire's cardiac arrest resuscitation protocols[841] deserve specific commendation as a best practice that is already in place in Aurora. We add only that the preservation of "code summary" records with integration into EMS run reports and quality reviews will further contribute to analyzing and improving cardiac arrest survival in Aurora. The feasibility of system-wide time-syncing of devices to the CAD (whether manual or automated) should also be explored. A consistent clock is important in accuracy and consistency in documentation and in retrospective review of quality across multiple time sensitive conditions and interventions.

b. Quality Assurance/Quality Improvement Process

Aurora Fire and Falck EMS collaborate in their quality improvement efforts and utilize a common medical director and protocols. Their quality improvement structure is organized, detailed, and falls in line with the recommendations that resulted from the National EMS Culture of Safety Strategy.[842] A key part of a structure that promotes patient safety is a well-designed quality assurance/quality improvement process that involves the EMS physician medical

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[838] Haubert Body Cam at 0:35; Nghiem Body Cam at 0:32; Leonard Body Cam 3 at 3:44.

[839] Aurora Fire Department - EMS Patient Care Report, General Offense Report at 345-46; Falck Patient Care Report at 6; Leonard Body Cam 3 at 3:44; Cichuniec Interview at 26:05.

[840] *See, e.g.*, Christy L. Hopkins et al., *Implementation of Pit Crew Approach and Cardiopulmonary Resuscitation Metrics for Out- of- Hospital Cardiac Arrest Improves Patient Survival and Neurological Outcome*, 5 J. Am. Heart Ass'n (2016).

[841] *Aurora EMS Protocols: 0050 General Guidelines: Field Pronouncement,* Aurora Fire Rescue at 14 (2019); *Aurora EMS Protocols: 3000 Universal Pulseless Arrest Algorithm*, Aurora Fire Rescue at 65 (2019); *Aurora EMS Protocols: 3030 Post-Resuscitation Care With ROSC*, Aurora Fire Rescue at 68 (2019).

[842] This is a strategy produced by the National Highway Traffic Safety Administration with support from the Health Resources and Services Administration's EMS for Children Program and the American College of Emergency Physicians, and "intended primarily for EMS leaders and organizations that are in a position to directly or indirectly support development of a culture of safety." Strategy for a National EMS Culture of Safety at 8, Ems.gov (2013), https://www.ems.gov/pdf/Strategy-for-a-National-EMS-Culture-of-Safety-10-03-13.pdf.

director(s) and includes automatically triggered case review, education, and feedback to the crews. Aurora Fire's quality assurance/quality improvement process includes the following automatic review triggers[843]:

1. **Automatic Review Triggers**
   - All medical cardiac arrests
   - All advanced airway management calls
   - All ketamine administration calls
   - Significant trauma calls including trauma arrests, needle decompressions, emergent trauma returns, tourniquet applications
   - Tactical EMS incidents (AFR Medical Director)
   - Cardiac Alerts (annually or as needed)

The internal medical quality assurance/quality improvement process for Aurora Fire/Falck, is built around the concept of "Just Culture," a term which "describes an organizational environment that encourages individuals to report mistakes so that the precursors to errors can be better understood in order to fix system issues."[844]

The Panel commends Aurora Fire for the design of its quality improvement process, which follows best practice for promoting patient safety within an EMS system. The City should ensure that its own quality improvement and quality assurance reviews are adhering to this process as well. In addition, the City should ensure that future processes continue to include and emphasize internal structures for incident reporting and whistleblower protections throughout the review process. More importantly, education and training on the quality assurance/quality improvement process should reinforce of the non-punitive nature of "Just Culture" and the importance of "near miss" reporting to avoid future incidents.

9. Additional Recommendations/Future Directions

a. Body Worn Camera for EMS

This Panel's assessment of Aurora Fire's interactions with Mr. McClain were limited based on the body worn camera footage available from the Aurora Police officers involved in the case and whether that footage captured those interactions. Had any of the Aurora Fire personnel been wearing a body worn camera, that perspective may have offered additional information regarding the course of events leading to Mr. McClain's cardiac arrest.

We understand that the addition of body worn cameras to the EMS system is not a small undertaking logistically or financially. However, doing so would offer several potential benefits, particularly in a large municipal jurisdiction where there is already a law enforcement body worn camera program in place. In the Panel's view, footage from body worn cameras may be useful in a multitude of EMS settings, including calls for police assistance, sedation administration, behavioral patients, mass casualty events, workplace injuries, vehicle crashes, violence against

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[843] Aurora Prehospital Care Consortium Quality Program: Case Review Process at 2.

[844] Strategy for a National EMS Culture of Safety at 37, Ems.gov (2013), https://www.ems.gov/pdf/Strategy-for-a-National-EMS-Culture-of-Safety-10-03-13.

EMS personnel, quality assurance, simple documentation improvement, and training. While there are certainly factors weighing both for and against the addition of body worn camera in EMS, recent discussions make a compelling case in favor of camera use and offer insight into dealing with the issues, concerns, and questions that are unique for camera use in an EMS environment.[845]

The Panel recognizes that the City would need to resolve a complex set of privacy concerns before adapting their body worn camera program for EMS. Encounters for the delivery of medical treatment carry with them significantly higher privacy needs, and different legal and policy interests would be at issue regarding disclosure when compared with the body worn camera video worn by a police officer. That said, there is little doubt among the Panel that body worn camera footage from the perspective of the Aurora Fire and Falck personnel could have provided additional clarity to many of the events in Mr. McClain's encounter.

b. Remote Monitor Devices

One of the major limitations in dealing with the medical assessment of agitated, fighting patients is the inability to attach and maintain all of the wires, stickers, cuffs, and probes involved in obtaining a complete assessment. Although, as we discuss above, we were not able to identify any instances on the body worn camera where Mr. McClain appeared to be an agitated or fighting patient, a monitor device with a single "sticker" or probe that can be rapidly applied to an easy-to-access area can be the "holy grail" of monitors for EMS. Such monitors are inexpensive and disposable, can be applied to an uncooperative or altered patient, are hard for the patient to remove, and can measure several vital signs remotely. They do not interfere with any need by law enforcement to restrain the patient, nor to do they require that a patient sit still.

While the general capability for remote monitoring of basic vitals goes back to the Gemini space program in the 1960s,[846] few of these innovations have altered the basic design of the monitoring equipment available to hospitals and EMS in the subsequent five decades. Recently there has been some newfound attention to the need for better remote monitors in medicine.[847] Spurred by the growth of remote intensive care unit care, expansion of broadband internet, funding of telemedicine, the explosion of consumer wearable technology and, most recently, innovations in response to COVID-19, we are in an environment ripe for innovation. Compact, wireless, remote acquisition of patient data without putting EMS personnel at risk will ideally become a reality in the near future. We encourage the City and its medical directors to create a culture of innovation within Aurora Fire. They should regularly review the available new equipment coming to market; reach out to equipment designers, manufacturers, and vendors to participate in trials

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[845] Erik S. Gaull, *Starting An EMS Body-Worn Camera Program*. EMS World (2020), https://www.emsworld.com/article/1224612/starting-ems-body-worn-camera-program.

[846] Our Heritage | Spacelabs Healthcare, Spacelabs Healthcare | Patient Monitoring and Diagnostic Cardiology Spacelabs Healthcare (2021), https://www.spacelabshealthcare.com/about-us-2/our-heritage/.

[847] Brooke Murphy, *What does the future of remote patient monitoring look like? Abbott executive Robert Ford weighs in*, Beckershospitalreview.com (2018), https://www.beckershospitalreview.com/healthcare-information-technology/what-does-the-future-of-remote-patient-monitoring-look-like-abbott-executive-robert-ford-weighs-in.html.

and studies as new devices come to market; and develop a sound process for the rollout and evaluation of new equipment, protocols, and devices.

c. Telemedicine Online Medical Control

Finally, the ability to transmit real-time audio and video simultaneously over a secure platform and to integrate medical control and/or supervisor participation in clinical decision making is long overdue as an adjunct to the traditional "protocol and radio" format that has governed EMS since the 1960s. We recommend that the City consider adding telemedicine capability to connect paramedics to medical control, law enforcement officers, behavioral health resources, primary care clinic physicians, and others. In addition, we believe that agencies would be well served in investigating the feasibility of real-time pre-hospital telemedicine in their communities.

D. Conduct of After-Incident Investigation

Aurora Police Department policy requires that Aurora Police personnel notify a supervisor whenever he or she uses restraints or physical force.[848] This reporting must be truthful and a failure to report in accordance with the directive subjects the officer to disciplinary action, up to and including termination.[849] According to this directive, the use of carotid holds generally constitutes a Tier Two use of force, which requires supervisor notification and the completion of a Use of Force Report within seven days of the event (absent authorization by a commanding officer to the contrary).[850] Carotid control holds must also be included in a General Offense Report.[851] A supervisor notified of a Tier Two or Three use of force, such as a carotid control hold, is "responsible for ensuring that a thorough investigation and a report of the incident are completed."[852] Moreover, pursuant to this directive, where an officer's use of force results in hospitalization or death, the officer will be "relieved of front-line duty… pending administrative review. This review will, at a minimum, involve the supervisor and a command level officer and will be forwarded to the [officer's] Division Chief or Deputy Chief for determination of duty status."[853]

The death of Mr. McClain was investigated by Major Crime and the results of the investigation were reviewed by the District Attorney and Aurora's Force Review Board. The matter was never assessed by Internal Affairs. As discussed elsewhere in this Report, the

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[848] *Directives Manual: Reporting and Investigating the Use of Tools, Weapons and Physical Force*, Aurora Police Dep't at 5.4 (revised Nov. 21, 2019).

[849] *Directives Manual: Reporting and Investigating the Use of Tools, Weapons and Physical Force*, Aurora Police Dep't at 5.4 (revised Nov. 21, 2019).

[850] *Directives Manual: Reporting and Investigating the Use of Tools, Weapons and Physical Force*, Aurora Police Dep't at 5.4 (revised Nov. 21, 2019).

[851] *Directives Manual: Reporting and Investigating the Use of Tools, Weapons and Physical Force*, Aurora Police Dep't at 5.4 (revised Nov. 21, 2019).

[852] *Directives Manual: Reporting and Investigating the Use of Tools, Weapons and Physical Force*, Aurora Police Dep't at 5.4 (revised Nov. 21, 2019).

[853] *Directives Manual: Reporting and Investigating the Use of Tools, Weapons and Physical Force*, Aurora Police Dep't at 5.4 (revised Nov. 21, 2019).

interviews conducted by Major Crime were neither probing nor thorough as would be expected in the case of an in-custody death.

In the experience of the Panel, accountability systems failures are frequently at the core of systemic problems in a police department. Robust and comprehensive review and identification of individual misconduct, as well as policy, training, and supervision failures are essential to ensure that bad outcomes are prevented in future. The post-incident review of the death of Mr. McClain is of serious concern to the Panel and revealed significant weaknesses in the Department's accountability systems. The Panel urges the City to consider overhaul of the post-incident review process to ensure that inadequacies are identified and addressed in policy, training, and supervision. Such a review process should focus both on discipline and on identifying opportunities to foster continuous system improvement.

The Department of Justice has described the various purposes of a post-lethal-force review as follows[854]:

Question of Lawfulness

An investigation that fails to provide the necessary relevant facts to allow a prosecutor to correctly determine whether the officer's use of deadly force was legally justified has failed its investigative mission. The public and the agency's officers expect that at minimum every agency will investigate to provide sufficient evidence to either prosecute the officer or to clear the officer of criminal liability.

Question of Procedural Compliance

A serious force investigation should provide enough evidence to determine whether the use of force complied with agency rules. In cases of agency rule violations, it can be helpful to the employee and the agency to have facts clearly stated in a report so that the internal follow-up actions will be properly justified and understood. An investigation that comprehends both the legal and procedural considerations is optimal.

Self-Critical Analysis

A serious use of force rigorously and candidly examined as a confidential self-critical analysis can be viewed as a research project with the aim of determining agency best practices throughout its systems, policies, and personnel by studying successes and failures in their real-world implementation. A serious use of force is a real-world test not only of that agency's organizational rules and systems, but can be a test of the theories and principles underlying them. There are few opportunities like officers' serious uses of force where so much can be learned from the exhaustive investigations typically conducted and expected.

It is important to consider that those who conduct such post-event analyses should include those in training, risk management, and all other agency units where the agency can draw on expertise to contribute to the discussion and analysis. The agency should seriously consider including not just high-ranking policy makers in these self-critical analyses, but also the practitioners at the lowest levels of the organization who know exactly and really what is taught and performed in the field. Outside experts can occasionally be helpful in this regard for special circumstances or questions beyond the expertise of the agency's personnel. In all cases the participants should be explicitly held to a standard of confidentiality such that the content of the discussions are not released to anyone but the agency head or designee.

Against these best practices, the Panel has the following observations:

First, the interviews conducted by Major Crime were neither probing nor objective. The officers involved were not asked key questions about their conduct or the justification for their actions. At times, questions appeared designed to elicit specific exonerating "magic language" from the case law.[855] In addition, the report of the Major Crime Unit stretched the record to

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[854] Community Oriented Policing Service, Standards and Guidelines for Internal Affairs at 41-42, https://cops.usdoj.gov/RIC/Publications/cops-p164-pub.pdf.

[855] The following exchange is a good illustration:

DETECTIVE INGUI: Were you scared?

OFFICER WOODYARD: A little bit, yeah.

DETECTIVE INGUI: Okay. So, was there fear within you?

OFFICER WOODYARD: Yes, there was.

exonerate the officers rather than present a neutral version of the facts. For example, the report stated that the officers were there to "check on his well-being," that they "attempted to explain to McClain why they wanted to talk to him and determine if he needed medical assistance," and that the officers attempted verbal de-escalation throughout.[856] Nothing in the video or interviews support these assertions. The closest evidence in the record is Officer Woodyard's statement that he would have stopped Mr. McClain even absent the call because he was acting strangely.[857] None of the officers ever appeared to express a concern that he might need medical help and EMS appears to have been summoned in compliance with the carotid control hold policy.

The goal of the Major Crime investigation of an in-custody death, like any other investigation conducted by the unit, should be designed to determine whether a crime has been committed. It is hard to imagine any other persons involved in a fatal incident being interviewed as these officers were. As the Department of Justice Community Oriented Policing Office noted in guidance, "A criminal investigation of an agency employee, particularly one involving a felony or crime of moral turpitude, is so serious that an agency should consider extraordinary measures to ensure that the investigation is as thorough and independent of conflicts of interest as possible."[858]

The Panel strongly urges the City to assess the training and supervision of Major Crime detectives as it relates the investigation of potential misconduct by police officers. Remaining objective and independent while investigating a fellow officer presents unique challenges. Both detectives and supervisors need special training to ensure that any such investigation is both fair and complete.

Second, this case should have been sent for a review by Internal Affairs. The role of Major Crime is to determine whether a crime has been committed and whether it can be proved beyond a reasonable doubt. The role of Internal Affairs is to protect the integrity of the agency by ensuring compliance with policy.[859] Its standard is a civil one, not a criminal one.

Currently, Aurora's Internal Affairs will only open an investigation at the direction of the Chief of Police.[860] Once assigned, the Internal Affairs Bureau Commander is responsible for the management of the investigation and making a report to the Chief's Review Board.[861] The practice

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DETECTIVE INGUI: Okay. Um, both for your own safety and —

OFFICER WOODYARD: For my safety and the officers on scene and for the suspect's safety.

Woodyard Interview at 30:00.

[856] Use of Force Investigation Summary – Ingui, M., General Offense Report at 470.

[857] Woodyard Interview at 29:19.

[858] Community Oriented Policing Service, *Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice* at 30, https://cops.usdoj.gov/RIC/Publications/cops-p164-pub.pdf.

[859] Internal Affairs Bureau – Authority and Responsibility, SOP IAB 2.01.

[860] *Directives Manual: Duties and Responsibilities of the Internal Affairs Section*, Aurora Police Dep't at 3.7 (revised May 10, 2007) ("The Internal Affairs Bureau receives its assignments from the Chief of Police or designee").

[861] Internal Affairs Investigations, SOP IAB 2.03.

of having the Chief determine which cases are subject to investigation is inconsistent with other large police agencies and places the Chief in a difficult and potentially compromised position of making a determination of wrongdoing in the absence of a thorough investigation.

Third, the City should reform the Force Review Board to do self-critical analysis of uses of force. The Force Review Board also looked at this incident. Aurora directives require that "The FRB will review all Tier Two and Three Use of Force Reports for compliance with Standard Operating Procedures, Department Directives[,] and applicable law."[862] The Force Review Board's assessment in this case was cursory and contained no analysis of the force used at any stage of the incident. There was no discussion of whether the use of force could have been avoided or whether force could have been reduced or eliminated as Mr. McClain's resistance decreased. Based on the body worn camera video, the letter from the prosecutor, police reports, and the autopsy, the Force Review Board concluded, in total[863]:

Notes: On January 28, 2019 at 14:00 hours, the Force Review Board met in accordance with directive 3.3.7. The FRB is responsible for reviewing all Tier Two, Tier Three and certain Tier One cases. The FRB reviews such cases to ensure compliance with Standard Operating Procedures, Department Directives and applicable law. The FRB is provided the entire investigation and all material related to the case.

CASE 2019-TIER 3-0006 was reviewed:

On August 24, 2019 at about 10:32 p.m., officers were dispatched to the area of Billings St. and East Evergreen St. on a report of a suspicious male wearing a ski mask, the male was described as acting weird. Officers arrived into the area and located a male subject wearing a ski mask, brown coat and black pants, holding a plastic bag. The male was later identified as Elijah McClain.

The officers gave Mr. McClain repeated commands to stop but Mr. McClain did not respond and continued walking. The officers approached Mr. McClain and again gave him verbal commands to stop. Mr. McClain verbally refused. "I have a right to go where I am going" The officers went hands-on to gain control of Mr. McClain. Mr. McClain immediately began to struggle and tense up. Officer maintained communication with Mr. McClain asking him to relax and to stop tensing up.
The officers were positioned in a pile of landscape rocks and chose to move Mr. McClain a few feet away from the rocks and onto a grassy area. This was done in the event the contact escalated causing them to go to the ground.

As the officers moved Mr. McClain to the grassy area, the struggle to control him intensified to the point an officer yells, "he's going for your gun" The Officers took Mr. McClain to the ground and successfully applied a carotid control hold, this allowed officers to gain control and place Mr. McClain in handcuffs.

Based on all the available information, the FRB concluded that the officers were called to the area to investigate a suspicious person. Officers had a lawful reason to contact Mr. McClain. The force applied during the altercation to include the carotid control hold was within policy and consistent with training.

The AIM case is closed as policy compliant.

The failure of the Force Review Board to examine this incident in detail and to look at each use of force against Mr. McClain, separately and with care, is a lost opportunity. Not only could doing so have assisted the City in identifying potential misconduct by the officers, but it could have also assisted the City in discovering and analyzing weaknesses in policy, training, and supervision. The Force Review Board should be a critical part of a continuous assessment and

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[862] *Directives Manual: Reporting and Investigating the Use of Tools, Weapons and Physical Force*, Aurora Police Dep't at 5.4 (revised Nov. 21, 2019).

[863] Aurora Police Department Incident Report – Case Summary at 7-8.

learning process, and every incident should be interrogated for what it can teach the Department to avoid negative outcomes in the future.

We encourage the City of Aurora to review its internal affairs policies and practices in line with the following:

1. Every in-custody death or serious injury should be subject to an internal affairs investigation.[864]

2. Internal Affairs should have self-starting authority not subject to review by the Chief of Police, although the Chief of Police holds ultimate responsibility for the work and review of internal affair investigations.

3. The Panel notes that the Department increased the reporting and chain of command review of uses of force.[865] These are important changes, but do not replace effective criminal and internal affairs investigations.

4. While not an issue in this case, the Panel observed that Internal Affairs is required to issue a *Garrity*[866] warning to every officer interviewed, whether the officer is a subject or witness, and whether there is a potential for criminal prosecution or that potential is nonexistent or remote.[867] This over-use of *Garrity* warnings is unnecessary and may interfere with the investigative process. We recommend that the Department limit its *Garrity* advisements to those cases in which a criminal prosecution is contemplated, and then only to the subject officer and never to witnesses.[868]

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[864] Community Oriented Policing Service, *Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice* at 30, https://cops.usdoj.gov/RIC/Publications/cops-p164-pub.pdf ("Internal Affairs should conduct all serious administrative investigations, including but not limited to officer-involved shootings, in-custody deaths, alleged constitutional violations, allegations of racial profiling or discriminatory policing or racial prejudice, dishonesty, drug use, sexual misconduct, cases handled for other jurisdictions, interagency cases, and cases referred directly by the agency head or command staff. Internal Affairs should also conduct all administrative investigations of allegations of misconduct that are likely to result in litigation against the agency or its members.").

[865] Panel's Interview with Aurora Deputy Chief of Police Darin Parker (Nov. 2, 2020).

[866] *Garrity v. New Jersey*, 385 U.S. 49 (1967).

[867] Internal Affairs Bureau Investigations – Interviews, SOP IAB 2.3.2

[868] *See* Community Oriented Policing Service, *Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice* at 30, https://cops.usdoj.gov/RIC/Publications/cops-p164-pub.pdf. Law enforcement officers do not lose their constitutional rights when they join the force, including the right against self-incrimination and the right to due process. Given the importance of the interests at stake, a law enforcement agency cannot put an officer "between the rock and the whirlpool," *Garrity*, 385 U.S. at 498, by forcing the officer to choose whether to make an incriminating statement or be terminated from his or her job for invoking the Fifth Amendment. *United States v. Cook*, 526 F. Supp. 2d 1, 6-7 (D.D.C. 2007), *aff'd*, 330 f. App'x 1 (D.C. Cir. 2009). Nor can an officer be terminated solely for failing to waive her or his right against self-incrimination. *Gardner v. Broderick*, 392 U.S. 273 (1968).

Critical to the *Garrity* analysis is the threat of criminal prosecution. The Fifth Amendment privilege should only apply where "the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States*, 390 U.S. 39, 53 (1968); *see also Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 190 (2004) (defendant may invoke the Fifth Amendment privilege where there is "reasonable cause to apprehend danger from a direct answer").

5. In cases of in-custody death, significant medical event, or serious physical injury of a subject — officer or bystander — we recommend that Internal Affairs include in their initial round of interviews any relevant EMS personnel. Ideally, these interviews would be conducted in collaboration with the EMS medical director. Additionally, we urge that Internal Affairs coordinate with EMS to ensure the preservation and review of code summaries, laryngoscope recordings, or other device records that constitute a portion of the medical records.

VI. AREAS OF CONCERN

The Panel identified the following areas of concern during its review. The Panel does not make specific findings regarding these issues, but urges the City to conduct further review and take appropriate steps.

A. The City Should Assess the Role of Implicit or Unconscious Bias in Policing

The national debate concerning the role of law enforcement in communities of color includes a robust discussion of implicit or unconscious bias. In looking at this single incident, the Panel has insufficient information to determine what role, if any, bias played in Aurora Police officers' and fire personnel's encounter with Mr. McClain. However, given the strong community concerns surrounding bias and because this incident involved an encounter between white officers, white EMS personnel, and a Black man, the Panel provides observations on the effects of implicit racial biases in law enforcement and healthcare. The Panel strongly recommends a more thorough review of this issue, with a broad mandate, as part of the undertakings of the City and State.

The Aurora Police Department policy prohibits bias-based policing and offers bias-free police training. The policy states:

> It is the policy of the Aurora Police Department to patrol in a proactive manner to actively enforce the law. The Aurora Police Department neither condones nor tolerates the use of bias[-]based policing. Bias[-]based policing undermines legitimate law enforcement efforts, alienates a significant percentage of the population[,] and fosters distrust of law enforcement by the community.[869]

The Panel notes that the policy provides general information about the processes for submission and review of complaints involving bias-based policing. However, the policy offers little specific detail to officers about implicit biases or how biases can affect officer judgment. The Panel recommends that the City review this policy and conform it to the United States Attorney General

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Witnesses need never be given a *Garrity* warning. The duty to provide a statement about what they observed in another officer's conduct is a routine part of their job. *United States v. Camacho*, 739 F. Supp. 1504, 1516 (S.D. Fla. 1990) (declining to find that "the mere existence of a departmental policy of disciplining those officers who refuse to give statements always operates as a matter of law to render officer statements involuntary"); *United States v. Tsou*, No. 92-2147, 1993 WL 14872, at *4-5 (5th Cir. Jan. 18, 1993) (unpublished) (holding that an FBI agent's statement was not compelled, despite an FBI policy requiring agents to cooperate with any administrative investigation).

[869] *Directives Manual: Biased Based Policing*, Aurora Police Dep't at 8.32.1 (revised Jul. 31, 2018).

Guidance on the Use of Race.[870] This guidance provides greater detail on the limited circumstances in which race can be considered during law enforcement activity, which could be helpful for Aurora officers.

As noted, Aurora policy also creates a process for submitting and reviewing complaints regarding bias-based policing. The Panel observes that in 2019, the Aurora Police Department found that there were no incidents of bias-based policing in the Department. Given the strong evidence that racial bias implicates all aspects of policing,[871] the concerns raised by the Panel regarding the Department's internal accountability systems, and the settlement of significant law suits in Aurora in recent years that implicated issues of racial bias,[872] this finding raises questions about whether additional investigation by the Department is required.[873] Evidence-based best practices require that the civilian complaint process for bias complaints be subject to "integrity testing, internal records and control assessments, accessibility reviews, timeliness standards, and complaint disposition."[874]

1. Research on Implicit Bias

Bias in policing, in the absence of explicit racialized statements, is difficult to assess in a single incident. The Panel did not undertake efforts to reach conclusions about the intentions or beliefs of any person involved in the events of August 24, 2019, nor did we seek to assess whether a pattern exists, as that inquiry was outside of the scope of our assignment. Below, we discuss in greater depth the research on implicit bias. That research has identified, among others, the following areas as potential indicators of implicit bias:

- Perception of people of color as more threatening;
- Perception of people of color as having unusual strength;

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[870] *See* U.S. Dep't of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* (Dec. 2014), https://www.dhs.gov/sites/default/files/publications/use-of-race-policy_0.pdf.

[871] Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, nature human behaviour (2020), https://www.nature.com/articles/s41562-020-0858-1; Frank Edwards et al., *Risk of being killed by police use-of-force in the U.S. by age, race/ethnicity, and sex*, Nat'l Acad. Sci. (2019), https://www.prisonpolicy.org/scans/police_mort_open.pdf; Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, nature human behaviour (2020), https://5harad.com/papers/100M-stops.pdf?utm_source=The+Appeal&utm_campaign=3a050d7014-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-3a050d7014-58394763.

[872] *See supra*, Section V.A.

[873] Ali Watkins, *2,495 Reports of Police Bias. Not One Was Deemed Valid by the N.Y.P.D.*, N.Y. Times, (June 26, 2019), https://www.nytimes.com/2019/06/26/nyregion/nypd-bias.html (reporting deficiencies in the New York Police Department's investigation of nearly 2,500 civilian complaints of biased policing).

[874] Lorie Fridell et al., *Racially Biased Policing: A Principled Response* at 2, Police Exec. Rsch. Forum (2001), https://cops.usdoj.gov/RIC/Publications/cops-w0172-pub.pdf.

- Indifference to the effect of officers' use of force on people of color and indifference to the pain experienced by people of color;

- Delay in administration of care of people of color and perception of ongoing resistance; and

- Misperception of the age and size of people of color.

In regard to the above factors, the Panel observed the following facts that may be relevant to any consideration in a future patterns and practices investigation.

- The speed and forcefulness with which Aurora Police officers first made physical contact with Mr. McClain appears disproportionate given the facts known at the time. The 911 caller reported that the caller did not see any weapons and that neither the caller, nor anyone else, was in danger.[875] Additionally, body camera footage confirms that when Officer Woodyard first observed and approached Mr. McClain, Mr. McClain's hands were in plain view and there were no visible weapons.[876] Officers Woodyard, Rosenblatt, and Roedema began to physically restrain Mr. McClain seconds after their arrival,[877] and within approximately one minute and forty seconds after Officer Woodyard first exited his vehicle, the officers had taken Mr. McClain to the ground and applied two carotid control holds to him.[878]

- Mr. McClain was a slight man weighing just 140 pounds.[879] Aurora Police officers repeatedly commented on Mr. McClain's "incredible strength,"[880] and even once Mr. McClain was handcuffed, appeared to perceive Mr. McClain as a continuing threat. Aurora Fire personnel also described Mr. McClain as "hyper aggressive"[881] and actively resisting the officers.[882] And in the approximately thirteen minutes between when Mr. McClain was handcuffed and when Mr. McClain was injected with ketamine, at least two officers at a time restrained Mr. McClain on the ground while other officers and fire personnel stood nearby.[883] The Panel observes that the available body camera footage does not reflect any acts of violence or forceful resistance by Mr. McClain.

- Officers applied multiple, and sometimes simultaneous, pain compliance techniques after Mr. McClain had been handcuffed, including one officer's use of an arm bar maneuver that caused

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[875] 911 Call at 3:30.

[876] Woodyard Body Cam at 0:33.

[877] Woodyard Body Cam at 0:33; Roedema Body Cam 1 at 0:37.

[878] Roedema Body Cam 1 at 1:33.

[879] McClain, E. – Autopsy - Lampson, General Offense Report at 104.

[880] Green Body Cam at 4:30 (reflecting that Officer Roedema said Mr. McClain "has incredible strength"); s*ee also* Woodyard Interview at 16:19 (referring to Mr. McClain as "incredibly strong").

[881] Cooper Interview at 12:52.

[882] Cichuniec Interview at 8:37; Bradley Interview at 6:11; Cooper Interview at 9:22.

[883] *See supra*, Section IV.A.10.

Mr. McClain's shoulder to "pop about three times."[884] The need for these measures is not clear from the body camera footage. Rather, following officers' use of pain compliance techniques, Mr. McClain apologized, sought to explain his movements, vomited, and repeatedly expressed that he could not breathe or was in pain.[885] As noted below, Aurora Fire personnel observed, without intervention, officers' application of numerous pain compliance measures.

- Aurora Fire personnel did not immediately administer care to Mr. McClain, and throughout the incident generally appeared to stand by and observe officers' continued restraint of Mr. McClain, even while Mr. McClain was handcuffed, gagging, and exhibiting other signs of physical distress. Paramedic Cooper, Lt. Cichuniec, FF Bradley, and FF DeJesus arrived on scene at approximately 10:53 P.M., but the first administration of care visible from the body camera footage was Paramedic Cooper's administration of ketamine at approximately 10:59 or 11:00 P.M. FF Bradley, Paramedic Cooper, and Lt. Cichuniec told Major Crime investigators that they observed Mr. McClain on the ground, in handcuffs, and resisting officers.[886] FF Bradley described Mr. McClain as being "in an agitated state," and "resisting arrest as much as possible."[887] In addition, FF Bradley confirmed to Major Crime investigators that he was not directed to do "anything besides stand there" until after he entered the ambulance.[888] FF DeJesus said that the Aurora Fire personnel did not evaluate Mr. McClain at the scene, but rather they let the police "do their thing" because Mr. McClain was struggling and Aurora Fire personnel "didn't have any need to touch him at that point."[889] Paramedic Cooper told Major Crime investigators that they were "pretty much hands off" and only there to "assist if [officers] needed it."[890] Neither the portions of the scene visible in the footage nor the accompanying audio reflect forceful or violent resistance, struggle, or agitation by Mr. McClain.

- Aurora Fire personnel repeatedly misjudged Mr. McClain's age, height, and weight. FF DeJesus told Major Crime investigators that Mr. McClain was thirty to forty years old and approximately six feet tall[891] — Mr. McClain was 23 years old and five foot six at the time of his death.[892] Lt. Cichuniec requested, and Aurora Fire personnel administered, 500 milligrams of ketamine to Mr. McClain because Lt. Cichuniec estimated Mr. McClain to be close to 200 pounds[893]; Falck personnel later estimated that Mr. McClain weighed 160 pounds.[894] The

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[884] Roedema Interview at 10:42, 35:49.

[885] *See supra*, Section IV.A.7.

[886] Cichuniec Interview at 8:37; Bradley Interview at 6:11; Cooper Interview at 9:22.

[887] Bradley Interview at 6:23.

[888] Bradley Interview at 26:45.

[889] DeJesus Interview at 6:00.

[890] Cooper Interview at 21:15.

[891] Use of Force Summary – Ingui, M., General Offense Report at 458.

[892] Adams County Autopsy Report – Ingui, M., General Offense Report at 195.

[893] Cichuniec Interview at 15:42.

[894] Falck Patient Care Report at 6.

coroner's report confirms that Mr. McClain was 140 pounds when he died[895] — 20 pounds less than the Falck personnel's estimate and sixty pounds less than the fire personnel's estimate.

2. Research on Implicit Bias in Policing and Provision of Medical Care

The following summarizes available research on the effects of implicit racial biases on perception of threat, use of force, and the provision care as it relates to Black and Latino individuals.[896]

a. Implicit Biases Can Influence Perceptions of Formidability and Judgments Regarding Use of Force

Unconscious or implicit biases "operate outside of conscious awareness and control but nevertheless influence our behaviors."[897] The implicit racial biases most directly related to policing can cause officers to:

(1) "judge the behavior of a Black person as more aggressive than the identical behavior of a White person,"

(2) associate Black people with criminality, and

(3) associate minorities with weapons.[898]

Researchers explain that "[b]ecause [officers] are often operating under conditions of uncertainty, high discretion, and stress and threat, the pervasive stereotypes linking Blacks and Latinos with violence, crime, and … weapons are likely to cause [officers] to make misattributions in seeking to disambiguate the intentions and behaviors of citizens."[899] These implicit biases "can lead to racially disparate rates of stops, searches, arrests, and use of force."[900]

Implicit racial bias can influence perceptions of age, physical size, and formidability — especially as it relates to Black men and boys. A 2014 study of the perceived innocence of Black, White, and Latino children found that Black children and young adults aged 10-25 are afforded

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[895] Adams County Autopsy Report – Ingui, M., General Offense Report at 195.

[896] The Panel's review of publicly available scholarship on implicit or unconscious racial bias was not exhaustive, and an investigation of the role of implicit bias in the events leading to Mr. McClain's death would require further analysis.

[897] Amanda K. Charbonneau et al., *Implicit Bias and Policing*, 10(1) Soc. and Personality Psych. Compass 50, 51 (2016).

[898] Amanda K. Charbonneau et al., *Implicit Bias and Policing*, 10(1) Soc. & Personality Psych. Compass at 54-55 (2016).

[899] Amanda K. Charbonneau et al., *Implicit Bias and Policing*, 10(1) Soc. & Personality Psych. Compass at 59 (2016).

[900] Amanda K. Charbonneau et al., *Implicit Bias and Policing*, 10(1) Soc. & Personality Psych. Compass (2016)

the presumption of innocence less than other races, and Black boys and young men are actually misperceived as older (by as much as 4.5 years) relative to their White and Latino peers.[901]

More recently, researchers found "consistent novel evidence," across seven field studies, that "Non-Black perceivers overestimated young Black men as taller, heavier, stronger, more muscular, and more capable of causing physical harm than young White men."[902] The researchers found that participants' "associations between race and physical size were strong enough to bias their judgments of the size of *identical* bodies simply because they were led to believe that [the subjects] were Black or White."[903] These perceptions of Black people as more threatening were found to impact judgments about the force necessary to restrain Black suspects as compared to their White peers and influence non-officer civilians to excuse officers' use of force against Black suspects.[904]

Racial disparities in perceptions of threat may also result in racial disparities in officers' use of force. A 2018 study on racial disparities in officers' use of force during investigatory stops found that "[B]lack individuals are not only more likely to be stopped by police, they are also more likely to be subjected to police use of force during that interaction, and more likely to be seen as threatening to officers, resulting in a greater rate of police drawing their weapons."[905] The researchers observed that this disparity persisted even where the Black suspects were not found to be engaging in criminal behavior.[906]

Similarly, a study of nearly 1,000 fatal shootings of civilians by police officers nationwide in 2015 found that "citizens in the other racial/ethnic group were significantly more likely than

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[901] Carmen Culotta et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psych. 526, 539-40 (2014) ("Taken together, the studies presented provide a disturbing portrait of the effects of racism on Black children in the United States. Study 1 provides evidence that Black Children are afforded the privilege of innocence to a lesser extent than children of other races. Studies 2-3 build on these findings by demonstrating that Black boys are seen as more culpable for their actions (*i.e.*, less innocent) within a criminal justice context than are their peers of other races. In addition, Black boys are actually misperceived as older relative to peers of other races.").

[902] Kurt Hugenberg et al., *Racial Bias in Judgments of Physical Size and Formidability*: From Size to Threat, 113 J. Personality & Soc. Psych. 59, 62, 74 (2017).

[903] Kurt Hugenberg et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. Personality & Soc. Psych. 74 (2017) (italics in original).

[904] Amanda K. Charbonneau et al., *Implicit Bias and Policing*, 10(1) Soc. and Personality Psych. Compass 50, 54 (2016) (citing research that found implicit dehumanization of Black people "leads to greater endorsement of an officer's violence against a Black civilian in a video" and "increases tolerance for violence against Black targets"); see also Kurt Hugenberg et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. Personality & Soc. Psych. 59, 74 (2017) ("Participants were more likely to indicate that police force was justified to detain Black versus White targets. Critically, perceptions of Black men as larger and more capable of harm partially accounted for this, providing crucial evidence for our central research question. Increased justification of force (a downstream judgment resulting from judgments of a person's ability to cause physical harm), was strongly associated with racially biased judgments of overall size and formidability.").

[905] Rory Kramer et al., *Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops*, 52 L. & Soc'y Rev. 960, 987 (2018).

[906] Rory Kramer et al., *Stop, Frisk, and Assault? Racial Disparities in Police Use of Force During Investigatory Stops*, 52 L. & Soc'y Rev. 960, 987 (2018).

Whites to have not been attacking the officer(s)" when they were fatally shot, and "Blacks were more than twice as likely as Whites to have been unarmed when they were shot and killed by police."[907] The researchers postulated that officers may have been more likely to misapprehend the threat in the fatal shootings that involved minority civilians — "[t]hat is, officers subconsciously perceived minority civilians to have been a greater threat than they were."[908]

In sum, implicit racial bias may lead officers and civilians to wrongfully perceive Black people as more formidable and more threatening. Officers' misapprehension of the threat posed by Black people may influence the level of force officers use during interactions with Black people and could result in racial disparities in police outcomes.

b. Implicit Biases Can Influence Medical Professionals' Perceptions of Pain Tolerance

As previously noted, Aurora Fire personnel perceived Mr. McClain as older, taller, and heavier than he was, and they generally appeared to defer to officers despite Mr. McClain's expressions of pain and discomfort. EMS personnel were on the scene for nearly seven minutes before they administered aid to Mr. McClain, at which point Paramedic Cooper administered 500 milligrams of ketamine after wrongly estimating that Mr. McClain weighed near 200 pounds.

Research on implicit bias in healthcare is notably sparse as compared to research on implicit bias in policing. However, the available studies suggest that implicit biases can lead medical professionals to perceive Black patients as noncompliant and more resistant to pain, which can impact decisions regarding care to the detriment of Black patients.

A 2016 analysis of the existing research regarding the effects of implicit racial bias in healthcare found that:

> (1) "ethnic/racial differences in care have been observed even after economic, educational, and access differences were accounted for"[909];
>
> (2) even in the absence of factual support, clinical providers perceived Black patients to be "less compliant and less cooperative in medical settings than White patients"[910]; and

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[907] Justin Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015: Further Evidence of Shooter Bias*, 16(I) Criminology & Pub. Pol'y 309, 328-29 (2017). The Panel notes that a 2007 study involving officers from the Denver Police Department suggests that while officers may hold implicit racial biases, officers are more likely to exert control over their behavioral choices than non-officer comparators and show less racial bias in their final decisions to shoot or not shoot Black and White suspects. *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92(6) J. Personality & Soc. Psych. 1006, 1015 (2007).

[908] Justin Nix et al., *A Bird's Eye View of Civilians Killed by Police in 2015: Further Evidence of Shooter Bias*, 16(I) Criminology & Pub. Pol'y 309, 329 (2017).

[909] Colin A. Zestcott et al., *Examining the Presence, Consequences, and Reduction of Implicit Bias in Health Care: A Narrative Review*, 19(4) Grp. Process & Intergroup Rels. 528, 529 (2016).

[910] Colin A. Zestcott et al., *Examining the Presence, Consequences, and Reduction of Implicit Bias in Health Care: A Narrative Review*, 19(4) Grp. Process & Intergroup Rels. 528, 531 (2016).

(3) past experiments demonstrate that "providers' perceptions and treatment recommendations for hypothetical Black patients differed significantly from those made for hypothetical White patients with the exact same symptoms."[911]

The authors posited that clinical providers' implicit bias can impact patient outcomes in two ways. First, clinical providers' bias "may affect their judgments and medical decisions regarding patients in their care" to the detriment of stigmatized groups.[912] Second, "providers' implicit bias may negatively impact their communication and interaction with stigmatized patients, impacting the patients' perceptions, judgments, and trust with their provider," which would in turn "impact the patients' engagement and adherence to treatment."[913] In either event, implicit racial bias could lead to racially disparate health outcomes.

Implicit racial bias also impacts the outcomes of emergency care. A 2019 study of EMS services in Oregon found that "[c]ompared with [W]hite patients, [B]lack patients… had 32% lower odds of receiving any pain medications from EMS providers," even after controlling for geographic location, age, sex, insurance status, and the provider's initial impressions.[914] In a subsequent discussion with National Public Radio, one author explained that "EMTs and paramedics often work in time-pressured situations, where they are limited to ambiguous clinical information and scarce resources." He said that under these conditions, "providers are much more likely to default to making decisions [based] on stereotypes[.]'"[915]

c. Implicit Bias Can Impact the Perception of the Dangerousness of the Neighborhood

Officer Roedema's inaccurate identification of the neighborhood as having a "pretty high crime rate" is also relevant for any consideration of implicit bias.[916] Research demonstrates that the predominant race of a neighborhood has a substantial impact on the way that officers police that neighborhood. A report of the United States Department of Health and Human Services concluded: "Overall, analyses showed significantly higher likelihood of having ever been arrested among [B]lacks, when compared to [W]hites, even after accounting for a range of delinquent behaviors. Importantly, after controlling for racial composition of the neighborhood, these

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[911] Colin A. Zestcott et al., *Examining the Presence, Consequences, and Reduction of Implicit Bias in Health Care: A Narrative Review*, 19(4) Grp. Process & Intergroup Rels. 528, 529 (2016).

[912] Colin A. Zestcott et al., *Examining the Presence, Consequences, and Reduction of Implicit Bias in Health Care: A Narrative Review*, 19(4) Grp. Process & Intergroup Rels. 528, 532 (2016).

[913] Colin A. Zestcott et al., *Examining the Presence, Consequences, and Reduction of Implicit Bias in Health Care: A Narrative Review*, 19(4) Grp. Process & Intergroup Rels. 528, 532 (2016).

[914] Jamie Kennel et al., *Racial/Ethnic Disparities in Pain Treatment: Evidence from Oregon Emergency Medical Services Agencies*, 57(12) Med. Care 924 (2019).

[915] *Emergency Medical Responders Confront Racial Bias*, Health News from NPR (Jan. 3, 2019, 5:00 A.M.) https://www.npr.org/sections/health-shots/2019/01/03/676039371/emergency-medical-responders-confront-racial-bias.

[916] Roedema Interview at 16:50.

disparities were no longer present, suggesting the importance of neighborhood context in influencing racial/ethnic disparities in arrests."[917]

d. Recommendations

Various intervention models have been used to try to counteract implicit racial bias. The research that specifically examines the effects of implicit bias trainings on law enforcement officers is under-developed, but suggests that single-day academy or in-service training is insufficient to yield meaningful change. The John F. Finn Institute for Public Safety, Inc. (the "Finn Institute") recently assessed the effects of the New York Police Department's 2018-2019 in-service implicit bias training on officers' judgments and law enforcement outcomes generally. The training consisted of a mandatory 8-12 hour in-person session that included specific instructions for reducing implicit bias and which was tailored to the responsibilities of officers of different ranks.[918] The Finn Institute found that immediately following the training, officers seemed more knowledgeable about implicit bias and reported that the officers expected to utilize the skills they learned in their in-field interactions.[919] However, the training did not appear to yield a change in police practices — 75% of commanding or supervisory officers reported that they had not applied what the tools from the in-service training — and there were no statistically significant changes to the racial disparities in police outcomes that could be attributed to the training.[920]

We urge Aurora to take a comprehensive look at the data that it collects on stops, arrests, and use of force by race to identify potential patterns of bias. We also recommend that the City enhance its use of scenario-based training on bias-free police practices both pre-service and in-service, and that the City seek to identify potential patterns of bias in individual complaints as well as evidence-based best practices to counter implicit bias. We also strongly urge a mandate that Internal Affairs consider whether bias was a factor in all of its investigations.

B. Crisis Intervention and Encounters with Persons Perceived to be in Crisis

As the Panel has discussed in detail above, Elijah McClain came into contact with the Aurora Police Department not because he was suspected of having committed a crime, but instead because of his unusual behavior. Each decision from whether to dispatch, stop, or take Mr.

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[917] Lauren N. Gase et al., *Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School and Community Characteristics*, 8(4) Race Soc. Probl. 296-312 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5509345.

[918] The research suggests that the standard departmental implicit bias training is a mandatory, single-day training that both educates officers about implicit biases and provides intervention techniques the officers can use in the field. *See* Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. Haw. L. Rev. 295, 300 (2015) ("A typical implicit bias training runs between five and six hours. The purpose of these trainings is to ensure that ' officers can learn skills to reduce and manage their own biases' and to promote the 'unlearning' of the association between [B]lack Americans and criminality.").

[919] Robert E. Worden et al., *Impacts of Implicit Bias Awareness Training in the NYPD*, IAC Center for Police Rsch. & Pol'y 109 (July 2020).

[920] Robert E. Worden et al., *Impacts of Implicit Bias Awareness Training in the NYPD*, IAC Center for Police Rsch. & Pol'y 109, 122 (July 2020).

McClain into custody was made because Mr. McClain was perceived as "sketchy,"[921] "strange,"[922] "abnormal,"[923] or in need of a "check on his welfare."[924] It is impossible to know from the record available to the Panel why Mr. McClain was wearing a ski mask on a sixty-seven degree night or what caused him to wave his arms or make "signs" at passers-by. We do not know if he was in a mental health or behavioral crisis,[925] dancing to the music on his earbuds, or simply acting oddly.

However, it is essential that all officers have sufficient training to identify a potential mental health issue or behavioral crisis issue; know when to call for additional assistance; and understand how to interact with a person who has, or is perceived to have, a mental illness or suffering from a behavioral crisis in order to apply other tactics, including strategies other than the use of force. Additional crisis workers should be available to be dispatched in response to appropriate calls.

Of concern, Officer Roedema was a crisis intervention trained ("CIT") officer.[926] Despite this training, and Mr. McClain's reported unusual behavior, Officer Roedema was not in control of the scene from the outset, and initially played a more secondary role when the other officers went hands on with Mr. McClain, which is in tension with Aurora policy.[927] The Panel would expect that a patrol officer with some crisis training, a crisis-intervention trained officer, or a mental health worker would have spent greater time observing Mr. McClain, engaging him from a safe distance, or even walking parallel to him in the street and using active listening strategies to engage Mr. McClain and learn whether he was in crisis or a threat to himself or others. But no non-force option was meaningfully utilized before the officers began physically restraining Mr. McClain.

We urge the City of Aurora to review its crisis response programs and training, and increase mental health resources. The conduct of these officers and the failure to afford Officer Roedema the opportunity to apply his CIT training suggest a departmental culture in need of reform with respect to its interactions with persons with potential disabilities or mental health problems. We recommend that the Aurora Police Department incorporate evidence-based best practices into their

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[921] 911 Call at 2:01.

[922] Rosenblatt Interview at 6:18, 7:19.

[923] Woodyard Interview at 29:13.

[924] Woodyard Interview at 29:13.

[925] Hamid Body Cam at 0:32, 1:30, 3:10 (reflecting Officer Hamid's interview of a friend of Mr. McClain, who described Mr. McClain as at times acting "mental" in recent years, particularly when using marijuana; she denied that he ever acted violently, however, and noted that even on occasions when others provoked or physically attacked him he would not fight).

[926] Email from Crisis Response Team Representative (Dec. 2, 2020). As reflected in Aurora Police Directive 8.36, CIT officers are "specially trained to intervene and de-escalate situations involving persons in crisis suffering from mental health issues or emotional situational crisis." *Directives Manual: Crisis Intervention Trained (CIT)*, Aurora Police Dep't at 8.36 (revised Jan. 3, 2015).

[927] *See Directives Manual: Crisis Intervention Trained (CIT)*, Aurora Police Dep't at 8.36.2 (revised Jan. 3, 2015). (stating that "the certified member is in-charge of the intervention portion of the event until relieved by a supervisor or department negotiator").

training programs on dealing with suspicious individuals who are not involved in criminal activity or presenting an immediate threat to themselves or others.

a. Aurora Proactively Amended its Policy to Increase Policy Guidance for Suspicious Calls

As also discussed above, the Panel notes that, following the death of Mr. McClain, the Aurora Police Department amended its policy directives to provide guidance to officers responding to calls regarding a suspicious person. The new policy requires greater inquiry by the person responding to that call; specifically, that:

> Upon arrival and locating the suspicious person, the responding members should take some time to observe the suspicious person unless there is something going on that requires immediate contact. Members should not rely solely on the reporting party's description to justify a contact. Members should use their training and observation skills to determine if the person is acting suspiciously in that the person was, is, or seems to be about to engage in criminal activity.[928]

b. Aurora's Crisis Response Capacity

In 2016, the Aurora Police Department expanded its crisis intervention program by developing a CIT course for officers in conjunction with the non-profit organization Aurora Mental Health Center.[929] Before that time, the Department sent a select number of officers to similar trainings hosted by other jurisdictions but did not have its own course.[930] The CIT program's purpose is described in Directive 8.36:

> CIT attempts to reduce violence, injuries[,] and potential litigation through the rendering of appropriate services to subjects in need of counseling or therapy. Training in CIT provides officers understanding of the impact of mental illness on individuals. Trained CIT officers learn skills to help in the verbal de-escalation of high risk situations involving the mentally ill. Successful intervention may lead to a reduction in the need to utilize the Criminal Justice System.[931]

Officers are required to complete a forty-hour course in crisis intervention to become CIT certified.[932] Once the forty-hour course has been completed, the officer is certified. There is no

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[928] *Directives Manual: Suspicious Calls*, Aurora Police Dep't at 8.48 (June 9, 2020).

[929] Panel's Interview with Crisis Response Team Representative (Oct. 22, 2020).

[930] Lance Hernandez, *Aurora Police work to improve statistics on dealing with suspects with disabilities*, ABC Denver7 (Sep. 29, 2016, 8:54 P.M.), https://www.thedenverchannel.com/news/local-news/aurora-police-work-to-improve-statistics-on-dealing-with-suspects-with-disabilities.

[931] *Directives Manual: Use of Physical Force*, Aurora Police Dep't at 5.3.1 (Jan. 1, 2016).

[932] Panel's Interview with Crisis Response Team Representative (Oct. 22, 2020). The City is a member of, and utilizes the resources of CIT International. *See Welcome to CIT International…CIT, more than just training,* CIT Int'l, Inc., https://www.citinternational.org/ (last visited Feb. 20, 2021).

annual or periodic refresher training.[933] As of December 2020, approximately 275 Aurora Police officers were CIT-trained.[934] According to the Crisis Response Team Representative interviewed by the Panel, this group includes 95 CIT patrol officers, who comprise about 37% of all Aurora Police Department patrol officers.[935]

A CIT officer receives a certificate and a pin to wear on her or his uniform. She or he is not specially assigned.[936] A roster is kept of CIT officers, which the scheduling system administrator uses to "assist with the identification of qualified members to respond to applicable calls for service."[937] The roster is not used for pay incentives or assignment purposes.[938]

The Department also has a Crisis Response Team. The Crisis Response Team is in the process of drafting its Directives and Standard Operating Procedures and documentation of the program is not currently available. The unit consists of five officers that are paired with a clinician from the Aurora Mental Health Center. As of December 2020, there were four clinicians working with the team. Team members work staggered shifts seven days per week to cover as much of the week as possible, but the hours between 11 P.M. and 9 A.M. are not covered.[939] At any given time there are between zero and three Crisis Response Teams available. The Crisis Response Team Representative interviewed by the Panel reported that on 343 occasions in 2019 and on 107 occasions during 2020,[940] officers indicated in call notes that they had requested a Crisis Response Team but that no team was available.[941]

The Panel applauds that the City of Aurora has undertaken a pilot project to provide an alternative response to 911 calls where the indication is that an individual is experiencing mental health distress. According to the City, this program will handle emergent mental health calls without the presence of a uniformed officer. The pilot program will be run out of the City's Housing and Community Services Department which also deals with housing and homelessness and youth initiatives. The City will contract with a local mental health provider for social work clinicians who will be paired with paramedics supplied by the City's local EMS service. The pilot will focus on a specific high-call-volume area and time period and run for forty hours per week. Data gathered during the pilot will be used to plan an effective program on a larger scale and also assess the need for continuing with the Police Department co-responder program.[942]

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[933] Panel's Interview with Crisis Response Team Representative (Oct. 22, 2020).

[934] Panel's Interview with Crisis Response Team Representative (Oct. 22, 2020).

[935] Email from Crisis Response Team Representative (Dec. 2, 2020).

[936] Panel's Interview with Crisis Response Team Representative (Oct. 22, 2020).

[937] *Directives Manual: Crisis Intervention Trained (CIT), Deployment*, Aurora Police Dep't at 8.36.3 (revised Jan. 3, 2015).

[938] Panel's Interview with Crisis Response Team Representative (Oct. 22, 2020).

[939] Panel's Interview with Crisis Response Team Representative (Oct. 22, 2020).

[940] As of December 1, 2020.

[941] Email from Crisis Response Team Representative (Dec. 2, 2020).

[942] Email from Aurora City Manager (Jan. 20, 2021).

c. Recommendations

While we commend the efforts that Aurora has taken to create crisis intervention resources, they are limited and were not effective to the extent they could have been utilized to respond to the call regarding Mr. McClain. Had additional emphasis been placed upon crisis response techniques and alternatives, a slower approach may have been used, or potentially, a Crisis Response Team may have been sent to interact with Mr. McClain.

Increased Training for All Officers. We recommend that Aurora consider increased training for all officers on interaction with persons in crisis or perceived to be in crisis. One model is the Police Executive Research Forum Integrating Communications, Assessment and Tactics ("ICAT") program.[943] Through the ICAT training program, officers learn to safely and professionally resolve critical incidents involving subjects who may pose a danger to themselves or others but who are not armed with firearms.

Improve Training and Protocols for 911 Dispatchers. It is important that dispatchers be trained to identify calls that might involve a person in crisis and how to elicit necessary information from those calls in order to understand what resources exist, to dispatch CIT trained officers, and to share with CIT officers the essential information gathered from the caller. Each dispatcher should have at least eight to sixteen hours of training in crisis intervention.[944] Additionally, dispatchers and communications center supervisors should be empowered to independently add CIT resources to a call response if they perceive a potential need. The policy of the New Orleans, Louisiana Police Department provides a model[945]:

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[943] *ICAT: Integrating Communications, Assessment, and Tactics Training Guide*, Police Executive Research Forum, https://www.policeforum.org/icat-training-guide.

[944] Randolph Dupont et al., *Crisis Intervention Team Core Elements*, Univ. of Memphis Sch. Of Urb. Affs. & Pub. Pol'y, Dep't of Criminology a& Crim. Just. 12 (Sep. 2007), https://www.citinternational.org/resources/Documents/CoreElements.pdf.

[945] *Crisis Intervention: Chapter 41.25*, New Orleans Police Dep't Operations Manual, Ch. 41.25 (Mar. 13, 2016), https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-41-25-Crisis-Intervention.pdf/.

CHAPTER 41.25 Page 5 of 13

CIT PIN

10. Only trained and active CIT officers are authorized to wear a CIT pin.

COMMUNICATIONS SERVICES RESPONSIBILITIES

11. The quality of information gathered by call takers can affect the way officers respond to and resolve a call for service. Gathering information is critical at all stages in assessing the situation but is particularly critical at the beginning.

12. When a call is received about the actions or behavior of a person potentially in crisis, it is essential that call takers try to collect information to prepare the responding officers, including:

    (a) The nature of the problem behavior;
    (b) Name of the individual potentially in crisis;
    (c) Events that may have triggered the person's behavior;
    (d) History of treatment for mental illness; and
    (e) The presence of weapons.

13. The party calling about a person in need may be able to provide additional information such as:

    (a) Past occurrences of this or other abnormal behaviors;
    (b) Past incidents involving injury or harm to the individual or others;
    (c) Previous suicide threats;
    (d) Reliance on medication or failure to take medication;
    (e) Names of and contact information for relatives, friends, or neighbors available to assist officers; and
    (f) Names of and contact information for physicians or mental health professionals or peer supporters available to assist officers.

14. Communications Services shall:

    (a) Dispatch the nearest available CIT officer and backup unit from the district of occurrence; or
    (b) If there are no available CIT officers clear to respond in reasonable proximity to the call location, determine if a CIT officer handling a lower priority call in the district of occurrence can be reassigned to the call; or
    (c) If unsuccessful at dispatching a CIT officer in the district of occurrence, Communications may attempt to dispatch the nearest available CIT officer from another district; or
    (d) If no CIT officers are available to respond, the assigned officers shall handle the call in accordance with training and the guidelines provided in this Chapter.

15. Communications Services shall notify an NOPD supervisor whenever a CIT officer is requested but not available.

16. In exigent circumstances, Communications Services may immediately dispatch the nearest available non-CIT officer.

17. Communications Services dispatchers shall relay as much information as possible to all units responding to a call for service involving individuals in crisis.

18. CIT calls for service shall be assigned and responded to by a minimum of two officers.

CHAPTER 41.25 Page 6 of 13

The first officer on the scene shall, if circumstances permit, wait until backup arrives before handling the call.

19. If requested by responding officers or when circumstances dictate, a supervisor and additional units shall be assigned.

20. All assigned units shall continue to the location until the primary unit has signaled a "Code 4" when it has determined additional backup is not necessary. The supervisor, however, shall respond to the scene if en route.

21. Communications Services shall dispatch the Crisis Transportation Service (CTS) to the scene if available. CTS shall not respond directly to the scene until an officer has secured the scene. CTS shall wait at a safe location close to the scene until summoned by a responding officer or supervisor who has secured the scene.

FIRST RESPONDING OFFICER

22. The first responding officer, if not a CIT officer, should perform the following:

    (a) Secure the scene, especially with regard to the safety of the officer, the subject, and any bystanders;
    (b) Determine if the circumstances require the continued response of a CIT officer and inform Communications Services of the status. Beware of a premature Code 4; and
    (c) Gather all available information to brief the CIT member upon his/her arrival. Information sources should include but are not limited to the following:
        1. Observations of the subject's actions, demeanor, etc.;
        2. The name(s) of individual(s) involved; and
        3. Interviews of family/friends on scene.

23. If a CIT officer is not available to respond to the scene, the first responding officer(s) should follow the instructions below on how to handle the situation.

CIT OFFICER RESPONSE

24. The CIT officer has control of the scene involving an individual in crisis and has the discretion to determine strategies for resolving the event, unless expressly relieved by an on-scene supervisor in exigent circumstances (for example, if a CIT officer is injured or involved in a use of force). This Chapter does not apply in unusual or emergency situations (e.g. barricaded subjects per Policy 414 and SWAT rolls per Policy 408) when other, specialized teams are required by necessity and regulation to resolve the incident.

25. The primary goal of CIT officers is to establish, develop, and implement safe, proactive, and preventive methods of containing emotionally explosive situations that could lead to violence.

26. When responding to calls involving individuals in crisis, CIT officers should obtain as much information as possible to assess and stabilize the situation (see **First Responding Officer** above).

27. Officers are not expected to diagnose a mental illness or developmental disability but are expected to decide on an appropriate response to the individual and the situation. Officers shall perform a rapid assessment and respond based on that assessment. Recognizing symptoms that may indicate mental illness or developmental disability will help in deciding on an appropriate response.

We note that since the death of Mr. McClain, the Department has changed its policy to strengthen the communication between dispatch and officers sent on a call. The revision states: "When [PSC] receives a report of suspicious person/activity, the reporting party will be asked to describe the suspicious behavior with as much specific detail as possible. All provided information will be included into the CAD event during the initial report."[946] This is an important change that must be supported with additional training. The training should be interactive with patrol officers and be developed with input from patrol, dispatch, and the Crisis Response Team to ensure that all avenues are covered.

Expand the Crisis Response Unit. The deployment of teams made up of law enforcement officers and mental health workers is an emerging best practice. The City has begun to adopt this model with the creation of its Crisis Response program. We recommend:

- Expanding the Crisis Response program so that crisis teams are available 24 hours per day, seven days per week in sufficient number to respond to crisis calls. The City should engage in a needs assessment to determine the number of Crisis Response Teams necessary to achieve this goal.[947] We recognize that expansion of this program will require an investment by the City during challenging budget times for local municipalities. However, this program will

[946] *Directives Manual: Suspicious Calls,* Aurora Police Dep't at 8.48.1 (effective Jun. 9, 2020).

[947] The Crisis Response Team Representative interviewed by the Panel suggested that a total of fifteen teams would be sufficient based on his experience. Panel's Interview with Crisis Response Team Representative (Oct. 22, 2020).

pay for itself in better outcomes and potentially less liability, will reduce calls currently being handled by patrol, and will reduce the risk of injury to officers and residents.

- Formalizing the program through Directives and Standard Operating Procedures. The program is currently operating without necessary policy guidance. Any program of this importance that is relatively new to the law enforcement field should have well-defined policies and procedures that spell out how the unit should function, and how it could benefit the Department's response mechanisms. A strong policy will translate into a strong training program for the unit and acceptance within the Department.

- Formalizing coordination with Aurora Fire and other emergency response agencies. Aurora's current policy is unclear as to what circumstances Crisis Response, Aurora Fire, and EMS are dispatched. Moreover, as discussed in further detail in Section V.C.1, there needs to be clarity of who is in charge if multiple agencies are on the scene.

Modernize CIT Policy. Clear and detailed policy guidance is essential to the effectiveness of the CIT program. The current policy lacks detail and is inconsistent in some ways with the goals and objectives of the program. For example, the CIT Directive instructs[948]:

> Members certified in CIT will use appropriate tactics to protect themselves, the individual in crisis and others at the scene using:
>
> - Cover officers armed with lethal and/or less lethal weapons
> - Retreat as a positive tactic
> - Distance

While this guidance addresses the critical issue of officer, bystander, and subject safety, it fails to address key strategies or approaches to assist a person in crisis and resolve the situation while limiting the use of force. The policy contrasts significantly from the training CIT officers receive. CIT officers are trained to use active listening skills, non-threatening body language, and to maintain communication and other engagement that are not discussed in this policy.[949] The Aurora policy would be significantly strengthened if it provided greater detail regarding the use of the tools that CIT brings to an encounter and more emphasis on the problem-solving goals of the program. The policy of the Portland, Oregon Police Bureau[950] is a good example:

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[948] *Directives Manual: CIT Procedures*, Aurora Police Dep't at 8.36.2 (revised Jan. 3, 2015), https://www.auroragov.org/common/pages/DisplayFile.aspx?itemId=16574797.

[949] Muhalar Dickson, *Crisis Intervention and Active Listening Skills*, Aurora Police Department Crisis Intervention Teams Training (Apr. 29 – May 3, 2019).

[950] *Directives Manual: 0850.20 Police Response to Mental Health Crisis*, City of Portland Or.: Police Bureau (revised Nov. 18, 2020), https://www.portlandoregon.gov/police/article/778534.

2. Responding to and managing scenes involving persons in mental health crisis:

2.1. When responding to incidents involving persons displaying behavior indicative of mental health crisis members will consider the following actions to manage the incident for the safety of all at the scene:

2.1.1. Evaluate the nature of the incident and necessity for police intervention when feasible, based on information known to the member at the time (e.g. reports, known history, observed behavior, etc.).

2.1.2. If the member decides to intervene, consider, when feasible, the use of verbal and non-verbal communication skills to engage a person who may be agitated, upset or at risk of becoming emotionally unstable in order to calmly and safely resolve the situation.

2.1.3. Tactics members should consider in devising a response plan include, but are not limited to, the following ("ROADMAP" is a mnemonic device that assists members in remembering tactics taught in training):

2.1.3.1. **R** – Request specialized units,

2.1.3.1.1. Evaluate the need for assistance from individuals with additional training in working with mental health crisis situations (e.g. Enhanced Crisis Intervention Team (ECIT) members, Project Respond, Crisis Negotiation Team (CNT)). When a member determines that ECIT assistance is needed, they shall make the request through the Bureau of Emergency Communications (BOEC).

2.1.3.1.2. Evaluate the need for possible consultation with a mental health provider (e.g. see the Behavioral Health Unit's Community Mental Health Resources such as the Multnomah County Call Center, the involved person's mental health providers), and/or anyone else the member deems appropriate.

2.1.3.2. **O** - Observe or use Surveillance to monitor subject or situation,

2.1.3.3. **A** – Area Containment (perimeter, containment),

2.1.3.4. **D** – Disengage with a plan to resolve later,

2.1.3.4.1. Disengagement is a tactic to be considered to reduce undue safety risk to the member, the involved persons, or others. Prior to disengagement, members will make reasonable efforts to gather relevant information about the person in crisis from readily available sources, such as the Multnomah County Call Center, and consult with a supervisor to determine whether to make contact at a different time or under different circumstances. The tactic requires members to complete a general offense report, notify the Multnomah County Call Center of the situation (e.g. name, date of birth, disposition), and develop a plan in accordance with Bureau training. Members shall not disengage where an individual presents an immediate danger to a third party. Where an individual presents an immediate danger to her/himself, prior to disengagement members shall assess whether they could reasonably remain at the scene and use other tactics to diminish the risk of harm to the individual without increasing the risk of harm to the member or third parties. A perception of risk based on mere suspicion will not constitute 'immediate danger.'

2.1.3.5. **M** – More Resources/Summon Reinforcements,

2.1.3.6. **A** – Arrest Delayed (get a warrant, or try different time/place),

2.1.3.7. **P** – Patience. Use time and communication to attempt to de-escalate the subject.

2.1.4. If custody is necessary, develop and communicate a tactical plan to participating members, so as to take advantage of the most effective options that may safely resolve the incident.

C. Independence and Separate Authority of Medical Personnel

Situations like the interaction with Mr. McClain require that Aurora Police and Fire work together closely. However, too close a relationship carries several risks for both agencies. Though the Panel made no findings as to the nature of the relationship between Aurora Police and Fire in this particular incident, in the Panel's experience, inappropriate utilization of either agency by the other may lead to frustration and burnout for the street-level, community-facing personnel and interfere with the ability of leadership to optimally deploy resources across a community. In addition, the Panel is cognizant that, from a community perspective, frequent co-response of both

the police and fire/EMS, similarity in uniform colors/designs, and the inevitable collegiality between departments that respond together routinely may inadvertently indicate that EMS is an "arm" of the Police Department rather than an independent and wholly separate agency.

The Panel is concerned that misperceptions which may result from this "role confusion" may give rise to a higher level of resistance to or violence against EMS/Fire personnel by patients[951] and could damage the reputation and credibility of both agencies. Further, the Panel notes the potential for EMS to be viewed as using sedative medications to facilitate law enforcement goals rather than medical ones.

In the Panel's experience, most EMS agencies around the country are not trained and do not function in a law enforcement capacity.[952] Likewise, many law enforcement agencies do not render medical care beyond basic assessment and interventions.[953] EMTs and paramedics rely heavily on their law enforcement colleagues to render a scene or a patient safe and secure prior to EMS intervention. Likewise, law enforcement relies on the EMS agency to be responsible for the medical care of subjects. Unfortunately, in cases of severe agitation or combativeness, the Panel's experience reflects that it is not always clear where law enforcement ends and EMS begins. There is often a need for EMS to initiate some level of medical intervention prior to a full transition from law enforcement in order to keep the patient, the officers, the medical personnel, and bystanders safe. Additionally, law enforcement policies and procedures often require EMS evaluation of persons that have been restrained or subdued by certain force techniques known to carry a higher level of risk for the subject.[954] Frequently these subjects are evaluated medically and then remain in the custody of the law enforcement agency.

It is critically important to maintain a positive working relationship between Aurora Police and Fire while at the same time making clear that the agencies are distinct and separate entities. The Panel therefore recommends the following:

- Aurora Police and Fire leadership should review and provide additional guidance to the field personnel and communication staff on the proper use of law enforcement support for EMS and vice versa. The goal should be to avoid frustrations in the relationship between the street-level personnel in both departments and to ensure optimal utilization of both law enforcement and EMS resources for the maximal benefit of the community.

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[951] *See* Greggory Favre, *Violence on the Rise Against Fire/EMS Personnel Medium*, White Hat Syndicate (2015), https://medium.com/homeland-security/violence-on-the-rise-against-fire-ems-personnel-bac670c0a5e3.

[952] Greggory Favre, *Violence on the Rise Against Fire/EMS Personnel Medium*, White Hat Syndicate (2015), https://medium.com/homeland-security/violence-on-the-rise-against-fire-ems-personnel-bac670c0a5e3.

[953] *See, e.g.*, Daniel Berger, Should law enforcement officers have the same duty to act as EMTs? EMS1 (2015), https://www.ems1.com/legal/articles/should-law-enforcement-officers-have-the-same-duty-to-act-as-emts-ePbOG6y6sWCXg7YB/; Sara F. Jacoby, Paul M. Reeping & Charles C. Branas, *Police-to-Hospital Transport for Violently Injured Individuals: A Way to Save Lives?*, 687 ANNALS of the Am. Acad. of Pol & Soc. Sci. 186-201 (2020); Jared Strote & Rachel A. Harper, *Use of Emergency Medical Services by Police*, 23 Prehospital Emerg. Care 327-331 (2018).

[954] *See, e.g.*, *Directives Manual: Use of Physical and Deadly Force*, Aurora Police Dep't at 5.3 (revised Oct. 7, 2020).

- The City should maintain and promote Aurora Police and Fire to the community as distinct and separate entities that share a common goal of public safety but that the "mission, objectives, tactics and threats remain separate and distinct at both at an operational and public-expectation level."[955] Public relations outreach could help the community understand similarities and differences between the agencies.

D. EMS Use of Ketamine

In light of the City's review of the use of ketamine, the Panel offers the following observations regarding ketamine's uses in the EMS context. Specifically, despite increased scrutiny of pre-hospital ketamine use, there is consensus among physician medical directors in EMS that, in the absence of new drug development, ketamine is currently a clinically appropriate medication for sedation of the agitated patient in the field.[956] Studies also show that ketamine has a high margin of safety "even when administered in settings lacking basic mechanical monitoring, often by non-anesthesiologists."[957]

A 2018 trial comparing the two medications available to Aurora Fire on the evening of August 24, 2019[958] revealed that midazolam (also known as Versed) took an average of 4.7 minutes longer to adequately sedate "profoundly" agitated patients when compared to ketamine.[959] Studies of similar medications — *e.g.*, droperidol (also known as Inapsine), lorazepam (also known as Ativan), and haloperidol (also known as Haldol) — have all shown consistently longer times to achieve adequate sedation when compared with ketamine, with some differences as high as twelve additional minutes.[960]

In response to public concerns surrounding this case (and others around the country), the City has suspended its EMS use of ketamine pending further review.[961] This moratorium prevents the use of ketamine not only for sedation in the setting of profound agitation, but for other indications for which ketamine has demonstrated emerging benefits (opiate-free pain control,

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[955] Position Paper, Consolidation of Fire/Emergency and Law Enforcement Departments and the Creation of Public Safety Officers, https://www.iafc.org/about-iafc/positions/position/iafc-position-consolidation-of-fire-emergency-and-law-enforcement-departments-and-the-creation-of-public-safety-officers (last visited Jan. 16, 2021).

[956] Douglas F. Kupas et al., *Clinical Care and Restraint of Agitated or Combative Patients by Emergency Medical Services Practitioners*, Nat'l Ass'n EMS Physicians (Oct. 2020), https://naemsp.org/NAEMSP/media/NAEMSP-Documents/Clinical-Care-and-Restraint-of-Agitated-or-Combative-Patients.pdf.

[957] S. M. Green, et al. *Ketamine safety profile in the developing world: survey of practitioners*, Acad. Emerg. Med. (June 1996) 3(6):598-604.

[958] *See, e.g.*, Cichuniec Interview at 32:45 (discussing Versed as another medication in the Agitated Patient Protocol); Cooper Interview at 15:50 (discussing Versed as the "normal" medication for "aggressive people").

[959] Jon Cole et al., *2 Ketamine Versus Midazolam for Out-of-Hospital Agitation: A Prospective Study*, 72(4) Annals of Emerg. Med. S1 (Oct. 2018).

[960] Bryan B. Kitch, *Out- of- hospital ketamine: review of a growing trend in patient care*, 1 Journal of the American Coll. of Emerg. Physicians Open 183-189 (2020).

[961] Press Release, Aurora Fire Rescue News, Ketamine Moratorium (Sept. 14, 2020), https://www.auroragov.org/residents/public_safety/fire_rescue/aurora_fire_rescue_news/ketamine_moratorium.

particularly).[962] This moratorium also means that Aurora Fire paramedics must rely on medications demonstrated to be less effective in patients with significant agitation, such as the medications discussed above, which potentially compromises both Aurora Fire personnel and patient safety. The Panel understands that the United States Food & Drug Administration may issue guidance on pre-hospital ketamine use by the end of 2021, and the Panel recommends that the City monitor and consider this guidance as it assesses whether to permit EMS use of ketamine in future.

In addition, should the City ultimately allow Aurora Fire to resume its use of pre-hospital ketamine, we recommend reducing the weight-based dose and maximum dose of ketamine. Dosing guidelines from multiple sources in emergency medicine and EMS offer a typical range of three to five milligrams per kilogram for intramuscular administration of ketamine for sedation.[963] Using the low end of the range will help preserve a large safety margin in the setting of weight estimation without significantly increasing the risk of undersedation.

VII. CONCLUSION

The events that led to the death of Elijah McClain unfolded rapidly on the streets of Aurora, Colorado on August 24, 2019. He came to the attention of police because a 911 call reported that he was wearing a ski mask on a summer evening and waving his arms and gesturing. Neither the caller nor any of the officers involved identified a crime that Mr. McClain was suspected of committing at the time that he first came to the officers' attention. Within seconds of exiting their cars, officers used force on Mr. McClain which they sustained over an extended time period, including two attempted carotid holds. EMS waited almost seven minutes after arriving to interact with Mr. McClain, and their first contact was to administer the sedative ketamine. The post-event investigation was flawed and failed to meaningfully develop a fulsome record. These facts trouble the Panel. However, it was not our charge to assess whether misconduct occurred; rather, our task was simply to report what we could learn from the record and make policy recommendations.

The Panel's policy recommendations primarily fall into three categories, which urge the City to:

- Review policy, training, and supervision regarding use of force and arrest practices;
- Improve accountability systems, including more effective review by Major Crime and mandatory review by Internal Affairs; and
- Clarify and strengthen the transition of an individual from suspect to patient when EMS is called.

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[962] Press Release, Aurora Fire Rescue News, Ketamine Moratorium (Sept. 14, 2020), https://www.auroragov.org/residents/public_safety/fire_rescue/aurora_fire_rescue_news/ketamine_moratorium.

[963] Alma Juels, *What are the dosing guidelines for procedural sedation and analgesia (PSA) in adults?* Medscape.com (Sept. 21, 2020), https://www.medscape.com/answers/109695-177726/what-are-the-dosing-guidelines-for-procedural-sedation-and-analgesia-psa-in-adults.

In addition, the Panel identified a need for the City to review its policies, practices, training, and culture regarding implicit bias, to reform its crisis intervention system, to maintain the independence of EMS, and to consider the impact of options other than ketamine.

Each member of the Panel was honored to undertake this important task and we hope that our work will assist the City, the Aurora Police and Fire Departments, and all communities in Aurora.