

As discussed in detail in Nissen’s Motion for Summary Judgment¹ and Reply,² Nissen made a split-second decision to assist the deputies by grabbing Ambler’s arms to help handcuff Ambler after the deputies’ intermediate force had taken place before Nissen arrived. Nissen’s actions at the scene were objectively reasonable. Since Nissen did not inflict constitutional harm on Ambler, Plaintiffs do not have a viable claim against the City, and summary judgment in favor of the City is proper as a matter of law.

II. Plaintiffs’ Inadequate Training Claim Should be Dismissed.

For their inadequate training claim, Plaintiffs must prove that: (1) the City’s training policy or procedures were inadequate, (2) the inadequate training policy was a “moving force” in causing the violation of Plaintiffs’ rights, and (3) the City was deliberately indifferent in adopting its training policy. *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010). The Plaintiffs must establish a direct causal link between the municipal policy and the constitutional injury. *Valle v. City of Houston*, 613 F.3d 536, 546 (5th Cir. 2010). In other words, the deficiency in training must be the actual cause of the constitutional violation. *Id.* Moreover, deliberate indifference is a stringent standard and is more than negligence or even gross negligence. *Id.* at 547.

Plaintiffs have failed to meet their burden with regard to these three elements. Plaintiffs allege in their response that APD trained Nissen to use excessive force, failed to train Nissen to de-escalate before using force and failed to train officers to intervene to stop another officer from using excessive force.

First, this Court has considered and rejected these and similar arguments regarding APD’s training on multiple occasions. *See Roque v. Harvel*, 2020 WL 6334800 at *9, W.D. Tex.,

¹ Doc. 167.

² Doc. 192-1.

Austin Div., March 23, 2020 (noting that APD’s training of its officers exceeds Texas’s minimum requirements and provides specific training on use of force and intervention among other topics); *Munroe v. City of Austin*, 300 F.Supp.3d 915, 929-930 (W.D. Tex. 2018)(no evidence of deliberate indifference in City’s training of its police officers); *Hernandez v. City of Austin*, 2015 WL 7301180 at *6, W.D. Tex., Austin Div., November 17, 2015 (no inadequacy or deliberate indifference in City’s training of its police officers); *Chacon v. City of Austin, Tex.*, **2013** WL 2245139 at *6-7, W.D. Tex., Austin Div., May 21, 2013.

1. Training on Use of Force

Plaintiffs contend that the City inadequately trained Nissen by subjecting Nissen and other officers to a “toxic ‘warrior’ training regimen” which led to Nissen responding to this incident with a “warrior mindset, prepared to fight.”³ Plaintiffs base this argument on a 2021 evaluation of the APD Training Academy performed by Kroll Associates, Inc. which was commissioned by the City’s Office of Police Oversight in consultation with the City Manager’s Office.⁴ Plaintiffs cherry-pick a handful of statements from the Kroll Report which indicate that some former APD cadets complained of intimidation and combative tactics used by instructors at the Training Academy.⁵ Plaintiffs conveniently omit that the Kroll Report noted that many other officers believed that the manner in which the Academy prepares cadets is necessary and that physical stress and psychological stress applied during training are essential preparation for policing.⁶

Regardless, a review of the Kroll Report reveals that it does not support a finding that APD’s training is inadequate, or that the City was deliberately indifferent in adopting its training

³ Doc. 186 at 2; 32.

⁴ Doc. 186-32.

⁵ Doc. 186-32 at p. 3.

⁶ *Id.* at 4.

policy. Setting Plaintiffs' inflammatory rhetoric aside, the actual facts are that APD provides comprehensive training to its cadets and officers on topics including the use of force and deadly force, far in excess of the minimum training hours required by the State of Texas for law enforcement certification.⁷ This training includes training on the quantum of force and the escalation and de-escalation of officer-applied force in response to the actions and resistance posed by the subject.⁸ Simply put, Plaintiffs have not met their burden to demonstrate that APD provides inadequate training on the use of force. Moreover, the commissioning of the Kroll Report by the City is clear evidence that the City was not deliberately indifferent in adopting its training since it was actively seeking feedback and recommendations on how to improve the Training Academy.

Additionally, Plaintiffs have not demonstrated that any alleged deficiency in training on the use of force was the actual cause of the alleged constitutional violation. Plaintiffs' argument that the alleged "paramilitary" nature and "toxic warrior" training at the Training Academy caused this incident is absurd. A simple review of the video of this incident reveals that Officer Nissen was not acting in the manner of a so-called "toxic warrior."⁹ Using minimal soft-hands force to assist with handcuffing Ambler is not acting as a "toxic warrior." Neither is immediately calling for medical attention for Ambler and assisting with medical intervention until paramedics arrived. In short, Plaintiffs have made no showing of how APD's training on the use of force **actually caused** this incident.

2. De-escalation and intervention training and policy

Officer Nissen's training at APD covered the APD policies in effect at the time of this incident, including Policy 200.1.3 Duty to Intercede, Policy 200.2 De-escalation of Potential

⁷ Doc. 165-2.

⁸ *Id.*

⁹ Doc. 167-12.

Force Encounters, and Policy 200.2.1 Assessment and De-escalation.¹⁰ Plaintiffs ignore this training and state that the Office of Police Monitor “recommended APD rethink its missing de-escalation training and aggressive tactics as early as 2007....”¹¹ This statement is simply a misrepresentation of the OPM report. The OPM report cited by Plaintiffs does not even mention de-escalation training or aggressive tactics. Instead, it simply states that “it **may** benefit the Department to more closely examine compliance with policy and procedure and **perhaps** explore de-escalation tactics for use in the DTAC Sector [Downtown Sector]...”¹² This is a far cry from a recommendation that APD add a specific de-escalation policy or bolster its de-escalation training.

Plaintiffs’ citation to the OPM 2015 Annual Report is also inaccurate.¹³ There, the OPM noted that the Citizen Review Panel’s review of an incident included a recommendation that APD “define more effective methods to de-escalate situations such as this one” and “look for ways to apply a measured use of force and balance that with de-escalation methods.”¹⁴ Again, this is not sufficient evidence that APD’s de-escalation training was inadequate. In 2017, APD acted on these recommendations and its own desire to formalize a de-escalation policy and added de-escalation provisions to its use of force policy in an effort to improve its policies.¹⁵ Additionally, as noted in the Kroll Report, attached as Plaintiff’s own exhibit, APD incorporated an additional ten hours of de-escalation training into its curriculum and devotes a total 31 hours of de-escalation training which is above the national average.¹⁶ This is further evidence that APD

¹⁰ Doc. 165-2, ¶9.

¹¹ Doc. 186-37.

¹² Doc. 186-37, p.4 (emphasis added).

¹³ Doc. 186, p. 33.

¹⁴ Doc. 186-45, p. 3.

¹⁵ Doc. 165-1; Doc. 165-2.

¹⁶ Doc. 186-32, p. 6.

was not deliberately indifferent since it never made a deliberate or conscious choice to fail to train officers on de-escalation.

Moreover, Plaintiffs have failed to produce sufficient evidence that the City's alleged inadequate training on de-escalation and intervention was the moving force (actual cause) of this incident. As noted in Nissen's Motion for Summary Judgment and Reply, most of the deputies' uses of force had already occurred before Nissen arrived on the scene and this incident progressed rapidly after Nissen arrived on the scene, providing Nissen with little opportunity to evaluate a need to de-escalate or intervene. In sum, Plaintiffs have not shown a direct causal link between APD's alleged policy of providing inadequate de-escalation and intervention training and any violation of Ambler's constitutional rights. As a result, Plaintiffs' inadequate training claim fails as a matter of law.

III. Plaintiffs' *Monell* claim that the City's alleged policy of using excessive force and failing to intervene caused Ambler's injuries is without merit.

1. No policy or custom of excessive force

Plaintiffs assert in their response that the City's policies and customs of excessive force caused Nissen to use excessive force on Ambler. This argument is without merit for several reasons. First, Plaintiffs have not produced evidence to prove that APD has such a policy. It is undisputed that APD has not promulgated an actual policy of using excessive force.

Plaintiffs in *Monell* claims may also prove a municipal policy by proving "a persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, **is so common and well-settled as to constitute a custom that fairly represents municipal policy.**"¹⁷ These customs or "practices must be so persistent and widespread as to practically have the force of law."¹⁸ Moreover, "[i]f actions of city employees

¹⁷ *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001)(emphasis added).

¹⁸ *Connick*, 563 U.S. at 61, 131 S. Ct. at 1359.

are to be used to prove a custom for which the municipality is liable, those actions must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees.”¹⁹ Plaintiffs have not established a custom of excessive force that is so common and well-settled and is the expected and accepted practice of city employees that it can be deemed municipal policy.

a. Plaintiffs’ use of prior incidents does not prove a policy or pattern of excessive force.

To prove their claim, Plaintiffs must establish that there is some pattern in the use of excessive force that demonstrates that the City has an unwritten policy permissive of excessive force.²⁰ To establish that prior incidents constitute a pattern, Plaintiffs must show that the incidents occurred for so long or with such frequency that policymakers must know that the improper conduct is the ordinary and accepted practice of the municipal employees.²¹ A pattern will not be established based on isolated incidents; the pattern must be composed of incidents that are numerous and similar to the specific violation alleged.²²

Plaintiffs attempt to prove this claim primarily by listing previous uses of force by Austin police officers. The problem with this effort is that most of the prior incidents listed by Plaintiffs are not substantially similar to the Ambler incident, and thus do not establish a pattern of similar constitutional violations sufficient to constitute a policy of APD. “Prior instances must point to the specific violation in question; notice of a pattern of similar violations is required.”²³ A

¹⁹ *Webster v. City of Houston*, 735 F.2d 838, 842 (5th Cir. 1984).

²⁰ *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 850 (5th Cir. 2009).

²¹ *Id.*

²² *Id.* at 850-851.

²³ *Valle v. City of Houston*, 613 F.3d 536, 548 (5th Cir. 2010).

pattern requires similarity and specificity; “[p]rior indications cannot simply be for any and all ‘bad’ or unwise acts, but rather must point to the specific violation in question.”²⁴

First, a number of the incidents cited by Plaintiffs were officer-involved shootings involving the use of deadly force which are evaluated by a completely different standard than the standard used to evaluate a minimal use of force such as the soft-hands force used by Nissen in this incident.²⁵ Of the officer-involved shootings listed, only the Rocha, Brown, and Joseph shootings were determined to be violations of APD’s policies and thus also constitutional violations.²⁶

Plaintiffs cite the incident in which Byron Carter was shot by Officer Nathan Wagner in 2011 when the car in which Carter was a passenger struck another officer, and Wagner believed the car was dragging the officer beneath the vehicle.²⁷ Wagner fired shots at the vehicle in an attempt to stop the vehicle. Plaintiffs state that Wagner fired his weapon even though there was no danger.²⁸ However, a jury obviously found Wagner’s version to be credible since they found that he did not use excessive force.²⁹ Thus, there was no constitutional violation. In the Sanders/Smith incident cited by the Plaintiffs, an independent investigation of the incident and of APD’s Internal Affairs investigation determined that the only policy violation committed by the involved officers was the failure to activate their mobile video recorders.³⁰ Again, there was no constitutional violation.

The Ahmede Bradley shooting was found by the Fifth Circuit not to be a constitutional violation because during the struggle, the suspect choked the APD officer with the officer’s radio

²⁴ *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005).

²⁵ *Tennessee v. Garner*, 471 U.S.1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)

²⁶ The City disciplined the officers involved in these incidents for violations of APD’s use of force policies. Doc. 186-121; Doc. 186-52.

²⁷ *Carter v. Wagner*, No. 1:11-cv-887-LY, 2013 WL 12121445 (W.D. Tex. May 20, 2013)

²⁸ Doc. 186, p. 10.

²⁹ Final Judgment, *Carter v. Wagner*, No. 1:11-cv-887-LY (W.D. Tex., June 11, 2013), 2013 WL 3490043.

³⁰ Doc. 186-59, p. 10.

cord and also repeatedly reached for the officer's gun while the two struggled on the ground.³¹ The Larry Jackson incident was not an intentional shooting by APD Detective Kleinert. Instead, Kleinert's gun discharged after Kleinert chased Jackson and the two engaged in a struggle.³² APD acknowledged that Kleinert engaged in tactics that were inconsistent with APD's policies, and Kleinert resigned in lieu of discipline.³³ Plaintiffs also cite the Jawhari Smith shooting, in which APD Sergeant Greg White shot a suspect who was chasing his girlfriend and then raised a BB gun which resembled an actual firearm in White's direction.³⁴ There was no finding of a constitutional violation by White.

Plaintiffs also cite the Richard Munroe officer-involved shooting as a shooting where the suspect was unarmed.³⁵ However, Munroe was armed with a BB gun that looked exactly like a firearm, and officers testified that he raised the gun in the direction of an officer which resulted in three officers discharging their weapons at Munroe.³⁶ Again, an incident in which officers use deadly force in response to a subject pointing a gun in their direction does not demonstrate or contribute to a custom or policy of using excessive deadly force. The other two shooting cases cited by Plaintiffs, *Roque* and *Nobles*, both involved hotly-disputed questions of whether the suspects were pointing weapons or had fired weapons at officers.³⁷ Likewise, Plaintiffs' reference to the 2020 protest incidents involving less lethal projectile weapons does not support a finding of a pattern of allowing excessive force since those incidents were not similar to the alleged use of excessive force in this case. Nissen used soft hands to help subdue Ambler, not a less lethal

³¹ *Orr v. Copeland*, 844 F.3d 484, 494 (5th Cir. 2016)

³² Ex. 1, Depo. of Manley in *Roque*, pp. 68-70.

³³ Ex. 1, Depo. of Manley in *Roque*, pp. 68-70.

³⁴ Doc. 186-76.

³⁵ Doc. 186, p. 16.

³⁶ *Munroe v. City of Austin*, 300 F.Supp.3d 915, 921 (W.D. Tex. 2018).

³⁷ *Roque v. Harvel*, 993 F.3d 325, 339 (5th Cir. 2021); *Nobles v. Egal*, 2022 WL 3971048 (W.D. Tex., Aug. 31, 2022).

shotgun, and this incident simply bears no resemblance to the George Floyd protests and the wide range of interactions between the protestors and police officers during the protests.

Plaintiffs also cite several non-shooting use of force incidents in their response, but conveniently leave out a number of important facts about those incidents. For instance, in the Callaway incident discussed by Plaintiffs,³⁸ Plaintiffs conveniently omit that the Court granted the City's motion for summary judgment on the *Monell* claim,³⁹ and the jury found in favor of the APD officers.⁴⁰ Similarly, Plaintiffs' reference to the Bolton incident⁴¹ omits that the Court granted two officers' motions for summary judgment on the bystander/intervention claims and the City's motion for summary judgment on the *Monell* claim and omits that the jury found in favor of the officers on the excessive force claim.⁴² Not satisfied with these omissions, Plaintiffs continue with their discussion of the Justin Scott incident.⁴³ There, they omit that a jury found in favor of Officer White on the excessive force claim.⁴⁴ It is difficult to ascertain how these incidents, in which juries found in favor of officers on excessive force claims, would be evidence of a custom of APD officers using excessive force.

Plaintiffs leave out material facts about other incidents as well. In their discussion of the Grant incident,⁴⁵ Plaintiffs do not mention that Grant had threatened a nearby bar employee and was armed with a knife and, as a result, the officers were forced to use force to gain control of the knife while Grant actively resisted their efforts.⁴⁶ Regarding the Yeager-Huebner incident,

³⁸ Doc. 186, p. 13.

³⁹ *Callaway v. Travis County, et al.*, No. 15-cv-00103-SS, (W.D. Tex. July 28, 2016).

⁴⁰ *Callaway v. Travis County, et al.*, 2016 WL 7676101 (W.D. Tex. Dec. 5, 2016)

⁴¹ Doc. 186, pp. 13-14

⁴² *Bolton v. Jimenez*, 2019 WL 4306871, (W.D. Tex. Aug. 23, 2019).

⁴³ Doc. 186, pp. 14-15.

⁴⁴ *Scott v. White*, No. 1:16-cv-1287-RP, 2019 WL 4496029, (W.D. Tex., Aug. 3, 2021).

⁴⁵ Doc. 186, p. 22.

⁴⁶ Ex. 2, Depo. of Alas, pp. 77-78; 87; 92.

Plaintiffs omit that Officers Hoover and Skeen were actively trying to subdue Yeager-Huebner because he was punching and gouging the eyes of Officer Jester.⁴⁷

Given the large population of Austin and the number of police interactions with the public, it is not surprising that isolated instances of excessive force have occurred. When they have occurred, APD has disciplined the officers for policy violations, and a few of the incidents cited by Plaintiffs reflect that discipline.⁴⁸ For example, APD disciplined the officers who used the excessive force in the Joseph, Brown and Rocha shooting incidents. Similarly, APD disciplined the officers who used excessive force in the Licon,⁴⁹ Aguado,⁵⁰ Martinez,⁵¹ McDonald,⁵² Soto-Torres,⁵³ Figueroa⁵⁴ incidents cited by Plaintiffs. In short, APD disciplines officers that APD determines have used excessive force and also regularly reviews whether officers show a pattern of using force that calls for closer scrutiny.⁵⁵ Plaintiff's evidence of other incidents is not sufficient to establish that the City had a policy or practice of using excessive force or tolerating excessive force.

b. Plaintiffs' statistical evidence does not prove a policy or pattern of excessive force.

Plaintiffs next attempt to establish a policy or pattern of using excessive force by relying solely on statistics from APD's Response to Resistance Reports from 2006 to 2020.⁵⁶ Plaintiffs evidently contend that APD has a pattern of using excessive force since during these years its

⁴⁷ Doc. 186-103; Doc. 186-104; Doc. 186-105.

⁴⁸ Doc. 165-1.

⁴⁹ Doc. 186-62.

⁵⁰ Doc. 186-79.

⁵¹ Doc. 186-83.

⁵² Doc. 186-84.

⁵³ Doc. 186-94.

⁵⁴ Doc. 186-95

⁵⁵ Doc. 165-1.

⁵⁶ Doc. 186, pp. 25-27.

officers used some degree of force on individuals who exhibited defensive, passive or verbal resistance. According to the Plaintiffs, these statistics alone constitute a “sweeping misuse of force.”⁵⁷

The problem with this analysis, or more accurately lack of analysis, is that the statistics alone provide no information about the individual uses of force or the resistance. Again, a pattern sufficient to constitute evidence of a custom or practice of using excessive force must be composed of incidents that are numerous and similar to the specific violation alleged.⁵⁸ One cannot review these statistics, without any underlying facts of the incidents which underly the statistics, and reach a conclusion that the statistics reflect incidents that are similar to this incident and the alleged violation committed by Nissen. As a result, this statistical evidence does not support a finding of a policy or practice of excessive force.

b. APD’s use of force policies did not cause Ambler’s death.

Additionally, Plaintiffs have failed to prove that if such a policy or custom of using excessive force existed, that it was the actual cause of Nissen’s use of force against Ambler. Plaintiffs have no evidence that Nissen was influenced by any other use of force incident or alleged APD custom of committing constitutional violations while using force. Plaintiffs’ bald assertions that APD’s policies and customs caused Nissen to use minimal force on Ambler are nothing but pure conjecture and fall far short of proving direct causation.

2. No policy or custom of failing to intervene.

Plaintiffs contend in their response that the City failed to supervise its police officers by not enforcing its policy requiring officers to intervene to stop excessive force, and that this failure caused Nissen’s failure to intervene. This argument fails for several reasons. First, as

⁵⁷ Doc. 186, p. 25.

⁵⁸ *Peterson*, 588 F.3d at 850-851.

more fully explained in Nissen's Motion for Summary Judgment and Reply, Nissen did not fail to intervene in this incident.⁵⁹ Likewise, Nissen did not violate APD's Duty to Intercede Policy. This policy essentially tracks the elements of a duty to intervene claim and requires that "[a]ny officer who observes another officer using force shall intercede to prevent further harm if the officer knows that the force being used is not objectively reasonable and the officer has a reasonable opportunity to prevent the harm."⁶⁰ Nissen, as a late-arriving officer, did not see or otherwise have knowledge of the initial force used by the deputies and had no reason to believe that it was not objectively reasonable. He also did not have a reasonable opportunity to prevent the harm caused by the alleged excessive force of the deputies.

Second, Plaintiffs' evidence on this issue is clearly insufficient to establish a pattern of not enforcing APD's policy. Plaintiffs basically contend that any time a use of force occurs when more than one officer is present, then the duty to intercede policy is triggered. Plaintiffs attempt to support this argument with bare statistics and a list of prior use of force incidents, similar to their effort to establish a practice or custom of excessive force. Again relying on the statistics from APD's Response to Resistance Reports from 2006 to 2020, Plaintiffs point out that, on average, each incident of force used by APD from 2006 to 2017 involved 1.6 officers and each incident of force from 2018 to 2020 involved two officers.⁶¹ Plaintiffs extrapolate these figures to theorize that since there were presumably more than one officer present for each use of force, then APD should have been investigating the non-primary officer for failing to intercede. Plaintiffs completely leapfrog over the actual elements of the duty to intercede policy since the bare statistics provide no information on factors such as (1) whether the uses of force behind the statistics were actually unreasonable, (2) whether the non-primary officer had a reasonable

⁵⁹ Doc. 167, pp. 22-28; Doc. 192-1, pp. 11-13.

⁶⁰ Doc. 186-33.

⁶¹ Doc. 186, pp. 26-27.

opportunity to prevent the harm and (3) whether the non-primary officer chose not to act. As a result, these bare statistics are not sufficient to support a *Monell* claim since they provide no evidence that any of the incidents represented by the statistics were substantially similar to this incident.

Similarly, Plaintiff's attempt to establish this failure to supervise by the use of other incidents also fails. Plaintiffs essentially rely on the same list of incidents that they used to attempt to establish a custom of excessive force and contend that since other officers may have been at these scenes, APD should have investigated those officers for failure to intervene.⁶² Yet, Plaintiffs again offer no evidence as to how those incidents are substantially similar to this incident. Also, as pointed out previously, many of these incidents did not involve excessive force at all since juries rejected the excessive force claims.⁶³ Plaintiffs provide no actual evidence that the other incidents were substantially similar to this incident, nor do they provide any evidence that the bystander officers in the other incidents had a reasonable opportunity to prevent the harm but chose not to act. Merely demonstrating that there was more than one officer at the scene of these other incidents is a far cry from presenting evidence that officers failed to intercede and that APD failed to supervise.

Third, Plaintiffs have not met the heightened standard of establishing a direct causal link between the City's alleged failure to supervise and the constitutional injury. Plaintiffs offer no actual evidence that Nissen's alleged failure to intervene was caused by APD's alleged failure to enforce its duty to intercede policy. There are no actions or statements of Nissen that suggests or even implies that he allegedly did not intervene because of any previous inaction on the part of APD with regard to the duty to intercede policy. Plaintiffs' assertions that APD's policies and

⁶² Doc. 186, pp. 61-62.

⁶³ See discussion of the Carter, Callaway, Bolton and Scott incidents, *supra* at pp.8- 10.

customs caused the alleged constitutional violation are nothing but pure conjecture and fall far short of proving direct causation. Plaintiffs have not met their burden to offer sufficient evidence of a policy of inadequate supervision, causation and deliberate indifference. As a result, this claim should be dismissed.

IV. *Hainze v Richards* Precludes Plaintiffs' claims; the ADA and RA do not Apply.

Title II of the ADA creates a private right of action for monetary and equitable relief, allowing individuals to sue local governments for disability discrimination committed by police in *non-exigent circumstances*. *Windham v. Harris Cnty., Texas*, 875 F.3d 229, 234–35 (5th Cir. 2017) (emphasis added; citing *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000)); *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 570–71, 574–76 (5th Cir. 2002).

In *Hainze v. Richards*, the Fifth Circuit held that “Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, **prior to the officer's securing the scene and ensuring that there is no threat to human life.**” *Hainze v. Richards*, 207 F.3d 795, 801-802 (5th Cir. 2000)(emphasis added).

Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public.

* * *

[In this case the Officer] Allison's actions were the result of a quick discretionary decision made in self-defense and for the safety of those at the scene. We are not persuaded that requiring Allison and other similarly situated officers to use *less than reasonable force* in defending themselves and others, or to hesitate to *802 consider

other possible actions in the course of making such split-second decisions, is the type of “reasonable accommodation” contemplated by Title II.

Once the area was secure and there was no threat to human safety, the Williamson County Sheriff's deputies would have been under a duty to reasonably accommodate Hainze's disability in handling and transporting him to a mental health facility.

Hainze, 207 F.3d at 801-802.

As in *Hainze*, a claim under Title II is not available to the Plaintiffs in this case. Officer Nissen's actions were the result of quick discretionary decisions made for the safety of himself and others and to secure the scene. Officer Nissen merely secured the scene and used ***reasonable force*** at all times. This is similar to the situation in *Munroe v. City of Austin*, 300 F.Supp.3d 915 (2018), involving a BB gun which police mistook for a real gun as they were securing the scene. Plaintiffs argued that there was no danger to human life or a threat to the officers. But the court explained that “[a]lthough in hindsight it appears that Munroe's BB gun probably was not a threat to the officers at the scene, because the gun was in appearance an exact replica of a real handgun, they could not have known that at the time. They cannot be said to have finished securing the scene before shooting Richard Munroe; rather, they did so in the process of attempting to secure the scene.” Summary judgment was granted in favor of the City with respect to the ADA claim. *Id.* at 932. (see also *Woods v. Harris Cnty.*, No. 4:18-CV-1152, 2022 WL 18396216 (S.D.Tex. May 26, 2022) (The evidence here, viewed in the light most favorable to Plaintiffs, suggests that Mr. Thomas, while perhaps not an imminent threat, was not secured before Deputy Brewer employed lethal force. Arguably, that triggers the exigent-circumstances exception in *Hainze* and forecloses Plaintiffs' ADA claim.”)

The *Hainze* rule provides for “securing the scene” and using reasonable force (as opposed to requiring officers to use ***less than reasonable force*** in defending themselves and others, or to hesitate to consider other possible actions in the course of making such split-second decisions).

This is consistent with *Graham v. Connor*, 490 U.S. 386 (1989) and the Fifth Circuit’s rulings in Fourth Amendment cases. There is no ADA violation for securing the scene just as there is no constitutional violation when officers secure the scene before attending to medical issues.

Placing a suspect in handcuffs is an ordinary and necessary part of securing the scene. *Betts v Brennan*, 22 F.4th 577, 584 (5th Cir. 2022); [Doc 192-1], pps. 10-11, (and see fn. 49. Nissen BWC, 05:058 – 06:08, Dkt. # 167-12 (clearly showing that Nissen stopped using force once Ambler was in handcuffs)), see also [Doc 192-1], pps. 15-17.

Officer Nissen properly secured the scene and there is no ADA or RA requirement for him to tend to Ambler’s possible medical conditions until the scene was secure. Nissen’s actions cannot constitute intentional discrimination as a result of Ambler’s alleged disability. The scene was not secure until after Plaintiff was handcuffed and then, in accordance with ADA, and *Hainze*, Nissen turned his attention to Mr. Ambler.

As fully explained in Defendant Nissen’s Motion for Summary Judgment [Doc 167] and his Reply in Support of Summary Judgment [Doc 192-1] (these documents are adopted and fully incorporated herein), Nissen was at all relevant times in the process of securing the scene and making it safe, and his actions were objectively reasonable. The City refers to and adopts and incorporates the chronology and video references at [Doc 192-1], p. 4-5 (fn. 15-18).

As explained by Officer Nissen [Doc 192-1], pp. 11-13 (and the supporting law, see fn. 52, 53,57), his actions in securing the scene and handcuffing Mr. Ambler were reasonable for a prudent “late-arriving” officer who had to make split-second assumptions with limited information. And this is exactly the type of situation with exigent circumstances that the Fifth Circuit envisioned when it articulated the *Hainze* rule.

The practical effect of *Hainze* is to make the “reasonable force” analysis for an officer arriving at and securing an incident scene the same for the application of the ADA and RA as it is for assessing reasonableness in cases alleging excessive use of force and the violation of the Fourth Amendment. The City refers to and adopts the *Graham* analysis included in Nissen’s Motion for Summary Judgment [Doc 167], p 13-14; *Graham v. Connor*, 490 U.S. 386 (1989), *Deshotels v. Marshall*, 454 Fed. Appx. 262, 267 (5th Cir. 2011) (citing *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 487 (5th Cir. 2001)).

The *Hainze* rule (as explained in *Munroe*) is consistent with *Graham* also in that the “reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight....The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

As Officer Nissen testified, his force was minimal, it was brief, and it stopped immediately after Mr. Ambler was placed in handcuffs. Accordingly, “the degree of force” that Officer Nissen individually used overwhelmingly passes the *Graham* factors and satisfies *Hainze*. Adopting again Defendant Nissen’s arguments [Doc 192-1, page 13], courts give “leeway to late-arriving officers to a scene. Police officers should not be subjected to “analysis paralysis” in the heat of the moment when a fellow officer is visibly in need of help securing a scene.” Just as Qualified Immunity is meant to provide police officers with breathing room to make split-second decisions without fear of enduring litigation or liability, so too does *Hainze*.

This approach has also been recognized in the case of *Bates ex rel. Johns v. Chesterfield Cnty., Va.*, 216 F.3d 367, 373 (4th Cir. 2000). In that case the Fourth Circuit explained: “We need

not undertake an independent ADA inquiry in this case because our Fourth Amendment scrutiny has already accounted for all the situation's circumstances.” ... “And in examining a claim of excessive force, a court must ask whether the officers' conduct was ‘objectively reasonable’ in light of the facts and circumstances confronting them.” (quoting *Graham*, 490 U.S. at 397, 109 S.Ct. 1865.) “Here, we have concluded that under all the circumstances the officers' actions were objectively reasonable. Officer Genova had a reasonable, articulable suspicion that criminal activity was afoot when he conducted his initial investigatory stop. The officers' use of force against Bates was also objectively reasonable—both the force used before the officers were aware or should have been aware of Bates' autism and the force used after they were notified of the disability. And Bates was not arrested because of his disability. Rather, he was arrested because there was probable cause to believe that he assaulted a police officer. Thus the stop, the use of force, and the arrest of Bates were not by reason of Bates' disability, but because of Bates' objectively verifiable misconduct. Such reasonable police behavior is not discrimination. As a result, there has been no ADA violation.”

Correspondingly, Plaintiffs have failed to prove their claim for the recovery of compensatory damages. They have failed to present any evidence of intentional discrimination against Ambler because of his alleged disability. The actions taken by officer Nissen were part of objectively reasonable police work in response to Ambler's criminal misconduct -- and not because of Ambler's alleged disability. As discussed above, Officer Nissen arrived at the scene and took reasonable, ordinary, and necessary steps to secure it, including limited assistance with handcuffing. The limited use of force was not by reason of Ambler's alleged disability, but only in response to Ambler's objectively verifiable criminal misconduct. Reasonable police behavior

is not discrimination. As a result, there has been no violation of the ADA or RA and those claims must be dismissed.

Further, to recover compensatory damages, a plaintiff must also prove that the discrimination was intentional. *Delano-Pyle v. Victoria County*, 302 F.3d 567, 574 (5th Cir. 2002). This court has hesitated to “delineate the precise contours” of the standard for showing intentionality. *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 575 (5th Cir. 2018). But the cases to have touched on the issue require “something more than ‘deliberate indifference.’”

The alleged discrimination must be in response to the alleged disability in order to recover compensatory damages for a private cause of action. *Windham v. Harris County Texas*, 2016 WL 4939563, at *7 (S.D. Tex. Sept. 13, 2016) (citing *Delano-Pyle v. Vict. Cnty.*, 302 F.3d 567, 574 (5th Cir. 2002) (citing *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 264 (5th Cir. 1984)) (“A plaintiff asserting a private cause of action for violations of the ADA or the RA may only recover compensatory damages upon a showing of intentional discrimination.”); See also *Windham v. Harris Cty.*, 875 F.3d 229, 235 n.5 (5th Cir.2017) (“To recover compensatory damages for disability discrimination under Title II of the ADA, a plaintiff must also show that the discrimination was ‘intentional’ in the sense that it was more than disparate impact.”) (affirming summary judgment but also discussing *Windham v. Harris County Texas*, 2016 WL 4939563, at *7, “Here, the district court appears to have relied on the intentionality requirement to resolve Windham's failure-to-accommodate claim. ... but because we conclude [plaintiff] fails to establish a prima facie case, we need not reach the issue.”).

Plaintiffs say that *Hainze* was wrongly decided. But the Court should pay no attention to those arguments. Defendant respectfully submits that the rule of “orderliness” applies and it is

not this Court's role to alter existing Fifth Circuit precedent. *Forster v. Bexar County*, 2022 WL 2820857, at *13–32 (W.D. Tex. July 19, 2022) (quoting *PlainsCapital Bank v. Keller Indep. Sch. Dist.*, 746 F. App'x 355, 361-62 (5th Cir. 2018)).

Alternatively, Defendant submits that *vicarious liability does not apply* to the City based on the recent Sixth Circuit decision of *Jones v. City of Detroit, Michigan*, 20 F.4th 1117 (6th Cir. 2021), which held that vicarious liability against a public entity, for monetary damages, is not available as a remedy for an agent's violations of the Rehabilitation Act, or for an agent's violations of Title II of the ADA based on intentional discrimination or failure to provide reasonable accommodation with respect to participation in or denial of benefits of services, programs, or activities of the public entity. (see also *Ingram v. Kubik*, 2022 WL 1042688 (11th Cir. 2022)).

V. Plaintiff's Spoliation Claims are not applicable.

In Subpart C, Plaintiffs assert spoliation. It does not apply to create an adverse evidentiary ruling against the City. Plaintiff's allegations could only have been asserted against the defendants who have settled out of this lawsuit: Defendants, Williamson County, Sheriff Robert Chody, and possibly Sheriff's Deputies James Johnson and Zachary Camden. Those defendants, as asserted in Plaintiff's First Amended Complaint [Doc 44], actually may have had something to do with the video -- but the City of Austin did not.

A spoliation claim has three elements: (1) the spoliating party must have controlled the evidence and been under an obligation to preserve it at the time of destruction; (2) the evidence must have been intentionally destroyed; and (3) the moving party must show that the spoliating party acted in bad faith. *Port of S. La. v. Tri-Parish Indus.*, 927 F. Supp. 2d 332, 346 (E.D. La.

2013); see also *Herster v. Bd. of Supervisors of Louisiana State Univ.*, 887 F.3d 177, 190 (5th Cir. 2018).

The City did not ever control the videos. As set out in Amended Complaint [Doc 44], whatever transpired was between Sheriff Chody and Big Fish to produce a television program called “Live PD.” Williamson County Sheriff’s Department was the law enforcement agency that may have had some sort of control over the video and an obligation to preserve it at the time of destruction. There is no evidence that the City of Austin intentionally destroyed any video or acted in bad faith. The City of Austin did, as the record shows, preserve all of the pertinent videos that were created by and maintained by APD. Those videos clearly show everything relevant and Plaintiffs have not been prejudiced in any way.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendant City of Austin respectfully requests that the Court grant its Motion for Summary Judgment and dismiss the Plaintiffs’ claims against it with prejudice with all costs assessed to the Plaintiffs. Defendant further requests that it recover any additional relief to which it may be entitled.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, City Attorney
MEGHAN L. RILEY, Chief, Litigation

/s/ Monte L. Barton Jr.
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**Counsel for Defendant
City of Austin**

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Rules of Federal Procedure, this 26th day of May, 2023.

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MICHELLE BEITIA FOR J.A.A.

/s/ Monte L. Barton Jr.
MONTE L. BARTON JR.

Exhibit 1

Chief Brian Manley - 4/30/2019

1 with regards to racial problems at the Austin Police
2 Department?

3 A. Not that I recall.

4 Q. Okay. How many unjustified police shootings
5 do you believe there have been in the last ten years
6 at the Austin Police Department?

7 A. I would need to see a list of the
8 officer-involved shootings that have occurred over the
9 past ten years, and at that point I could give you my
10 opinion on how many of those, in my opinion, were not
11 justified.

12 Q. Okay. Was the David Joseph shooting
13 justified or unjustified?

14 A. Unjustified.

15 Q. Why?

16 A. Because there were other force options that
17 the officer could have employed in handling
18 Mr. Joseph.

19 Q. Okay. Was the Larry Jackson shooting
20 unjustified or justified? That's Officer Kleinert.

21 A. I remember it.

22 Q. Okay.

23 A. That one was outside of policy based on
24 using tactics that were not appropriate, so I believe
25 the -- the shooting itself was not an intentional act,

WRIGHT WATSON & ASSOCIATES

Chief Brian Manley - 4/30/2019

1 but instead, my recollection is, that weapon went off
2 when he struck him with the weapon, so he was using
3 tactics that were not appropriate.

4 Q. So it was excessive force?

5 A. The -- he was not following the policies
6 based on how we train officers to utilize force, and
7 therefore, the result of that would have been looked
8 at as a policy violation for how he chose to employ
9 force. So there would have been -- had he not
10 retired, I know, in my conversations with
11 Chief Acevedo, there would have been a finding of
12 fault on the part of Officer Kleinert.

13 Now, what he would have found on that,
14 I don't know, but I believe that it was the
15 inappropriate tactics, not only in the encounter under
16 the bridge, but there were other violations that
17 occurred prior to that as well.

18 Q. Leaving aside those other violations, just
19 the part where he killed Larry Jackson, that was
20 unwarranted and shouldn't have happened. Right?

21 A. Our policies are such that that was -- that
22 should not have happened the way that that did.
23 Correct.

24 Q. Okay. But leaving aside your policies, that
25 conduct was -- well, strike that. Let's move on.

WRIGHT WATSON & ASSOCIATES

Chief Brian Manley - 4/30/2019

1 All right. Other than David Joseph
2 and -- well, do you -- strike that. Sorry.

3 You said something like the City -- did
4 the City ever issue a formal finding that the force
5 used was excessive or inappropriate or that the
6 tactics used were inappropriate?

7 A. In which case?

8 MR. LAIRD: Objection. Form.

9 Q. (BY MR. EDWARDS) In the Larry Jackson case.

10 A. No. Officer Kleinert retired prior to the
11 chief being able to make any final determination of
12 fact or administer discipline.

13 Q. So as a consequence of his retirement, there
14 were no official findings from the City of Austin
15 Police Department?

16 A. When an officer retires, the case is closed
17 at that point due to the retirement of the officer
18 because there's no -- there's no need for completing
19 the case for disciplinary purpose. However, we had
20 recognize policy violations, tactics violations along
21 the way, so we still glean information from the
22 investigation. We just don't work it to completion if
23 the officer resigns or retires.

24 Q. Okay. Well, the benefit of working it to
25 completion, though, is that there's a record that

WRIGHT WATSON & ASSOCIATES

Chief Brian Manley - 4/30/2019

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ALBINA ROQUE AND
VINCENTE ROQUE,
INDIVIDUALLY, AS HEIRS
AT LAW TO THE ESTATE OF
JASON ROQUE, AND ON
BEHALF OF ALL WRONGFUL
DEATH BENEFICIARIES,

Plaintiffs,

CAUSE NO. 1:17-CV-932-LY

VS.

JAMES HARVEL AND THE
CITY OF AUSTIN,

Defendants.

* * * * *

REPORTER'S CERTIFICATION
ORAL AND VIDEOTAPED DEPOSITION OF
BRIAN MANLEY

VOLUME 1
APRIL 30, 2019

* * * * *

I, BRENDA J. WRIGHT, Certified Shorthand
Reporter in and for the State of Texas, hereby certify
to the following:

That the witness, BRIAN MANLEY, was duly sworn

WRIGHT WATSON & ASSOCIATES

Chief Brian Manley - 4/30/2019

1 by the officer and that the transcript of the oral
2 deposition is a true record of the testimony given by
3 the witness;

4 I further certify that pursuant to Federal
5 Rules of Civil Procedure, Rule 30(e)(1)(A) and (B) as
6 well as Rule 30(e)(2) that the signature of the
7 deponent:

8 X was requested by the deponent and/or a
9 party before completion of the deposition and is to be
10 returned within 30 days from date of receipt of the
11 transcript. If returned, the attached Changes and
12 Corrections and Signature pages contain any changes
13 and the reasons therefor;

14 was not requested by the deponent and/or a
15 party before the completion of the deposition.

16 That \$ is the deposition
17 officer's charges for preparing the original
18 deposition transcript and any copies of exhibits,
19 charged to PLAINTIFFS;

20 That pursuant to information given to the
21 deposition officer at the time said testimony as
22 taken, the following includes all parties of record:
23
24
25

WRIGHT WATSON & ASSOCIATES

Chief Brian Manley - 4/30/2019

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9 scott@edwards-law.com
10 david@edwards-law.com
11 mike@edwards-law.com
12 greg@edwards-law.com
13 willy@edwards-law.com

8 For the Defendant James Harvel:

9 Mr. Robert Icenhauer-Ramirez
10 LAW OFFICES OF ROBERT ICENHAUER-RAMIREZ
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14 rirlawyer@gmail.com

13 For the Defendant The City of Austin:

14 Mr. H. Gray Laird
15 Assistant City Attorney
16 CITY OF AUSTIN LAW DEPARTMENT
17 301 W. 2nd Street
18 Fourth Floor
19 Austin, Texas 78701
20 512-974-1342/512-974-1311 (fax)
21 gray.laird@austintexas.gov
22 priscilla.chavez@austintexas.gov

19 I further certify that I am neither attorney
20 nor counsel for nor related to nor employed by any of
21 the parties to the action in which this deposition is
22 taken;

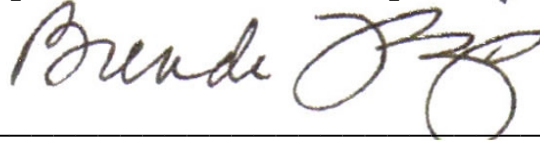
23 Further, I am not a relative nor an employee of
24 any attorney of record in this cause, nor am I
25 financially or otherwise interested in the outcome of

WRIGHT WATSON & ASSOCIATES

Chief Brian Manley - 4/30/2019

1 the action.

2 Certified to by me this 17th day of May, 2019.

3 

4 BRENDA J. WRIGHT, Texas CSR No. 1780
5 Expiration Date: 08-31-21
6 WRIGHT WATSON & ASSOCIATES
7 Firm Registration No. 225
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10 JOB NO. 04302019MANLEY

WRIGHT WATSON & ASSOCIATES

Exhibit 2

Gadiel Alas - 9/16/2021

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JUSTIN GRANT,

Plaintiff,

VS.

CIVIL ACTION
NO. 1:20-CV-688

GADIEL ALAS AND COREY
HALE, IN THEIR INDIVIDUAL
CAPACITIES, AND THE CITY
OF AUSTIN,

Defendants.

ORAL AND VIDEOTAPED DEPOSITION OF

GADIEL ALAS

VOLUME 1

SEPTEMBER 16, 2021

(Reported Remotely)

WRIGHT WATSON & ASSOCIATES

1250 South Capital of Texas Highway, Building 3, Suite 400 Austin, Texas 78746 (512) 474-4363

Gadiel Alas - 9/16/2021

1 was given to us by 911 and what was reported to us by
2 the two employees when we arrived on scene,
3 absolutely, yes.

4 Q. And what offense were you investigating
5 Mr. Grant for when you first arrived on the scene?

6 A. So we had anything from an aggravated
7 assault with a deadly weapon to as minor as a
8 terroristic threat. We didn't know yet. We were
9 very -- everything unfolded quickly from when we
10 arrived on scene. We didn't get a chance to -- to go
11 into the investigation.

12 Q. Well, you had -- you didn't have any
13 information that Mr. Grant had actually injured
14 anyone. Correct?

15 A. No. But you don't have to injure anybody to
16 commit an aggravated assault.

17 Q. Okay. That wasn't my question, though.
18 You didn't have any information that
19 Mr. Grant had injured anyone. Correct?

20 A. Correct.

21 Q. Okay. You didn't have any information that
22 he pulled the knife on anyone. Right?

23 A. I believe in the -- in the 911 call, I
24 believe he said armed with a knife which normally
25 means it was brandish. I don't think it specifically

WRIGHT WATSON & ASSOCIATES

Gadiel Alas - 9/16/2021

1 said that he pulled it.

2 Q. Okay. When you first arrived, none of the
3 people, the bouncers, the club owner, neither of them
4 told you that he had actually pulled a knife. Right?

5 A. No, but they told us he was armed with a
6 knife.

7 Q. Okay. So when you're approaching Mr. Grant,
8 you have no information that would make you think
9 that he actually pulled the knife. Right?

10 A. Again, the 911 call -- the 911 call tech, I
11 believe, said he was armed with a knife, which again,
12 normally indicates that the knife was used in one
13 manner or another.

14 Q. Okay.

15 A. So we have to -- we have to consider worst
16 case in order to be safest.

17 Q. But none of the people who were actually
18 there even in the brief time that you spoke with them
19 said anything like, "He stabbed me" or "he pulled the
20 knife." Nothing like that at all. Right?

21 A. Correct.

22 Q. And the offense that you ultimately end up
23 charging Mr. Grant with is making a terroristic
24 threat. Right?

25 A. Correct.

WRIGHT WATSON & ASSOCIATES

Gadiel Alas - 9/16/2021

1 you take him to the ground. Right?

2 A. Correct.

3 Q. Okay. And you take him to the ground
4 because he is pulling with that opposing force.
5 Right?

6 A. Because he is armed with a knife, and he is
7 pulling opposing force towards the front of his body
8 where the -- where the knife is.

9 Q. Okay. Have you seen the knife at that
10 point?

11 A. Yes.

12 Q. How large is the knife?

13 A. It was clipped to the front of his belt
14 buckle, so just right below his bell -- belly button.
15 From what I could see it was -- it was -- I think I
16 estimated it maybe 5 to 6 inches long.

17 Q. Okay. And that would include the -- the
18 handle of the knife, not just the blade. Right?

19 A. Correct. The full length, about 5 to 6
20 inches long.

21 Q. Okay. And you haven't seen the blade.
22 Right? You have no idea how long the blade is?

23 A. Correct.

24 Q. And it's in some sort of a sheath. Right?

25 A. That is correct.

WRIGHT WATSON & ASSOCIATES

Gadiel Alas - 9/16/2021

1 A. Correct. I definitely punched him in the
2 face more than three times.

3 Q. Definitely punched him in the face more than
4 three times. Correct?

5 A. Yes.

6 Q. Tell me all the reasons you punched
7 Mr. Grant in the face.

8 A. So after we took Mr. Grant to the ground, he
9 started to throw -- he threw the two punches towards
10 Officer Hale and I. He is now distributing -- he is
11 now exhibiting active aggression resistance. As soon
12 as he finished throwing those strikes, he moved his
13 hand, his right hand towards the knife where the
14 blade was -- the handle of the knife was pointing to
15 the -- to his right hand.

16 He moved his hand to his belt line to
17 remove that knife and that now escalated us to a
18 deadly force situation. So instead of using deadly
19 force, I used strikes to the face to prevent him from
20 getting that knife.

21 Q. Okay. Once Officer Hale is holding
22 Mr. Grant's arms on the ground, he can no longer get
23 that -- reach towards his belt line to get the knife.
24 Right?

25 MR. LAIRD: Object to the form.

WRIGHT WATSON & ASSOCIATES

Gadiel Alas - 9/16/2021

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JUSTIN GRANT,

Plaintiff,

VS.

CIVIL ACTION
NO. 1:20-CV-688

GADIEL ALAS AND COREY
HALE, IN THEIR INDIVIDUAL
CAPACITIES, AND THE CITY
OF AUSTIN,

Defendants.

* * * * *

REPORTER'S CERTIFICATION
ORAL AND VIDEOTAPED DEPOSITION OF
GADIEL ALAS
VOLUME 1
SEPTEMBER 16, 2021
(Reported Remotely)

* * * * *

WRIGHT WATSON & ASSOCIATES

Gadiel Alas - 9/16/2021

1 I, Jodi Cardenas, Certified Shorthand
2 Reporter in and for the State of Texas, hereby
3 certify to the following:

4 That the witness, GADIEL ALAS, was duly
5 sworn by the officer and that the transcript of the
6 oral deposition is a true record of the testimony
7 given by the witness;

8 I further certify that pursuant to the
9 Federal Rules of Civil Procedure, Rule 30(e)(1) (A)
10 and (B) as well as Rule 30(e)(2) that the signature
11 of the deponent:

12
13 X was requested by the deponent and/or
14 a party before the completion of the deposition and
15 is to be returned within 30 days from date of receipt
16 of the transcript. If returned, the attached Changes
17 and Corrections and Signature Pages contains any
18 changes and the reasons therefor;

19 _____ was not requested by the deponent or
20
21 a party before the completion of the deposition.

22 That \$ _____ is the deposition
23 officer's charges for preparing the original
24 deposition transcript and any copies of exhibits
25 charged to PLAINTIFF;

WRIGHT WATSON & ASSOCIATES

Gadiel Alas - 9/16/2021

1 That pursuant to information given to the
2 deposition officer at the time said testimony was
3 taken, the following includes all parties of record:

4
5 FOR THE PLAINTIFF:

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16 FOR THE DEFENDANTS:

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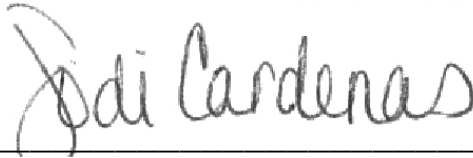
23 I further certify that I am neither counsel
24 for, related to, nor employed by any of the parties
25 or attorneys in the action in which this proceeding
was taken;

Further, I am not a relative nor an
employee of any attorney of record in this cause, nor
am I financially or otherwise interested in the
outcome of the action.

WRIGHT WATSON & ASSOCIATES

Gadiel Alas - 9/16/2021

1 Certified to by me this 30th day of
2 September, 2021.

3
4 

5
6 JODI CARDENAS, RPR, Texas CSR 7594
7 CSR Expiration: 12-31-21
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25 JOB NO. 09162021.ALAS

WRIGHT WATSON & ASSOCIATES

FILED

July 06, 2023

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BY: PG
DEPUTY

JAVIER AMBLER, Sr., et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01068-LY
	§	JURY DEMANDED
	§	
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	
Defendants.	§	

PLAINTIFFS’ RESPONSE IN OPPOSITION TO DEFENDANT NISSEN’S MOTION FOR SUMMARY JUDGMENT

Defendant Austin Police Department Officer Michael Nissen, together with non-party sheriff’s deputies James Johnson and Zachary Camden, used excessive deadly force to kill Javier Ambler, Jr., despite knowing Ambler was morbidly obese, suffered from congestive heart failure, and did not pose a threat to anyone. Nissen’s motion for summary judgment should be denied.

I. SUMMARY OF THE RESPONSE

Defendant Austin Police Officer Michael Nissen’s motion should be denied for four reasons. First, contrary to Nissen’s motion, a reasonable jury could conclude Nissen knew that Ambler posed no danger to anyone and was not resisting. Nissen also knew that forcing Ambler’s face into the pavement and the deputies’ simultaneous use of force was deadly due to Ambler’s visible morbid obesity, his congestive heart failure, and pleas that he needed help and could not breathe. These facts reflect unconstitutional excessive force and failure to intervene.

Second, Nissen mistakenly argues Plaintiffs—Ambler’s decedents—have not pleaded failure to intervene, but this argument ignores the plain language of the complaint. *See* Doc. 44, Amended Complaint, pp. 5, 40, ¶¶ 25, 324.

Third, Nissen violated clearly established law by using what he knew to be deadly force against a person who was not resisting. As the Fifth Circuit specifically held in *Darden v. City of Fort Worth*, these facts show that Ambler “was merely trying to get into a position where he could breathe and was not resisting arrest.” 880 F.3d 722, 730 (5th Cir. 2018). Even if Nissen had unreasonably mistaken Ambler’s efforts to breathe for resistance, it would only have been passive, and clearly established law likewise forbid using deadly force against a passively resisting subject. Under that same authority, Nissen violated his clearly established duty to intervene.

Finally, a question of fact is supported by negative inferences that this Court should infer. Specifically, this Court should infer from the invocation of the 5th Amendment during the testimony of Williamson County deputies James Johnson and Zachary Camden that their testimony was adverse to Nissen.

Thus, Nissen is not entitled to qualified immunity and his motion should be denied.

I. FACTUAL BACKGROUND

On March 28, 2019, Javier Ambler II, unarmed, was brutally killed by police while he begged “I can’t breathe.”¹ The ordeal began when Williamson County deputies James Johnson and Zachary Camden initiated a vehicle pursuit of Ambler at approximately 1:26 a.m. for failure to dim high beams, but an Austin Police Department Lieutenant informed Defendant Austin Police Department Officer Michael Nissen via dispatch that “this is not an offense that we can pursue for” and APD officers could only assist once the pursuit ended.² Nissen also would have heard over the radio that Ambler had no known criminal history.³ After Ambler stopped his vehicle, he

¹ Ex. 3, Body-worn Camera, T06:46:45–46Z; Ex. 6, Autopsy report, 2–4; Ex. 10, Kadar Declaration, 2; Ex. 15, Baden Declaration, 6–7.

² Ex. 16, CAD Report, at COA 0182.

³ Ex. 2, Nissen Deposition, 73:1–25, 222:1–8; Ex. 17, Radio excerpt from COA 51371.

stepped out, raised his hands in the air, and began stepping backward toward the curb showing the deputies he intended to surrender.⁴ Nevertheless, a deputy fired a TASER at Ambler while he stood with his hands up, shocked him again multiple times, struck him with their knees, and held him face down to the ground while he begged for medical help.⁵ Nissen arrived in the midst of the ongoing forcible restraint about thirty seconds after Ambler exited the vehicle.⁶

Nissen confirmed Ambler's vehicle was empty, then turned to assist the deputies in restraining Ambler.⁷ Nissen knew the deputies had already TASERed Ambler once, as they audibly threatened they would use their TASER "again" and he observed TASER wires attached to Ambler.⁸ As Nissen arrived, he heard Camden and Johnson give Ambler the command of "get on the f'ing ground" and "Do it now" and observed Ambler complying, on the ground with his arms up.⁹ Officers also commanded Ambler to "roll over" and Nissen observed him rolling over.¹⁰ Ambler was beginning to lay face down, and by the time Nissen turned his attention to Ambler, Ambler was on his stomach on the pavement with one deputy on top of him.¹¹

⁴ Ex. 5, Dash camera footage, timestamp 01:45:45–53. The dash camera is cited by the timestamp on the bottom right of the screen. Deputies Johnson and Camden are currently under indictment for manslaughter related to the killing of Javier Ambler, II. Ex. 8, Travis County Indictment of James Johnson, D-1-DC-20-900070; Ex. 9, Travis County Indictment of Zachary Camden, D-1-DC-20-900069.

⁵ Ex. 5, Dash camera footage, 01:45:49–1:46:36.

⁶ See Ex. 3, Body-Worn Camera, 1:48–3:01 duration (T06:46:37–47:51 timestamp). Exhibit 3 was published by KVUE with captions and redactions, while Exhibit 4 is a clean excerpt from what the City produced in this litigation. The timestamps in the top right are the same in both exhibits.

⁷ Ex. 3, Body-Worn Camera, 1:27–1:32 (T06:46:17–21); Ex. 5, Dash camera footage, 01:46:20–29.

⁸ Ex. 3, Body-Worn Camera, 1:31 (T06:46:20); Ex. 2, Nissen Deposition, 93:7-13, 99:4-11.

⁹ Ex. 2, Nissen Deposition, 234:20-25, 235:16-21, 236:6-12, 237:15-21.

¹⁰ Ex. 2, Nissen Deposition, 236:18-22, 237:15-21.

¹¹ Ex. 13, Nissen Interrogatory Responses, 12-13; Ex. 3, Body Worn Camera, 2:02 (T06:46:25).

Next, in Nissen’s presence, and clearly audible on Nissen’s chest-mounted camera, Ambler repeatedly told the officers, “I can’t breathe” and “I have congestive heart failure.”¹² Ambler also weighed over 400 pounds and this fact was immediately evident to Nissen, who addressed Ambler as “big man” and later reported he was “heavy-set.”¹³ As Ambler begged for help and repeated that he could not breathe at least five times, Ambler instinctively struggled to provide leverage to his lungs by keeping at least one elbow on the ground.¹⁴ Nissen knew that Ambler “experienced some sort of medical episode” and heard Ambler state that he was not resisting.¹⁵ Although Nissen understood he needed to weigh the risk of taking Ambler into custody against possible health conditions and testified that congestive heart failure was a factor to consider,¹⁶ Nissen ignored all of Ambler’s pleas and helped the deputies forcibly restrain him in a position that restricted Ambler’s ability to breathe.¹⁷ Nissen continued to move Ambler’s left hand behind his back, applied force to Ambler’s left and right arm, and attempted to pull his hands behind his back.¹⁸

¹² Ex. 3, Body-Worn Camera, 1:38–1:41, 1:53–1:57, 2:00–2:04, 2:15–2:17 (T06:46:28–31, T06:46:44–47, T06:46:50–54, T06:47:05–07); Ex. 5, Dash-camera footage, 01:46:24, 01:46:33, 01:46:34–35, 01:46:48–49, 01:47:08–09; Ex. 2, Nissen Deposition, 146:3-5, 284:24-285:3 (Nissen heard “I have congestive heart failure” on the video but claimed he did not hear it on scene although he was present); 286:20-25 (Ambler said it a second time, “louder than the first time”).

¹³ Ex. 3, Body-Worn Camera, 1:43–44 (T06:46:33–34Z), 3:35–40 (T06:48:25–30); Ex. 2, Nissen Deposition, 70:18-21, 171:21-25, 286:5-14.

¹⁴ Ex. 5, Dash Camera Footage, 1:45:58–1:47:22; Ex. 3, Body-Worn Camera, :41–1:42 (T06:46:31–32), 1:54–55 (T06:46:43–44), 1:56 (T06:46:46), 2:03–04 (T06:46:52–53), 2:15–16 (T06:47:05–06); Ex. 1, Clark Declaration, 27; *see* Ex. 10, Kadar Declaration, 2; Ex. 2, Nissen Deposition, 116:4-10 (Nissen heard Ambler state “I can’t breathe” at least three times), 327:3-22 (Heard Ambler state he could not breathe, but did nothing in response because “it would be very difficult for someone to not be able to breathe for two minutes...I could hear that Mr. Ambler was breathing”).

¹⁵ Ex. 2, Nissen Deposition, 145:23-24, 140:12-14, 288:6-8 (Ambler repeated “I am not resisting” in response to Nissen stating “Stop resisting”).

¹⁶ Ex. 2, Nissen Deposition, 72:8-15, 169:7-11, 218:25-219:7.

¹⁷ Ex. 10, Kadar Declaration, 2.

¹⁸ Ex. 2, Nissen Deposition, 142:15-16, 176:8-11, 179:15-16; Ex. 13, Nissen Interrogatory Responses, 12-13.

Johnson announced his intention to TASER Ambler again and deployed his taser for the second time.¹⁹ Nissen did not intervene when he heard Johnson announce his plan, or when he heard the sounds of the TASER.²⁰

After the last TASER deployment, Ambler became limp and silent.²¹ Nonetheless, Nissen pushed the back of Ambler's neck with his hand and pressed his knee into Ambler's upper back, continuing to force Ambler's face and chest into the pavement.²² Nissen explained he was pushing his hand downward on "the back of [Ambler's] head and neck area" or "his neck and head" with his left hand.²³ Nissen's application of direct pressure against the back of Ambler's neck restrained his ability to breathe.²⁴ Nissen moved Ambler's left hand behind his back while placing his left knee on Ambler's shoulder to "hold it in place."²⁵ Hemorrhage in Ambler's upper back where Nissen applied his knee suggests there was significant pressure, which would have stopped the chest from expanding.²⁶ Overall, Nissen was present for two minutes of the use of force, with his own hands on Ambler for at least one minute and 15 seconds before he relented.²⁷

The officers eventually rolled Ambler onto his side—long after he was limp, silent and unconscious.²⁸ Had the officers paused or stopped their restraint earlier, turned Ambler over onto his side, or placed him in a tripod sitting position, then more than likely he would not have died.²⁹

¹⁹ Ex. 3, Body-Worn Camera, 2:39 (T06:47:29), Ex. 2, Nissen Deposition, 93:22-25, 94:1-4.

²⁰ Ex. 2, Nissen Deposition, 94:5-8.

²¹ Ex. 3, Body-Worn Camera, 2:38 (T06:47:28).

²² Ex. 3, Body-Worn Camera, 2:55-58 (T06:47:45-48); Ex. 7, IA Investigative Summary, p. 4; Ex. 2, Nissen Deposition, 126:4-10.

²³ Ex. 2, Nissen Deposition, 273:13-15, 294:4-7, 295:2-296:2 ("It's very hard to raise your upper body when your head is down."), 296:4-12; Ex. 13, Nissen Interrogatory Responses, 12-13.

²⁴ Ex. 10, Kadar Declaration, 2.

²⁵ Ex. 13, Nissen Interrogatory Responses, 12-13.

²⁶ Ex. 10, Kadar Declaration, 2.

²⁷ Ex. 3, Body-Worn Camera (T06:46:05-48:07).

²⁸ Ex. 3, Body-Worn Camera 4:01-6 (T06:48:25-30).

²⁹ Ex. 10, Kadar Declaration, 2.

Minutes after Ambler went fully unresponsive, Nissen finally, belatedly, voiced concern that Ambler was experiencing a medical episode; thereafter, the officers eventually attempted to render aid and call EMS.³⁰ About three and half minutes after Ambler had become limp from the last TASER, the officers finally began chest compressions on Ambler after confirming he had no pulse.³¹ It was too late; Ambler had died, and resuscitative efforts failed.³²

The medical examiner that performed Ambler's autopsy classified his death as a homicide and found that Ambler died of congestive heart failure and cardiovascular disease "in combination with forcible restraint."³³ The examiner explains that the forcible restraint, pressure to Ambler's back, and TASERs can "markedly exacerbate underlying cardiovascular disease, leading to an arrhythmia."³⁴ The examiner further identified a possible "component of asphyxia" from the restraint, pointing to petechial hemorrhages in Ambler's eyes.³⁵ Plaintiffs' expert pathologist Dr. Michael Baden opines that the restraint impaired Ambler's ability to breathe as he called out four times; that he lost consciousness and was lifeless in less than three minutes after the restraint was started; that Ambler died of restraint asphyxia that caused terminal respiratory and cardiac arrests; and that but for the way the physical force and tasers were employed he would not have died when he did.³⁶

Nissen knew Ambler was not a threat. He admitted Ambler was never violent.³⁷ Nissen testified that deadly force was not warranted to be used by himself, Johnson, or Camden against

³⁰ See Ex. 2, Nissen Deposition, 309:23-310:3; 325:4-6.

³¹ Ex. 3, Body-Worn Camera, 6:12 (T06:51:02).

³² Ex. 6, Autopsy Report, 3; Ex. 3, Body-Worn Camera, 6:38 (T06:51:02).

³³ Ex. 6, Autopsy report, 2.

³⁴ Ex. 6, Autopsy report, 3-4.

³⁵ Ex. 6, Autopsy report, 3-4.

³⁶ Ex. 15, Baden Declaration, 6-7.

³⁷ Ex. 2, Nissen Deposition, 94:24-95:5; see also *id.* at 222:21-22, 226:12-13 (no weapons in plain view); 227:5-16 (no weapons or people in Ambler's car).

Ambler³⁸ and acknowledged that officers could not have shot Ambler.³⁹ Nissen understood his obligation to intervene to stop excessive force, and conceded that if he realized the officer were killing Ambler, then he should have stopped it.⁴⁰ Nissen conceded he had time to tell the deputies to stop, but he did not.⁴¹ Despite all his training, Nissen testified that he would disregard his responsibility and training in that he “wouldn’t want another officer telling me what force to use because ultimately I’m the one who has to decide whether or not that’s reasonable, I wouldn’t want to tell another officer what to do because of the same reason.”⁴²

Nissen knew that Ambler was at serious risk from the use of force. He knew he was obliged to make sure subjects are breathing safely and he knew a person may be able to speak even if they are having legitimate shortness of breath.⁴³ Nissen knew that subjects in the prone position are at risk for positional asphyxiation, which is heightened for overweight subjects and other medical conditions.⁴⁴ Nissen knew officers should make sure subjects can breathe safely while being restrained and if they state “I can’t breathe” the statement can indicate difficulty breathing.⁴⁵ Nissen knew that placing a knee on someone’s back can negatively impact a person’s ability to breathe, a knee in the spine can cause them injury, and exerting pressure on the neck can choke somebody.⁴⁶ Nissen was also trained to consider congestive heart failure and obesity during a

³⁸ Ex. 2, Nissen Deposition, 108:17-21.

³⁹ Ex. 2, Nissen Deposition, 138: 8-11.

⁴⁰ Ex. 2, Nissen Deposition, 81:10-15, 82:7-19, 84:9-24, 87:20-24, 274:10-25, 275:7-8.

⁴¹ Ex. 2, Nissen Deposition, 16:9-12, 90:14-22.

⁴² Ex. 2, Nissen Deposition, 174:11-16.

⁴³ Ex. 2, Nissen Deposition, 104:14-20, 113:6-10, 123:3-6; *see also* Ex. 11, Staniszewski Dep., 129:11-16 (trained to consider when a person says “I can’t breathe”).

⁴⁴ Ex. 2, Nissen Deposition, 61:6-23, 63:3-25, 64:17-23, 70:9-17, 103:14-20, 106:17-23; Ex. 11, Staniszewski Dep., 131:20-132:4.

⁴⁵ Ex. 11, Staniszewski Dep., 129:11-16; Ex. 2, Nissen Deposition, 123:3-6, 104:14-20.

⁴⁶ Ex. 2, Nissen Deposition, 105:8-13, 106: 3-14, 107:11-18.

detention.⁴⁷ Despite this, Nissen never asked Ambler if he needed help.⁴⁸ Nissen testified that he agreed that one of the goals of restraining someone is to avoid injury at all costs and use the least amount of force possible.⁴⁹ Nissen agreed that he had a duty to continually evaluate the level of force he used in any situation.⁵⁰

Williamson County Deputies pled the Fifth, allowing the court to draw the following inferences against Nissen, see *infra* Section(C), pp. 34–35:

1. That officers on occasion overreact and another officer who observes this should deescalate the situation. Ex. 14, Johnson Deposition, 59:15-60:1.
2. That police officers have an obligation to intervene and stop conduct they know is excessive, dangerous, or unconstitutional. *Id.* at 20:15-22.
3. That leaving a suspect in the prone position while force is being exerted and he is struggling to breathe is well-known to be dangerous to the suspect, *id.* at 80:25-81:8, and that putting a knee in to someone’s back who is struggling to breathe is improper police work. *Id.* at 100:21-101:2.
4. That it is not appropriate to use force on a suspect that poses no danger. *Id.* at 24:17-22.
5. That Ambler posed no threat after exiting his vehicle, *id.* at 24:11-16, and that Ambler posed no threat of death or serious bodily harm to any of the officers. *Id.* at 71:13-18.
6. That when Johnson pointed his weapon at Ambler, he held his hands out to show he was not a threat and had no weapons. *Id.* at 98:17-24.
7. That Johnson knew Ambler was obese. *Id.* at 55:15-20.
8. That keeping an obese person on their stomach and exerting pressure on them is dangerous. *Id.* at 56:7-11.
9. That officers heard Ambler say “I can’t breathe” multiple times. *Id.* at 94:15-19; Ex. 12, Camden Deposition, 45:9-14.
10. That not being able to breathe is a serious medical condition and Ambler telling officers communicated a medical need. Ex. 14, 26:8-12; 81:14-19.
11. That Ambler said he had congestive heart failure more than once. *Id.* at 99:19-23.
12. That Camden and Johnson made no accommodations for Ambler’s obesity or his inability to breathe. Ex. 12, 49:24-50:4, 50:19-51:2.
13. That Nissen did not do anything to help Ambler while he was present, *Id.* at 59:21-60:3, and should not have ignored his pleas for help. Ex. 14, 77:9-15; Ex. 12, 59:13-20.
14. That Ambler got on the ground and put one hand behind his back as asked by officers. Ex. 12, 74:11-15; 91:13-18.

⁴⁷ Ex. 11, Staniszewski Deposition, 123:22-124:3, 126:23-127:4.

⁴⁸ Ex. 2, Nissen Deposition, 169:16-18, 170:16-20.

⁴⁹ Ex. 2, Nissen Deposition, 107: 19-108:3.

⁵⁰ Ex. 2, Nissen Deposition, 178:11-21.

15. That there was no risk of escape once Ambler was on the ground. Ex. 14, 72:8-18.
16. That an officer who observed Camden and Johnson ought to have taken steps to stop it from occurring. *Id.* at 117:8-14.
17. That if another officer on scene had had told Johnson and Camden to stop using force on Ambler, they would have stopped. *Id.* at 27:16-21, 23-25; Ex. 12, 93:9-19.
18. That Nissen had time to watch what Johnson and Camden were doing to Ambler but did not tell them to stop, even though he had the time to do so. Ex. 14, Johnson Deposition, 28:24-29:6, 28:13-17, 76:9-15; Ex. 12, 46:1-5, 96:21-25.
19. That Johnson and Camden would have listened if Nissen had said “We’ve got to stop this. This guy is in trouble.” Ex. 14, 62:21-63:1; Ex. 12, 25:25-26:14 (That Camden would have listened if Nissen had told him to stop, that Ambler could not breathe, and that he was killing him); 47:7-15 (That he would not have ignored Nissen).
20. That Camden unnecessarily struck Ambler with his knee, struck him with a TASER, seized Ambler’s back, head, hand and arm, and pinned Ambler’s hand and head with his knee. Ex. 12, 56:6-57:16; 12:22-25.
21. That Camden forced Ambler into a prone position and told him to get flat on his stomach. Ex. 12, 13:2-12.
22. That Nissen wrenched Ambler’s hand behind his back, rather than helping him. Ex. 14, 100:8-14.
23. That Ambler was not resisting. Ex. 14, 94:22-96:2.
24. That nothing justified the use of a taser on Ambler. Ex. 14, 94:4-8.
25. That Johnson intentionally used deadly force on Ambler when he knew he posed no danger to anyone and it was not warranted under the circumstances. Ex. 14, 70:21-71:12.
26. That Johnson, Camden and Nissen continued to use force though there was no risk of escape. Ex. 14, 73:17-22.
27. That Camden, Johnson, and Nissen used more force than they needed to and the use of force was unreasonable, Ex. 14, 23:14-18, 116:14-20; Ex. 12, 12:16-21.
28. That Nissen’s conduct was not justified and he used more force than was necessary. Ex. 12, 104:8-19; 105:3-15.
29. That as a consequence of the actions of Camden, Johnson, and Nissen Ambler was killed. Ex. 14, 73:23-74:4.
30. That after Johnson, Nissen and Camden used force on Ambler, he went unresponsive and died. Ex. 12, 107:17-108:8.
31. That Camden did not see Nissen do anything to help Ambler, prevent the force, or deescalate the force. Ex. 12, 96:8- 16, 102:6-13.
32. That cameramen and photographers from LivePD were present, Ex. 12, 38:13-16, and the TV cameras effected the officers’ overreaction. Ex. 14, 75:20-76:1.

II. PROCEDURAL HISTORY

Plaintiffs brought this 42 U.S.C. § 1983 case against Nissen, the City of Austin, and other now-dismissed defendants arising from Ambler’s death. Doc. 44. Plaintiffs specifically sued

Nissen both for using force himself and because he “failed to intervene to stop Johnson and Camden’s use of excessive force.” Doc. 44, pp. 5, 40, ¶¶ 25, 324. All defendants other than Nissen and the City of Austin were voluntarily dismissed, due to settlement, on January 6, 2022. Doc. 107; *see* Doc. 106. On February 28, 2023, Nissen moved for summary judgment. Doc. 167.

III. STANDARD OF REVIEW

In deciding a motion for summary judgment, a district court “must draw all reasonable inferences in the non-movant’s favor, and view the evidence in the light most favorable to the non-movant,” here, Ambler’s survivors. *Winfrey v. Rogers*, 901 F.3d 483, 493 (5th Cir. 2018). “[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.” *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (reversing Fifth Circuit order affirming grant of summary judgment in police excessive force case where material facts were disputed). “The evidence of the nonmovant is to be believed, with all justifiable inferences drawn and all reasonable doubts resolved in its favor.” *Taylor Pipeline Const., Inc. v. Directional Road Boring, Inc.*, 438 F. Supp. 2d 696, 703 (E.D. Tex. Apr. 26, 2006) (collecting cases).

IV. ARGUMENT AND AUTHORITIES

Nissen’s motion should be denied because he violated Ambler’s clearly established right to be free from excessive force—both directly, as to Nissen’s own use of deadly force, and indirectly, as Nissen did not intervene to stop the deputies’ use of deadly force. Thus, Nissen is not entitled to summary judgment or qualified immunity. Finally, the Court can infer fact disputes from the testimony of Williamson County Deputies Johnson and Camden because both deputies pled the 5th Amendment in response to questions regarding Nissen’s actions.

A. Nissen (and the deputies) used unconstitutional excessive force against Ambler.

Officers violate the Fourth Amendment by using force that was clearly excessive to the need and objectively unreasonable. *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 275 (5th Cir. 2015). In evaluating whether a use of force was objectively unreasonable, the Court should weigh the following *Graham v. Connor* factors:

- [1] the severity of the crime at issue,
- [2] whether the suspect poses an immediate threat to the safety of the officers or others, and
- [3] whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.

Graham v. Connor, 490 U.S. 386, 396 (1989). Even at the summary judgment stage, “[e]xcessive force claims are necessarily fact-intensive; whether the force used is ‘excessive’ or ‘unreasonable’ depends on the facts and circumstances of each particular case.” *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009). “[C]ourts have an obligation to sash [their] way through the factbound morass of ‘reasonableness’” in resolving excessive force claims. *Mason*, 806 F.3d at 276 (citing *Scott v. Harris*, 550 U.S. 372, 383 (2007)); *see also, e.g., Pena v. City of Rio Grande, Tex.*, 816 Fed. Appx. 966, 969 (5th Cir. June 8, 2020) (unpublished) (reversing district court where it “dismissed genuine disputes of material facts as merely ‘slightly differing’”). Thus, excessive force cases are particularly ill-suited for summary disposition.

“It is irrelevant ‘whether the force was justified based on the [defendant's] claimed interpretation of the situation at the time.’” *Pena v. City of Rio Grande City, Texas*, 816 Fed. Appx. 966, 970 (5th Cir. 2020); *see also Roque v. Harvel*, 993 F.3d 325, 334 (5th Cir. 2021). The objective facts available to the officers—from the situation right in front of them—are the only ones that matter for the Court’s analysis. *Id.*; *see also Autin v. City of Baytown*, 174 F. App'x 183,

185 (5th Cir. 2005). Nissen is limited to the facts that were knowable to him when evaluating his use of force. *Hernandez v. Mesa*, 137 S.Ct. 2003, 2007 (2017).

1. The Graham factors, when viewed in Plaintiffs' favor, show Nissen's use of force was objectively unreasonable.

Contrary to Nissen's briefing, the *Graham* factors weigh heavily against the use of any force, much less pressing Ambler's face and chest into the pavement despite his repeated pleas that he could not breathe. First, the severity of the offense weighs against Nissen's use of force. Williamson County deputies began their pursuit of Ambler because Ambler failed to dim his high beams.⁵⁷ This infraction was not serious and Nissen was aware of the nature of the violation.⁵⁸ This pursuit started at approximately 1:26 in the morning,⁵⁹ making it less likely that the pursuit itself was dangerous to the public. *See, Lytle v. Bexar County*, 560 F.3d 404, 416 (5th Cir. 2009) ("a suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is *per se* reasonable. In assessing the reasonableness of a police officer's use of force, we must instead delve into the facts and circumstances of each case." (Collecting cases)).

The second and third *Graham* factors weigh against Nissen's use of force as Ambler did not constitute a threat and ceased resisting or attempting to evade arrest. By the time Nissen arrived on scene, Ambler had ceased his flight, exited his vehicle, put his hands in the air, and was attempting to surrender and comply with commands from the Williamson County deputies.⁶⁰ Any

⁵⁷ Ex. 16, CAD Report, COA 0182.

⁵⁸ Ex. 16, CAD Report, COA 0182; Ex. 2, Nissen Deposition, 73:1-4, 10-17, 22-25, 222:1-8. Nissen speculates that Ambler was guilty of other crimes, but these assertions are irrelevant because he had no inkling about that speculation at the time. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007, 198 L. Ed. 2d 625 (2017) ("Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant.").

⁵⁹ Ex. 16, CAD Report, COA 0182.

⁶⁰ Ex. 5, Dash camera footage, 1:45:44–1:46:14; Ex. 2, Nissen Deposition, 234:20-25, 235:16-21, 236:6-12, 236:18-22, 237:15-21.

threat of danger posed by the pursuit dissipated at the time Ambler exited his vehicle, raised his hands in the air, and surrendered to the deputies' authority.⁶¹ There was zero threat to anyone while Ambler laid on the ground and rolled onto his stomach with a deputy on top of him, which Nissen observed.⁶² Ambler did not make any threatening gestures or statements, nor did Nissen observe a weapon on Ambler or in his vehicle.⁶³ *See, Newman v. Guedry*, 703 F.3d 757, 762 (5th Cir. 2012) (“The videos do not show [plaintiff] attempting to strike either officer, holding a weapon, or even reaching for his waistband. The officers did not try to warn each other or the other officers that [plaintiff] had a weapon, which might be expected if either officer truly thought that at the time.”). No reasonable officer would have considered Ambler an immediate threat in these circumstances.

Nissen's own body camera makes it clear that Ambler was not resisting at all; he was instinctively putting one arm on the ground to try to breathe.⁶⁴ He clearly informed the officers several times that he could not breathe and had congestive heart failure.⁶⁵ Ambler told the officers, in response to a command to “stop resisting” that he was not resisting.⁶⁶ But even if Nissen thought Ambler's single arm on the pavement was resistance, this is what the Fifth Circuit has often characterized as “passive resistance” where the use of force is objectively unreasonable. *See, e.g., Joseph v. Bartlett*, 981 F.3d 319, 328, 335 (5th Cir. 2020) (arrestee who “squirmed, wiggled, and flailed” against officers trying to handcuff him was not “actively resisting”); *Trammell v. Fruge*, 868 F.3d 332, 341 (5th Cir. 2017) (man who smelled strongly of alcohol ignored multiple

⁶¹ Ex. 5, Dash camera footage, 1:45:44–53.

⁶² Ex. 13, Nissen Interrogatory Responses, 12-13; Ex. 3, Body-Worn Camera, 2:02 (T06:46:25Z).

⁶³ Ex. 2 at 226:6-13, 227:5-16 251:21-252:6.

⁶⁴ Ex. 5, Dash Camera Footage, 1:45:58–1:47:22; Ex. 3, Body-Worn Camera, 2:00–39 (T06:46:49–47:28); Ex. 1, Clark Declaration, 27; *see* Ex. 10, Kadar Declaration, 2.

⁶⁵ Ex. 3, Body-Worn Camera, 1:38–1:41, 1:53–1:57, 2:00–2:04, 2:15–2:17 (T06:46:28–31, T06:46:44–47, T06:46:50–54, T06:47:05–07); Ex. 5, Dash-camera footage, 01:46:24, 01:46:33, 01:46:34–35, 01:46:48–49, 01:47:08–09; Ex. 2, Nissen Deposition, 146:3-5, 284:24-285:3.

⁶⁶ Ex. 2, Nissen Deposition, 140:10-14.

commands, refused to answer questions, refused to walk towards officer, said “I’m not going to jail,” then repeatedly pulled his arm away when the officer grabbed it was only “passively resist[ing]”); *Hanks v. Rogers*, 853 F.3d 738, 746 (5th Cir. 2017) (man cursing at officer, refusing instructions to exit vehicle for 45 seconds, rolling up sleeves, reaching into pocket, then refusing to kneel despite repeated commands for 20 seconds was “at most, passive resistance”); *Deville v. Marcantel*, 567 F.3d 156, 168 (5th Cir. 2009) (“passive resistance” for driver to say traffic stop was “bullshit,” leave the vehicle running, and, when repeatedly commanded to exit the vehicle, to refuse and roll up her window); *Chacon v. Copeland*, 577 F. App'x 355, 361–62 (5th Cir. 2014) (finding dispute of fact whether man actively resisted officers when he spun around and shoved officers in response to officers trying to pull him to the ground).⁶⁷

Contrary to Nissen’s insistence on discussing the earlier vehicle pursuit—and speculation about totally unrelated crimes that he had no information about at the time—“an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.” *Lytle v. Bexar Cnty, Tex.*, 560 F.3d 404, 413 (5th Cir. 2009). Nissen’s motion for summary judgment is replete with the assertion that because Ambler had fled, all bets as to the use of force were off, even after Ambler had exited his vehicle, attempted to comply with the Williamson County deputies’ commands, and was lying face down on the pavement. Clearly established Fifth Circuit case law shows that Nissen’s analysis is hopelessly flawed. In *Lytle*, the Fifth Circuit held that while an officer’s use of force at the moment the suspect’s vehicle was

⁶⁷ See also *Soto v. Bautista*, No. 21-40803, 2023 WL 2624785, at *4 (5th Cir. Mar. 24, 2023) (comparing subdued arrestee spitting at officer to passive resistance cases); *Pena v. City of Rio Grande City, Tex.*, 816 Fed. Appx. 966, 972–73 (5th Cir. 2020) (suspect who refused to give officer her hands then fled on foot exhibited only “minimal resistance” insufficient to justify using TASER); *Scott v. White*, 810 Fed. Appx. 297, 299, 301–302 (5th Cir. 2020) (comparing arrestee who refused to relinquish an unknown object, who “twisted and turned underneath” the officer trying to handcuff him, and who briefly grabbed officer’s arm, to passive resistance cases).

backing up toward him *could* be reasonable, that did not necessarily make shooting at the vehicle once it was three to four houses down the road, anywhere from three to ten seconds later, “equally reasonable.” *Id.* at 413, 414.

Here, any force that was justified by Ambler’s flight from the Williamson County deputies dissipated as soon as he exited his vehicle, surrendered, and attempted to comply with the deputies’ commands. *See, Cooper v. Brown*, 844 F.3d 517, 524 (5th Cir. 2016) (“Our caselaw makes certain that once an arrestee stops resisting, the degree of force an officer can employ is reduced.”); *Joseph v. Bartlett*, 981 F.3d 319, 335 (5th Cir. 2020) (“summary judgment is inappropriate when the timing of the officer’s force may or may not have corresponded to the timing of the suspect’s resistance. For an officer’s force to be reasonable, it must be commensurate with the suspect’s level of contemporaneous, active resistance.”); *Aguirre v. City of San Antonio*, 995 F.3d 395, 408 n.6 (5th Cir. 2021) (“even if a seized person’s conduct earlier in the encounter amounted to active resistance, ‘the force calculus changes substantially once that resistance ends.’” (quoting *Curran v. Aleshire*, 800 F.3d 656, 661 (5th Cir. 2015))). This case is not like *Salazar v. Molina*, 37 F.4th 278, 280 (5th Cir. 2022), where the (nonfatal) force ended within twenty seconds after the suspect stopped fleeing, nor *Escobar v. Montee*, 895 F.3d 387, 391 (5th Cir. 2018), where the suspect still had a knife within reach (and the force was also not fatal). Here, Nissen kept using deadly force for two minutes after he arrived, so he certainly had adequate time between arriving at Ambler’s vehicle and his uses of force against Ambler to assess the situation and understand that the threat of Ambler fleeing or resisting arrest had ended when he exited his vehicle and got on the ground.

Because Ambler was no threat to officers or the public once he exited his car with his hands up, and was not resisting—or, even in Nissen’s mistaken telling, at most passively resisting—the *Graham* factors weigh heavily against the officers’ use of force here.

2. *Nissen escalated to the use of force without even attempting other solutions.*

The Court also looks to the alternatives to the use of force, and whether the officers attempted to de-escalate first. The Fifth Circuit has stated that it “considers the speed with which an officer resorts to force where officers deliberately, and rapidly, eschew lesser responses when such means are plainly available and obviously recommended by the situation.” *Crane v. City of Arlington, Texas*, 50 F.4th 453, 464 (5th Cir. 2022); *see also Trammell v. Fruge*, 868 F.3d 332, 342 (5th Cir. 2017). This is an extremely easy case for Plaintiffs under this prong of the analysis. *See Joseph*, 981 F.3d at 324 (“A disproportionate response is unreasonable. And if it describes physical force inflicted by a police officer, it is unconstitutional.”).

The Fifth Circuit has repeatedly denied qualified immunity to police who took to the ground or piled on to an arrestee who had refused to surrender both arms to officers for handcuffing. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 734, 740 (5th Cir. 2000) (reversing summary judgment where officer suddenly grabbed man, who pulled back, and then another officer tackled him); *Trammell*, 868 F.3d at 342 (same); *Joseph v. Bartlett*, 981 F.3d at 326, 335 (affirming summary judgment against an officer who put his weight on arrestee and another officer who TASERed him, before escalating to baton strikes, punches, and kicks, after the arrestee refused to get on the ground, refused to put his hands behind his back, and was “flailing his arms and legs”); *Scott v. White*, 810 Fed. Appx. 297, 299, 301–302 (5th Cir. 2020) (dismissing qualified immunity appeal of officer who struck, pulled to the ground, and then continued to strike arrestee for not giving the officer his hands). Here, the officers did not take any time to try non-violent options—they just kept escalating until Ambler was dead. Thus, the force was objectively unreasonable, under binding precedent. *Id.* (reversing summary judgment for officers who used

force after three seconds of noncompliance); *Hanks*, 853 F.3d at 746 (same for 20 seconds of noncompliance).

The Fifth Circuit has repeatedly held officers who knowingly pile on to excessive force, like Nissen, use unreasonable force in similar situations even where the victim (unsurprisingly) struggles in response to the excessive force. In *Trammell*, an officer grabbed the plaintiff suddenly, before he had done anything more than refuse orders; a second officer tried to grab the plaintiff, in reaction to pulling away from the first officer's grab; and finally, two other officers (along with the first) tackled the plaintiff—all within about three seconds after the first time the plaintiff pulled away. *Id.* A struggle ensued, injuring the plaintiff's arm. 868 F.3d 332, 341 (5th Cir. 2017). The Fifth Circuit reversed summary judgment as to all four officers—including those who were ostensibly reacting to the plaintiff's resistance to their fellow officers' efforts to detain him. *Id.* at 342. The Court reasoned that “even if [plaintiff's] decision to pull his arm away from the officers can be characterized as some degree of resistance that would justify an officer's use of force, the quickness with which the officers resorted to tackling [plaintiff] to the ground militates against a finding of reasonableness.” *Id.* at 342. Likewise, in this case, even if Ambler “resisted” the deputies' efforts by keeping a hand on the ground, Nissen did not explore Ambler's pleas that he needed help or could not breathe; instead, Nissen merely gave geometrically impossible verbal commands (“flat on your stomach”) while force was already in use.⁶⁸ Nissen thus immediately resorted to helping the deputies use force—which, for Nissen, eventually escalated to pressing Ambler's face and chest into the pavement,⁶⁹ rather than trying anything other than violence.

⁶⁸ Ex. 3, Body-worn camera, 6:46:43.

⁶⁹ Ex. 3, Body-worn camera, 6:47:26–48.

Similarly, in *Newman v. Guedry*, the Fifth Circuit found that two officers engaged in excessive force, even though that plaintiff had resisted the first officer's forcible attempt to control him. 703 F.3d 757, 763 (5th Cir. 2012). In that case, the plaintiff was the occupant of a vehicle stopped during a traffic stop; one officer ordered him to allow a pat-down search. *Id.* at 760. During the pat-down, the plaintiff taunted the officer—and allegedly grabbed the officer's hand and refused to let go. *Id.* This prompted the officer to push the plaintiff forward, but he resisted the push, so a different officer approached and resorted to multiple baton strikes to try to force the plaintiff down, but he continued to stand. *Id.* at 760, 763. Accordingly, the first officer escalated further by firing his TASER. *Id.* at 760. The Fifth Circuit affirmed the denial of summary judgment as to both officers, reasoning that neither officer “attempt[ed] to use physical skill, negotiation, or even commands” before resorting to force despite the lack of active resistance by the plaintiff. *Id.* at 763. Likewise, here, Nissen immediately resorted to immediate and violent force against Ambler without any attempt to de-escalate.

In yet another case involving multiple officers, the Fifth Circuit affirmed denial of summary judgment in *Chacon v. Copeland*, 577 Fed. Appx. 355 (5th Cir. 2014). In *Chacon*, the plaintiff called 911 because a motel staffer was brandishing a gun and had tried to extort him at a motel. *Id.* at 357. When one officer arrived, he approached a motel staffer—matching the description the plaintiff provided—who denied calling 911 but accused the plaintiff of being a belligerent drunk. *Id.* Despite obvious inconsistencies, the first officer drew his gun and ordered the plaintiff from his vehicle as another APD officer arrived. *Id.* After the plaintiff exited his vehicle, the first officer tried to handcuff him but he pulled away. *Id.* Next, the two officers tried to pull him to the ground and the plaintiff struggled, including by spinning around and shoving the

officers. *Id.* at 358. In response, the officers began punching and electrocuting him with TASERS until they had subdued the plaintiff on the ground. *Id.*

The Fifth Circuit in *Chacon* concluded that the plaintiff’s disobeying orders and struggling against the officers did not justify their reaction because “[e]ven if some action by [plaintiff] demonstrated resistance, the fact question found by the district court remains: whether, even when considering his possible resistance, shoving [plaintiff] to the ground while he attempted to explain himself, punching him in the head while he was on the ground, or shooting him with a Taser [sic], constituted excessive force.” *Id.* at 362. Similarly, it was also unreasonable for Nissen to intervene and escalate the use of force merely because Ambler was trying not to die from the deputies’ ongoing use of deadly force⁷⁰—whether Nissen mistakenly interpreted Ambler’s efforts as “resistance” or not. Clearly here, the unnecessary escalation of force without first attempting other solutions demonstrates that the degree of force used was unreasonable.

3. *The degree of force was clearly excessive to any need.*

The degree of force here was also grossly disproportionate to any need for two reasons: Ambler’s non-resistance (or, in Nissen’s telling, passive resistance) required that he greatly limit the force used and Nissen instead used deadly force, which he admits was excessive.

First, Nissen failed to use a measure of force proportional to Ambler’s (lack of) resistance.

“[O]fficers must assess not only the need for force, but also ‘the relationship between the need and the amount of force used.’” *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009); *see also Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008). “Police are entitled only to [use] ‘measured

⁷⁰ Ex. 5, Dash Camera Footage, 1:45:58–1:47:22; Ex. 3, Body-Worn Camera, 2:00–39 (T06:46:49–47:28); Ex. 1, Clark Declaration, 27; *see* Ex. 10, Kadar Declaration, 2.

and ascending responses’ to the actions of a suspect, ‘calibrated to physical and verbal resistance’ shown by that suspect.” *Chacon v. Copeland*, 577 F. App'x 355, 362 (5th Cir. 2014).

Here, despite his single hand on the pavement, which at the most could be passive resistance, Nissen and the deputies used deadly force—not “minimal” force like Nissen argues—to kill Ambler. The video evidence demonstrates that Ambler was merely moving his body to attempt to continue breathing.⁷¹ He continued to alert officers to his condition and the difficulty he was facing as he moved.⁷² After leaving his vehicle, Ambler did not attempt to run and was no threat to any person, including Nissen. Nissen could only use measured force that was calibrated to the very minimal resistance demonstrated by Ambler. *See Joseph*, 981 F.3d at 324, 335; *Trammell*, 868 F.3d at 342; *Goodson*, 202 F.3d at 734, 740; *Scott*, 810 Fed. Appx. at 299, 301–302; *Chacon*, 577 F. App’x at 362. Nissen ignored Ambler’s pleas for help breathing and continued to use force: pushing Ambler’s head and neck down, pulling on Ambler’s left arm, placing his left knee on Ambler’s shoulder sufficient to cause hemorrhage, and further impairing Ambler’s breathing.⁷³ This was disproportional on its face to the non-resistance Ambler exhibited.

Second, Nissen’s use of force was further disproportionate because it rose to the level of deadly force—as reflected by the fact that it was a contributing cause of Ambler’s death.⁷⁴ When death is the result—and the officers knew it was a risk—compared to the minimal (if any) resistance, a reasonable jury could conclude the officers’ use of force “evinced such wantonness

⁷¹ Ex. 5, Dash Camera Footage, 1:45:58–1:47:22; Ex. 3, Body-Worn Camera, 2:00–39 (T06:46:49–47:28); Ex. 1, Clark Declaration, 27; *see* Ex. 10, Kadar Declaration, 2.

⁷² Ex. 4, Body-Worn Camera (COA 51366), 2:05-6 (T06:49:29-30Z), 2:21-22 (T06:46:45-46Z), 2:38-58 (T06:46:56-47:23Z).

⁷³ Ex. 2, Nissen Deposition, 273:13-15, 294:4-7, 295:2-296:2, 296:4-12; Ex. 10, Kadar Declaration, 2; Ex. 13, Nissen Interrogatory Responses, 12-13; Ex. 6, Autopsy Report, 3; Ex. 15, Baden Declaration, 6.

⁷⁴ Ex. 10, Kadar Declaration, 2; Ex. 6, Autopsy Report, 2; Ex. 15, Baden Declaration, 6-7.

with respect to the unjustified infliction as is tantamount to a knowing willingness that it occur.” *Deville*, 567 F.3d at 168. “In evaluating excessive force claims, courts may look to the seriousness of injury to determine ‘whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction as is tantamount to a knowing willingness that it occur.’” *Brown v. Lippard*, 472 F.3d 384, 386-87 (5th Cir. 2006) (quoting *Whitley v. Albers*, 475 U.S. 312, 321 (1986)).

Nissen and the Williamson County deputies knew there was a risk of death due to Ambler’s repeated cries that he could not breathe, informing them that he suffered from a heart condition, and his general distress during the incident.⁷⁵ Nissen was specifically trained, and the City’s written policy alerted him, to the risk of fatal positional asphyxia during a prone restraint.⁷⁶ The City has also testified in this case that those concerns embodied in APD policy were consistent with widely accepted minimum police practices.⁷⁷ This information gave Defendant Nissen and the Williamson County deputies no pause as they continued to apply force that injured Ambler and led to his death.⁷⁸ The extreme degree of force further distinguishes those cases Nissen relies upon such as *Salazar*, 37 F.4th at 280 (TASER) and *Escobar*, 895 F.3d at 391 (dog bite). Clearly, the wanton disregard of Ambler’s condition, the likelihood of his death, and the seriousness of his injury all lend themselves to the conclusion that the severity of the force was entirely disproportionate to the degree of (non-existent to minimal) passive resistance by Ambler, making the use of force unreasonable.

⁷⁵ Ex. 2, Nissen Deposition, 72:8-15, 169:7-11, 218:25-219:7.

⁷⁶ Ex. 11, Staniszewski Deposition, 131:11-24; Ex. 2, Nissen Deposition, 61:6-23; Ex. 7, APD Policy 321 – Care and Transport of Prisoners, [COA 0272257] (“warning about positional asphyxia”).

⁷⁷ Ex. 11, Staniszewski Deposition, 130:8-20, 131:25-132:8.

⁷⁸ Ex. 10, Kadar Declaration, 2; *see also* Ex. 6, Autopsy Report, 2.

4. *Nissen independently failed to intervene to stop the deputies' excessive force.*

In addition to Nissen's decision to rapidly escalate the already excessive use of force to push Ambler's chest and neck into the ground himself, Nissen is also liable because he was "present at the scene and [did] not take reasonable measures to protect a suspect from another officer's use of excessive force." *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995).

Plaintiffs specifically pleaded bystander liability due to Nissen's failure to intervene. Contrary to Nissen's argument, Plaintiffs specifically pleaded Nissen was "liable to the Plaintiffs as [a] bystander[]" because he "knew that a fellow officer was violating Ambler's rights by using excessive force, had a reasonable opportunity to protect Ambler from harm, and nonetheless, chose not to act." Doc. 44, p. 40, ¶ 324. Plaintiffs also pleaded that Nissen "failed to intervene to stop Johnson and Camden's use of excessive force." Doc. 44, p. 5, ¶ 25. And Plaintiffs' evidence bears these allegations out, so summary judgment must be denied.

Nissen's actions establish a question of fact as to whether he failed to reasonably intervene. "[A]n officer may be liable under § 1983 under a theory of bystander liability where the officer '(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act.'" *Hamilton v. Kindred*, 845 F.3d 659, 663 (5th Cir. 2017) (internal citations omitted); *see Hale*, 45 F.3d at 919. Nissen is liable for three reasons.

First, Nissen had knowledge of the Williamson County deputies' misconduct. *See Montgomery v. Hollins*, No. 3:18-CV-1954-M-BN, 2019 WL 2424053, at *2-3 (N.D. Tex. May 8, 2019), *report and recommendation adopted*, No. 3:18-CVV-1954-M-BN, 2019 WL 2422493 (N.D. Tex. June 10, 2019) ("A bystanding officer must know of his fellow officer's misconduct"). The *Montgomery* court explained:

The rationale underlying the bystander liability theory is that a bystander officer, by choosing not to intervene, functionally participates in the unconstitutional act of his fellow officer. If the bystander lacks such specific knowledge, he cannot be a participant in the unlawful acts, and the imposition of personal liability is impermissible.

Id. Here, Nissen was on scene, fully aware of the force being used, aware that the stop was due to a traffic violation, knew Ambler was not breathing appropriately and had a heart condition, and knew that, *at worst*, Ambler was passively resisting.⁷⁹ But Nissen went further: he actively participated in the unlawful force by assisting with additional force, clearly meeting the first requirement under *Hamilton*.

Second, Nissen had a reasonable opportunity to prevent harm to Ambler. Although mere presence on scene does not render an officer automatically responsible for the actions of another officer, *Montgomery*, 2019 WL 2424053 at *2-3, Nissen had every reasonable opportunity to mitigate and stop the use of force once he got to the scene.⁸⁰ In this determination, “courts consider the duration of the alleged use of force and location of the suspect in relationship to the observing officer”. *Garrett v. Crawford*, No. SA-15-CV-261-XR, 2016 WL 843391, at *9–10 (W.D. Tex. Mar. 1, 2016) (internal quotations omitted). In alleging a failure to intervene, the plaintiff must show or the Court may reasonably infer “that the officer’s presence related to the allegedly excessive force alerted the officer to act and gave that officer time to intervene.” *Montgomery*, 2019 WL 2424053 at *4 (finding officer alleged to be right next to the use of excessive force would have had a reasonable opportunity to intervene).

⁷⁹ Ex. 3, Body-Worn Camera, 1:38–1:41, 1:53–1:57, 2:00–2:04, 2:15–2:17 (T06:46:28–31, T06:46:44–47, T06:46:50–54, T06:47:05–07); Ex. 5, Dash-camera footage, 01:46:24, 01:46:33, 01:46:34–35, 01:46:48–49, 01:47:08–09; Ex. 2, Nissen Deposition, 146:3-5, 284:24-285:3; Ex. 14, Johnson Deposition, 94:22-96:2.

⁸⁰ Ex. 2, Nissen Deposition, 16:9-12, 90:14-22; Ex. 14, Johnson Deposition, 28:24-29:6, 28:13-17, 76:9-15; Ex. 12, Camden Deposition, 46:1-5, 96:21-25.

In this case, Nissen had the reasonable opportunity to intervene. Nissen had at least two minutes to react.⁸¹ Nissen was also close enough to hear Ambler’s complaints and touch Ambler.⁸² Nissen remained within touching distance of Ambler and Williamson County Deputies.⁸³ More fundamentally, Nissen demonstrably had enough time to decide to use considerable, deadly force himself—so he should not be heard to complain that he lacked an opportunity to instead intercede before the deputies killed Ambler. The deputies used force against Ambler right in front of Nissen and he affirmatively participated, rather than interceding. Thus, “[v]iewing the allegations and summary judgment evidence most favorably to [plaintiff], the summary judgment evidence raises a fact issue as to whether [the officers] had a reasonable opportunity to realize the excessive nature of the force and to intervene to stop it.” *Hale*, 45 F.3d at 919.

In the analogous *Garrett v. Crawford*, the district court in San Antonio found that the plaintiff had adequately pled a failure to intervene claim where the plaintiff was shocked with a TASER for more than one minute while other officers “stood by”. No. SA-15-CV-261-XR, 2016 WL 843391, at *10 (W.D. Tex. Mar. 1, 2016). The court determined that “more than sixty seconds would have been sufficient time” for the officers to intervene and that alleging officers “stood by” was sufficient to demonstrate officers observed and acquiesced in the force. *Id.*⁸⁴ Here, Nissen was

⁸¹ Ex. 3, Body-Worn Camera (T06:46:05–48:07).

⁸² Ex. 2, Nissen Deposition, 116:4-10 (Nissen heard Ambler state “I can’t breathe” at least three times); 142:15-16, 176:8-11, 179:15-16; Ex. 13, Nissen Interrogatory Responses, 12-13.

⁸³ Ex. 3, Body-Worn Camera 4:01–6 (T06:48:25–30).

⁸⁴ See also *Robinson v. City of Garland, Texas*, Civ. Ac. No. 3:10-CV-2496-M, 2015 WL 9591443, at *8 (N.D. Tex. Nov. 23, 2015), *report and recommendation adopted*, Civ. Ac. No. 3:10-CV-2496-M, 2015 WL 9593623 (N.D. Tex. Dec. 31, 2015) (court concluded that allegations that officers were in relatively close proximity and force lasted for approximately four to five minutes would give officers an opportunity to intervene); *Dwyer v. City of Corinth, Tex.*, Civ. Ac. No. 4:09-CV-198, 2009 WL 3856989, at *6 (E.D. Tex. Nov. 17, 2009) (court concluded that since the plaintiff stated that an officer had used a TASER on him fifteen times in a row, the other officers had enough time to have an opportunity to stop the force).

at the scene and then engaged with Ambler for over two minutes before he stopped using force—and he did not just stand by, but used force himself, confirming that he “acquiesced.”⁸⁵

In another similar case, *Malone v. City of Forth Worth*, the plaintiff brought failure to intervene claims against nine officers arguing that officers used excessive force in releasing a police dog on him to pull him from the cab of his truck. No. 4:09-CV-634-Y, 2014 WL 5781001, at *16 (N.D. Tex. Nov. 6, 2014). The court found that in review of the summary-judgment evidence, including video evidence, there were material facts in dispute regarding the proximity of officers and duration of the incident that would support bystander liability for four officers, drawing a contrast between officers close enough for a much greater time and others. *Id.* at 17, 21. The court ruled that regarding the four officers present close in time to the outset of the force; within a few feet of where the force occurred; looking at the officer with clear sight of him; and within shouting distance, a question of fact for bystander liability had been established. *Id.* at 17. The court only excused those officers who were several yards away, could not see the scene, or had not even arrived before the force ended. *Id.* at 17-18. Similarly, in this case, video evidence demonstrates Nissen’s awareness of the excessive force, the exact duration of the Nissen’s interaction and the interactions of Williamson County deputies with Ambler, and over two minutes of Nissen’s immediate presence.⁸⁶ See *Malone*, 2014 WL 5781001, at *21-2 (relying on video to determine bystander’s involvement).

Third, Nissen chose not to act to intervene.⁸⁷ An officer has a duty not to acquiesce in another officer’s use of force by refusing to take measures to stop the use of excessive force. *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995). Nissen went further than failing to act and

⁸⁵ Ex. 3, Body-worn camera, T06:46:06–06:48:08.

⁸⁶ Ex. 3, Body-worn camera, T06:46:06–06:48:08.

⁸⁷ Ex. 2, Nissen Deposition, 16:9-12, 90:14-22.

acquiescing; when Nissen did act, it was to contribute unnecessary and deadly force to Ambler, causing his death.⁸⁸ Just like in *Malone*, the jury could reasonably determine that Nissen had a reasonable opportunity to stop the excessive force but did not even try. *See Malone*, 2014 WL 5781001, at *21.

B. Nissen is not entitled to qualified immunity as his actions violated clearly established law.

Nissen is not entitled to qualified immunity for violating Ambler's constitutional rights. A police officer is not entitled to qualified immunity if the plaintiff can prove that: 1) the officer violated the plaintiff's constitutional right, and 2) the right was clearly established. *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019) (en banc). Constitutional rights are "clearly established" by "controlling authority – or a robust consensus of cases of persuasive authority – that defines the contours of the right in question with a high degree of particularity." *Wigginton v. Jones*, 964 F.3d 329, 355 (5th Cir. 2020). The purpose of the "clearly established" prong of the qualified immunity analysis is to ensure "that every reasonable official would have understood that what he [or she] is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal citations omitted). The right's "contours must be sufficiently clear that a reasonable officer would understand what they are doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "[I]n light of pre-existing law the unlawfulness must be apparent." *Id.* A plaintiff, however, does not need to produce "a case directly on point." *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 727 (5th Cir. 2018). Qualified immunity will not protect "officers who apply excessive and unreasonable force merely because their means of applying it are novel." *Newman v. Guedry*, 703 F.3d 757, 763- 764 (5th Cir. 2012).

⁸⁸ Ex. 2, Nissen Deposition, 273:13-15, 294:4-7, 295:2-296:2, 296:4-12; Ex. 10, Kadar Declaration, 2; Ex. 13, Nissen Interrogatory Responses, 12-13.

The qualified immunity inquiry is still dependent upon disputes of material fact: “a judge’s function at summary judgment is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.” *Tolan*, 572 U.S. at 656 (internal citations omitted). Thus, in evaluating the relevant context for the qualified immunity analysis of applicable authority, “courts must be careful not to define a case’s ‘context’ in a manner that imports genuinely disputed factual propositions.” *Id.* at 657. Plaintiffs have shown that, when the facts are viewed in their favor, the law is clearly established as to both of Nissen’s constitutional violations, and so he is not entitled to qualified immunity.

1. Nissen’s use of excessive force violated clearly established law.

Nissen’s assertion of qualified immunity should be easily rejected for two reasons.

First, when Nissen killed Ambler on March 28, 2019, he was already on notice that this conduct was unlawful based on ten of the prior Fifth Circuit excessive force decisions applied in the foregoing section. *See supra* pp. 12–22.⁸⁹ Six of these were binding cases; the four unpublished Fifth Circuit decisions are also relevant to “discern[] the clearly established law.” *Roque v. Harvel*, 993 F.3d 325, 337–338 (5th Cir. 2021). Further cementing the application of that authority to these facts is that all five subsequent Fifth Circuit decisions cited above addressed incidents from before Ambler’s death⁹⁰—so each “is instructive about what was clearly established when [Ambler] died.” *Fairchild v. Coryell Cnty., Tex.*, 40 F.4th 359, 368, n.7 (5th Cir. 2022). As Nissen’s (and

⁸⁹ *See Hanks*, 853 F.3d at 747; *Trammell*, 868 F.3d at 343; *Chacon*, 577 F. App’x at 363; *Newman*, 703 F.3d at 764; *Deville*, 567 F.3d at 169; *Autin v. City of Baytown*, 174 F. App’x 183, 185 (5th Cir. 2005); *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000); *Hale*, 45 F.3d at 919.

⁹⁰ *Soto v. Bautista*, No. 21-40803, 2023 WL 2624785, at *1 (5th Cir. Mar. 24, 2023) (May 13, 2016 incident); *Crane v. City of Arlington, Texas*, 50 F.4th 453, 459 (5th Cir. 2022) (February 1, 2017 incident); *Pena v. City of Rio Grande City, Tex.*, 816 Fed. Appx. 966, 967 (5th Cir. 2020) (June 30, 2014 incident); *Joseph v. Bartlett*, 981 F.3d 319, 326 (5th Cir. 2020) (February 7, 2017 incident); *Scott v. White*, 810 Fed. Appx. 297, 298 (5th Cir. 2020) (February 2015 incident).

the deputies’) use of force here is just as egregious as, or worse than, the facts addressed in those decisions—including *Chacon* and *Scott*, which involved other APD officers—the law was clearly established that Nissen could not force Ambler’s face and chest into the ground, or stand by while deputies electrocuted him with a TASER, for non-resistance—or even passive resistance. As such, Nissen cannot be cloaked in the shroud of qualified immunity.

Second, one of the cases Nissen identifies and fails to distinguish, *Darden v. City of Fort Worth*, is on all fours with this case, so that decision alone clearly established Ambler’s right to be free from Nissen’s precise malfeasance. 880 F.3d 722 (5th Cir. 2018). In *Darden*, on March 16, 2013, police officers were executing a no-knock warrant for a suspected cocaine distribution operation at Darden’s house. *Id.* at 725. Darden (similar to Ambler) weighed approximately 340 pounds, was kneeling on a couch seat near the door and immediately raised his hands in the air when Fort Worth officers entered his home to execute a no-knock warrant. *Id.* at 726. Similar to the deputies in this case TASERing Ambler, the officers threw Darden to the ground before he had any time to react. *Id.* The officers punched, kicked, choked, and TASERed Darden, then pushed his face into the ground while pulling his arms behind his back. *Id.* As all of this was happening, other people in the house—and, according to witnesses, Darden himself—informed officers that Darden had asthma and could not breathe. *Id.* Darden, just like Ambler, was not in handcuffs and “pull[ed] his arm away” from an officer’s grasp and repeatedly “push[ed] himself up on his hands.” *Id.* Because the officers kept trying to “press[] his face into the ground,” despite his and his family’s voiced concerns that he could not breathe, Darden ultimately went limp. *Id.* Only then did the officers sit Darden up; it was later determined that “Darden had suffered a heart attack and died.” *Id.*

Nissen’s attempt to distinguish *Darden* based on the fact that Darden did not resist fails spectacularly, because in fact the officers in that case made the exact same argument Nissen makes today, and the Fifth Circuit specifically rejected it: The Fifth Circuit determined that a “jury could conclude that all reasonable officers on the scene would have believed that Darden was merely trying to get into a position where he could breathe and was not resisting arrest” when he pulled his arm away and tried to push himself off the ground. *Id.* at 730. The Fifth Circuit thus reversed the district court’s grant of qualified immunity to both officers. *Id.* at 732-33. Nissen’s self-serving characterization aside, Darden’s conduct is the exact same instinctual reaction Ambler exhibited in this case—not resistance.⁹¹ If Darden was not resisting as of the Fifth Circuit’s decision in 2018, then it was clearly established to Nissen that Ambler was also not resisting when he engaged in the exact same conduct—and provided analogous warnings about his health conditions⁹²—before Nissen killed him in this case. Thus, like in *Darden*, there is a question of fact for the jury to decide: whether Ambler was attempting to resist arrest when Nissen was using force to pin Ambler face down on the ground. This determination must be made by a jury, and thus precludes Nissen’s assertion of qualified immunity.

Finally, Nissen’s other errant argument is that the Fifth Circuit “sharply limited the precedential value of *Darden*” in the case of *Henderson v. Harris County, Texas*, but this assertion is completely groundless—and, in any event, *Henderson* is obviously inapplicable on its facts. 51 F.4th 125 (5th Cir. 2022) (cert. pending). As an initial matter, *Henderson* is a per curiam panel

⁹¹ See Ex. 5, Dash Camera Footage, 1:45:58–1:47:22; Ex. 3, Body-Worn Camera, 2:00–39 (T06:46:49–47:28); Ex. 1, Clark Declaration, 27; see Ex. 10, Kadar Declaration, 2.

⁹² Ex. 3, Body-Worn Camera, 1:38–1:41, 1:53–1:57, 2:00–2:04, 2:15–2:17 (T06:46:28–31, T06:46:44–47, T06:46:50–54, T06:47:05–07); Ex. 5, Dash-camera footage, 01:46:24, 01:46:33, 01:46:34–35, 01:46:48–49, 01:47:08–09; Ex. 2, Nissen Deposition, 146:3-5, 284:24-285:3; 286:20-25.

decision—so it cannot “limit[] the precedential value” of a previous, published panel decision like *Darden*. See, e.g., *United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014) (“It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel’s decision”); *F.D.I.C. v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998) (“one panel of this court cannot disregard, much less overrule, the decision of a prior panel”). Substantively, even a cursory reading of *Henderson* shows that it did not attempt to cast *Darden* into doubt, but only recognized that the facts of *Henderson* are dramatically different from *Darden*. For the same reasons *Henderson* is distinct from *Darden*, *Henderson* is distinguishable from this case.

Henderson involved officers in a foot pursuit of a man they allegedly saw with marijuana in a public park. *Henderson*, 51 F.4th at 128. During the pursuit, an officer caught up to the suspect and ordered him to stop or “I’m going to tase you.” *Id.* at 129. The suspect stopped, but simultaneously began to turn around—the parties disputed whether he was moving his hands up to surrender, or down to his waistband—and so the officer fired his TASER in that moment. *Id.* The suspect was otherwise uninjured. *Id.* The Fifth Circuit held that neither *Darden* or any other case had clearly established that firing a TASER alone would be excessive force during a split-second decision where a suspect is suddenly turning to face the officer. *Id.* at 134–135. For the exact same reason, *Henderson* is not applicable here, while *Darden* is on all fours: Ambler had stopped fleeing minutes—not less than a second—earlier, and was already face down on the ground by the time Nissen arrived.⁹³ This is similar to *Darden*, where the fatal force occurred over a minute after any exigency had passed as the victim was subdued facedown. As discussed above, “an exercise of force that is reasonable at one moment can become unreasonable in the next if the

⁹³ Ex. 13, Nissen Interrogatory Responses, 12-13; Ex. 3, Body Worn Camera, 2:02 (T06:46:25).

justification for the use of force has ceased.” *Lytle*, 560 F.3d at 413. That moment had not yet passed in *Henderson*, but it was several minutes earlier in this case.

Accordingly, Nissen’s use of force was clearly forbidden by a number of binding cases—and further supported by informative, unpublished decisions—including otherwise similar cases where the subjects were not killed such as *Newman*, *Trammell*, and *Chacon*. The *Darden* case specifically shadows the events here: officers used almost the exact same techniques, in response to almost the exact same conduct, and caused the death of their victim in almost the exact same way as Nissen did to Ambler. While clearly established law does not require “a case directly on point,” here, Plaintiffs have one. *Darden*, 880 F.3d at 727. No reasonable officer could have believed it was lawful to ignore Ambler’s pleas, continue to escalate the force against him, and ultimately kill him as demonstrated here. Nissen is therefore not entitled to qualified immunity on Plaintiffs’ excessive force claims, therefore, his motion should be denied.

2. *Nissen’s failure to intervene violated clearly established law.*

Clearly established law also provides that officers must intervene to stop excessive force when they have a reasonable opportunity to do so; Nissen violated this principle and is not entitled to qualified immunity for two reasons.

First, as discussed in the previous section, *see supra* §(A)(4) at 22, the Fifth Circuit has long held that an officer incurs § 1983 liability if he “is present at the scene and does not take reasonable measures to protect a suspect from another officer’s use of excessive force.” *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995) (affirming denial of summary judgment to deputy who stood by and laughed as a peace officer from a different agency used excessive force on arrestee); *see also Carroll v. Ellington*, 800 F.3d 154, 177 (5th Cir. 2015) (dismissing appeal from denial of summary judgment to deputy who did not stop excessive force on subdued arrestee); *Harris v.*

Chanclor, 537 F.2d 203, 205 (5th Cir. 1976) (jailer liable to inmate where a police officer beat the inmate in his presence and he failed to intervene). *Hale*, *Carroll*, and *Harris* each involved less severe acquiescence to the excessive force than present here, as the victim survived and the bystander did not contribute—whereas Nissen affirmatively assisted in the use of force. This same logic was endorsed by the Fifth Circuit—albeit after Ambler’s death and in an unpublished case—to find that officers violated clearly established law by helping their fellows use force, rather than intervening to stop it. *See Greene v. DeMoss*, No. 21-30044, 2022 WL 3716201, at *4 (5th Cir. Aug. 29, 2022) (“with each officer’s personal participation in the excessive force, it is reasonable to infer that they each knew about the others’ unconstitutional conduct”).⁹⁴ The underlying incident in *Greene* was also in 2019, and the Fifth Circuit likewise relied on pre-2019 cases: if it was clearly established by that binding precedent for the officer in *Greene*, then it was clearly established for Nissen. *See Fairchild*, 40 F.4th at 368, n.7 (explaining reliance on on post-incident decisions); *Roque*, 993 F.3d at 337–338 (explaining reliance on unpublished decisions).

Second, in addition to the binding authority, “a robust consensus of cases of persuasive authority” clearly established Nissen’s duty to intervene in this case. *Wigginton v. Jones*, 964 F.3d 329, 355 (5th Cir. 2020). In this circuit, as discussed in the earlier section, *Malone*, 2014 WL 5781001, at *21; *Montgomery*, 2019 WL 2424053, at *2-3; and *Garrett*, 2016 WL 843391, at *10, all applied the Fifth Circuit’s precedent in the same way—and in cases that, like *Hale*, *Carroll*, and *Harris*, involve less severe misconduct than Nissen’s with Ambler. An appeal from the decision in *Malone* was dismissed—indicating there was no question of law presented, which would have

⁹⁴ *See also Timpa v. Dillard*, 20 F.4th 1020, 1039 (5th Cir. 2021) (applying *Hale* to conclude law was clearly established and reversing summary judgment on bystander claims where officers stood by and laughed while other officers used force on incapacitated subject, ultimately killing him); *Hamilton v. Kindred*, 845 F.3d 659, 663 (5th Cir. 2017) (holding *Hale* clearly established bystander liability for failing to stop overly invasive street-side cavity search of detainees).

included whether bystander liability was clearly established. *Malone v. Tidwell*, 615 Fed. Appx. 189 (5th Cir. 2015). The same law was applied to reject an assertion of qualified immunity by officers who stood by during a nonfatal beating in *Robinson v. City of Garland, Tex.*, No. 3:10-CV-2496-M, 2015 WL 9591443, at *8 (N.D. Tex. Nov. 23, 2015), *report and recommendation adopted*, No. 3:10-CV-2496-M, 2015 WL 9593623 (N.D. Tex. Dec. 31, 2015) and by officers who stood by during a nonfatal beating and TASERing in *Dwyer v. City of Corinth, Tex.*, No. 4:09-CV-198, 2009 WL 3856989, at *6 (E.D. Tex. Nov. 17, 2009). *Hale, Carroll, and Harris* clearly control in this circuit, and a consensus of district court cases apply them to a wide range of comparable conduct. And a far-reaching consensus likewise exists outside the Fifth Circuit. *See, e.g., Davis v. Rennie*, 264 F.3d 86, 98 (1st Cir. 2001); *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994); *Smith v. Mensinger*, 293 F.3d 641, 652 (3d Cir. 2002); *Randall v. Prince George's Cty., Md.*, 302 F.3d 188, 204 (4th Cir. 2002); *Stevenson v. City of Seat Pleasant, Md.*, 743 F.3d 411, 419 (4th Cir. 2014); *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 853 (6th Cir. 2016); *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983); *Fogarty v. Gallegos*, 523 F.3d 1147, 1165 (10th Cir. 2008); *Estate of Booker v. Gomez*, 745 F.3d 405, 422 (10th Cir. 2014); *Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986).

In addition to being closely analogous in some or all of the relevant facts to the specific decisions discussed above, this is moreover an “obvious case” in which the *Graham* factors independently and clearly establish the rights that Nissen violated by using excessive force and failed to intervene. *Hanks*, 853 F.3d at 747. Thus, whether Nissen used unreasonable, excessive force and “stood by” despite having a reasonable opportunity to intervene should be assessed by a jury.

C. The Court should find a question of fact exists by relying on key witnesses' assertion of Fifth Amendment rights.

As outlined in the Statement of Facts, *supra* 2–9, Williamson County Deputies Johnson and Camden repeatedly pled their 5th Amendment right against self-incrimination in response to questions regarding Nissen's actions during the subject incident. It is permissible to draw a negative inference regarding the invocation of the Fifth Amendment by a non-party. *See, FDIC v. Fidelity & Deposit Co. of Maryland*, 45 F.3d 969, 977 (5th Cir. 1995) (“The Fifth Amendment ‘does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.’ [citation]. We acknowledge that no party has refused to testify in this civil action, but ‘[a] non-party’s silence in a civil proceeding implicates Fifth Amendment concerns to an even lesser degree.’”). Because there is no constitutional bar to such evidence’s admission, “a jury could determine that a witness who colluded with [Defendant] took the Fifth Amendment to avoid disclosing that collusion.” *Id.*

Although “‘a party seeking summary judgment cannot rely solely on the other party’s exercise of his fifth amendment rights’”, *Bean v. Alcorta*, No. SA:14-CV-604-DAE, 2015 WL 4164787, *9 (W.D. Tex. July 9, 2015) (quoting *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 n.3 (5th Cir. 1990)), it can be considered with corroborating evidence. *See generally Bean*, 2015 WL 4164787 at *9. The assertion of the 5th Amendment privilege is an ambiguous response, especially where there is no other evidence presented to bolster the inference. *Bean v. Alcorta*, No. SA:14-CV-604-DAE, 2015 WL 4164787, *9 (W.D. Tex. July 9, 2015) (citation omitted). Here, where Plaintiff provided substantial independent evidence to support its contentions concerning Nissen’s conduct, a negative inference can appropriately be taken. *See, c.f. State Farm v. Gutterman*, 896 F.2d at 119 *Id.* at 119 n.3 (“At least two courts have declined to draw the inference at all where the party relying on the inference provided no independent evidence to support it.”).

V. CONCLUSION

For the foregoing reasons, Nissen's motion for summary judgment should be denied.

Date: May 5, 2023.

Respectfully submitted,

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**ATTORNEYS FOR PLAINTIFF
MICHELLE BEITIA AS NEXT FRIEND OF
J.A.A., A MINOR**

CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing has been served on all counsel of record through the Electronic Case Files System of the Western District of Texas.

By /s/ Jeff Edwards
JEFF EDWARDS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION No. 1:20-cv-01068-LY
	§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	
Defendants.	§	

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT NISSEN'S MOTION
FOR SUMMARY JUDGMENT**

Exhibit 16

Excerpt from APD's Computer Aided Dispatch (CAD)
Report

FILED UNDER SEAL



AUSTIN POLICE DEPARTMENT
CAD Call HARDCOPY
CP# 2019-870090

Confidential



AUSTIN POLICE DEPARTMENT
CAD Call HARDCOPY

CP# 2019-870090

Narrative Text**Type** COMPLAINT COMMENT**Subject** CAD Complaint Comments**Author** AP7966 - KNIGHT, JENNIE**Related Date** Mar-28-2019 *****

03/28/2019 01:26:40AP7966 WILCO IN PURSUIT OF VEH //ORIGINAL STOP WAS FOR HAVING HIGH BEAMS ON // 28 - VVF4DV - 2015 HONDA CARRY ALL WHITE IN COLOR
 03/28/2019 01:26:53AP7966 ON WILCO CALL 1
 03/28/2019 01:27:11AP7966 ASKING IF THEY CAN PATCH TO REG LAW 1
 03/28/2019 01:27:11AP6277 CCC
 03/28/2019 01:27:34AP7966 HEADING EB ON WELLS BRANCH
 03/28/2019 01:27:40AP7966 HEADING TO 35
 03/28/2019 01:27:58AP7966 SM DISP SEE 190870090 - GB WILCO PURSUIT INTO APD
 03/28/2019 01:28:08AP6277 SM WC, LT632 SEE 190870090 IN EDWD
 03/28/2019 01:28:21AP7966 90 MPH - LIGHT TRAFFIC SB ON 35
 03/28/2019 01:28:27AP7966 ON REGIONAL LAW 1
 03/28/2019 01:28:36AP7966 35 SB NOW COMING UP ON FARMER
 03/28/2019 01:28:38AP8693 GBD EDWD
 03/28/2019 01:28:59LT632 CLR
 03/28/2019 01:29:00AP7966 # 3 LANE SB -
 03/28/2019 01:29:05AP7966 ON 35 STILL
 03/28/2019 01:29:09WC5 CLR
 03/28/2019 01:29:10AP8306 GBD IDA
 03/28/2019 01:29:32AP7966 PASSING BRAKER STILL SB
 03/28/2019 01:29:44AP7966 NOW IN EXCESS OF 100 MPH
 03/28/2019 01:29:47AP8732 GBD APT
 03/28/2019 01:29:51AP8297 E805 GBD HENR
 03/28/2019 01:29:52AP7742 E805 GBD BAKR
 03/28/2019 01:30:00AP9017 E805 GBD ADAM
 03/28/2019 01:30:06AP8327 GBD GRGE
 03/28/2019 01:30:14AP7966 WILCO REQ SPIKE STRIPS
 03/28/2019 01:30:16AP8714 E805 GB'D FRNK
 03/28/2019 01:30:28AP8855 GB'D CHAR
 03/28/2019 01:30:35LT643 CLR, SINCE THIS IS NOT AN OFFENSE THAT WE CAN PURSUE FOR, APD UNITS MAY NOT ENGGE IN TEH PURSUIT, BUT MAY ASSIST WITH STOP STICKS OR AT THE TERMINATION OF THE PURSUIT
 03/28/2019 01:31:06AP7966 TAKING RUNDBERG EXIT
 03/28/2019 01:31:21AP8480 E805 GBD DAVD
 03/28/2019 01:31:25AP8855 BACKED UP E805 WITH AIR2
 03/28/2019 01:31:32AP8693 BACKED UP E805 WITH E808
 03/28/2019 01:31:33AP8855 AIR2 SWITCHING TO REG LAW 1
 03/28/2019 01:31:42AP8306 I809 SETTING UP AT AIRPORT/35 W SPIKES... WSITCHING TO REG LAW 1
 03/28/2019 01:32:13AP8693 E808 HEADED ON THE SVRD SB
 03/28/2019 01:32:25AP7966 COMING UP TO ANDERSON LANE
 03/28/2019 01:32:41AP8693 E805 STILL SB ON THE SVRD // HEADING INTO IDA
 03/28/2019 01:32:49AP7966 LIGHT TRAFFIC // APD BEHIND WILCO UNIT
 03/28/2019 01:33:09AP7966 35 FRONTAGE NOW..STILL SB



AUSTIN POLICE DEPARTMENT
CAD Call HARDCOPY

CP# 2019-870090

TITLE 01400242184081521 ISSUED 07/08/2015 ODOMETER 596 REG DT 07/24/2017
 2015,HOND,PIL,LL,5FNYF3H38FB027880,PASS-TRK,COLOR: WHI, PRICE \$ 33670.00 PREV
 OWN CLEO BAY HONDA KILLEEN TX OWNER JAVIER AMBLER JR,ID#=N/A,JAVIER AMBLER SR,
 5703 SULFUR SPRINGS DR,,KILLEEN,TX,76542 LIEN 06/09/2015,AMERICAN HONDA
 FINANCE CORP,,PO BOX 997512,,SACRAMENTO,C
 A,95899 PLATE AGE: 2 LAST ACTIVITY 08/05/2017 RENEW OFC: 014 REMARKS
 ACTUAL MILEAGE.DATE OF ASSIGNMENT:2015/06/09.PAPER TITLE. MRI: 92177847
 IN: MVDWS 9192 AT 28MAR2019 01:53:06 OUT: ASX1 1508 AT 28MAR2019 01:53:06
 [SHARED]
 03/28/2019 01:54:42AP8306 BACKED UP I809 WITH I890 [SHARED]
 03/28/2019 01:55:44EM3008 ENGL8 >>>CPR IN PROGRESS<<< [SHARED]
 03/28/2019 01:56:10PAGINGSERVICE PAGING GROUPS NOTIFIED:ALL - ACTIVE 911
 [SHARED]
 03/28/2019 01:56:23FD002497 ENGL8 REQUESTING SECOND UNIT FOR CPR [SHARED]
 03/28/2019 01:57:32EM2144 [PAGE] *****ADDITIONAL FIRE UNIT NEEDED*****
 [SHARED]
 03/28/2019 01:59:06AP8306 SECONDARY LOCATION FOR I890: BETHUNE AVE / E ST
 JOHNS AVE, BETHUNE AVE / E ST JOHNS AVE,AUSTIN, TX 78752. [SHARED] 03/28/2019
 01:59:28AP8306 BACKED UP I809 WITH I803 [SHARED]
 03/28/2019 02:13:33AP8624 M14 PALMER, JAKE EM2808.....ROSENACKER, KRISTY EM2571
 [SHARED]
 03/28/2019 02:14:39AP8624 ENGL8 ANGUIANO, CARLO FD002049....LEDET, EUGENE
 FD002354....RONQUILLO, JERRY FD002366....TAYLOR, JAMES FD002103 [SHARED]
 03/28/2019 02:17:16AP8732 QNT18 PERSONNEL: ETHEREDGE, JONATHAN FD1603 //
 JOHNSON, SCOTT FD 1702 // LISCANO JR, ARTURO FD2356 // PUTMAN, SKYLAR FD1488
 [SHARED]
 03/28/2019 02:17:36AP8732 DC05 PERSONNEL: MARTIN, JAMES EM1497 [SHARED]
 03/28/2019 02:21:2410E905 TRANSPORTED PERSON GENDER IS MALE [SHARED]
 03/28/2019 02:21:56EM3008 DC05 WILL BE TRANSPORTING WITH CPR IN PROGRESS.
 CLOSEST FAC IS DSMC @ 06:09 [SHARED]
 03/28/2019 02:23:38AP8732 M14 XPORT'G TO DELL SETON [SHARED]
 03/28/2019 02:24:15AP8732 [PAGE] PROBLEM CHANGED FROM *ASSIST NON
 EMERGENCY TO XASSIST OTHER POLICE AGENCY BY AUSTIN PD [SHARED]
 03/28/2019 02:32:31AP8624 I890 SM OOC PLS PAGE SIU FOR I890 REF 190870090
 [SHARED]
 03/28/2019 02:35:13AP8306 SGT GRIFFIN AP4670 PAGED FOR I890 [SHARED]
 03/28/2019 02:43:46AP8306 SM EDWD, CHAR PER LT732... ALL UNITS ONSCENE SHOULD
 KILL THEIR BODY WORN CAMERAS AND DMAVS [SHARED]
 03/28/2019 02:50:11I803 TOD 0237 DR. HURST [SHARED]
 03/28/2019 02:53:10ENGL8 [FIRE] HAS CLOSED THEIR INCIDENT [19031937]
 03/28/2019 02:54:28AP6277 CCC ON UPDATE [SHARED]
 03/28/2019 02:54:47AP6277 SM WC SEE UPDATE IN 190870090 IN IDA [SHARED]
 03/28/2019 02:54:49AP8306 I890 SM OOC PLS HAVE ONCALL IA DET 21 I890 @
 ***? OCA 190870090 [SHARED]
 03/28/2019 03:00:10AP8306 IA931/BEALAND AP4413 PAGED FOR I890 [SHARED]
 03/28/2019 03:01:3810E905 [AUSTIN-TRAVIS COUNTY EMS] HAS CLOSED THEIR INCIDENT
 [19087-0019]
 03/28/2019 03:11:07AP6277 APD CITIZEN DEATH PAGE SENT PER WC5 [SHARED]
 03/28/2019 03:12:57AP6277 VH2/HORN AP2764 PAGED FOR NOTIFICATION PER WC5

FILED

July 06, 2023

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BY: _____ pg _____
DEPUTY

JAVIER AMBLER, Sr., et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01068-LY
	§	JURY DEMANDED
	§	
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	
Defendants.	§	

PLAINTIFFS’ RESPONSE TO DEFENDANT CITY OF AUSTIN’S MOTION FOR SUMMARY JUDGMENT

The City of Austin’s motion for summary judgment, Doc. 165, should be denied.

I. SUMMARY OF THE RESPONSE

The Court should deny the City of Austin’s motion for summary judgment as to Plaintiffs’ Americans with Disabilities Act, Rehabilitation Act, and 42 U.S.C. § 1983 excessive force claims for the following three reasons:

First, the City is liable under the ADA and RA. Ambler was subdued and posed no threat by the time Nissen arrived, so the area was secure and the City’s officer, co-Defendant Austin Police Department Officer Michael Nissen, was not permitted to discriminate against Ambler because of his disabilities. But Nissen did so anyway: Nissen knew Ambler was disabled both because he saw Ambler was morbidly obese and he heard Ambler say he had congestive heart failure. Nissen knew from his training that both disabilities meant he and Williamson County Sheriff’s deputies were imperiling Ambler’s life with their unnecessary restraint tactics, as both conditions impaired Ambler’s ability to breathe and survive while the officers pressed Ambler prone and face-first into the pavement. Nissen also knew from Ambler’s begging Nissen to help him because, “I can’t breathe.” Despite this, Nissen refused to make accommodations by relenting

or at least modifying his restraint tactics. Nissen did not do anything to reduce the risk such as simply rolling Ambler over or sitting him up, much less stop using unnecessary force—all accommodations which were reasonable and would have saved Ambler’s life. The City thereby failed to reasonably accommodate Ambler’s known disabilities—intentionally discriminating against Ambler and killing him because of his disabilities.

Second, the City also violated § 1983. Nissen violated Ambler’s constitutional rights by using excessive force and by failing to intervene to stop the two deputies’ excessive and deadly force. Nissen’s misconduct flowed directly from longstanding problems with the City’s supervision and training. In particular, APD never disciplined any officer for failing to intervene, despite recognizing that this failure would promote exactly the misconduct at issue in this case, and also never fixed a toxic “warrior” training regimen it put Nissen through, before Ambler’s death. The City has candidly acknowledged these deficiencies—but it also knew of them at the time, as the City repeatedly saw its officers violate the Constitution as a result of the same issues for many years before Ambler’s death. The City’s failure to correct its longstanding, known unconstitutional policy failures before Ambler’s death evinces deliberate indifference—satisfying the standard for municipal liability.

Finally, the City unjustifiably permitted the destruction of key video evidence in this case, despite knowing there was an ongoing criminal investigation and a likelihood of civil litigation. Thus, a reasonable jury could conclude that this evidence was highly unfavorable to the City, and that this inference independently creates a fact issue precluding summary judgment.

Accordingly, if the material fact disputes are resolved in Plaintiffs’ favor, then the City is liable for disability discrimination and violating Ambler’s constitutional rights, so its motion should be denied.

II. FACTS IN THE LIGHT MOST FAVORABLE TO NON-MOVANT¹

On March 28, 2019, Javier Ambler II, unarmed, was brutally killed by police while he begged “I can’t breathe.”²

A. APD’s officer helped Williamson County deputies kill Ambler.

After a roughly twenty minute vehicle pursuit which began after Ambler allegedly had his high beams on, Ambler’s vehicle hopped a curb and collided with a fixed object.³ As Williamson County Sheriff’s deputies Zachary Camden and James Johnson approached, Ambler stepped out of his crashed vehicle, raised his hands in the air, and began stepping backward toward the street—showing the deputies he intended to surrender.⁴ Nevertheless, Johnson fired his TASER at Ambler while he stood with his hands up, shocking him multiple times and causing him to fall.⁵ Both deputies then struck Ambler with their knees and held him face down to the ground while he begged for medical help.⁶ Defendant Austin Police Department Officer Michael Nissen arrived in the midst of the ongoing forcible restraint about thirty seconds after Ambler exited the vehicle.⁷

¹ Plaintiffs refer to and incorporate their response to Nissen’s motion for summary judgement, Doc. 183, for a more detailed discussion of the underlying misconduct by Nissen and the deputies.

² Ex. 3, Body-Worn Camera, 0:56 duration (T06:46:45–46Z timestamp); Ex. 6, Autopsy Report, pp. 2–4; Ex. 10, Kadar Declaration, p. 2; Ex. 15, Baden Declaration, Report pp. 5–6. Exhibit 3 was published by KVUE with captions and redactions, while Exhibit 4 is a clean excerpt from what the City produced in this litigation. The timestamps in the top right are the same in both exhibits, and references to either should be construed as a reference to both. Exhibit 15 references are all to the numbered pages of the attached report.

³ Ex. 16, CAD Report, at COA 0182.

⁴ Ex. 5, Dash Camera Footage, timestamp 01:45:45–53. The dash camera is cited by the timestamp on the bottom right of the screen. Deputies Johnson and Camden are currently under indictment for manslaughter related to the killing of Javier Ambler, II. Ex. 8, Travis County Indictment of James Johnson, D-1-DC-20-900070; Ex. 9, Travis County Indictment of Zachary Camden, D-1-DC-20-900069.

⁵ Ex. 5, Dash Camera Footage, 01:45:49–1:46:36.

⁶ Ex. 5, Dash Camera Footage, 01:45:49–1:46:36.

⁷ See Ex. 3, Body-Worn Camera, 1:48–3:01 (T06:46:37–47:51).

Nissen confirmed Ambler's vehicle was empty, then turned to assist the deputies in restraining Ambler.⁸ Obeying the deputies' commands, Ambler was beginning to lay face down when Nissen arrived, and, by the time Nissen turned his attention to Ambler, Ambler was on his stomach on the pavement with one deputy on top of him.⁹

Next, in Nissen's presence, and clearly audible on Nissen's chest-mounted camera as well as a nearby deputy's chest-mounted mic, Ambler told the officers three times, "I have congestive heart failure."¹⁰ This was true, as reflected by Ambler's medical records.¹¹ Ambler also weighed over 400 pounds, making him morbidly obese, and this fact was immediately evident to Nissen, who addressed Ambler as "big man" and later reported he was "heavy-set."¹² These health conditions had emergently impaired Ambler's ability to breathe in the past.¹³ After the police held him face down on the ground, he twice begged "please," and said, "I can't breathe," at least five times.¹⁴ When the officers did not relent in their pressure, Ambler instinctively struggled to provide leverage to his lungs by keeping at least one elbow on the ground.¹⁵ Nissen knew that Ambler

⁸ Ex. 3, Body-Worn Camera, 1:27–1:32 (T06:46:17–21); Ex. 5, Dash Camera Footage, 01:46:20–29.

⁹ Ex. 13, Nissen Interrogatory Responses, 12-13; Ex. 3, Body-Worn Camera, at 2:02 (T06:46:25).

¹⁰ Ex. 3, Body-Worn Camera, 1:30–1:31 (T06:46:20–21), 1:37–1:38 (T06:46:28–29), 1:40–1:41 (T06:46:29–30) 1:53–1:57 (T06:46:28–31), 2:00–2:04 (T06:46:44–47), 2:15–2:17 (T06:46:50–54, T06:47:05–07); Ex. 5, Dash Camera Footage, 01:46:23–24, 01:46:30–31, 01:46:32–33, 01:46:34–35, 01:46:48–49, 01:47:08–09; Ex. 2, Nissen Deposition, 146:3-5, 284:24-285:3 (Nissen heard "I have congestive heart failure" on the video but claimed he did not hear it on scene although he was present); 286:20-25 (Ambler said it a second time, "louder than the first time").

¹¹ Ex. 18, St. David's Medical Records, AMBLER000159.

¹² Ex. 3, Body-Worn Camera, 1:43–44 (T06:46:33–34Z), 3:35–40 (T06:48:25–30); Ex. 2, Nissen Deposition, 70:18-21, 171:21-25, 286:5-14; Ex. 6, Autopsy Report, p. 5 [COA 052264].

¹³ Ex. 18, St. David's Medical Records, AMBLER000261 ("Obese Respiratory: Hypoxic on room air.").

¹⁴ Ex. 3, Body-Worn Camera, 1:41–1:42 (T06:46:31–32), 1:54–55 (T06:46:43–44), 1:56 (T06:46:46), 2:03–04 (T06:46:52–53), 2:15–16 (T06:47:05–06).

¹⁵ Ex. 5, Dash Camera Footage, 1:45:58–1:47:22; Ex. 3, Body-Worn Camera, 2:00–39 (T06:46:49–47:28); Ex. 1, Clark Report, 27; Ex. 10, Kadar Declaration, 2.

“experienced some sort of medical episode” and heard Ambler state that he was “not resisting.”¹⁶ Nissen admitted Ambler was never violent.¹⁷

Despite knowing that Ambler’s health problems would make him vulnerable to injury and death from the prone restraint,¹⁸ and knowing he had to be alert to complaints about difficulty breathing,¹⁹ Nissen ignored all of Ambler’s pleas and instead helped the deputies forcibly restrain him in that position, which further restricted Ambler’s ability to breathe.²⁰ Nissen continued to apply force to Ambler’s left and right arm to pull his hands behind his back.²¹ Johnson announced his intention to TASER Ambler again and then did so.²² Nissen did not intervene when he heard Johnson announce his plan, nor when he heard the sounds of the TASER.²³

After the last TASER deployment, Ambler became limp, silent, and unconscious.²⁴ Nonetheless, Nissen pushed the back of Ambler’s neck with his hand and pressed his knee into Ambler’s upper back, continuing to force Ambler’s face and chest into the pavement.²⁵ Nissen’s application of direct pressure against the back of Ambler’s neck and back further restrained his ability to breathe.²⁶ Petechial hemorrhage in Ambler’s eyes indicated he was suffocating from the

¹⁶ Ex. 2, Nissen Deposition, 145:23-24, 140:12-14, 288:6-8 (Ambler repeated “I am not resisting” in response to Nissen stating “Stop resisting”); Ex. 3, Body-Worn Camera, 2:03–04 (T06:46:53–54).

¹⁷ Ex. 2, Nissen Deposition, 94:24-95:5, 222:21-22; *see also id.* at 226:12-13 (no weapons in plain view); 227:5-16) (no weapons or people in Ambler’s car).

¹⁸ Ex. 2, Nissen Deposition, 61:6-23, 63:3-25, 64:17-23, 70:9-17, 72:8-15, 103:14-20, 106:17-23, 169:7-11, 218:25-219:7; Ex. 11, Staniszewski Deposition, 126:23-127:4, 131:20-134:3.

¹⁹ Ex. 2, Nissen Deposition, 104:14-20, 113:6-10, 123:3-6; *see also* Ex. 11, Staniszewski Deposition, 129:11-16 (trained to consider when a person says “I can’t breathe”).

²⁰ Ex. 10, Kadar Declaration, 2.

²¹ Ex. 2, Nissen Deposition, 142:15-16, 176:8-11, 179:15-16; Ex. 13, Nissen Interrogatory Responses, 12-13.

²² Ex. 3, Body-Worn Camera, 2:39 (T06:47:29), Ex. 2, Nissen Deposition, 93:22-25, 94:1-4.

²³ Ex. 2, Nissen Deposition, 94:5-8.

²⁴ Ex. 3, Body-Worn Camera, 2:40 (T06:47:29); *see also* Ex. 15, Baden Declaration, p. 5.

²⁵ Ex. 3, Body-Worn Camera, 2:55–58 (T06:47:45–48); Ex. 2, Nissen Deposition, 126:4-10.

²⁶ Ex. 10, Kadar Declaration, 2.

pressure to his neck.²⁷ Hemorrhage in Ambler's upper back where Nissen applied his knee suggests there was significant pressure, which would have stopped the chest from expanding.²⁸ Nissen knew these types of force could impair breathing.²⁹ Overall, Nissen was present for two minutes of the use of force, with his own hands on Ambler for 85 seconds, before he relented.³⁰

The officers eventually rolled Ambler onto his side—long after he was unconscious.³¹ Had the officers paused or stopped their restraint earlier, turned Ambler over onto his side, or placed him in a tripod sitting position, then more than likely he would not have died.³² Minutes after Ambler went fully unresponsive, Nissen finally, belatedly, voiced concern that Ambler was experiencing a medical episode; thereafter, the officers eventually attempted to render aid and call EMS.³³ About three and half minutes after Ambler had become limp from the last TASER, the officers began chest compressions on Ambler after confirming he had no pulse.³⁴ It was too late; Ambler had died, and resuscitative efforts failed.³⁵

The Travis County Medical Examiner performed Ambler's autopsy, classified his death as a homicide, and found that Ambler died of congestive heart failure associated with morbid obesity “in combination with forcible restraint.”³⁶ The examiner explains that the forcible restraint, pressure to Ambler's back, and TASERs can “markedly exacerbate underlying cardiovascular disease, leading to an arrhythmia.”³⁷ The examiner further identified a possible “component of

²⁷ Ex. 6, Autopsy Report, p. 3.

²⁸ Ex. 10, Kadar Declaration, 2.

²⁹ Ex. 2, Nissen Deposition, 105:8–13, 106: 3–14, 107:11–18.

³⁰ Ex. 3, Body-Worn Camera, T06:46:05–48:07.

³¹ Ex. 5, Dash Camera Footage, 1:48:15.

³² Ex. 10, Kadar Declaration, 2–3; Ex. 15, Baden Declaration, 5–6.

³³ See Ex. 2, Nissen Deposition, 309:23–310:3; 325:4–6.

³⁴ Ex. 3, Body-Worn Camera, 6:12 (T06:51:02).

³⁵ Ex. 6, Autopsy Report, p. 2; Ex. 15, Baden Declaration, pp. 6–7.

³⁶ Ex. 6, Autopsy Report, p. 2.

³⁷ Ex. 6, Autopsy Report, pp. 3–4.

asphyxia” from the restraint, pointing to petechial hemorrhages in Ambler’s eyes.³⁸ Plaintiffs’ expert pathologist Dr. Michael Baden, MD, opines that the restraint impaired Ambler’s ability to breathe as he called out four times; that he lost consciousness and was lifeless in less than three minutes after the restraint was started; that Ambler died of restraint asphyxia that caused terminal respiratory and cardiac arrests; and that but for the way the physical force and tasers were employed he would not have died when he did.³⁹ Plaintiffs’ retained intensive care physician, Dr. Aran Kadar, MD, concurs.⁴⁰

B. Austin Police Department’s Long History of Excessive Force.

Killing Ambler was certainly not the first time APD officers used grossly excessive force on civilians, particularly when those officers were in groups. The numerous similar (and infamous) incidents from the ten years before Ambler’s death include:

On May 11, 2009, then-Officer Leonardo Quintana shot both Nathaniel Sanders and Sir Smith after approaching their car while they were asleep—Sanders died, Smith survived.⁴¹ Quintana and another officer came up on the car from behind, and could tell through the car windows that both occupants were asleep.⁴² Instead of making a plan, communicating with his partner, or identifying himself as police, Quintana woke Sanders, saw that Sanders had a pistol in his waistband, unsuccessfully tried to grab it, then backed away and opened fire on the car, killing Sanders.⁴³ Smith, unarmed and suddenly under fire, awoke from sleeping and tried to escape by running from the car. Instead of letting Smith escape to safety, Quintana shot him while Smith was

³⁸ Ex. 6, Autopsy Report, pp. 3–4.

³⁹ Ex. 15, Baden Declaration, 5–6.

⁴⁰ Ex. 10, Kadar Declaration, 2–3.

⁴¹ Ex. 59, Keypoint Government Solutions, Report on Officer Involved Shooting of May 11, 2009 (Sep. 30, 2009), pp. 3–4 [AMBLER007616–AMBLER007777].

⁴² *Id.* at 19.

⁴³ *Id.* at 21–22, 40–41.

fleeing, unarmed, and posed no danger to anyone.⁴⁴ The police chief only disciplined Quintana only for failing to activate his squad car's video camera, rejecting an internal recommendation to discipline him for his poor tactics that ultimately led to deadly force.⁴⁵ Tellingly, the City paid Sanders' family \$750,000 and Smith \$175,000.⁴⁶ Quintana's partner and the other officer present did nothing to stop the improper tactics or excessive force throughout the ordeal. Despite this, the City did not even investigate whether they should have intervened to stop the use of deadly force.⁴⁷

On November 28, 2010, APD officers John Gabrielson and Justin Berry used force on Alan Licon.⁴⁸ Gabrielson and Berry watched Licon crash a pickup truck into a light pole and then back up; Gabrielson followed the truck into traffic and aimed his firearm at Licon.⁴⁹ Licon put his hands up; Gabrielson kept his gun aimed at Licon while Berry drew his TASER and also aimed it at Licon.⁵⁰ Licon complied with commands by exiting the vehicle and dropping to his knees; Berry then pulled him to the ground and put his foot on Licon's back.⁵¹ Two other APD officers arrived and observed the arrest from that point onward.⁵² Despite Licon's compliance throughout, Gabrielson then put his own foot on Licon's "upper back or his neck," then pointed his pistol an "inch or two" from Licon's head and threatened to "fucking blast him" and "I'll blow your fucking head off."⁵³ Berry did nothing, so eventually one of the recently arrived officers interceded—because they believed Licon "wasn't presenting any ... physical threat to anybody. He was prone

⁴⁴ *Id.* at 23.

⁴⁵ *Id.* at 98; Ex. 60, Sanders and Smith Shooting IA Excerpt, 1, [COA 175310], 113 [COA 175424], 117 [COA 175428].

⁴⁶ Ex. 61, City Council Minutes (Aug. 25, 2011), pp. 13, 17.

⁴⁷ *See generally* Ex. 61, Sanders and Smith Shooting IA Excerpts.

⁴⁸ Ex. 62, Licon Use of Force IA Report, 2–3 [COA 175497–98].

⁴⁹ Ex. 62, Licon Use of Force IA Report, 2 [COA 175497].

⁵⁰ Ex. 62, Licon Use of Force IA Report, 2–3 [COA 175497–98].

⁵¹ Ex. 62, Licon Use of Force IA Report, 3, 9–10 [COA 175498, 504–505].

⁵² Ex. 62, Licon Use of Force IA Report, 3 [COA 175498].

⁵³ Ex. 62, Licon Use of Force IA Report, 5, 7, 9 [COA 175500, 502, 504].

down ... lying on the sidewalk, ... I feel that we needed to come in, take control of the scene.”⁵⁴ Thus, the two other officers physically pushed Gabrielson’s gun away so they could handcuff Licon.⁵⁵ APD suspended Gabrielson for five days for violating the use of force policy, but did not even investigate Berry—despite the fact that he admitted to helping use force and failed to intercede.⁵⁶

On April 29, 2011, APD officers Eric Copeland and Russell Rose used excessive force against Carlos Chacon when he called 911 to report he was the victim of an armed robbery.⁵⁷ When Copeland and Rose arrived and saw Chacon, they immediately brandished their firearms before saying a word.⁵⁸ The officers were angry even as Chacon complied with their initial commands, and only quickly escalated from there to adorn their angry commands with profanity.⁵⁹ The officers ordered him to both “get on the fucking ground now” and “don’t fucking move”—so Chacon tried to comply with the contradictory orders by lowering himself to the ground slowly, but the officers forced Chacon to the ground. Copeland and Rose then escalated to punching and electrocuting Chacon with a TASER.⁶⁰ In reviewing the undisputed facts from the video, Judge Sparks concluded that “[b]oth officers’ involvement in the entire struggle could likely have been avoided had the officers behaved reasonably,” and “[i]t was, after all, *the officers* who escalated

⁵⁴ Ex. 62, Licon Use of Force IA Report, 7 [COA 175502].

⁵⁵ Ex. 62, Licon Use of Force IA Report, 7 [COA 175502].

⁵⁶ See Ex. 62, Licon Use of Force IA Report, 1, 9–10 [COA 175494, 504–505].

⁵⁷ Ex. 63, Dash Camera Video of C. Chacon Arrest, 0:00–0:06, *available at* <https://www.youtube.com/watch?v=Y-lM2Iocw18> (Excerpt from 1:25 to 5:41).

⁵⁸ *Chacon v. City of Austin*, No. 1:12-cv-00226-SS, 2013 WL 2245139, *11 (W.D. Tex. May 21, 2013).

⁵⁹ *Chacon v. City of Austin*, No. 1:12-cv-00226-SS, 2013 WL 2245139, *2–3 (W.D. Tex. May 21, 2013); Ex. 63, Dash Camera Video of C. Chacon Arrest, 2:10–2:21 *available at* <https://www.youtube.com/watch?v=Y-lM2Iocw18> (Excerpt from 1:25 to 5:41).

⁶⁰ *Id.*

the situation by drawing their weapons and shouting profanity.”⁶¹ The Fifth Circuit affirmed⁶² and a jury found against the officers on May 13, 2015.⁶³ Yet APD never disciplined Copeland or Rose for abusing Chacon.⁶⁴ APD did not investigate either of them for failing to intervene.⁶⁵

On May 30, 2011, Officer Nathan Wagner fatally shot Byron Carter, Jr., a 20-year-old Black man. Carter was in a vehicle driven by L.W., a Black 16-year-old child, while exiting a tight parallel parking space after 11:00 pm.⁶⁶ Unbeknownst to Carter and L.W., Wagner and his partner were nearby on foot, and had been following Carter and L.W. surreptitiously and without suspecting the young men of any crime.⁶⁷ L.W. heard Carter say, “go,” in a fearful tone, so he accelerated out of the parking space. Although there was no danger, Wagner fired his weapon five times into the driver’s side doors as the car drove away.⁶⁸ Wagner’s shots wounded L.W. and killed Carter.⁶⁹ Wagner’s partner did nothing to intervene and stop the shooting, even as the car drove away.⁷⁰ In ensuing excessive force litigation, Judge Yeakel denied summary judgment to Wagner.⁷¹ Although neither officer was disciplined by APD, then-Police Monitor Margo Frasier and a Citizen Review Panel told the chief that the shooting was unjustified.⁷² APD never

⁶¹ *Id.* at *15 (emphasis in original).

⁶² *Chacon v. Copeland*, 577 Fed. Appx. 355 (5th Cir. 2014).

⁶³ *Chacon v. City of Austin*, No. 1:12-cv-00226-SS, 2013 WL 2245139, *2–3.

⁶⁴ *Id.* at *4.

⁶⁵ Ex. 11, Staniszewski Deposition, 103:14–17.

⁶⁶ *Carter v. Nathan Wagner & the City of Austin*, A-11-CV-887-LY, 2013 WL 12121445, at *2 (W.D. Tex. May 20, 2013).

⁶⁷ *Id.* at *1.

⁶⁸ *Id.* at *2.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 4–5.

⁷² See Ex. 58, Frasier Deposition, 74:15–75:7; Ex. 65, Tony Plohetski, *Citizens panel calls for firing of officer*, Austin-American Statesman (Jan 22, 2012); Ex. 23, Use-of-Force Related Discipline List.

investigated Wagner’s partner for failing to intervene.⁷³

On June 7, 2012, at least three officers used excessive force against Pete Hernandez, whose only “crime” was exiting a Wal-Mart store. As Hernandez walked through the parking lot, a police officer suddenly yelled from behind him to “stay,” and then, “get on the ground.”⁷⁴ Hernandez stopped—he testified that all he heard was to “Move out of the way,” not “get on the ground.”⁷⁵ Then, less than four seconds after the first command, Officer John Sikoski ordered his colleagues to “grab him.” Officer Jesus Sanchez executed a flying tackle into Hernandez, slamming him into the ground. Officer Robert Escamilla then stepped on Hernandez’s hand.⁷⁶ The City found the officers did not violate any policies.⁷⁷ (Albeit, without even investigating whether the officers failed to intervene.⁷⁸) Magistrate Judge Austin recommended denial of summary judgment on the excessive force claims against Sikoski, Sanchez, and Escamilla, and that recommendation was adopted by Judge Yeakel.⁷⁹ A jury found Sanchez used excessive force, awarding Hernandez \$877,000 (later reduced on remittitur).⁸⁰ APD never investigated any of the officers for failing to intervene to stop the initial use of force nor its escalation.⁸¹

On December 20, 2013, co-Defendant Nissen as well as APD officers Cassandra Langston and Chance Bretches were sent to an apartment in search of Jason Brown, whom Williamson

⁷³ Ex. 11, Staniszewski Deposition, 104:6–10, 106:19–24.

⁷⁴ *Hernandez v. the City of Austin*, No. A-14-CV-492-LY, 2015 WL 7301180, *3 (W.D. Tex. Nov. 17, 2015).

⁷⁵ Ex. 70, Hernandez Deposition, 39:2–40:8 (testifying police told him, “Move out of the way,” and he complied), 45:6–17 (did not hear other commands).

⁷⁶ *Hernandez v. the City of Austin*, No. A-14-CV-492-LY, 2015 WL 7301180, *4.

⁷⁷ *Id.* at *7.

⁷⁸ Ex. 11, Staniszewski Deposition, 104:11–16, 106:19–24.

⁷⁹ *Id.* at *8; *Hernandez v. Sanchez*, No. 1:14-CV-492-LY, 2015 WL 12670886, at *2 (W.D. Tex. Dec. 21, 2015).

⁸⁰ Ex. 43, *Hernandez v. the City of Austin*, No. A-14-CV-492-LY, Doc. 112 (W.D. Tex. Feb. 8, 2016).

⁸¹ Ex. 23, Use-of-Force Related Discipline List.

County said was involved in a domestic disturbance, to arrest Brown.⁸² Instead of Brown, the officers encountered Hunter Pinney, who lived at the apartment.⁸³ The officers knocked on the door persistently and demanded that Pinney come out. When Pinney complied, he told the officers his name. Instead of letting Pinney re-enter the apartment he had just voluntarily exited to get his ID and prove the officers were at the wrong address, the police suddenly grabbed Pinney and, Nissen claims, demanded that Pinney allow them to frisk him for weapons.⁸⁴ When Pinney “began to tense up” and “pull away,” the officers escalated their use of force and ultimately Nissen struck Pinney with his knee and electrocuted Pinney with a TASER.⁸⁵ Although APD officers charged Pinney with resisting arrest, those charges were dismissed and the City settled Pinney’s ensuing lawsuit against Nissen and the other officers.⁸⁶ Nissen and the other officers were not disciplined for their uses of force or investigated for failing to intervene.⁸⁷

In March 2014, APD Sgt. Greg White shot Jawhari Smith, a young black man, after confronting Smith when Smith was holding a small BB gun. Smith honestly and immediately told White that the “pistol” was just a BB gun and held it up in his right hand over his head, *according to White*.⁸⁸ Smith reported that he quickly dropped the BB gun on the ground.⁸⁹ White disagreed, claiming Smith still kept his right hand holding the BB gun above his head.⁹⁰ Nonetheless, instead of giving Smith time to comply, White shot Smith, though his patrol car audio recording shows

⁸² Ex. 72, Pinney Report, p. 13.

⁸³ Ex. 2, Nissen Deposition, 28:12–15.

⁸⁴ Ex. 2, Nissen Deposition at 28:16–29:11.

⁸⁵ Ex. 2, Nissen Deposition at 29:5–14, 42:12–14.

⁸⁶ Ex. 2, Nissen Deposition at 32:18–22; Ex. 74, Pinney Complaint; Ex. 73, Pinney Motion to Dismiss.

⁸⁷ Ex. 23, Use-of-Force Related Discipline List.

⁸⁸ Ex. 76, White Deposition, 97:9–24; *see also* Ex. 75, Dash Camera Footage with audio from *J. Smith*.

⁸⁹ Ex. 77, Smith Deposition, 91:18–21.

⁹⁰ Ex. 76, White Deposition, 97:9–98:23.

White gave Smith less than two seconds to comply with his commands.⁹¹ APD did not discipline White, but the City paid Smith a settlement.⁹²

On February 4, 2015, APD Sergeant Adam Johnson and APD Officer Patrick Oborski were conducting a blood draw of Caroline Callaway with Sheriff's deputies and a nurse.⁹³ Callaway, a 140-pound, 22-year-old woman, was placed into a restraint chair in a padded room with several deputies, the two APD officers, and a nurse. Although Callaway did not resist, she was placed in a mask that covered her entire face, impeding her ability to see and breathe.⁹⁴ This induced a panic attack, causing her to involuntarily shake. Sergeant Johnson placed his boot under her restrained arm to further pin it in place. A Sheriff's deputy applied a chokehold to Callaway.⁹⁵ Oborski knew Callaway had been diagnosed with anxiety, but did not speak up. Neither Johnson nor Oborski intervened to stop the use of excessive force.⁹⁶ In ensuing litigation by Callaway, Judge Sparks denied summary judgment to Johnson and Oborski because they stood by and did nothing despite the face mask and chokehold.⁹⁷ APD never investigated the officers for failing to intervene.⁹⁸

On February 9, 2015, APD Officers Manuel Jimenez, Michael Nguyen, and Rolando Ramirez approached Grady Bolton after Bolton was told to leave a bar on 6th Street.⁹⁹ Jimenez escalated the encounter by suddenly grabbing Bolton's wrist, twisting it behind Bolton's back, and

⁹¹ Ex. 75, Dash Camera Footage with audio from *J. Smith*, 1:23–1:25.

⁹² Ex. 78, Joint Advisory Concerning Settlement in Jawhari Smith Shooting; *see* Ex. 23, Use-of-Force Related Discipline List.

⁹³ *Callaway v. Travis Cty.*, No. A-15-CA-00103-SS, 2016 WL 4371943, at *2 (W.D. Tex. July 28, 2016).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at *11.

⁹⁸ Ex. 11, Staniszewski Deposition, 104:17–21, 106:19–24.

⁹⁹ *Bolton v. City of Austin*, No. A-17-CA-077-SS, 2018 WL 2392557, at *1 (W.D. Tex. May 25, 2018).

then kicking out Bolton's legs. Instead of intervening to stop Jimenez, Johnson joined in the use of force, including by hitting Bolton in the neck. Next, Nguyen also did nothing to stop the force, instead joining and repeatedly kicking Bolton with knee strikes. In ensuing litigation by Bolton, Judge Sparks denied summary judgment to Jimenez, Nguyen, and Ramirez.¹⁰⁰ APD never investigated the officers for failing to intervene.¹⁰¹

On February 15, 2015, Joseph Cuellar, who was intoxicated, encountered a "phalanx" of APD officers on horseback on 6th Street, while APD Detective Otho Deboise stood nearby.¹⁰² When Cuellar did not immediately yield to the horses, the officer riding ordered him to back away. Cuellar complied, but in a dancing motion. Cuellar then "danced" back towards one of the horses.¹⁰³ Deboise reacted by advancing and grabbing Cuellar when he was one to three yards from the horse, and throwing him to the ground. None of the other three officers intervened to stop Deboise or assist Cuellar. Deboise initially claimed that Cuellar had merely "stumbled" when pushed by the officer and fallen to the ground, but revised his report when a bystander's cell phone footage revealed Deboise had brutally thrown Cuellar down.¹⁰⁴ In ensuing litigation by Cuellar, Judge Sparks denied summary judgment on excessive force claims against Deboise on October 11, 2018.¹⁰⁵ APD never investigated the officers for failing to intervene.¹⁰⁶

On February 20, 2015, APD Officer Greg White (apparently the same officer who shot Jawhari Smith) tackled and repeatedly struck Justin Scott, who was only passively resisting—

¹⁰⁰ *Id.* at *2.

¹⁰¹ Ex. 11, Staniszewski Deposition, 104:22–105:2, 106:19–24.

¹⁰² *Cuellar v. Duboise*, No. AU-17-CA-00223-SS, 2018 WL 4955218, at *1 (W.D. Tex. Oct. 11, 2018).

¹⁰³ *Id.* at *2.

¹⁰⁴ *Id.* at *2, n.3.

¹⁰⁵ *Id.* at *6.

¹⁰⁶ Ex. 11, Staniszewski Deposition, 105:3–6, 106:19–24.

Smith argued with White before the tackle, then “twisted and turned” on the ground—on February 20, 2015.¹⁰⁷ Judge Pitman denied summary judgment on January 7, 2019, and the Fifth Circuit dismissed a subsequent appeal.¹⁰⁸ White was not disciplined for this use of force.¹⁰⁹

On April 25, 2015, APD Officers Eric Copeland (who also beat Carlos Chacon) and Mark Bergeson had ordered Adrian Aguado out of the back of Copeland’s patrol vehicle to reapply his handcuffs, which had slipped off one hand, when Copeland suddenly fired his TASER at Aguado without warning.¹¹⁰ Aguado had been complying with Copeland’s command to exit the vehicle and had not even put his second foot on the ground to exit the patrol vehicle when Copeland fired, causing Aguado to fall.¹¹¹ As Bergeson stood by doing nothing, Copeland then “dropped his body weight onto” Aguado’s shoulder using his knee, then fired his TASER a second time.¹¹² Copeland was disciplined for using objectively unreasonable force, while Bergeson was not even investigated for failing to intervene.¹¹³

On June 15, 2015, Officer Bryan Richter used excessive force against Breiaon King, a 120-pound Black woman that he had stopped for speeding.¹¹⁴ Richter hauled King from her seat, slammed her into a nearby vehicle, and then repeatedly knocked her onto the ground despite King’s minimal resistance and very small stature.¹¹⁵ Richter later falsely told fellow officers King tried to

¹⁰⁷ *Scott v. White*, No. 1:16-CV-1287-RP, 2019 WL 122055, at *9, 12 (W.D. Tex. Jan. 7, 2019)

¹⁰⁸ *Id.* at *14, *appeal dismissed sub. nom.*, 810 Fed. Appx. 297 (5th Cir. 2020).

¹⁰⁹ *See* Ex. 23, Use-of-Force Related Discipline List.

¹¹⁰ Ex. 79, Aguado Use of Force IA Summary, p. 2 [COA 174560].

¹¹¹ Ex. 79, Aguado Use of Force IA Summary, p. 2 [COA 174560].

¹¹² Ex. 79, Aguado Use of Force IA Summary, p. 2 [COA 174560].

¹¹³ Ex. 79, Aguado Use of Force IA Summary, pp. 1–2 [COA 174557–58].

¹¹⁴ *King v. City of Austin, Texas*, No. A-16-CA-1020-SS, 2018 WL 2027748, at *1 (W.D. Tex. May 1, 2018).

¹¹⁵ *Id.*

punch him.¹¹⁶ In denying Richter summary judgment, Judge Sparks concluded, “a reasonable jury could find Officer Richter’s use of force was clearly excessive and objectively unreasonable.”¹¹⁷ Tellingly, APD command staff failed to take formal disciplinary action or even respond seriously to Richter’s misconduct until after the civil lawsuit was filed.¹¹⁸ Thus, Judge Sparks also denied summary judgment as to the City on May 1, 2018, concluding that a reasonable jury could find the City’s use of force, training, and discipline policies were inadequate, causing Richter’s use of force against King, and that the City was deliberately indifferent to these known inadequacies.¹¹⁹

On July 5, 2015, Richard Munroe called 911 on himself at about 4:00 a.m. because “he wanted someone to talk to.”¹²⁰ Three APD officers arrived and saw Munroe appeared to be holding a handgun (which was later determined to be a BB gun).¹²¹ Eventually Munroe walked out onto his porch, sat down, and placed the BB gun in his lap when officers told him to put the gun down. While Munroe was still holding his phone to his ear, speaking to 911, with the BB gun in his lap, APD Officer Matthew Murphy snuck up behind him, then shot Munroe with a TASER. Murphy and Officer Stephen Johnson claimed they saw Munroe react to the TASER by pointing the BB gun at the officers. The three APD officers shot and killed Munroe with 23 rounds. But Munroe’s autopsy showed, and a witness attested, that the officers shot Munroe as he fell from the TASER.¹²² Judge Pitman denied officer Murphy’s and Johnson’s motions for summary judgment on March 12, 2018, emphasizing that if the jury believed the witness and the autopsy evidence, then their

¹¹⁶ *King v. City of Austin, Texas*, No. A-16-CA-1020-SS, 2018 WL 2027748, at *1 (W.D. Tex. May 1, 2018).

¹¹⁷ *King*, No. A-16-CA-1020-SS, 2018 WL 2027748, *7.

¹¹⁸ *Id.* at *2, 4 (noting that although Richter used force on June 15, 2015, Chief Acevedo did not learn of the incident until July 19, 2016).

¹¹⁹ *Id.* at *9–10.

¹²⁰ *Munroe v. City of Austin*, 300 F. Supp.3d 915, 920 (W.D. Tex. Mar. 12, 2018).

¹²¹ *Id.* at 921, n.1.

¹²² *Id.* at 921.

conduct in shooting Monroe when he had fallen over violated clearly established law.¹²³ On June 28, 2018, the City of Austin settled the matter with Munroe’s family for \$895,000.¹²⁴ APD never disciplined the officers for the shooting or investigated them for failing to intervene.¹²⁵

On August 27, 2015, APD Officers Christopher Van Buren and Daniel Jackson approached Armando Martinez, suspected of public urination, who was laying under a tree in a park.¹²⁶ Jackson ordered Martinez to “show me your hands,” then Van Buren ordered, “stand up,” “get off the ground,” and “walk in front of that vehicle, or I’m going to tase you now.”¹²⁷ Martinez kept laying on the ground, and so, because Jackson did not tell him to wait, Van Buren fired at Martinez with his TASER four seconds later.¹²⁸ Jackson agreed with APD investigators that he would not have used a TASER; Martinez was not preparing to fight, “just kind of sitting there.”¹²⁹ Jackson then handcuffed Martinez.¹³⁰ EMS was called to remove the TASER barb, and they determined Martinez was suffering a hyperglycemic reaction that required him to be hospitalized.¹³¹ Despite the fact that Martinez was obviously never a threat to anyone and Van Buren audibly threatened to use a TASER anyway, Jackson was not investigated for failing to intervene even though Van Buren was disciplined for using objectively unreasonable force.¹³²

On December 20, 2015, Gregory Jackson was attempting to cross to the north side of 6th

¹²³ *Id.* at 927–928.

¹²⁴ Ex. 80, Austin City Council Minutes (June 28, 2018), p. 5.

¹²⁵ Ex. 11, Staniszewski Deposition, 105:11–25, 106:19–24; *see also* Ex. 23, Use of Force-Related Discipline List.

¹²⁶ Ex. 83, Martinez Use of Force File, p. 1 [COA 174611]

¹²⁷ Ex. 83, Martinez Use of Force File, p. 1 [COA 174611]

¹²⁸ Ex. 83, Martinez Use of Force File, pp. 1, 3 [COA 174611, 13]

¹²⁹ Ex. 83, Martinez Use of Force File, p. 4 [COA 174614]

¹³⁰ Ex. 83, Martinez Use of Force File, p. 3 [COA 174613]

¹³¹ Ex. 83, Martinez Use of Force File, p. 1 [COA 174611]

¹³² Ex. 83, Martinez Use of Force File, p. 1 [COA 174609]

Street with his party when officers were about to close the street.¹³³ He encountered APD Officers Jason Jones and Brian Huckaby on bicycles, among many other patrol officers. Jones' bike bumped into Jackson, they had an eleven second conversation, then Jones suddenly grabbed Jackson to place him under arrest. Contrary to the officers' testimony, Jackson complied—or at least “did not actively resist.”¹³⁴ Nonetheless, in seconds, Jones and Huckaby grabbed Jackson's arms and kicked him with their knees multiple times before escalating to punching his head and face. Video evidence revealed a large number of officers surrounded Jackson and assisted in the use of force, causing a facial fracture, concussion, and other head injuries.¹³⁵ Many APD officers were present and could see Jackson was not resisting, but none of them intervened to stop the use of excessive force. Magistrate Judge Austin denied summary judgment for Jackson's excessive force claims against Jones and Huckaby.¹³⁶ APD never investigated the officers for failing to intervene.¹³⁷

On April 22, 2016, APD Officers Matthew Murphy, Tony Bishop, and Brenda Glasgow were preparing to leave the scene of an arrest of several suspects for possession of controlled substances when Murphy checked his dash-camera footage and found that one suspect, Joe McDonald, had put what appeared to be narcotics into his mouth.¹³⁸ Although all suspects were secured in patrol vehicles, Murphy ultimately pulled McDonald out of the patrol vehicle, without warning, and onto the ground when McDonald would not spit out the drugs.¹³⁹ Bishop and

¹³³ *Jackson v. City of Austin*, No. 1:17-CV-1098-AWA, 2019 WL 5102575, at *2 (W.D. Tex. Oct. 11, 2019), *appeal dismissed sub nom. Jackson v. Jones*, No. 19-50976, 2020 WL 1921612 (5th Cir. Feb. 5, 2020).

¹³⁴ *Id.* at *3.

¹³⁵ *Id.* at *3.

¹³⁶ *Id.* at *9.

¹³⁷ Ex. 11, Staniszewski Deposition, 106:3–7, 106:19–24.

¹³⁸ Ex. 84, McDonald Use of Force IA Report, pp. 1, 5 [COA 175663, 175667].

¹³⁹ Ex. 84, McDonald Use of Force IA Report, p. 13 [COA 175675].

Glasgow then assisted Murphy in holding McDonald in place.¹⁴⁰ When McDonald still would not spit them out, Glasgow warned “You’re gonna get tased,” then Murphy deployed his TASER.¹⁴¹ This violated APD policy on the amount of permissible force to retrieve drugs from a suspect’s mouth¹⁴² as well as Texas law holding that because “there is always a risk of death when a Taser is used,” using a TASER to similarly retrieve suspected illegal narcotics from an arrestee’s mouth was an “excessive use of force that violated the Fourth Amendment prohibition against unreasonable seizures.” *Hereford v. State*, 339 S.W.3d 111, 123, 126 (Tex. Crim. App. 2011). Nonetheless, while APD disciplined Murphy with three days of retraining, it did not even investigate the two officers who helped him and failed to stop him.¹⁴³

On February 8, 2016, then-Officer Geoffrey Freeman fatally shot David Joseph, a seventeen-year-old Black child, while Joseph (suffering a mental health crisis) was running naked around a suburban area. Freeman found Joseph, naked and obviously unarmed, standing in the middle of a residential street. Freeman exited his vehicle with his sidearm already drawn, and shouted at Joseph not to move. Confused, Joseph instead ran towards Freeman, who opened fire, killing Joseph.¹⁴⁴ APD terminated Freeman and concedes the shooting was not justified.¹⁴⁵ The City paid Joseph’s mother \$3,250,000 to settle her claims.¹⁴⁶

On May 2, 2017, APD Officer James Harvel shot at Jason Roque—whom Harvel knew to be suicidal—three times, including twice after Roque dropped his BB-gun and was stumbling

¹⁴⁰ Ex. 84, McDonald Use of Force IA Report, pp. 2, 6, [COA 175664, 668].

¹⁴¹ Ex. 84, McDonald Use of Force IA Report, p. 3, [COA 175665].

¹⁴² Ex. 84, McDonald Use of Force IA Report, pp. 1, 8, [COA 175662, 670].

¹⁴³ Ex. 84, McDonald Use of Force IA Report, p. 1, [COA 175662].

¹⁴⁴ Ex. 85, G. Freeman Dash-camera Excerpt [AMBLER007471].

¹⁴⁵ Ex. 52, Manley Deposition in *Roque*, 68:12–14.

¹⁴⁶ Ex. 88, City Council Minutes (Feb. 16, 2017), p. 3 [AMBLER007288].

away from the police, hitting and killing him with the third shot.¹⁴⁷ Though four other APD officers were on the scene standing right next to Harvel watching him take one shot after another, none of them did anything to try to prevent Harvel from continuing to fire on Roque.¹⁴⁸ In ensuing litigation by Roque’s survivors, Judge Yeakel denied summary judgment on excessive force claims against Harvel.¹⁴⁹ The Fifth Circuit affirmed.¹⁵⁰ The City settled the matter for \$2,250,000.¹⁵¹ APD never investigated the officers who were standing right next to Harvel for failing to intervene and stop the shooting—particularly after Roque dropped the BB gun and fled.¹⁵²

On May 7, 2017, APD Officers Richard Egal and Maxwell Johnson encountered twenty-four-year-old Landon Nobles on Sixth Street.¹⁵³ Johnson found Nobles with other APD officers, and Nobles ran when he saw Johnson approach. Egal intercepted the pursuit and pushed a bicycle into Nobles’ path, causing Nobles to stumble and fall to the ground. Johnson and Egal testified at trial that they saw a gun in Nobles’ hand, so they drew their own weapons, but another APD officer, Nobles’ cousin, and two security guards testified that Nobles never had a gun in his hands.¹⁵⁴ Egal and Johnson fired at Nobles five times, hit him three times, and killed him.¹⁵⁵ A jury found a constitutional violation, rejected the qualified immunity defense, and awarded Nobles’ family \$67,107,500 in damages, later remitted.¹⁵⁶ Neither Egal, Johnson, nor any of the APD officers

¹⁴⁷ *Roque v. Harvel*, No. 1:17-CV-932-LY, 2020 WL 6334800, at *1–3 (W.D. Tex. Mar. 23, 2020), *aff’d*, 993 F.3d 325 (5th Cir. 2021).

¹⁴⁸ See Ex. 91, Harvel Deposition, 175:11–14.

¹⁴⁹ *Roque v. Harvel*, No. 1:17-CV-932-LY, 2020 WL 6334800, at *10.

¹⁵⁰ *Roque v. Harvel*, 993 F.3d 325, 339 (5th Cir. 2021).

¹⁵¹ Ex. 90, City Council Minutes (Sep. 2, 2021), p. 6.

¹⁵² Ex. 11, Staniszewski Deposition, 106:11–24.

¹⁵³ *Nobles v. Egal*, No. A-19-CV-389-ML, 2022 WL 3971048, at *1 (W.D. Tex. Aug. 31, 2022), *judgment entered*, No. A-19-CV-389-ML, 2022 WL 6255520 (W.D. Tex. Sept. 14, 2022)

¹⁵⁴ *Id.* at *1–2.

¹⁵⁵ *Id.* at *2.

¹⁵⁶ *Id.* at *3.

present was disciplined arising from Nobles' death.¹⁵⁷

On July 26, 2017, APD Officer Bryan Richter (who also brutally attacked Breiaion King) and Detective Steven McCurley approached Abel Soto-Torres to arrest him and, although he did not resist at all, they performed a "take down" to slam him onto the ground, kicked him in the stomach, put a foot on his arm, put a foot on his head, and kicked him in the side.¹⁵⁸ Soto-Torres was never given an opportunity to comply before force was used.¹⁵⁹ Soto-Torres pleaded for them to relieve the pressure on his face, explaining that it was very painful due to a previous injury that damaged his eye socket, to no avail.¹⁶⁰ Throughout, APD Officers Ricardo Aguilar-Lopez and Vincent Garcia were present, but did nothing to stop the use of force.¹⁶¹ Both Richter and McCurley were suspended for using objectively unreasonable force (as well as lying about it), but APD did not even investigate the officers who stood by and did nothing—even though both Augilar-Lopez and Garcia admitted they saw that Soto-Torres never resisted.¹⁶²

On April 17, 2018, APD Officers Mario Aquino and Daniel McLeish stopped a person for walking against a pedestrian signal when Aquino decided to physically move a third person, Joseph Figueroa, who was standing against a nearby wall.¹⁶³ Aquino pushed Figueroa's arm at the same time as he told him to move, prompting Figueroa to move but angrily tell the officer not to touch him.¹⁶⁴ Instead of ignoring the compliant (and understandably annoyed) Figueroa, Aquino taunted him, "You wanna get involved bro? Come closer. Otherwise, just keep running your mouth the

¹⁵⁷ See Ex. 23, Use-of-Force Related Discipline List.

¹⁵⁸ Ex. 94, Soto-Torres Use of Force IA Report, pp. 1, 5 [COA 175729, 733]

¹⁵⁹ Ex. 94, Soto-Torres Use of Force IA Report, pp. 22–23 [COA 175750–751]

¹⁶⁰ Ex. 94, Soto-Torres Use of Force IA Report, p. 6 [COA 175734]

¹⁶¹ Ex. 94, Soto-Torres Use of Force IA Report, pp. 4, 5 [COA 175732–733]

¹⁶² Ex. 94, Soto-Torres Use of Force IA Report, pp. 1–2, 23, 26 [COA 175727–728, 751, 754]

¹⁶³ Ex. 95, Figueroa Use of Force IA Report, p. 1 [COA 175866].

¹⁶⁴ Ex. 95, Figueroa Use of Force IA Report, p. 2 [COA 175867]

way you are.” When Figueroa continued to comply by staying away, Aquino again taunted him, “That’s right. Right?” Figueroa still stayed away, but retorted, “I don’t know, we’ll see.” For a third time, Aquino tried to goad Figueroa, saying, “Talk the way you talk, right? Till I pull your card and see what you’re about.” Figueroa still did not take the bait. Aquino continued, “Otherwise you’re just talk, keep talking.”¹⁶⁵ When Figueroa pulled out his phone to record the officers. Aquino continued his taunting, “Yeah, now say what you said before. Say what you said before now that the camera’s on.” Figueroa responded, “What did I say?” Aquino retorted, “Yeah, you forgot already?” When Figueroa responded angrily, McLeish spoke up for the first time not to stop his colleague, but to tell Figueroa to “get out of here.”¹⁶⁶ Reacting to the incessant taunts, Figueroa moved toward the officers, so Aquino slammed him on the ground. Although the City temporarily suspended Aquino for starting a completely unnecessary fight with a person who was just standing nearby, McLeish was never investigated for failing to intervene.¹⁶⁷

On July 4, 2018, Justin Grant had an argument with security at a bar who refused to let him rejoin his party. Grant walked away, but APD officers Gadiel Alas and Corey Hale approached Grant from behind. Alas and Hale grabbed Grant without warning, then violently threw him to the ground. Once Grant was on the ground, Alas escalated further by electrocuting Grant with his TASER while Alas sat on top of Grant.¹⁶⁸ Instead of intervening to stop Alas’ excessive force, Hale then punched Grant in the face repeatedly.¹⁶⁹ Alas then punched Grant in the face repeatedly as well. Neither Alas nor Hale were disciplined by APD.¹⁷⁰

¹⁶⁵ Ex. 95, Figueroa Use of Force IA Report, p. 2 [COA 175867]

¹⁶⁶ Ex. 95, Figueroa Use of Force IA Report, p. 3 [COA 175868]

¹⁶⁷ Ex. 95, Figueroa Use of Force IA Report, p. 1 [COA 175864]

¹⁶⁸ Ex. 96, Alas Body-Worn Camera of Grant incident [AMBLER008661].

¹⁶⁹ Ex. 97, Grant citizen video [AMBLER008662].

¹⁷⁰ Ex. 98–99, IA History of Sustained Allegations as to Alas and Hale.

On November 18, 2018, Michael Yeager-Huebner and his girlfriend were heading back to their hotel from 6th Street when four unidentified assailants attacked Yeager while he waited at a crosswalk.¹⁷¹ APD Officers Bradley Hoover and Timothy Skeen witnessed the assault, dispersed the assailants, and then followed Yeager to a nearby parking lot where they immediately threatened to electrocute him with a TASER.¹⁷² Then a third APD officer, Dusty Jester, sprinted over thirty yards to intentionally “surprise” tackle Yeager, pulling him to the ground, and then began to repeatedly punch him in the face.¹⁷³ Instead of stopping Jester, Hoover and Skeen piled on—and called for backup, leading to a large mass of APD officers pummeling Yeager.¹⁷⁴ Skeen testified in subsequent litigation that he would intervene to assist an officer who used unjustified force if their victim tried to defend themselves.¹⁷⁵ Jester was given an informal reprimand but no additional punishment.¹⁷⁶ The City did not even investigate, much less discipline, Hoover nor Skeen.¹⁷⁷

On March 28, 2019, the same day Nissen helped kill Ambler, numerous officers, including officers Chance Bretches and Gregory Gentry, mercilessly punched and kicked Paul Mannie in the face while they had him pinned to the ground and he was not resisting.¹⁷⁸ Although many officers were present, none of them intervened to stop the obviously excessive force. While APD decided not to discipline any of the officers—indeed, no one was even investigated for failing to intervene¹⁷⁹—Bretches was indicted for aggravated assault by a public servant on January 20,

¹⁷¹ Ex. 100, Dash Camera Footage from *Yeager*, 0:38.

¹⁷² Ex. 100, Dash Camera Footage from *Yeager*, 1:44; Ex. 102, Hoover Deposition, 33:14–34:5.

¹⁷³ Ex. 103, D. Jester Report; Ex. 101, Jester Body-Worn Camera of Yeager Incident.

¹⁷⁴ Ex. 104, B. Hoover Report; Ex. 105, T. Skeen Report.

¹⁷⁵ Ex. 108, Skeen Deposition, 87:18–88:8.

¹⁷⁶ Ex. 107, Jester Deposition at 31, 208; Ex. 106, Conduct Counseling Memorandum [COA 174150-174151].

¹⁷⁷ Ex. 102, Hoover Deposition at 21; Ex. 108, Skeen Deposition, 23; Ex. 23, Use-of-Force Related Discipline List; Ex. 11, Staniszewski Deposition, 90:6–12, 92:4–8.

¹⁷⁸ Ex. 109, Bretches Body-Worn Camera of Mannie Incident.

¹⁷⁹ Ex. 11, Staniszewski Deposition, 97:3–11.

2021.¹⁸⁰

Despite the disclosure of hundreds of reports of use of force in this case, including over a hundred that resulted in APD discipline, the City was unable to identify any occasion when an APD officer ever intervened to stop what they believed to be another officer's excessive force during the ten years preceding Ambler's death.¹⁸¹ The undersigned has identified only two such occasions where this arguably happened—including the Licon incident, discussed above, where a different officer failed to intervene (and was not investigated).

APD's deficiencies with intervention, unnecessary escalation, and excessive force continued for over a year after Ambler's death. In perhaps the most salient moment, on May 29, 2020 and for several days thereafter, the Black Lives Matter, George Floyd, and Michael Ramos protests in Austin resulted in many incidents of violence by police with less lethal kinetic energy projectile weapons, OC spray, and other uses of force—including many incidents of seriously injuring upon completely innocent protestors by shooting them with bean bag rounds.¹⁸² Despite

¹⁸⁰ Ex. 110, Indictment of Chance Bretches relating to Mannie Incident.

¹⁸¹ Ex. 11, Staniszewski Deposition, 107:12–18.

¹⁸² See Ex. 111, Travis County Criminal Indictments of Austin Police Department Officers; *see, e.g.*, Ex. 112, HALO View of Howell and Evans shootings (filed under seal) (COA-Evans.001034) (showing Anthony Evans, wearing a white shirt with his hand above his head at the middle of the screen, being hit in the jaw at 0:08 and Justin Howell, wearing a blue and black checked shirt in the middle of the screen, being hit in the back of the head and falling to the ground at 0:11); Ex. 113, Teng Body-Worn Camera Footage (filed under seal) (COA-Evans_000664) (showing Officer Teng shooting from the highway toward Howell and Evans); Ex. 114, Officer Ricker Body-Worn Camera (filed under seal) (COA-General Protest.017757) (showing Officer John Siegel, standing directly to the left of Ricker, shooting Nicole Underwood, who is in a black tank top and standing in the middle of the crowd, at 0:09); Ex. 115, Ayala Shooting Video (showing Brad Levi Ayala shot in the head with his hands by his sides by Officer Nicholas Gebhart at 0:02); Ex. 116, Morgan Body-Worn Camera Highlighted (filed under seal) (COA Herrera 005) (enhanced video showing Officer James Morgan shooting Jose Herrera, holding a black umbrella, at 0:45); Ex. 117, Morgan Body-Worn Camera (filed under seal) (COA Herrera 005) (unmodified excerpt of video showing Herrera shooting).

over 700 instances where APD officers fired kinetic energy projectiles,¹⁸³ over a dozen lawsuits, and twenty ongoing criminal cases against APD officers from that one weekend,¹⁸⁴ no officers were disciplined or even investigated for failing to intervene to stop their fellow officers' obvious, ongoing excessive force.¹⁸⁵

These cases show only the tip of the iceberg—but APD had been scathed in the media and the courtroom for numerous other incidents where its officers escalated the situation unnecessarily in the years before Ambler was killed.¹⁸⁶

Beyond these examples of troubling misconduct, sweeping misuse of force had been commonplace for years. APD's own records reflect that its officers used excessive force routinely to a statistically alarming degree. From 2006 through 2016, APD generally categorized the victim's "action" that prompted the force as "aggressive," "defensive," "passive," "verbal," "firearm," "edged weapon," or "other." The reports generally used the following definitions relevant here:

¹⁸³ Ex. 53, Manley Deposition in *Evans*, 105:5–20.

¹⁸⁴ Ex. 111, Travis County Criminal Indictments of Austin Police Department Officers.

¹⁸⁵ Ex. 11, Staniszewski Deposition, 90:6–12, 92:4–8; *see also* Ex. 53, Manley Deposition in *Evans*, 191:18–23, 195:4–12.

¹⁸⁶ For example, APD has also conceded that the July 29, 2013 shooting of Larry Jackson, Jr. by APD Detective Charles Kleinert was unjustified, and the City settled a resulting lawsuit. Ex. 52, Manley Deposition in *Roque*, pp. 225:22–226:2; Ex. 118, City of Austin Excessive Force Case List; *see also* Ex. 119, City Council Minutes (Aug. 7, 2014). APD was further advised by then-Police Monitor Margo Frasier that Officer Copeland's April 5, 2012 shooting of Ahmede Bradley was unjustified. Ex. 58, Frasier Deposition, p. 80:12–15; Ex. 120, E. Copeland Dash Camera regarding A. Bradley, 0:38 (Excerpted from 0:09 to 3:10) *available at* <https://www.youtube.com/watch?v=qpQSZn0LS5E>. Notably, Copeland is the same officer who brutalized Chacon in the incident described above. The City likewise settled a lawsuit from Sergeant Michael Olsen's fatally shooting Kevin Brown on June 3, 2007, and admitted the use of force was unreasonable. Ex. 121, APD Chief Memo on Sgt. Olsen (Nov. 28, 2007), p. 5; Ex. 122, City Council Minutes (Nov. 6, 2008). The City also settled a lawsuit against Officer Julie Schroeder for fatally shooting the unarmed Daniel Rocha on June 9, 2005, which it later admitted was unreasonable. *See Rocha v. City of Austin*, No. A-06-CA-067-LY, 2007 WL 9701630 (W.D. Tex. July 6, 2007); Ex. 123, City Council Minutes (Dec. 11, 2008), p. 17; Ex. 52, Manley Deposition in *Roque*, p. 225:17–21.

- Aggressive Resistance—physical assaults by the subject on the police such as kicks, punches, slaps, grabs, and head butts.
- Defensive Resistance—physical resistance by the subject such as pulling and pushing away to prevent the police officer’s control.
- Verbal Resistance—verbal statements resisting police control, indicating refusal to cooperate, and threats.
- Passive Resistance—physical resistance less than defensive or aggressive resistance such as going limp.

Within these categories, from 2006 through 2016, APD reported that it used force against 1,159 people who only exhibited “passive” resistance, 838 people who only exhibited “verbal” resistance, and 6,626 who only exhibited “defensive” resistance—over half of the 16,323 people subjected to force by APD during that ten year period.¹⁸⁷ The degree of resistance was not reported in 2017,¹⁸⁸ but the trend continued from 2018 through 2020; during that period, APD used force against 58 identified people who did not resist, 310 people who exhibited only “passive” resistance, and 4,148 people who exhibited “defensive” resistance, accounting for over 60% of all APD uses of force against identified subjects.¹⁸⁹ Moreover, on average, each incident of force from

¹⁸⁷ See Ex. 30, APD Response to Resistance Reports p. 4 (2006 – 56 verbal, 46 passive, 218 defensive; 2007 – 49 verbal, 30 passive, 171 defensive), p. 10 (2008 – 72 verbal, 88 passive, 250 defensive), p. 15 (2009 – 58 verbal, 110 passive, 398 defensive), p. 19 (2010 – 87 verbal, 122 passive, 563 defensive), p. 24 (2011 – 88 verbal, 155 passive, 721 defensive), p. 29 (2012 – 136 verbal, 175 passive, 788 defensive), p. 34 (2013 – 96 verbal, 155 passive, 833 defensive), p. 39 (2014 – 80 verbal, 103 passive, 797 defensive), p. 45 (2015 – 75 verbal, 75 passive, 946 defensive), p. 51 (2015 – 42 verbal, 100 passive, 941 defensive). These total to 8,623 subjects. This exhibit is the combination of excerpts from the eleven different reports, which are available from the City’s website: <https://www.austintexas.gov/page/response-resistance-reports>. The individual report excerpts are concatenated and continuously Bates labeled for ease of reference.

¹⁸⁸ Ex. 30, APD Response to Resistance Reports, p. 55.

¹⁸⁹ Ex. 31, Kroll Associates, *Evaluation of APD Use of Force*, p. 29, available at <https://www.austintexas.gov/edims/document.cfm?id=379807>. As Kroll was retained by the City for the purpose of the publication, and the City published the report, its statements in that publication are admissible against it. Regardless, the City directly published underlying numbers that corroborate Kroll’s analysis. See Ex. 34, 2018 Response to Resistance Data, available at <https://data.austintexas.gov/api/views/rus9-w6q5/rows.csv?accessType=DOWNLOAD&bom=true&format=true&delimiter=%3B>; Ex. 35, 2019 Response to Resistance Data, available at <https://data.austintexas.gov/api/views/dwrk-z7q9/rows.csv?accessType=DOWNLOAD&bom=true&format=true&delimiter=%3B>; Ex. 36,

2006 through 2017 involved 1.6 APD officers.¹⁹⁰ Similarly, each incident where officers used force from 2018 to 2020 involved an average of 2 officers.¹⁹¹

The City relatedly concluded in 2018 that APD kills its inhabitants at the second highest rate, per capita, when compared to the fifteen largest Cities in the U.S., tallying nineteen fatal police shootings in just over three years during the examined period.¹⁹²

C. APD’s deficient training and dangerous customs caused the excessive use of force in this case.

APD’s pattern of violence is unsurprising, as the City has encouraged excessive force and failing to intervene to stop it through three deficient policy decisions.

1. APD failed to supervise by never enforcing its policy requiring that officers intercede to stop excessive force.

While APD written policy since at least 2011 has required that an officer to intercede to prevent ongoing harm when excessive force is being used,¹⁹³ the City consciously failed to enforce this policy for at least ten years before Ambler’s death. Thus, it is unsurprising that, while Nissen agreed in principle that he had a duty to intervene,¹⁹⁴ and conceded he had time to tell the deputies

2020 Response to Resistance Data, *available at* <https://data.austintexas.gov/api/views/xu5c-p4hq/rows.csv?accessType=DOWNLOAD&bom=true&format=true&delimiter=%3B>.

¹⁹⁰ Each involved officer generated a separate use of force report, creating 29,623 reports for 18,297 incidents. Ex. 30, APD Response to Resistance Reports p. 2 (2006 – 1,023; 2007 – 789), p. 7 (2008 – 1,152), p. 12 (2009 – 1,703), p. 17 (2010 – 2,165), p. 21 (2011 – 3,030), p. 26 (2012 – 3,321), p. 31 (2013 – 3,392), p. 36 (2014 – 2,887), p. 41 (2015 – 3,273), p. 47 (2016 – 3,293), p. 53 (2017 – 3,595).

¹⁹¹ *See* Ex. 34–36, Response to Resistance Data 2018-2020. There are 4,162 reports listed in 2018, 5,981 in 2019, and 5,262 in 2020. Assuming that reports with the same “Primary Key,” the same “Occurred Date,” and the same “Master Subject ID” reflect the same incident—just reported by a different involved officer—there were 2,197 unique incidents involving use of force in 2018, 3,097 in 2019, and 2,454 in 2020.

¹⁹² Ex. 46, Austin City Auditor, *APD Response to Mental Health-Related Incidents* (Sep. 2018), p. 7.

¹⁹³ Ex. 33, APD General Orders, GO 200.1.3 Duty to Intercede (COA 27106); *see* Ex. 51, APD General Orders, GO 200.1.3 Duty to Intercede, p. 2 (2011 version of the analogous policy).

¹⁹⁴ Ex. 2, Nissen Deposition, 81:10–15, 82:7–19, 84:9–24, 87:20–24, 274:10–25, 275:7–8.

to stop while they were killing Ambler, he did not intervene.¹⁹⁵ Instead, Nissen testified that he would disregard his responsibility and APD policy because he “wouldn’t want another officer telling me what force to use because ultimately I’m the one who has to decide whether or not that’s reasonable, I wouldn’t want to tell another officer what to do because of the same reason.”¹⁹⁶

The City concedes that its policy demanding officers intervene to stop excessive force is extremely important to serve as a check against the risk of abuse by other officers.¹⁹⁷ The City further concedes that officers will be exposed to excessive force and, time and time again, need to decide whether they need to intervene and stop it.¹⁹⁸ Countervailing this principle is that officers are also expected to back up their colleagues, so enforcing the requirement to intervene when a fellow officer crosses the line is critical.¹⁹⁹ And the City concedes that this dichotomy was obvious and known to the police chief.²⁰⁰ The City further testified that never punishing officers for failing to intervene, or never investigating possible failures to intercede, would promote a culture of “letting it slide”²⁰¹ which would have the known and obvious consequence that officers would not be deterred from failing to intervene.²⁰² The City further agreed that this, in turn, would risk a feedback effect of officers engaging in more excessive force because they believe they can get away with it, as their fellow officers are not stepping in.²⁰³ And the City testified that all of these risks were known to the police chief at the time of Ambler’s death in 2019.²⁰⁴

¹⁹⁵ Ex. 2, Nissen Deposition, 16:9–12, 90:14–22.

¹⁹⁶ Ex. 2, Nissen Deposition, 174:11–16.

¹⁹⁷ Ex. 11, Staniszewski Deposition, 55:19–56:2.

¹⁹⁸ Ex. 11, Staniszewski Deposition, 56:3–19.

¹⁹⁹ Ex. 11, Staniszewski Deposition, 61:13–19, 62:11–16.

²⁰⁰ Ex. 11, Staniszewski Deposition, 56:20–24, 62:17–20. Which is why the City had the policy in the first place. *See* Ex. 33, APD General Orders, GO 200.1.3 Duty to Intercede (COA 27106)

²⁰¹ Ex. 11, Staniszewski Deposition, 63:7–14, 64:15–20.

²⁰² Ex. 11, Staniszewski Deposition, 64:21–65:5.

²⁰³ Ex. 11, Staniszewski Deposition, 63:15–21.

²⁰⁴ Ex. 11, Staniszewski Deposition, 64:1–3, 65:6–10.

Nonetheless, APD's current chief of police admitted APD had never disciplined anybody for failing to intervene to stop excessive force until after Ambler's death.²⁰⁵ Previous Chief Manley concurred, and went a step further—before Ambler's death, APD had never even *investigated* an officer for failure to intervene.²⁰⁶ In fact, Chief Manley was mistaken, because there had been precisely *one* such investigation in the ten years before Ambler's death—but that exception proves the rule, as that investigation reached the issue only because an outside complainant specifically cited to APD's failure to intervene policy.²⁰⁷ In any event, no officer was ever disciplined for failure to intervene in the ten years preceding Ambler's death. The City testified it has no explanation for why it never investigated other officers for failing to intervene to stop unlawful force in their presence.²⁰⁸

As illustrated above, this pattern holds true for the most egregious misconduct, including many cases where the City itself disciplined an officer arising from the underlying unreasonable use of force, where a court ruled the officer was not entitled to qualified immunity, or where the City paid settlements to its victims. Even though APD has found at least 89 violations of policy arising from uses of force by APD officers in the ten years before Ambler's death, it never investigated any of the officers present for failure to intervene to stop that use of force.²⁰⁹ As disciplinary decisions are the purview of the chief of police, the City agreed that the chief of police

²⁰⁵ Ex. 55, Chacon Deposition in *Evans*, 101:23–102:23.

²⁰⁶ Ex. 53, Manley Deposition in *Evans*, 191:18–25.

²⁰⁷ Ex. 11, Staniszewski Deposition, 90:6–19, 91:18–92:8; *see* Ex. 50, External Failure to Intercede Complaint, COA 059126, n. 1 & COA 059129.

²⁰⁸ Ex. 11, Staniszewski Deposition, 109:4–8. Of course, the simplest explanation is most likely the truth: the decision was intentional. APD's written intervention policy was fiction, and the real policy adopted by APD's leadership was to completely disregard that constitutional mandate to the detriment of countless people, including Javier Ambler, II.

²⁰⁹ Ex. 11, Staniszewski Deposition, 57:12–18, 76:18–77:5, 92:18–93:2; Ex. 23, Use of Force Related Discipline List.

knew in 2019 both the volume of use-of-force-related discipline and the fact that none of the officers present had been investigated for failing to intervene to stop the underlying conduct.²¹⁰

Even during APD’s investigation of conduct during the May 29–31, 2020 protests, Chief Manley testified he decided not to investigate whether officers should have intervened to stop the more than 700 less lethal uses of force during that single weekend.²¹¹ This included, for example, deciding not to investigate the officers who stood by and watched as their colleagues fired bean bag rounds from an overpass into a crowd standing beyond the safe range of those weapons.²¹² Thus, those officers on the overpass also knew their colleagues were firing from an unsafe distance, but did not attempt to stop them.²¹³ Accordingly, the longstanding practice of looking the other way extended to the policymaker.

2. APD improperly trained Nissen to use excessive force.

During the period of Nissen’s academy training in 2012, the City operated a “stress-oriented military-style [police training] academy” where multiple cadets resigned due to the “toxic, abusive, and combative ... teaching methods that embraced intimidation tactics.”²¹⁴ Indeed, according to a report commissioned by the City,²¹⁵ “APD historically has been ... strong[ly] reluctan[t] ... to change the paramilitary nature of the Academy in any fundamental way.”²¹⁶ As such, the Academy used “teaching” techniques like “yelling and screaming at cadets, and other

²¹⁰ Ex. 11, Staniszewski Deposition, 93:14–94:8.

²¹¹ Ex. 53, Manley Deposition in *Evans*, 105:5–20, 195:4–12.

²¹² Ex. 53, Manley Deposition in *Evans*, 197:14–198:10.

²¹³ Ex. 53, Manley Deposition in *Evans*, 199:6–12.

²¹⁴ Ex. 32, Kroll Associates, *Review and Assessment of Austin Police Department Training Academy*, p. 5, 39 & 48, available at <https://www.austintexas.gov/edims/document.cfm?id=359317>.

²¹⁵ See Ex. 124, City Council Minutes (Nov. 12, 2020), p. 9.

²¹⁶ Ex. 32, Kroll Associates, *Review and Assessment of Austin Police Department Training Academy*, p. 94, available at <https://www.austintexas.gov/edims/document.cfm?id=359317>.

humiliating tactics, [which] serve little purpose other than to instill a military-like, bootcamp atmosphere that is counterproductive to preparing officers to serve.”²¹⁷ This combative attitude instilled by the City is exactly why Nissen did not think twice about using force against Ambler despite his pleas for help.

APD leadership believed this “Paramilitary Training Model,” was “essential to ensure cadets ... [are] prepare[d] ... to effectively respond in crisis situations,”²¹⁸ but this deliberate choice comes “at the expense of training cadets to be community-oriented guardians.”²¹⁹ In particular, APD’s training “reflect[ed] an ‘us vs. them’ mentality that potentially escalates encounters between police officers and the public”²²⁰—much like how Nissen escalated the confrontation with Ambler when the situation obviously called for de-escalation.

The Academy’s paramilitary atmosphere was abusive to cadets, and encouraged them to abuse members of the public. “Instructors relentlessly ridiculed and mocked certain cadets during physical training.”²²¹ Cadets described how instructors “frequently yelled and cursed at [them],” leading these cadets to believe the Academy would “create police officers who were indifferent to the community.”²²² Indeed, as a result of their training in the Academy, “[m]ost APD officers contend ... that stressful tactics are essential to preparing cadets.”²²³ “[A] group of former cadets [however] alleged that the Academy encouraged a culture of abuse towards citizens. One former cadet alleged that instructors told cadets that they would ‘punch them in the face’ if they said that

²¹⁷ *Id.* at 97.

²¹⁸ *Id.* at 6.

²¹⁹ *Id.*

²²⁰ *Id.* at 7 & 48.

²²¹ Ex. 32, Kroll Associates, *Review and Assessment of Austin Police Department Training Academy*, p. 5, available at <https://www.austintexas.gov/edims/document.cfm?id=359317>.

²²² *Id.* at 41.

²²³ *Id.* at 6.

the reason they wanted to be police officers was to help people.”²²⁴ Another instructor told cadets to “pick someone out of a crowd ... and ask yourself, ‘how could I kill that person?’”²²⁵ As a result, “The message absorbed by the cadets was that the Austin community”—including members like Ambler—“was the enemy.”²²⁶ Unsurprisingly, “The culture of a police training academy reflects the culture of a department and impacts the mindset and approach to policing.”²²⁷

There is a need to train officers for the job and tasks they will be required to perform. The majority of those tasks involve using empathy, tact, discretion, and integrity when communicating with citizens. Training that prepares officers for the limited number of outcomes that require them to utilize legitimately required military-like tactics ... should not dictate the foundation of a department’s training program.²²⁸

“[F]requent analyses have also noted the perils of a ‘warrior’ mentality in law enforcement”—embraced by APD—“and the need to shift to a more ‘guardian’ approach”²²⁹—which APD has historically resisted. “[W]hereas the warrior police officer fights to control and conquer criminals, the guardian serves to protect the community.”²³⁰ APD’s “paramilitary-style training and recruiting is believed to create a warrior-based culture.”²³¹

In reality, situations where there is “an immediate risk to the public and [officers]” are “rare in day-to-day police work.”²³² Instead, most policing involves “situations that can escalate when officers respond with a warrior mindset, prepared to fight”—as Nissen clearly did here.²³³

²²⁴ *Id.* at 11.

²²⁵ *Id.* at 42.

²²⁶ *Id.* at 42.

²²⁷ *Id.* at 5.

²²⁸ *Id.* at 49.

²²⁹ Ex. 32, Kroll Associates, *Review and Assessment of Austin Police Department Training Academy*, pp. 15, 48, 94, available at <https://www.austintexas.gov/edims/document.cfm?id=359317>.

²³⁰ *Id.* at 15.

²³¹ *Id.* at 15.

²³² *Id.* at 15.

²³³ *Id.* at 15.

“[S]eeing oneself primarily as a ‘warrior’ is a precarious mindset.”²³⁴ “[W]hen officers are taught to see citizens as potential threats to their life, they learn to fear them.”²³⁵ “[M]ilitary-style boot camps and ‘stress-oriented’ training styles”—like the ones APD employs—“foster this warrior mentality.”²³⁶ Indeed, training videos used by the Academy were described as “disappointing in quality, contain[ing] unprofessional or sensationalistic commentary,” which “echoed concerns expressed by ... community leaders ... that APD trains its cadets to reflect an ‘us vs. them’ mentality that potentially escalates encounters between police officers and the public.”²³⁷

3. APD failed to train Nissen to attempt to de-escalate before resorting to force.

The Office of the Police Monitor (OPM), an agency created by the City to facilitate public complaints against police officers, participated in investigations of APD officers and made non-binding policy recommendations to APD through 2015.²³⁸ OPM recommended APD rethink its missing de-escalation training and aggressive tactics as early as 2007—based on 2005 data—due to a high number of complaints and allegations of misconduct.²³⁹ For 2005, OPM reported citizens made a total of 73 use-of-force-related allegations, and succeeding years saw between 47 and 123 such complaints each year through 2015, for a total of 815 allegations of excessive force reported to OPM from 2004 to 2015.²⁴⁰ Critically, every year between 2009 and 2015, OPM warned that

²³⁴ *Id.* at 16.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 69.

²³⁸ Ex. 45, Austin Office of the Police Monitor Annual Report: 2015, p. 1.

²³⁹ Ex. 37, Austin Office of the Police Monitor Annual Report: 2005, p. 4.

²⁴⁰ Ex. 37, Austin Office of the Police Monitor Annual Report: 2005, p. 19 (55 in 2004, 73 in 2005); Ex. 38, 2008 Report, p. 21 (75 in 2006, 123 in 2007, and 58 in 2008); Ex. 39, 2009 Report, p. 23 (61 in 2009); Ex. 40, 2010 Report, pp. 37–38 (60 in 2010); Ex. 41, 2011 Report, p. 43 (56 in 2011); Ex. 42, 2012 Report, p. 47, (47 in 2012); Ex. 43, 2013 Report, p. 49 (70 in 2013); Ex. 44, 2014 Report, p. 48 (68 in 2014); Ex. 45, 2015 Report, p. 12 (69 in 2015).

this number was under-inclusive, with succeeding reports stating that APD was not obeying its own written use-of-force complaint and investigation procedures—hampering oversight of misconduct both by deterring citizens from raising excessive force matters and by failing to internally investigate potential excessive uses of force.²⁴¹ In 2015, OPM observed that “[s]everal high profile cases have highlighted the deficiency in the manner in which APD reviews responses to resistance or uses of force.”²⁴² For example, the OPM wrote that the use of force against Breiaon King and another use of force against Tyrone Wilson—a young man who was handcuffed in the back of a prisoner transport van and pepper sprayed in the face only for harmlessly kicking the van door—were originally determined by APD to be objectively reasonable, only to later result in officer discipline when the videos were leaked to the press.²⁴³ In August 2016, then-APD Chief Art Acevedo admitted that APD officers “have this attitude of” falsifying reports about using force with “creative writing.”²⁴⁴ In its 2015 report, OPM again recommended APD revise policies and training for de-escalation and officer communication, but APD again declined.²⁴⁵

Despite this considerable evidence and notice to policymakers that APD’s lack of de-escalation policies and training caused officers to use excessive force, APD did not change course. Indeed, the aforementioned, City-commissioned report further found fundamental flaws in APD’s

²⁴¹ Ex. 39, Austin Office of the Police Monitor Annual Report: 2009, p. 15; Ex. 40, 2010 Report, pp. 14, 38; Ex. 41, 2011 Report, pp. 18, 49; Ex. 42, 2012 Report, pp. 52–53; Ex. 43, 2013 Report, p. 55; Ex. 44, 2014 Report, pp. 53–54; Ex. 45, 2015 Report, p. 10.

²⁴² Ex. 45, Austin Office of the Police Monitor Annual Report: 2015, p. 8.

²⁴³ Ex. 45, Austin Office of the Police Monitor Annual Report: 2015, p. 13.

²⁴⁴ Ex. 56, Tony Plohetski, *Austin’s Art Acevedo vents over high-profile minority policing failures* (Austin-American Statesman Oct. 20, 2016), p. 7, available at <http://specials.mystatesman.com/art-acevedo-forceful-talk/>.

²⁴⁵ Ex. 45, Austin Office of the Police Monitor Annual Report: 2015, p. 4.

training regime. Most shockingly, even “as of 2016”—long after Nissen received his Academy training in 2012²⁴⁶—“the APD did not require de-escalation strategies.”²⁴⁷

APD finally relented to public pressure and changed its policy to the aforementioned emphasis on de-escalation in early 2018. Due to this delay, Nissen, like many APD officers, did not receive the new de-escalation training until after Ambler’s death—facts that APD’s chief of police would have had to have known.²⁴⁸

D. APD testified Nissen adhered to official policy despite its recognizing all of the facts showing he denied Ambler any reasonable accommodation for his disability.

According to the City, its officers have several options in how to restrain a person and need to be flexible because it is widely known and generally accepted by police that some restraint positions risk causing death.²⁴⁹ For example, an injured or disabled person may not need to be restrained at all, or may need to be restrained in a seated position or with their hands handcuffed in front of their body.²⁵⁰ Thus, an officer needs to consider—and Nissen was trained by the City to consider—a subject’s congestive heart failure when deciding how to safely restrain them, as congestive heart failure makes the subject more likely to be injured from restraint.²⁵¹ This is consistent with APD’s written policy.²⁵² The City likewise testified that it knows an arrestee’s obesity affects their safety during restraint, so Nissen was trained to be alert to a person’s obesity in determining how to safely restrain a person.²⁵³ The City trained Nissen that an arrestee

²⁴⁶ Ex. 21, Nissen TCOLE Status Report, p. 8.

²⁴⁷ Ex. 32, Kroll Associates, *Review and Assessment of Austin Police Department Training Academy*, pp. 10–11, available at <https://www.austintexas.gov/edims/document.cfm?id=359317>.

²⁴⁸ Ex. 21, Nissen TCOLE Status Report, p. 2; Ex. 11, Staniszewski Deposition, 72:18–23.

²⁴⁹ Ex. 11, Staniszewski Deposition, 120:24–121:4, 130:8–20.

²⁵⁰ Ex. 11, Staniszewski Deposition, 119:7–120:3.

²⁵¹ Ex. 11, Staniszewski Deposition, 125:23–126:1, 126:22–127:4, 127:15–128:17.

²⁵² Ex. 7, APD General Orders, GO 321 Care and Transport of Prisoners (COA 027256–7).

²⁵³ Ex. 11, Staniszewski Deposition, 123:15–124:3.

complaining “I can’t breathe” could be evidence the person is at a greater risk from the default restraint position, as the restraint can interfere with normal respiration.²⁵⁴ The City trained Nissen to be alert to the risk of positional asphyxia during a prone restraint.²⁵⁵ This is consistent with APD’s written policy.²⁵⁶ The City testified that this training and its positional asphyxia policy were based on widely accepted minimum police practices and a reliable scientific foundation.²⁵⁷ The City agreed that pushing a person’s head into the ground, face down, would limit their ability to breathe.²⁵⁸ Accordingly, the City testified that if what Ambler told Nissen were true—namely, that he couldn’t breathe—then it was inappropriate, and therefore, not a reasonable accommodation, for Nissen to push the back of Ambler’s neck into the ground facedown.²⁵⁹

Despite this, and despite watching the video, the City testified that Nissen’s conduct—ignoring both Ambler’s pleas for help and the fact that a morbidly obese man with a cardiac condition could not breathe—was consistent with APD policy and widespread practice at the time in 2019.²⁶⁰ The City likewise argues in its motion that “[t]he Chief of Police found that Nissen did not violate any APD policies,” effectively ratifying his conduct. Doc. 165, p. 4.

E. APD caused the destruction of video evidence.

Nissen observed the LivePD film crew present while on scene with Ambler.²⁶¹ After Ambler was put into the ambulance, APD was in charge of the investigation and had control of the crime scene.²⁶² The City testified that therefore APD had responsibility to preserve available

²⁵⁴ Ex. 11, Staniszewski Deposition, 128:18–129:21.

²⁵⁵ Ex. 11, Staniszewski Deposition, 131:11–24; Ex. 2, Nissen Deposition at 61:6–23.

²⁵⁶ Ex. 33, APD General Orders, GO 200.1.3 Duty to Intercede (COA 027106).

²⁵⁷ Ex. 11, Staniszewski Deposition, 130:8–20, 131:25–132:8.

²⁵⁸ Ex. 11, Staniszewski Deposition, 134:18–22.

²⁵⁹ Ex. 11, Staniszewski Deposition, 138:13–24.

²⁶⁰ Ex. 11, Staniszewski Deposition, 141:16–142:3.

²⁶¹ Ex. 2, Nissen Deposition, 204:15–22, 205:9–12.

²⁶² Ex. 11, Staniszewski Deposition, 161:5–9, 170:24–171:15.

evidence, including the LivePD footage.²⁶³ The City admits it should have just collected the LivePD videos at the scene as evidence relating to a fatal use of force²⁶⁴—or, having failed to do that, done everything within its lawful authority to find the video and preserve it.²⁶⁵ The City also admits that the video would have been helpful to assess Nissen’s conduct,²⁶⁶ as evidence of potential crimes, and as evidence in potential civil litigation.²⁶⁷

But APD allowed the LivePD camera crew to leave the crime scene and then did not do anything to retrieve the footage until four months after Ambler’s death—and at that time, all they did was make a phone call to LivePD.²⁶⁸ Even though APD had the LivePD camera crew’s names, they did not follow up with them directly until nearly 15 months after Ambler’s death—which was after the body-worn camera footage was published by KVUE and triggered public backlash.²⁶⁹ APD ultimately learned that the videos were destroyed due to the delay, as Williamson County had a contract with LivePD requiring destruction of unused footage within 30 days.²⁷⁰

III. STANDARD OF REVIEW

Summary judgment is only proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. PROC. 56(c). In deciding a motion for summary judgment, the Court must view the evidence and draw all

²⁶³ Ex. 11, Staniszewski Deposition, 157:10–15.

²⁶⁴ Ex. 11, Staniszewski Deposition, 163:13–164:5, 166:22–167:2.

²⁶⁵ Ex. 11, Staniszewski Deposition, 167:3–8.

²⁶⁶ Ex. 11, Staniszewski Deposition, 165:13–25.

²⁶⁷ Ex. 11, Staniszewski Deposition, 166:11–21.

²⁶⁸ Ex. 11, Staniszewski Deposition, 159:1–7; *see also id.* at 164:6–18.

²⁶⁹ Ex. 11, Staniszewski Deposition, 168:18–169:4; *see, e.g.,* Ex. 47, *Texas police chase ends in death as ‘Live PD’ cameras roll. ‘I can’t breathe,’ the man cries*, USA Today (June 8, 2020) available at <https://www.usatoday.com/story/news/investigations/2020/06/08/texas-police-chase-ends-death-i-cant-breathe-man-cries/3137476001/>.

²⁷⁰ Ex. 22, “Live PD” – Williamson County Access Agreement, p. 3; Ex. 19, APD Ambler General Offense Report, pp. 49, 60; Ex. 11, Staniszewski Deposition, 157:19–25, 172:21–173:11.

reasonable inferences in favor of the non-moving party—here, Plaintiffs. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “A judge’s function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine if there is a genuine issue for trial.” *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (reversing Fifth Circuit order affirming grant of summary judgment in excessive force case). Thus, “[t]he norm at summary judgment is to adopt the plaintiff’s version of the facts.” *Fuentes v. Riggle*, 611 Fed. Appx. 183, 2015 WL 2151832, *4 (5th Cir. May 8, 2015).

The City of Austin does not enjoy any immunity in this case. Unlike individual government employees and officers, “municipalities have no immunity from damages liability flowing from their constitutional violations.” *Owen v. City of Indep., Mo.*, 445 U.S. 622, 657 (1980).²⁷¹ Therefore, even if an officer is granted qualified immunity because the law he allegedly violated was not “clearly established,” a municipality can still be liable for the same violation. *See, e.g., Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 759 (5th Cir. 1993).

Deputies Camden and Johnson, whose interests were aligned with Nissen’s, invoked the Fifth Amendment in practically all of their deposition testimony. “[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” *Farace v. Independent Fire Ins. Co.*, 699 F.2d 204, 210 (5th Cir. 1983) (citations omitted). “In general, the decision as to whether to admit a person’s invocation of the Fifth Amendment into evidence is committed to the discretion of the district court.” *FDIC v. Fid. & Deposit Co.*, 45 F.3d 969, 977 (5th Cir. 1995).

²⁷¹ *See also Trent v. Wade*, 776 F.3d 368, 388 (5th Cir. 2015); *Glenn v. City of Tyler*, 242 F.3d 307, 310 n.2 (5th Cir. 2001); *Heath v. Brown*, 807 F.2d 1229, 1231, n.1 (5th Cir. 1987).

An adverse inference from invocation of the privilege is appropriate in a civil case, particularly where other evidence demonstrated that person's culpability. *See, e.g., Sec. & Exch. Comm'n v. Milles*, No. 1:19-CV-714-RP, 2022 WL 206808, at *5 (W.D. Tex. Jan. 24, 2022); *W.L. v. Zirus*, No. SA-19-CV-00607-FB, 2020 WL 6703238, at *5 (W.D. Tex. Nov. 12, 2020); *Robert v. Maurice*, No. CV 18-11632, 2021 WL 9540422, at *5 (E.D. La. Oct. 15, 2021); *Hernandez v. Theriot*, No. CV 14-42-SDD-EWD, 2016 WL 4118919, at *2 (M.D. La. Aug. 1, 2016), *aff'd*, 709 Fed. Appx. 755 (5th Cir. 2017) (drawing adverse inference against police chief accused of sexually assaulting minor plaintiff when police chief pled the Fifth to every question at trial).

Courts can draw this adverse inference from invocations of the Fifth Amendment at the summary judgment stage. *Sec. & Exch. Comm'n v. Sethi Petroleum, LLC*, 229 F. Supp. 3d 524, 532 (E.D. Tex. 2017) ("This inference is available to the court on summary judgment."); *see Sec. & Exch. Comm'n v. Milles*, No. 1:19-CV-714-RP, 2022 WL 206808, at *5 (W.D. Tex. Jan. 24, 2022) (drawing the inference). Likewise, the jury can draw that same inference at trial. *See Hinojosa v. Butler*, 547 F.3d 285, 291, 294, 297 (5th Cir. 2008) (reversing and ordering new trial in § 1983 excessive force case where district court had prevented testimony about a prior use of force incident that would have precipitated Fifth Amendment invocation, and thus been relevant to credibility).

IV. ARGUMENT AND AUTHORITIES

The City's motion for summary judgment should be denied for three reasons.

A. The City of Austin failed to accommodate Javier Ambler, II's disability.

Fact issues preclude summary judgment on Plaintiffs' disability discrimination claims.

To allege a claim under the ADA and RA, plaintiffs must show (1) a qualified individual within the meaning of the statutes (2) was excluded from participation in, or being denied benefits

of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity, and (3) that such exclusion, denial of benefits, or discrimination was by reason of his disability. *Cadena v. El Paso Cnty.*, 946 F.3d 717, 723 (5th Cir. 2020); *Lightbourn v. County of El Paso, Tex.*, 118 F.3d 421, 428 (5th Cir. 1997).²⁷² To recover compensatory damages, plaintiffs must also show defendants intentionally denied accommodations to the person with a disability. *See Delano-Pyle v. Victoria County*, 302 F.3d 567, 574 (5th Cir. 2002). The City's motion does not contest whether Plaintiffs satisfy these elements, but instead solely argues the ADA and RA do not apply pursuant to *Hainze v. Richards*, 207 F.3d 795. (5th Cir. 2000). *See* Doc. 165, pp. 20–21. Plaintiffs' evidence easily raises material fact issues on whether these statutes apply. Moreover, although the City has waived any issue on the other elements, Plaintiffs have also shown fact disputes on every other element required to prove ADA and RA violations.

1. The ADA and RA apply; Hainze does not preclude Plaintiffs' claims.

The City errantly claims, in its only argument relating to the ADA and RA, that it was allowed to discriminate based on Ambler's disability due to *Hainze v. Richards*, 207 F.3d 795, 797 (5th Cir. 2000). *See* Doc. 165, pp. 20–21. *Hainze* and its progeny craft a limited exception to the ADA and RA—recognized only in this circuit and nowhere else in the country—for claims arising

²⁷² The Rehabilitation Act follows the same standards as the Americans with Disabilities Act, adding only the requirement that the entity also receive federal funding. Courts thus interpret the ADA and RA under the same body of law. *See, e.g., Epley v. Gonzalez*, 860 Fed. Appx. 310, 312 (5th Cir. 2021); *Bennett-Nelson v. La. Bd. Of Regents*, 431 F.3d 448, 455 (5th Cir. 2005). The City of Austin did and does receive federal funding—including specifically for APD. Ex. 24, City of Austin 2018–2019 Approved Budget, 358, 448–449, 468–469, 472, available at https://assets.austintexas.gov/budget/18-19/downloads/FY19_Approved_FINAL.pdf; Ex. 25, City of Austin 2020–2021 Approved Budget, pp. 15, 199, 507, available at https://assets.austintexas.gov/budget/20-21/downloads/2020-21_Approved_Budget.pdf. The Court should take judicial notice of the City's website. *See, e.g., Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (denying rehearing en banc).

from police action amidst an exigent “threat to human safety.” *Hainze*, 207 F.3d at 802. Here, Ambler posed no threat. Thus, the *Hainze* decision does not bar Plaintiffs’ claims for two reasons.

- a) Nissen encountered a secure scene, as Ambler posed no threat to human safety, so the *Hainze* exception does not apply.

When the evidence is viewed in the light most favorable to Plaintiffs, the “area was secure” and there was no ongoing “threat to human safety,” so this case is cognizable according to *Hainze*. *Hainze*, 207 F.3d at 802. This is consistent with the Fifth Circuit and its district courts’ application of the rule; “[t]he *Hainze* exception is applied narrowly, only in situations that legitimately present a threat of imminent danger” *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 758 (N.D. Tex. 2014).²⁷³ Because Ambler posed no threat of imminent danger, the City’s argument fails.

In *Hainze v. Richards*, the plaintiff was a mentally ill, intoxicated man yelling profanities at police officers while advancing toward them with a knife. 207 F.3d 795, 797 (5th Cir. 2000). After repeatedly ordering him to drop his weapon, those officers fired on Hainze. *Id.* Hainze survived, was convicted of aggravated assault for menacing the officers, but nonetheless sued, claiming the ADA required the officers to accommodate him as he prepared to attack them. *Id.* at 800. The *Hainze* decision reasoned that “[o]nce the area was secure and there was no threat to human safety, the [police] would have been under a duty to reasonably accommodate Hainze’s disability in handling and transporting him to a mental health facility.” *Id.* at 802. However, the Fifth Circuit held against Hainze because his assault on the officers meant an ADA “claim is not available.” *Id.* at 801. In contrast, by the plain terms of *Hainze* itself, the ADA and RA clearly

²⁷³ See also, e.g., *Tellis v. LeBlanc*, No. CV 18-541, 2022 WL 67572, at *7 (W.D. La. Jan. 6, 2022) (“The Fifth Circuit in *Hainze* made clear that its holding was limited to the time period before the officer secured the scene and ensured there was no threat to human life.”).

apply to Ambler, because “the area was secure and there was no threat to human safety” for three reasons.

First, unlike in *Hainze*, here, after his car crashed, objective evidence proves Ambler immediately surrendered and no longer posed a threat.²⁷⁴ Unlike the plaintiff in *Hainze*—who was actively threatening the officers with a knife and ignoring orders from the police—Ambler immediately complied with the officers’ orders as best as his disabilities would allow, and held up his hands to show he was unarmed.²⁷⁵ By the time Nissen arrived, he could see that Ambler was subdued, face down on the ground, and posed no threat.²⁷⁶ Nissen even had the opportunity to check that the car was turned off, free of weapons, and unoccupied before turning to Ambler—he confirmed “car looks clear” to the deputies.²⁷⁷ Plaintiffs’ police practices expert likewise attests that the scene was secure based on the information available to Nissen.²⁷⁸ Thus, the objective evidence reflects that there was, in fact, no threat to human safety other than the excessive force being inflicted by the police.

Second, Nissen’s and the other officers’ testimony and conduct shows they did not believe Ambler posed a threat. Nissen admitted Ambler was not being violent.²⁷⁹ When asked if Ambler posed any threat while on the ground, both deputies asserted their Fifth Amendment rights and refused to answer.²⁸⁰ The officers all readily permitted private citizens—the LivePD camera crew—within arms’ reach of Ambler, showing the officers had zero safety concerns.²⁸¹ When two

²⁷⁴ Ex. 5, Dash Camera Footage, 1:45:50.

²⁷⁵ Ex. 5, Dash Camera Footage, 1:45:52.

²⁷⁶ Ex. 3, Body-Worn Camera, 1:21–3:01, (T06:46:10–47:51).

²⁷⁷ Ex. 3, Body-Worn Camera, 1:31 (T06:46:22Z).

²⁷⁸ Ex. 1, Clark Report, p. 24.

²⁷⁹ Ex. 2, Nissen Deposition at 94:20–95:5.

²⁸⁰ Ex. 12, Camden Deposition, 84:16–85:4; Ex. 14, Johnson Deposition, 71:13–18, 72:16–73:9.

²⁸¹ Ex. 5, Dash Camera Footage (COA 51378), at 23:10; Ex. 3, Body-Worn Camera, 1:48 (T06:46:13Z), 3:49 (T06:46:14Z) [COA 51366].

additional officers arrived, they stood idle, demonstrating that they also saw no exigent need to protect anyone from Ambler, block access to Ambler's vehicle, or even have the camera crew keep their distance.²⁸² As such, after the crash, Nissen and the other police knew the area was controlled and secure, triggering the City and Nissen's obligations to accommodate Ambler under the plain text of *Hainze*.

Finally, the City's only countervailing evidence is Nissen's self-serving testimony, but this is not enough. *See* Doc. 165, p. 21. Even if the credibility of Nissen's testimony were not obliterated by the video evidence and every officers' conduct at the scene—though it is—his self-serving account is insufficient to eliminate a fact issue as a matter of law. *Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 492 (5th Cir. 2001) (officer's self-serving statement was insufficient for summary judgment).

In much more dangerous situations, courts in this circuit have found *Hainze* inapplicable. For example, in *Hobart*, the plaintiff, in the midst of a severe schizophrenic episode, ran toward the defendant officer, flailing his arms and striking the officer on the body and head. *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 742 (S.D. Tex. 2011). Still, that court denied summary judgment, finding that the plaintiffs had raised fact issues as to whether the plaintiff "present[ed] any serious threat, let alone threat of human life, and whether there was any need for the officer to secur[e] the scene." *Id.* at 757–58 (cleaned up). By contrast, Ambler never charged any officer, nor did he do anything remotely resembling striking any officers on the body or head.

And in *Wilson v. City of Southlake*, 936 F.3d 326, 331 (5th Cir. 2019), the Fifth Circuit affirmed how narrow the *Hainze* exception actually is, and that it only applies during "exigent" arrests. In *Wilson*, a disruptive, autistic child threatened and attempted to hit adults with a jump

²⁸² Ex. 5, Dash Camera Footage, 01:45:57–01:48:16.

rope, precipitating a forceful arrest by school police. *Id.* at 328. Despite *Wilson* involving an arrest of an unrestrained, threatening person with a “weapon,” the Fifth Circuit held “[b]ecause there was no exigent circumstance, the *Hainze* exception does not apply.” 936 F.3d at 331; *see also Rubin v. Cruz*, No. 4:21-CV-01148, 2022 WL 4450489, at *6 (S.D. Tex. Sept. 22, 2022) (*Hainze* exception did not apply as arrest was not exigent); *Salinas v. City of New Braunfels*, 557 F. Supp. 2d 771, 776 (W.D. Tex. 2006) (*Hainze* exception did not apply to police conduct while investigating a person’s death). The same is true here—the exigency had decidedly ended by the time Nissen approached, as Ambler was lying face down on the ground begging for help and not threatening anyone.

The City errantly suggests that because the incident happened “on a public street,” *Hainze* necessarily applies. Doc. 165, p. 21. This application of *Hainze* is patently incorrect. By the plain language of the decision, the ADA and RA apply once the “area is secure,” meaning there is no longer an actual “threat to human safety.” *Hainze*, 207 F.3d at 802. Indeed, in the facts of *Hainze*, the court of appeals anticipated that the area would eventually *be made secure* so that the officers would have been obliged by the ADA to transport the subject from the scene (which was not literally a street, but a convenience store) to a mental health facility. *Id.* There is no inherent threat engendered by public streets versus any other location. In this specific case, Ambler was lying face down on a deserted street at 1:46 a.m., so there simply was not any conceivable threat to the “public at large.”²⁸³ *Contra* Doc. 165, p. 21. Nor is there any evidence that Nissen and the deputies were “defending themselves,” *contra* Doc. 165, p. 21, as Nissen admits Ambler was never violent.²⁸⁴ Thus, the Court should reject the City’s cursory argument.

²⁸³ Ex. 3, Body-Worn Camera, at 1:16 (T06:46:06Z).

²⁸⁴ Ex. 2, Nissen Deposition, 94:20–95:5.

Accordingly, Ambler was no longer a threat to the officers' safety and so he was entitled to be free from discrimination based on his disability.

- b) Every court of appeals outside this circuit to squarely address the issue has rejected *Hainze*'s controversial exception.²⁸⁵

Although *Hainze* remains binding in this circuit and does not preclude Plaintiffs' claims—particularly not at summary judgment—the decision was wrongly decided and there is a clear circuit split. The ADA and RA have no exceptions for police action whether or not the area is secure. Thus, the City's argument on this point should be rejected for that independent reason.

As Judge Ho noted in *Wilson*, the *Hainze* “exigent circumstance” exception “appears nowhere in the text of either [statute],” “[s]o it is not surprising that every circuit to opine on this issue has ... rejected [the Fifth Circuit's] approach.”²⁸⁶ *Wilson*, 936 F.3d at 333 (Ho, J., concurring); see *Gray v. Cummings*, 917 F.3d 1, 16–17 (1st Cir. 2019); *Seremeth v. Bd. of Cnty. Comm'rs Frederck Cnty., Md.*, 673 F.3d 333, 339 (4th Cir. 2012); *Sheehan v. City & Cnty. of San Francisco, Calif.*, 743 F.3d 1211, 1232 (9th Cir. 2014) *rev'd on other grounds*, 135 S.Ct. 1765 (2015); *Vos v. City of Newport Beach*, 892 F.3d 1024, 1036 (9th Cir. 2018); *Bircoll v. Miami-Dade Cnty., Fla.*, 480 F.3d 1072, 1085 (11th Cir. 2007); see also *King v. Hendricks Cnty. Commissioners*, 954 F.3d 981, 989 (7th Cir. 2020) (assuming without deciding that the ADA applied to exigent arrest); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) (rejecting “a broad rule categorically excluding arrests from the scope of Title II”). “Our obligation to apply

²⁸⁵ Plaintiffs respectfully argue this issue to ensure it is preserved to the extent necessary.

²⁸⁶ Judge Ho's analysis notwithstanding, while the Sixth and Eighth Circuits have not adopted *Hainze*'s reasoning, they have reached very similar results and cited favorably to the decision. See, e.g., *Roell v. Hamilton Cnty., Ohio/Hamilton Cnty. Bd. Of Cnty. Commissioners*, 870 F.3d 471, 489 (6th Cir. 2017); *Bahl v. County of Ramsey*, 695 F.3d 778, 785 (8th Cir. 2012).

binding precedent faithfully does not require us to extend it where it doesn't belong." *Wilson*, 936 F.3d at 333 (Ho., J. concurring).

After the crash, Ambler never posed a serious threat to any person on scene—at a minimum, this creates a dispute of material fact as to whether Ambler lying face down on the ground beneath three officers, doing nothing but trying to breathe and begging for help, could have possibly resembled a “potentially life-threatening situation or threat to human life.” *See Wilson*, 936 F.3d at 331. In any event, *Hainze*'s judge-made limit on the ADA and RA is erroneous. Thus, the City's argument to the contrary should be rejected.

2. *Javier Ambler II was a qualified person with a disability.*

Ambler was disabled and thus a qualified person within the meaning of the ADA and RA.

“Whether a plaintiff is disabled under the ADA is not a demanding question.” *Epley v. Gonzalez*, 860 F. App'x 310, 312 (5th Cir. 2021). The statute expressly provides that “[t]he definition of disability ... shall be construed in favor of broad coverage” 42 U.S.C. § 12102(4)(A); *see also* 29 C.F.R. § 1630.2(j)(1)(iii). To qualify for protections under the ADA and RA, a person with a disability must show they suffer from “a physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. § 12102(1)(A). “Major life activities” include “caring for oneself,” 42 U.S.C. § 12102(2)(A), and limitations on “the operation of a major bodily function,” such as the circulatory system, respiratory system, and endocrine system. 42 U.S.C. § 12102(2)(B). To be “substantially limited” merely requires the person with the disability “be unable to perform a major life activity that the average person in the general population can perform or to be significantly restricted in the ability to perform it.” *Weed v. Sidewinder Drilling, Inc.*, 245 F. Supp. 3d 826, 833 (S.D. Tex. Mar. 29, 2017) (Harmon, J.)

(denying motion for summary judgment); *see also* 29 C.F.R. § 1630.2(j)(1)(ii). Ambler easily met this threshold for two reasons: his morbid obesity and his congestive heart failure.

First, at the time of his death, Ambler weighed over 400 pounds with a body mass index of 55.5—“extremely obese” according to the NIH.²⁸⁷ The Travis County Medical Examiner and Ambler’s treating doctors specifically described Ambler as “morbidly obese.”²⁸⁸

Courts in this circuit regularly recognize morbid obesity as a qualifying disability. *McCollum v. Livingston*, No. 4:14-CV-3253, 2017 WL 608665, at *35 (S.D. Tex. Feb. 3, 2017) (denying summary judgment in part on basis that morbidly obese plaintiff qualified as an individual with a disability under the ADA); *E.E.O.C. v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 696 (E.D. La. 2011) (“[Plaintiff] was severely obese, which is an impairment under the ADA.”); *see also Cook v. Rhode Island*, 10 F.3d 17, 25-26 (1st Cir. 1993).

Ambler’s weight met the threshold for disability, as it limited his bodily systems and daily life activities. His father described him as “too big” and talked about needing to encourage him to “Eat more veggies, more fruits. Do some walking” after Ambler had ended up in the hospital due to multiple complications that both he and his father understood to be related to his morbid obesity.²⁸⁹ Before his death, Ambler’s physicians noted that due to his obesity, Ambler was “Hypoxic on room air”—meaning Ambler’s bodily system of respiration was substantially limited by his morbid obesity compared to an average person.²⁹⁰ This limitation on Ambler’s ability to

²⁸⁷ Ex. 6, Autopsy Report, p. 3; Ex. 26, National Institute of Health, Body Mass Index Chart, *available at* http://www.nhlbi.nih.gov/health/educational/lose_wt/BMI/bmi_tbl.pdf (Ambler’s BMI was even beyond the range given by the NIH for “extreme obesity” as between 40 and 54). The Court should take judicial notice of the NIH publication. *See Coleman*, 409 F.3d at 667.

²⁸⁸ Ex. 6, Autopsy Report, p. 3; Ex. 18, St. David’s Medical Record Excerpts, AMBLER000314, 328, 351.

²⁸⁹ Ex. 27, Ambler, Sr. Deposition, 34:12–25.

²⁹⁰ Ex. 18, St. David’s Medical Record Excerpts, AMBLER000261.

breathe was even more pronounced when the officers forced him to lay face down on the ground, as he exclaimed to the officers that he could not breathe at the scene repeatedly.²⁹¹ Plaintiffs’ physician expert likewise opines Ambler had these limitations from his disability.²⁹² And obviously his body shape prevented him from laying “flat on [his] stomach” no matter how many times the officers gave that instruction.²⁹³

Second, Ambler suffered congestive heart failure, which is also a disability.²⁹⁴ After the ADAAA, “disability” includes impairment that is episodic or in remission, including if in remission due to medication, if it would substantially limit a major life activity when active—and examples given specifically include heart conditions similar to congestive heart failure, like hypertension. ADA Amendments Act of 2008, §§ 4, § 3(4)(D), 122 Stat. 3553, 3555; 29 C.F.R. § 1630(j)(5).

Federal courts have recognized congestive heart failure as a disability under the ADA. *Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1171 (9th Cir. 2008) (finding individual disabled under ADA on basis of congestive heart failure); *Demyanovich v. Cadon Plating & Coatings, L.L.C.*, 747 F.3d 419, 433 (6th Cir. 2014) (finding individual disabled under ADA on basis of congestive heart failure). And Fifth Circuit courts have recognized hypertension—often a precursor, as it was for Ambler, to the *more severe* congestive heart failure—as a condition that qualifies as a disability under the ADA. *See Martone v. Livingston*, No. 4:13-CV-3369, 2014 WL

²⁹¹ Ex. 3, Body-Worn Camera, 1:41–1:42 (T06:46:31–32), 1:54–55 (T06:46:43–44), 1:56 (T06:46:46), 2:03–04 (T06:46:52–53), 2:15–16 (T06:47:05–06); Ex. 2, Nissen Deposition, 115:13.

²⁹² Ex. 10, Kadar Declaration, p. 3.

²⁹³ Ex. 3, Body-Worn Camera, 1:53–1:54 (T06:46:43–44); Ex. 10, Kadar Declaration, p. 3.

²⁹⁴ Ex. 18, St. David’s Medical Record Excerpts, AMBLER000175, 178; Ex. 3, Body-Worn Camera, 1:30–1:31 (T06:46:20–21), 1:37–1:38 (T06:46:28–29), 1:40–1:41 (T06:46:29–30); Ex. 5, Dash Camera Footage, 01:46:23–24, 01:46:30–31, 01:46:32–33.

3534696, at *16 (S.D. Tex. July 16, 2014) (denying motion to dismiss ADA claims in part on basis that plaintiff suffered from hypertension, obesity, and diabetes); *Garner v. Chevron Phillips Chem. Co., L.P.*, 834 F. Supp. 2d 528, 565 (S.D. Tex. 2011) (finding plaintiff with hypertension and depression qualified as individual with a disability under ADA). In different statutory frameworks for employment disability, the Fifth Circuit has likewise recognized congestive heart failure supported determinations of permanent total disability. *Mayes v. Astrue*, No. 08-10306, 2008 WL 5069750, at *2 (5th Cir. Dec. 2, 2008) (unpublished); *Halliburton Energy Servs. V. Bourg*, 189 F.3d 468, 1999 WL 511559, *1 (5th Cir. June 30, 1999) (per curiam).

Here, Ambler needed to take medications and required cardiac catheterization in December 2017 to treat the effects of his congestive heart failure.²⁹⁵ However, even missing his medication for one or two days had led him back to the ER. In March 2018, Ambler had ran out of his medication for two days and had to go to the hospital with shortness of breath and swelling in his extremities.²⁹⁶ In November 2018, he went to refill his medication and was immediately assessed as in acute decompensated heart failure, hypoxic, hypertensive, and edematous.²⁹⁷ His doctors similarly noted Ambler had “long-term morbidity and mortality” due to his uncontrolled hypertension.²⁹⁸ As such, although mitigated using medication, Ambler’s congestive heart failure clearly impacted his normal circulatory system functioning in such a way that qualified him as a person with a disability under the ADA.

Both of Ambler’s severe health conditions, his morbid obesity and his congestive heart failure, independently qualified Ambler as disabled under the ADA. Both contributed to his

²⁹⁵ Ex. 18, St. David’s Medical Record Excerpts, AMBLER000159.

²⁹⁶ Ex. 18, St. David’s Medical Record Excerpts, AMBLER000177.

²⁹⁷ Ex. 18, St. David’s Medical Record Excerpts, AMBLER000261.

²⁹⁸ Ex. 18, St. David’s Medical Record Excerpts, AMBLER000226.

death.²⁹⁹ In concert, Ambler’s conditions combined to more severely impact major life activities and major bodily functions: making it harder to breathe, harder for his circulatory system to function, harder to endure the stress of the forcible restraint, and harder for him to respond to (and survive complying with) the officers’ commands in light of their refusal to accommodate his disabilities. As such, Ambler qualified as an individual with a disability under the ADA.

3. *Ambler was denied participation in City of Austin programs and services.*

Ambler was denied the program and service of proper policing by Defendants’ actions. Programs, services, and activities of a public entity are broadly understood for the purposes of the ADA and RA. *See, e.g., Frame v. City of Arlington*, 657 F.3d 215, 226 (5th Cir. 2011). The Fifth Circuit has recognized that police officers who fail to reasonably accommodate people with disabilities during their arrest violate their rights under the ADA and RA—thus, policing is a program or service within the meaning of the statutes. *See Wilson v. City of Southlake*, 936 F.3d 326, 333 (5th Cir. 2019); *Delano-Pyle v. Victoria Cnty., Tex.*, 302 F.3d 567, 574 (5th Cir. 2002); *see also Morais v. City of Philadelphia*, No. 06-582, 2007 WL 853811, at *12 (E.D.Pa. Mar. 19, 2007) (“the lawful exercise of police power is a benefit of the services, programs, or activities of a public entity”). Here, as described below, Nissen and the City failed to accommodate Ambler’s repeatedly communicated and obvious disabilities, and thus denied him the benefits of the City of Austin’s policing.

4. *Ambler died, and was thereby excluded from a City of Austin program or service, because of his disabilities.*

Nissen knew that Ambler had a disability that endangered his life if Nissen stuck to the “default” method of forcible restraint, so Nissen had a duty to accommodate Ambler’s disability

²⁹⁹ Ex. 10, Kadar Declaration, p. 3.; Ex. 6, Autopsy Report

in the arrest, but he failed to do so. As a result of Nissen’s failure to accommodate, Ambler died at the hands of Nissen and the Williamson County deputies.³⁰⁰

Unlike other anti-discrimination statutes, the ADA and RA create an “affirmative obligation” to accommodate people with disabilities—not simply treat people with disabilities the same as able-bodied people. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 533 (2004).

Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility.

Id., at 531-532 (discussing affirmative “duty to accommodate”); *see* 28 C.F.R. § 35.130 (b)(7) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability”). In this context, officers like Nissen have a duty to accommodate disabilities and their departments can be liable when its officers “fail to reasonably accommodate the disabled person's disability in the course of investigation or arrest, ‘causing the person to suffer greater injury or indignity in that process than other arrestees.’” *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 756 (S.D. Tex. 2011).³⁰¹ In other

³⁰⁰ Ex. 10, Kadar Declaration, pp. 2–3; Ex. 15, Baden Declaration, pp. 5–6.

³⁰¹ *See also McCollum v. Livingston*, No. 4:14-CV-3253, 2017 WL 608665, at *35 (S.D. Tex. Feb. 3, 2017); *Hinojosa v. Livingston*, 994 F.Supp.2d 840 (S.D. Tex. Jan. 16, 2014); *O’Neil v. Tex. Dep’t of Crim. Justice*, 804 F.Supp.2d 532, 538 (N.D. Tex. Apr. 7, 2011); *Martone v. Livingston*, 2014 WL 3534696 (S.D. Tex. July 16, 2014) (Ellison, J.); *Togonidze v. Livingston*, No. 6:14-cv-00093-JDL, Doc. 52 (magistrate’s April 9, 2014 recommendation) (E.D. Tex.) (Love, Mag. J.) and Doc. 56 (May 6, 2014 order adopting magistrate’s recommendation) (Schneider, J.); *Webb v. Livingston*, No. 6:13-cv-00711-JDL, Doc. 98 (magistrate’s report and recommendation, attached as Ex. 125) (E.D. Tex.) (Love, Mag. J.) and Doc. 125 (May 5, 2014 order adopting magistrate’s recommendation, attached as Ex. 126) (Schneider, J.); *Hinojosa v. Livingston*, 994 F.Supp.2d 840 (S.D. Tex. 2014) (Gonzales Ramos, J.); *Borum v. Swisher Co.*, 2015 WL 327508 (N.D. Tex. Jan. 26, 2015) (Robinson, J.) (alcoholic prisoner denied accommodations). *See also Wright v. Tex. Dep’t Crim. Justice*, 2013 WL 6578994 (N.D. Tex. Dec. 16, 2013) (O’Connor, J.); *Wolfe v. Fla. Dep’t of Corr.*, No. 5:10–CV–663, 2012 WL 4052334, *4 (M.D. Fla. Sept. 14, 2012); *Miller v. Chapman*, No. 13–00367, 2014 WL 2949287, at *3 (M.D. La. June 30, 2014); *Reeves v. LeBlanc*, No. 13–0586, 2014 WL 7150615, *4 (M.D. La. Dec. 15, 2014); *Hacker v. Cain*, No. 3:14-00063, 2016 WL 3167176, *13 (M.D. La. June 6, 2016); *Cleveland v. Gautreaux*, 198 F.Supp.3d 717,

words, “[t]his prong can be satisfied with evidence that the defendant failed to make reasonable accommodations for a plaintiff’s disability.” *Epley v. Gonzalez*, 860 F. App’x 310, 314 (5th Cir. 2021). Nissen’s misconduct failed to accommodate, and thereby was “because of,” Ambler’s disabilities for three reasons.

First, Nissen knew Ambler was disabled and needed an accommodation. He testified that he recognized that Ambler was obese.³⁰² Indeed, in the moment, Nissen referred to Ambler as “big man” and “real heavy-set.”³⁰³ Nissen acknowledged that he heard Ambler plead that he could not breathe.³⁰⁴ Further, Ambler’s labored breathing and medical distress are obvious on Nissen’s body-worn camera.³⁰⁵ When asked if Ambler was having difficulty breathing and struggling to survive, the deputies pleaded the Fifth.³⁰⁶ Nissen testified that he received training about the risks of positional asphyxia and that he received training on how to restrain “heavyset” people.³⁰⁷ He understood “the obvious pitfalls of that [prone] position ... people could be at risk for positional asphyxiation.”³⁰⁸ Thus, Nissen knew “a whole bunch of different options” were reasonable aside from the deadly prone restraint³⁰⁹—indeed, the City’s own policy spells out that an injured or disabled person may not need to be restrained at all, or may need to be restrained in a seated

737 (M.D. La. Aug. 1, 2016); *Romero v. Bd. Of County Comm’n of County of Curry, NM*, 202 F.Supp.3d 1223, 1265 (D. N.M. Aug. 15, 2016); *Jacobs v. Trochesset*, NO. 3:16-CV-65, 2016 WL 6518420, *1 (S.D. Tex. Nov. 2, 2016).

³⁰² Ex. 2, Nissen Deposition, 286:5–14.

³⁰³ Ex. 3, Body-Worn Camera, 1:43–44 (T06:46:33–34Z), 3:35–40 (T06:48:25–30).

³⁰⁴ Ex. 2, Nissen Deposition at 146:3–5.

³⁰⁵ Ex. 3, Body-Worn Camera, 1:41–1:42 (T06:46:31–32), 1:54–55 (T06:46:43–44), 1:56 (T06:46:46), 2:03–04 (T06:46:52–53), 2:15–16 (T06:47:05–06).

³⁰⁶ Ex. 14, Johnson Deposition, 96:13–24; Ex. 12, Camden Deposition, 58:12–17.

³⁰⁷ Ex. 2, Nissen Deposition at 63:20–25, 67:2–8.

³⁰⁸ Ex. 2, Nissen Deposition at 61:12–14.

³⁰⁹ Ex. 2, Nissen Deposition at 195:18–19.

position or with their hands handcuffed in front of their body.³¹⁰ Yet, when faced with a completely nonthreatening subject who was experiencing obvious medical distress as a result of his obesity and Nissen's insistence on the dangerous restraint, Nissen did nothing to provide any reasonable accommodation. Thus, based on Nissen's testimony alone, he discriminated against Ambler based on his morbid obesity by continuing to try to force Ambler to lay "flat on your stomach" despite knowing this was not only impossible, but inappropriate and dangerous due to Ambler's obesity.

Second, a reasonable juror could further reject Nissen's self-serving plea of ignorance and conclude that he did hear Ambler twice tell him directly that he had congestive heart failure. Considering how clearly Ambler's pleas can be heard on Nissen's body worn camera,³¹¹ this is a straightforward fact issue for a jury to weigh the credibility of Nissen's testimony against video evidence—and the testimony from Nissen, the City, and Plaintiffs' expert that Nissen should have been listening for this information because he knew it was relevant to the risk of killing Ambler with forcible restraint.³¹² See *Roque v. Harvel*, 993 F.3d 325, 334 (5th Cir. 2021) (despite officer's claim that he believed subject was armed and dangerous, video showing subject was unarmed and fleeing was sufficient to dispute this version of events); *Bazan*, 246 F.3d at 492; *Streetman v. Coriell*, No. A-13-CA-404-LY, 2014 WL 3548458 (W.D. Tex. July 17, 2014) (Austin, Mag. J.) (despite officers' denial, finding fact dispute whether officers saw suspect had dropped gun).

If the jury sides with Plaintiffs' evidence over Nissen's self-serving denial, then it can rely on Nissen's admission that hearing Ambler say he had congestive heart failure would have made

³¹⁰ Ex. 11, Staniszewski Deposition, 119:7–120:3; Ex. 7, APD Policy 321 – Care and Transport of Prisoners, p. 2 (COA 027256).

³¹¹ Ex. 3, Body-worn camera, 1:37–1:41 (T06:46:27–31); Ex. 5, Dash Camera Footage, 01:46:23–28.

³¹² Ex. 2, Nissen Deposition, 169:7–11; Ex. 11, Staniszewski Deposition, 126:22–127:4; Ex. 1, Clark Report, p. 23.

a difference in his response.³¹³ The City likewise testified an arrestee’s congestive heart failure would make them more likely to be injured or killed from this restraint, and that Nissen was trained on that reality.³¹⁴ That fact would have required further urgency to the already obvious need to accommodate Ambler’s disabilities, demonstrating Nissen’s failure to reasonably accommodate.

Finally, Ambler repeatedly requested help³¹⁵ and explained to Nissen that he could not breathe,³¹⁶ while Nissen ignored the wide range of reasonable options to accommodate Ambler’s request and thereby save Ambler’s life. Nissen did not stop what he was doing as Ambler asked, or use any other options: Nissen could have, but did not, stopped using force, asked the deputies to stop, had Ambler sit up, had Ambler kneel, rolled Ambler on to his side, or done anything to relieve the pressure on his chest.³¹⁷ Or Nissen could have simply chosen not to use a restraining device.³¹⁸ The reasonableness of each of these available accommodations that Nissen failed to use is a fact question to be resolved by a jury. *Brennan v. Stewart*, 834 F.2d 1248, 1262 (5th Cir. 1988). Yet, instead, Nissen did not even stop applying force himself or stop the Williamson County deputies.³¹⁹ Indeed, Nissen and the deputies made the situation worse by pressing Ambler’s face

³¹³ Ex. 2, Nissen Deposition, 169:7–11.

³¹⁴ Ex. 11, Staniszewski Deposition, 125:23–126:1, 126:22–127:4, 127:15–128:17.

³¹⁵ Ex. 3, Body-Worn Camera, 2:05–2:06 (T06:46:56), 2:20–21 (T06:47:10–11), 2:25–26 (T06:47:15–16).

³¹⁶ Ex. 3, Body-Worn Camera, 1:41–1:42 (T06:46:31–32), 1:54–55 (T06:46:43–44), 1:56 (T06:46:46), 2:03–04 (T06:46:52–53), 2:15–16 (T06:47:05–06).

³¹⁷ Ex. 2, Nissen Deposition, 195:18–20; Ex. 1, Clark Report, p. 25 (“Even if the officers insisted on handcuffing him, they could have easily directed Ambler to sit on the ground, lay on his side, or simply handcuffed him in the front to relieve the pressure on his chest.”); Ex. 3, Body-Worn Camera, 2:05–2:06 (T06:46:56), 2:20–21 (T06:47:10–11), 2:25–26 (T06:47:15–16).

³¹⁸ Ex. 11, Staniszewski Deposition, 119:7–120:3; Ex. 7, APD Policy 321 – Care and Transport of Prisoners, p. 2 (COA 027256; Ex. 1, Clark Report, p. 25 (“There was no need to handcuff Ambler at all.”); *see generally* Ex. 3, Body-Worn Camera.

³¹⁹ Ex. 3, Body-Worn Camera; *see also* Ex. 1, Clark Report, p. 26 (“Nissen went out of his way to increase the deadly pressure on Ambler’s chest by using his knee on Ambler’s back and his arm on Ambler’s neck for no reason. Nissen helped convert a peaceful arrest into a use of deadly force.”).

and chest directly into the ground when they knew he was having trouble breathing. In other words, Nissen did not take any of the many reasonable options available to safely accommodate Ambler's disability. Instead, Nissen continued his own unnecessary application of force, and continued to assist the deputies in their unnecessary force, that he knew would pose a heightened risk due to Ambler's disability, thereby failing to provide any reasonable accommodation for Ambler's disability, and ultimately proximately causing Ambler's death.³²⁰

Nissen was faced with a compliant subject being brutally arrested by two deputies and begging for his life. Instead of taking any one of the many actions that would have accommodated Ambler's disability, Nissen simply helped apply more force that ultimately killed Ambler due to his disabilities. This shows that Nissen discriminated against Ambler based on his disabilities.

5. Nissen's conduct was intentional, not accidental.

Though the Fifth Circuit has declined to explicitly define "intentional discrimination,"³²¹ every Circuit addressing the question has concluded "the standard for intentional violations is deliberate indifference to the strong likelihood of a violation" of the ADA or RA. *See, e.g., Loeffler v. Staten Island Univ. Hospital*, 582 F.3d 268, 275 (2nd Cir. 2009); *A.G. v. Lower Merian School Dist.*, 542 Fed. Appx. 194, 198 (3rd Cir. 2013); *Meagley v. Little Rock*, 639 F.3d 384 (8th Cir. 2011); *Duvall v. Co. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001); *Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1228-29 (10th Cir. 2009); *Liese v. Indian River Co. Hospital*, 701 F.3d

³²⁰ Ex. 10, Kadar Declaration, p. 2; Ex. 6, Autopsy Report, p. 3; Ex. 15, Baden Declaration, pp. 5–6.

³²¹ *See Frame*, 657 F.3d at 231 n. 71 (5th Cir. 2011) ("We express no opinion as to whether (or when) a failure to make reasonable accommodations should be considered a form of intentional discrimination"); *Estate of A.R. v. Muzyka*, 543 Fed. Appx. 363, 365 (5th Cir. Oct. 16, 2013) (unpublished) (declining to adopt competing "bad faith" or "deliberate indifference" standards for "intentional discrimination" advocated by the parties); *Perez*, 624 Fed. Appx. At 184 ("declin[ing] to make new law on the nature of intent").

334, 345 (11th Cir. 2012).³²² Deliberate indifference only requires officials to both (1) know about the inmate’s disability, and (2) disregard the need for a reasonable accommodation.

The Fifth Circuit has ruled that ignoring “clear indications” that a person has a disability in need of accommodation is sufficient to establish intentional discrimination. *See Perez v. Doctors Hosp. at Renaissance, Ltd.*, 624 Fed. Appx. 180, 185 (5th Cir. 2015) (reversing summary judgment). Failure to provide an “effective” accommodation is “evidence of intentional discrimination.” *Id.*

The Fifth Circuit cursorily discussed “intentional discrimination” under Title II of the ADA in *Delano-Pyle v. Victoria Co.*, 302 F.3d 567 (5th Cir. 2002). The facts in *Delano-Pyle* and its successor, *Perez*, demonstrate knowledge of a need for an accommodation and a failure to provide it is enough. In *Delano-Pyle*, the Circuit affirmed a jury verdict for a deaf plaintiff who was arrested after police refused to provide him a sign-language interpreter during a traffic stop. Though the Circuit reviewed the sufficiency of the evidence, it did not discuss any proof “beyond” deliberate indifference, when upholding the district court’s award of compensatory damages. That the officer knew the plaintiff was deaf, but chose not to provide a sign-language interpreter and arrested him anyway, was enough. *See also Perez*, 624 Fed. Appx. at 185.

In this case, Nissen clearly recognized that Ambler was obese, as it was not only obvious, but Nissen referred to Ambler as “big man” and “real heavy-set.”³²³ Nissen acknowledged that he heard Ambler plead that he could not breathe.³²⁴ And Ambler’s desperate pleas that he had

³²² The Sixth Circuit has also assumed, without deciding, this is the correct standard. *R.K. v. Bd. Of Educ. Of Scott County, Ky.*, 637 Fed. Appx. 922, 925 (6th Cir. Feb. 5, 2016). The Fifth Circuit is “always chary to create a circuit split.” *U.S. v. Kebodeaux*, 647 F.3d 137, 141 (5th Cir. 2011) *rev’d on other grounds at* 133 S.Ct. 2496 (2013).

³²³ Ex. 3, Body-Worn Camera, 1:43–44 (T06:46:33–34Z), 3:35–40 (T06:48:25–30).

³²⁴ Ex. 2, Nissen Deposition, 146:3–5.

congestive heart failure are clearly audible on Nissen’s body worn camera.³²⁵ Ambler also repeatedly begged “please” and explained he was “not resisting.”³²⁶ Nissen had more than clear indications that Ambler had a disability—it was both obvious and Ambler explicitly begged him to recognize how he needed to be accommodated. Further, Nissen understood that Ambler’s obesity affected how he needed to respond—and he admits he would have recognized congestive heart failure did so as well, as discussed above.³²⁷

Thus, Plaintiffs’ evidence satisfies every element of their ADA and RA claims, so the City’s motion for summary judgment on the disability discrimination claims should be denied.

B. APD’s practice of using excessive force and failing to intervene, which the City promoted with inadequate supervision and errant training, proximately caused Nissen to use deadly force and fail to intervene.

Nissen used excessive force, instead of intervening to de-escalate the deputies’ ongoing excessive force, because APD had created a custom of using and not intervening to stop excessive force by never enforcing a nominal requirement that officers intervene, by failing to train on de-escalation, and by training officers to be aggressive “warriors.” Each of these customs was known to APD’s chief of police, its policymaker, and was a moving force of the excessive force and failure to intervene in this case.

Plaintiffs have satisfied each element under the Fifth Circuit’s well-settled test for municipal liability: “(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose ‘moving force’ is that policy (or custom).” *See, e.g., Jauch v. Choctaw Cty, Miss*, 874 F.3d 425, 435 (5th Cir. 2017).

³²⁵ Ex. 3, Body-Worn Camera, 1:30–1:31 (T06:46:20–21), 1:37–1:38 (T06:46:28–29), 1:40–1:41 (T06:46:29–30); Ex. 5, Dash Camera Footage, 01:46:23–24, 01:46:30–31, 01:46:32–33.

³²⁶ Ex. 3, Body-Worn Camera, 2:05–2:06 (T06:46:56), 2:20–21 (T06:47:10–11), 2:25–26 (T06:47:15–16).

³²⁷ Ex. 2, Nissen Deposition, 169:7–11.

The City’s Chief of Police for the Austin Police Department—at the time, Brian Manley—was the relevant policymaker, as he made all final decisions in enacting APD policy, disciplining officers, as well as hiring, firing, and retaining officers.³²⁸

As to the underlying constitutional violation, a reasonable jury could conclude Nissen, Johnson, and Camden violated the constitution when he, Johnson, and Camden killed Ambler, as no reasonable officer would have concluded Ambler posed an immediate threat to anyone by lying face down on the ground with one elbow on the ground. *See* Doc. 183, Response to Nissen’s Motion, pp. 11–21, 27–31; *see, e.g., Joseph v. Bartlett*, 981 F.3d 319, 333 (5th Cir. 2020) (“If the suspect lacks any means of evading custody—for example, by being pinned to the ground by multiple police officers—force is not justified.”). In fact, combined with his readily apparent difficulty breathing and pleas for help, an objectively reasonable officer would have recognized Ambler was not resisting. *Id.*; *see also, e.g., Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 730 (5th Cir. 2018) (reversing summary judgment because arrestee “was merely trying to get into a

³²⁸ Ex. 29, Excerpts from APD General Orders, pp. 1, 26, 28, 538; *see also* Doc. 165-1, Declaration of Joseph Chacon, p. 2 (identifying police chief as the City’s person with “final responsibility for setting the operational policies ..., hiring standards, and training standards for APD” as well as “final authority over internal affairs investigations and police officer discipline” subject to state law); *see, e.g., Garza v. City of Donna*, 922 F.3d 626, 637 (5th Cir. 2019) (police chief is final policymaker as to law enforcement for Texas municipality); *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 168 (5th Cir. 2010) (same); *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847-48 (5th Cir. 2009) (same); *Lewis v. Pugh*, 289 F. App’x 767, 776 (5th Cir. 2008) (same); *Fraire v. City of Arlington*, 957 F.2d 1268, 1279 (5th Cir. 1992) (same); *Morgan v. City of DeSoto, Tex.*, 900 F.2d 811, 815 (5th Cir. 1990) (same); *Rosenstein v. City of Dallas, Tex.*, 876 F.2d 392, 397 (5th Cir. 1989) (same); *Roundtree v. City of San Antonio, Texas*, No. SA18CV01117JKPESC, 2022 WL 903260, at *5 (W.D. Tex. Mar. 28, 2022) (same); *Kelley v. City of Cedar Park*, No. 1:20-CV-481-RP, 2022 U.S. Dist. LEXIS 19462 at *49-50, 2022 WL 329342, at *19 (W.D. Tex. Feb. 3, 2022) (same); *Kincheloe v. Caudle*, No. A-09-CA-010 LY, 2009 WL 3381047, at *18 (W.D. Tex. Oct. 16, 2009), *report and recommendation adopted*, No. A-09-CA-010-LY, 2009 WL 10699745 (W.D. Tex. Dec. 7, 2009) (same); *Redd v. City of Odessa*, No. MO-99-CA-073, 2001 WL 681588, at *11 (W.D. Tex. Mar. 6, 2001), *aff’d*, 44 F. App’x 651 (5th Cir. 2002) (same); *Williams v. City of Luling*, 802 F. Supp. 1518, 1530 (W.D. Tex. 1992) (same).

position where he could breathe and was not resisting arrest”). Thus, Nissen violated the law both by failing to intercede and by using unlawful force himself. *Id.*; see Doc. 183, Response to Nissen’s Motion, pp. 21–25, 31–33.

This unjustified excessive force, and Nissen’s decision to pile on rather than intervene to stop it, in turn, would not have occurred but for the City’s deficient supervision, training, and resulting long-standing custom of excessive force and failure to intervene to stop it. The consequences of that lack of supervision, deficient training, and troubling practice had been obvious and ongoing for years before this incident, but APD policymakers continued to ignore the problem. “Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent as to practically have the force of law.” *Hicks-Fields v. Harris Cty., Tex.*, 860 F.3d 803, 808 (5th Cir. 2017).

1. *The City of Austin had an official custom of overuse of force and failing to intervene to stop excessive force, which ensued from a widespread lack of supervision and inadequate training.*

APD had a longstanding practice of excessive force and unconstitutional failure to intervene. This custom became entrenched due to successive police chiefs’ decisions to never discipline—or even investigate—officers for failing to intervene, while also ignoring a specific need for de-escalation training and to correct a militaristic police academy. Accordingly, these practices were the official policy of the City of Austin for the ten years preceding Ambler’s death for four reasons.

First, the City never disciplined any officers for failure to intervene before Ambler’s death—going back through at least 2009.³²⁹

³²⁹ Ex. 23, Use-of-Force-Related Discipline List.

“[T]he existence of a persistent pattern of illegal conduct, tolerated by municipal policymakers, tends to show that the subject conduct does not represent an unauthorized departure from lawful policy but instead represents the realization of an *unlawful* policy.” *Milam v. City of San Antonio*, 113 Fed. Appx. 622, 625 (5th Cir. 2004) (emphasis in original); *see also Lawson v. Dallas Cnty.*, 286 F.3d 257, 263 (5th Cir. 2002) (fact that practices “were consistently applied” was sufficient to show municipal policy).

Here, the City’s failure to discipline was uniform: It even failed to investigate among all 89 incidents when the City specifically found other policy violations arising from a use of force.³³⁰ APD’s chief of police specifically chose not to discipline officers who were present during what the agency itself deemed to be excessive force or failure to de-escalate during uses of force, such as those against Alan Licon,³³¹ Adrian Aguado,³³² Armando Martinez,³³³ Jose McDonald,³³⁴ Abel Soto-Torres,³³⁵ Joseph Figueroa,³³⁶ and Michael Yeager-Huebner.³³⁷ And this practice also held true in egregious incidents where the excessive force itself also went unpunished, such as the Sir Smith shooting,³³⁸ the Carlos Chacon beating,³³⁹ the Byron Carter, Jr. shooting,³⁴⁰ the Pete

³³⁰ Ex. 11, Staniszewski Deposition, 57:12–18, 76:18–77:5, 92:18–93:2; Ex. 23, Use-of-Force-Related Discipline List.

³³¹ Ex. 62, Licon Use of Force IA Report, 1 [COA 175494].

³³² Ex. 79, Aguado Use of Force IA Summary, pp. 1–2 [COA 174557–58].

³³³ Ex. 83, Martinez Use of Force IA Report, p. 1 [COA 174609].

³³⁴ Ex. 84, McDonald Use of Force IA Report, p. 1, [COA 175662].

³³⁵ Ex. 94, Soto-Torres Use of Force IA Report, pp. 1–2, 23, 26 [COA 175727–728, 751, 754]

³³⁶ Ex. 95, Figueroa Use of Force IA Report, p. 1 [COA 175864]

³³⁷ Ex. 102, Hoover Deposition, 21; Ex. 105, Skeen Deposition, 23.

³³⁸ *See generally* Ex. 60, Sanders and Smith Shooting IA Excerpt.

³³⁹ *Chacon v. City of Austin*, No. 1:12-cv-00226-SS, 2013 WL 2245139, *4; Ex. 11, Staniszewski Deposition, 103:14–17.

³⁴⁰ Ex. 11, Staniszewski Deposition, 104:6–10, 106:19–24.

Hernandez beating,³⁴¹ the Hunter Pinney beating,³⁴² the use of force against Caroline Callaway,³⁴³ the Grady Bolton beating,³⁴⁴ the Joseph Cuellar beating,³⁴⁵ the Richard Munroe shooting,³⁴⁶ the Gregory Jackson beating,³⁴⁷ the Jason Roque shooting,³⁴⁸ the Justin Grant beating,³⁴⁹ and the Paul Mannie beating³⁵⁰ which all involved APD officers who had an opportunity to prevent or mitigate the harm. *See supra* pp. 7–27. This practice continued in a dramatic weekend a year after Ambler’s death, as APD officers fired hundreds of rounds of kinetic energy projectiles into crowds during the George Floyd protests—without any of their colleagues investigated for their failure to intervene despite the admittedly improper conduct captured on video.³⁵¹ Thus, this widespread

³⁴¹ *Hernandez v. the City of Austin*, No. A-14-CV-492-LY, 2015 WL 7301180, *7; Ex. 11, Staniszewski Deposition, 104:11–16, 106:19–24.

³⁴² Ex. 23, Use-of-Force-Related Discipline List.

³⁴³ Ex. 11, Staniszewski Deposition, 104:17–21, 106:19–24.

³⁴⁴ Ex. 11, Staniszewski Deposition, 104:22–105:2, 106:19–24. The head of OPM at the time who concluded it was unreasonable to shoot Carter, Margo Frasier, was the former Travis County Sheriff and routinely evaluated conduct for excessive force. Ex. 58, Frasier Deposition, 23:24–24:2, 44:8–23, 75:19–76:8.

³⁴⁵ Ex. 11, Staniszewski Deposition, 105:3–6, 106:19–24.

³⁴⁶ Ex. 11, Staniszewski Deposition, 105:11–25, 106:19–24; *see* Ex. 23, Use-of-Force-Related Discipline List.

³⁴⁷ Ex. 11, Staniszewski Deposition, 106:3–7, 106:19–24.

³⁴⁸ Ex. 11, Staniszewski Deposition, 106:11–24.

³⁴⁹ Ex. 98–99, IA History of Sustained Allegations as to Alas and Hale.

³⁵⁰ Ex. 11, Staniszewski Deposition, 97:3–11.

³⁵¹ Ex. 53, Manley Deposition in *Evans*, 35:10–17, 39:2–4, 91:7–20, 105:12–20, 106:2–108:9, 126:2–127:1, 135:19–25, 137:7–10; Ex. 55, Chacon Deposition in *Evans*, 62:23–64:3, 85:12–17, 88:3–16, 216:6–25, 217:13–16, 250:6–251:12; Ex. 23, Use-of-force-related Discipline List. Post-incident conduct is still relevant to show the existence of official policy. *See, e.g.*, Courts “continue to hold that ‘subsequent or contemporaneous conduct can be circumstantial evidence of the existence of preceding municipal policy or custom.’” *Adams v. City of New Orleans*, No. CV 15-1543, 2017 WL 713853, at *3 (E.D. La. Feb. 23, 2017) (cleaned up) (collecting cases). Subsequent incidents are “relevant to show a continuous pattern that supports a finding of an accepted custom or policy.” *Bordanaro v. McLeod*, 871 F.2d 1151, 1167 (1st Cir. 1989); *see also Shepherd v. Dallas Cnty.*, 591 F.3d 445, 457 (5th Cir. 2009) (affirming admission into evidence of report released two years after incident in question which covered “specific incidents ... that occurred shortly before, during, and shortly after” the incident at issue).

custom, implemented with the police chief’s direct involvement over disciplinary decisions, had the force of official policy.

Second, the City’s own investigation found that the APD was improperly training its officers in a “paramilitary nature” that “reflect[s] an ‘us vs. them’ mentality” of escalation.³⁵² As a result, the City’s report concluded, APD trains its officers to be “indifferent to the community.”³⁵³ Specifically, the City-commissioned report found no de-escalation strategies were required, whereas a “warrior” mentality encouraging violence was emphasized.³⁵⁴ The same report found that APD never trained officers of their duty to intervene when a fellow officer uses excessive force.³⁵⁵ This pervasive flaw in the official training thus likewise reflected official policy.

Third, the lack of supervision and flawed training both dovetailed with the department’s widespread practice and custom of excessive force. On top of the aforementioned failures to intervene that APD declined to investigate despite finding use of force policy violations, APD officers routinely failed to de-escalate calls, to the obvious detriment of civilians. This practice extends to incidents when multiple officers were present, as reflected by the thousands of instances—over half of all incidents of APD uses of force—where its officers *admit* they used force to address merely “passive,” “verbal,” and “defensive” resistance.³⁵⁶ Those reports also indicate that many, if not most, instances involve more than one officer using force.³⁵⁷ As

³⁵² Ex. 32, Kroll Associates, *Review and Assessment of Austin Police Department Training Academy*, pp. 7, 48, 94, available at <https://www.austintexas.gov/edims/document.cfm?id=359317>.

³⁵³ *Id.* at 41.

³⁵⁴ *Id.* at 10–11, 15, 48.

³⁵⁵ *See id.* at 62–63.

³⁵⁶ *See* Ex. 30, Excerpts from APD Response to Resistance Reports; *see supra* p. 26, nn.187–189, and accompanying text.

³⁵⁷ *See* Ex. 30, Excerpts from APD Response to Resistance Reports; *see supra* p. 27, nn.190–191, and accompanying text.

discussed below, *infra* pp. 68–69, APD’s self-reporting reflects that a majority of these uses of force were excessive.

The violent escalation in this case is consistent with not just those statistics and the cases where officers were disciplined, but also high-profile incidents such as the unnecessary beatings of Carlos Chacon, Pete Hernandez, Hunter Pinney, Caroline Callaway, Grady Bolton, Joseph Cuellar, Braeion King, Gregory Jackson, Justin Grant, Michael Yeager-Huebner, and Paul Mannie—and the unnecessary escalation in shootings such as those of Byron Carter, Jr., Richard Munroe, Jawhari Smith, Jason Roque, and David Joseph.³⁵⁸ “A pattern could evidence not only the existence of a policy but also official deliberate indifference.” *Piotrowski v. City of Houston*, 237 F.3d 567, 582 (5th Cir. 2001). Every officer involved in just the incidents illustrated in Section II.B, pp. 7–27, could have chosen obvious alternatives to violence, but they chose to use excessive force instead—and their colleagues often piled on, just like Nissen, or stood by instead of intervening. This common thread through so many controversial uses of force demonstrates the existence of a practice of excessive force. Officers should only rarely be rapidly escalating to deadly force, or ignoring excessive force by their own colleagues, so “it is reasonable to allow a lower number of incidents to establish a pattern of conduct in” extreme cases. *Flanagan v. City of Dallas, Tex.*, 48 F. Supp. 3d 941, 954 (N.D. Tex. 2014) (denying motion to dismiss *Monell* claim based on pattern); *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc) (“Where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of the conduct to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation.”).

³⁵⁸ See *supra* pp. 7–26.

On top of its own self-reports, disciplinary cases, and litigated incidents, between 2004 to 2015, APD incurred 815 complaints to the OPM of excessive force, demonstrating a widespread problem.³⁵⁹ Indeed, the problem is likely far worse than these numbers—and APD’s internal investigations into them—suggest, as APD was also afflicted with underreporting and even falsification of evidence in excessive force incidents, as repeatedly highlighted by the OPM,³⁶⁰ admitted to by then-Chief Acevedo,³⁶¹ and demonstrated in cases such as the King beating where an officer was caught lying on camera.³⁶² And the evidence of a pattern of excessive force is not merely anecdotal. OPM concluded that APD officers too often improperly escalated confrontations, resulting in the unnecessary use of force.³⁶³

Finally, the use of force in this case was, and continues to be, tolerated by APD. Nissen was not disciplined at all for killing Ambler.³⁶⁴ A reasonable jury could certainly conclude that “because the officers received no reprimands or discharges from the city following such a flagrant use of excessive force, there must have been a preexisting disposition and policy of reckless

³⁵⁹ See *supra*, p. 16, n.240 (tallying 815 allegations). The sheer volume of allegations sharply distinguishes the City’s authority in *Peterson v. City of Ft. Worth, Tex.*, 588 F.3d 838, 850 (5th Cir. 2009), which pointed to just 27 complaints in a similarly sized department (1,500 officers in Fort Worth compared to 1,900 in Austin). And this number is not raised in isolation: The conclusions of the OPM all point to the customs here, whereas there was no independent evidence presented in *Peterson*. Moreover, unlike the minor complaints in *Peterson*, in this case the City has been sharply criticized for a series of high-profile incidents with similar facts.

³⁶⁰ Ex. 39, Austin Office of the Police Monitor Annual Report: 2009, p. 15; Ex. 40, 2010 Report, pp. 14, 38; Ex. 41, 2011 Report, pp. 18, 49; Ex. 42, 2012 Report, pp. 52–53; Ex. 43, 2013 Report, p. 55; Ex. 44, 2014 Report, pp. 53–54; Ex. 45, 2015 Report, pp. 10.

³⁶¹ Ex. 56, Tony Plohetski, *Austin’s Art Acevedo vents over high-profile minority policing failures* (Austin-American Statesman Oct. 20, 2016), p. 12 available at <http://specials.mystatesman.com/art-acevedo-forceful-talk/>.

³⁶² *King v. City of Austin*, No. A-16-CA-1020-SS, 2018 WL 2027748, *3 (W.D. Tex. May 1, 2018) (noting Richter falsely accused King of throwing a “haymaker”).

³⁶³ Ex. 37, Austin Office of the Police Monitor Annual Report: 2005, p. 4; Ex. 45, Austin Office of the Police Monitor Annual Report: 2015, p. 4.

³⁶⁴ Ex. 20, IA Complaint Control Sheet.

disregard for life.” *Barkley v. Dillard Dep't Stores, Inc.*, 277 Fed. Appx. 406, 413 (5th Cir. 2008). Here, the City went even further in ratifying the officers’ unreasonable decisions, as the City helped Nissen avoid responsibility by permitting the destruction of key video evidence despite knowing the criminal case was ongoing—and despite knowing that Ambler’s survivors were likely to pursue civil litigation.³⁶⁵ And the City directly testified that Nissen’s conduct reflected official policy and his use of force was “how [the City] expect[ed] officers to behave” and “the same thing that ... APD officers were routinely doing at this time, in 2019.”³⁶⁶ This testimony is “sufficient to create a genuine issue of material fact on the issue of municipal liability.” *Bishop v. Arcuri*, 674 F.3d 456, 469 (5th Cir. 2012) (police chief’s testimony that unconstitutional no-knock raid adhered to policy required reversal of summary judgment as to the city); *see also Martinez v. Klevenhagen*, 52 F.3d 1068 (5th Cir. 1995) (affirming denial of summary judgment as to sheriff who admitted deputies had followed policy when they left the wrong driver’s license associated with an arrest warrant in their database).

Accordingly, Plaintiffs have identified official policies within the meaning of *Monell*.

2. The policymaker knew about the deficient official policies.

Knowledge by the policymaker is the “*sine qua non* of municipal liability.” *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003). The chief of police and, in fact, even the City Council, realized the department’s custom of using excessive force and failing to intervene existed and was substantially likely to violate the Constitution for at least five reasons:

First, the City admits the chief of police knew that no officer had been disciplined for failing to intervene, and the chief himself testified he did not believe an officer had even been

³⁶⁵ *See supra*, pp. 7–27.

³⁶⁶ Ex. 11, Staniszewski Deposition, 141:21–142:3.

investigated.³⁶⁷ The chief was likewise aware of the decision to discipline or not discipline in each of the excessive force cases above.³⁶⁸ And the chief was even aware that this practice would have the known and obvious consequence that officers would not only fail to intervene, but also use excessive force more often as a result.³⁶⁹

Second, the deficiency of APD’s training and customs was actually known and obvious. The findings of the City-commissioned report on the Academy did not uncover secret practices, but instead reiterated widely reported complaints and widely-known practices.³⁷⁰ It was well-known that the Academy had no de-escalation requirements, and instead had officers think of themselves as “warriors” fighting against their own community.³⁷¹ APD *affirmatively decided* to train officers that way—to “fight” in an “us vs. them” war against civilians.³⁷² Based on the reasoning of the City’s own report, then, the deficiencies in its academy training were open, well-known, and obvious to policymakers.³⁷³

Third, the OPM repeatedly—and loudly—rang the same alarm bell and told APD’s leadership long before this incident that the department suffered from a chronic failure to train officers to use de-escalation.³⁷⁴ This, particularly coupled with the obvious deficiencies of the Academy, was enough for the City to realize it could not rely on state-level minimum training requirements to fix its self-inflicted culture of excessive force. *Hobart v. Stafford*, 784 F.Supp.2d 732, 754 (S.D. Tex. 2011) (“compliance with state training requirements [is a] relevant but not

³⁶⁷ Ex. 55, Chacon Deposition in *Evans*, 101:23–102:23

³⁶⁸ Ex. 11, Staniszewski Deposition, 93:14–94:8.

³⁶⁹ Ex. 11, Staniszewski Deposition, 63:15–21.

³⁷⁰ Ex. 32, Kroll Associates, *Review and Assessment of Austin Police Department Training Academy*, p. 11, available at <https://www.austintexas.gov/edims/document.cfm?id=359317>.

³⁷¹ *Id.* at pp. 10–11, 42.

³⁷² *Id.* at p. 6.

³⁷³ *Id.* at p. 49.

³⁷⁴ See *supra* p. 35, n.363.

dispositive factor”) (citing *Zarnow v. City of Wichita Falls*, 614 F.3d 161 (5th Cir. 2010)). APD was constitutionally required to correct its policies, training, and practices when policymakers (like the Chief) were presented with these repeated condemnations and other evidence of the problem, but did not do so.

Fourth, APD officers had a long history of unconstitutional excessive force that was well-known to the Chief and City Council. The incidents summarized in Section II.B, pp. 7–27, are all from controversial uses of force covered extensively in local media or specific disciplinary findings overseen by the chief, many of which proceeded through litigation to large adverse settlements or judgments against the City. These were certainly known to APD’s then-police chief, a 28-year veteran of the force and APD executive for eight years.³⁷⁵ For even a single constitutional violation, the Fifth Circuit has held a municipality is liable for failure to train officers when (1) the need for training “should have been obvious to” the policymaker, (2) the violation was an obvious consequence of that lack of training, and (3) the failure to train caused the violation—all factors that are present here. *Brown v. Bryan Cty., Okla.*, 219 F.3d 450, 460 (5th Cir. 2000); *see also infra* pp. 72–74.

Finally, on top of the high-profile cases and the OPM complaints, APD’s own reports demonstrate that its officers have routinely engaged in what the Fifth Circuit considers excessive force for over ten years preceding this incident. The Fifth Circuit has repeatedly decried the use of force against people who are not actively resisting—even if they are “passively” resisting. *See, e.g., Trammell v. Fruge*, 868 F.3d 332, 341 (5th Cir. 2017); *Hanks v. Rogers*, 853 F.3d 738, 746 (5th Cir. 2017); *Deville v. Marcantel*, 567 F.3d 156, 168 (5th Cir. 2009); *Chacon v. Copeland*, 577 F. App’x 355, 361–62 (5th Cir. 2014); *Goodson v. City of Corpus Christi*, 202 F.3d 730, 734, 740

³⁷⁵ Ex. 52, Manley Deposition in *Roque*, pp. 230:13–17; Ex. 54, Chief Manley’s Biography, p. 1.

(5th Cir. 2000). By “passive resistance,” the Fifth Circuit has included actions such as pulling away when officers grab the person’s arm (*Trammell, Chacon, Goodson*), cursing at officers (*Hanks*), refusing to comply with instructions (*Trammell, Hanks, Deville, Chacon*), and even shoving officers away (*Chacon*). The City’s own reports indicate that APD officers used force against *thousands* of such people who were not actively resisting: before Ambler’s death, more than 7,788 victims of force were only “pulling and pushing away to prevent the police officer’s control,” which is how APD defines “defensive”³⁷⁶—just like what the Fifth Circuit means by “passive” in *Trammell, Chacon, or Goodson*. Indeed, although Ambler was not actually resisting, pulling away is the *most* Nissen has accused him of in this incident.³⁷⁷ 5 others were “not resistant” in 2018³⁷⁸ and 838 people were only making “verbal statements resisting police control” from 2006 to 2016.³⁷⁹ Finally, 1,284 were engaged in what APD itself calls “passive resistance”—which is merely “fail[ing] to follow commands and, although not threatening, may be verbally non-compliant, questioning or disagreeing”—far less than what the Fifth Circuit means when it uses

³⁷⁶ Ex. 30, APD Response to Resistance Reports, pp. 4, 9, 14, 19, 23, 28, 33, 38, 44, 50 (defining the terms), p. 4 (2006 – 218 defensive; 2007 – 171 defensive), p. 10 (2008 – 250 defensive), p. 15 (2009 – 398 defensive), p. 19 (2010 – 563 defensive), p. 24 (2011 – 721 defensive), p. 29 (2012 – 788 defensive), p. 34 (2013 – 833 defensive), p. 39 (2014 – 797 defensive), p. 45 (2015 – 946 defensive), p. 51 (2015 – 941 defensive); Ex. 31, Kroll Associates, *Evaluation of APD: Use of Force*, p. 29 (2018 – 1,162 defensive), available at <https://www.austintexas.gov/edims/document.cfm?id=379807>.

³⁷⁷ Ex. 2, Nissen Deposition, 94:20-95:5.

³⁷⁸ Ex. 31, Kroll Associates, *Evaluation of APD: Use of Force*, p. 29 (2018), available at <https://www.austintexas.gov/edims/document.cfm?id=379807>.

³⁷⁹ Ex. 30, APD Response to Resistance Reports p. 4 (2006 – 56 verbal; 2007 – 49 verbal), p. 10 (2008 – 72 verbal), p. 15 (2009 – 58 verbal), p. 19 (2010 – 87 verbal), p. 24 (2011 – 88 verbal), p. 29 (2012 – 136 verbal), p. 34 (2013 – 96 verbal), p. 39 (2014 – 80 verbal), p. 45 (2015 – 75 verbal), p. 51 (2015 – 42 verbal).

the term.³⁸⁰ All told, fully half of APD’s uses of force were excessive, according to its own reports and the Fifth Circuit’s guidance on permissible uses of force.

Here, Plaintiffs’ “resolution of the first and second elements [of municipal liability] is as clear as ever it could be.” *Jauch*, 874 F.3d at 435 (citing *Connick v. Thompson*, 563 U.S. 51, 61 (2011)). APD knew it had a problem, but chose not to address it before Nissen killed Ambler, and therefore proximately caused Ambler’s death.

3. Nissen used excessive force and failed to intervene because of APD’s failure to supervise, inadequate training, and widespread custom.

Plaintiffs have also shown that APD’s lack of supervision, errant training, and customary excessive force was a moving force of Nissen’s misconduct.

First, the City conceded the lack of discipline would promote a culture of “letting it slide,”³⁸¹ undermine the deterrent effect of discipline,³⁸² and ultimately create a positive feedback effect, as more officers would engage in excessive force when there is a widespread practice of never intervening to stop it—prompting more officers to test the limit and find their colleagues do not object.³⁸³ Thus, before Ambler’s death, APD officers, including Nissen specifically, had never heard of anyone ever being investigated, much less disciplined, for failing to intervene.³⁸⁴ Indeed, Nissen demonstrated his resulting reticence to intervene during his deposition, admitting that he “wouldn’t want another officer telling me what force to use because ultimately I’m the one who

³⁸⁰ Ex. 30, APD Response to Resistance Reports, pp. 4, 9, 14, 19, 23, 28, 33, 38, 44, 50 (defining the term), p. 4 (2006 – 46 passive; 2007 – 30 passive), p. 10 (2008 – 88 passive), p. 15 (2009 – 110 passive), p. 19 (2010 – 122 passive), p. 24 (2011 – 155 passive), p. 29 (2012 – 175 passive), p. 34 (2013 – 155 passive), p. 39 (2014 – 103 passive), p. 45 (2015 – 75 passive), p. 51 (2015 – 100 passive); Ex. 31, Kroll Associates, *Evaluation of APD: Use of Force*, p. 29 (2018 – 96 passive), available at <https://www.austintexas.gov/edims/document.cfm?id=379807>.

³⁸¹ Ex. 11, Staniszewski Deposition, 63:7–14, 64:15–20.

³⁸² Ex. 11, Staniszewski Deposition, 64:21–65:5.

³⁸³ Ex. 11, Staniszewski Deposition, 63:15–21.

³⁸⁴ Ex. 2, Nissen Deposition, 201:16–202:8.

has to decide whether or not that's reasonable, I wouldn't want to tell another officer what to do because of the same reason.”³⁸⁵ Stamping out this erroneous rationale is exactly why discipline is so important, as Plaintiffs' expert attests.³⁸⁶ A reasonable jury could credit these admissions and find that APD's culture of tolerating excessive force engendered Nissen's parallel thinking which caused his misconduct—not only failing to intervene, but using excessive force himself—and thereby Ambler's death.

Second, Nissen's flawed training further increased the risk: the Academy lacked training on the duty to intervene as bystanders³⁸⁷ and promoted excessive force with a militant, “us vs. them” culture.³⁸⁸ Moreover, Nissen did not receive curative de-escalation training—even though he himself engaged in the misuse of force against Hunter Pinney in 2013, which should have put him first in line for retraining—until after he killed Ambler.³⁸⁹ And he acted in comportment with his flawed training; rather than de-escalating, he kept using force in the same way, despite the absence of any threat from Ambler, and tolerated the deputies' escalation to the TASER. *See Valle v. City of Houston*, 613 F.3d 536, 546-47 (5th Cir. 2010) (deficient officer training is sufficient “moving force” causation). The fact that Nissen acted in comportment with his flawed cadet training and lack of de-escalation training is further evidence that the policy was a moving force of his actions. *See, e.g., Brown v. Chapman*, 814 F.3d 447, 463 (6th Cir. 2016) (policy of targeting taser on “center mass” was moving force because the officer fired his taser at the plaintiff's chest).

³⁸⁵ Ex. 2, Nissen Deposition, 174:11–16.

³⁸⁶ Ex. 1, Clark Report, pp. 28–29.

³⁸⁷ *See* Ex. 32, Kroll Associates, *Review and Assessment of Austin Police Department Training Academy*, pp. 62–63, available at <https://www.austintexas.gov/edims/document.cfm?id=359317>.

³⁸⁸ *Supra* II.B.2, pp. 7–27.

³⁸⁹ Ex. 21, Nissen TCOLE Status Report, p. 8 (filed under seal).

Finally, Nissen was not alone; the entire department was affected by these policies. Many officers had engaged in excessive force and failure to intervene without discipline.³⁹⁰ Indeed, this incident is not even the first time these policy decisions caused *Nissen* to engage in excessive force and a failure to intervene.³⁹¹ This pattern is further evidence that Nissen’s conduct was caused by the deficient practices, supervision, and training by APD.³⁹² When asked if he thought he needed to do anything differently, Nissen denied it—even knowing what he knows today—indicating his conduct resulted from APD’s entrenched customs of excessive force and failure to intervene.³⁹³

4. *The policymaker evinced deliberate indifference to the risk of violations of Ambler and other civilians’ constitutional rights.*

As discussed above, the police chief knew of these problems from many sources, but did nothing. *See supra* pp. 65–69. The policymaker demonstrated deliberate indifference in three respects.

First, “[a] pattern could evidence not only the existence of a policy but also official deliberate indifference.” *Piotrowski v. City of Houston*, 237 F.3d 567, 582 (5th Cir. 2001). Here, the policymaker’s indifference is shown by the lack of corrective action in training, supervision, and policies, and by the fact that in thousands of instances of excessive force³⁹⁴ and *all* incidents of failure to intervene,³⁹⁵ including two dozen prior high-profile incidents or disciplinary results personally known to the chief of police—including one with Nissen himself³⁹⁶—where in almost

³⁹⁰ Ex. 55, Chacon Deposition in *Evans*, 101:23–102:23; Ex. 53, Manley Deposition in *Evans*, 191:18–25.

³⁹¹ *Supra* at p. 10.

³⁹² *Supra* at pp. 5–32.

³⁹³ Ex. 2, Nissen Deposition, 322:16–323:5.

³⁹⁴ Ex. 23, Use-of-Force-Related Discipline List.

³⁹⁵ Ex. 55, Chacon Deposition in *Evans*, 101:23–102:23; Ex. 53, Manley Deposition in *Evans*, 191:18–25.

³⁹⁶ *Supra* at p. 10.

every incident “officers received no reprimands or discharges from the city.” *Barkley v. Dillard Dep't Stores, Inc.*, 277 Fed.Appx. 406, 413 (5th Cir. 2008). This deliberate indifference is further pronounced by the fact that the City has a policy requiring officers to intervene—and admits it (and its policymaker) *knew* enforcement of that policy was required to deter exactly the type of ongoing misconduct APD was exhibiting³⁹⁷—but then *never* enforced that policy.³⁹⁸ *See Williams v. Treen*, 671 F.2d 892, 899 (5th Cir. 1982) (“If an official's conduct contravenes his own state's explicit and clearly established regulations, a subjective belief in the lawfulness of his action is *per se* unreasonable.”).

As the City “demonstrated deliberate indifference to the offensive acts by failing to take action that was obviously necessary to prevent or stop the abuse,” the City of Austin is liable for the resulting excessive force and failure to intervene by Nissen. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456-57 (5th Cir. 1994) (en banc); *see also Lopez v. City of Houston, Tex.*, No. Civ. A. 03-2297, 2005 WL 1770938, *24-26 (S.D. Tex. July 25, 2005).

Second, in addition to the pattern, this case meets all of the requirements of the single incident exception because (1) the need for enforcement of the intervention policy “should have been obvious to” the policymaker (as the City admits³⁹⁹), (2) the violation was an obvious consequence of the failure to enforce the intervention policy (as the City also admits⁴⁰⁰), and (3) the lack of enforcement caused the violation.⁴⁰¹ *Brown v. Bryan Cty., Okla.*, 219 F.3d 450, 460 (5th Cir. 2000); *see also Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 624 (5th Cir. 2018) (“[E]ven absent proof of pattern, deliberate indifference can still be inferred if the factfinder

³⁹⁷ Ex. 11, Staniszewski Deposition, 64:15–65:10.

³⁹⁸ Ex. 11, Staniszewski Deposition, 90:6–19, 91:18–92:8.

³⁹⁹ Ex. 11, Staniszewski Deposition, 65:6–10.

⁴⁰⁰ Ex. 11, Staniszewski Deposition, 64:15–65:5.

⁴⁰¹ *See supra* pp. 58–60.

determines that the risk of constitutional violations was or should have been an ‘obvious’ or ‘highly predictable consequence’ of the alleged training inadequacy.”); *Covington v. City of Madisonville, Texas*, 812 F. App’x 219, 225 (5th Cir. 2020) (applying the same rule); *Kelley v. City of Cedar Park*, No. 1:20-CV-481-RP, 2022 WL 329342, at *19 (W.D. Tex. Feb. 3, 2022) (same).

Here, the City’s total failure to enforce its own disciplinary regime satisfies the single incident exception addressed by the Supreme Court in *City of Canton, Ohio v. Harris*. 489 U.S. 378, 390, n.10 (1989). A police department with officers who are *never* required to obey a constitutionally required policy, as they are *never* punished—and, save one occasion, never even investigated—when they violate that policy, is obviously deficient, just as a police department with *no* training on the use of force would be. The City admitted as much.⁴⁰² The City admitted that its officers would be put into recurring situations where they would need to apply this principle to prevent constitutional violations.⁴⁰³ The City admitted that failing to discipline misconduct would thereby fail to deter it, and in fact cause it to happen more often.⁴⁰⁴ The City’s own testimony shows “that a constitutional violation was ‘the highly predictable consequence’ of [APD’s] failure to supervise.” *Kelley*, No. 1:20-CV-481-RP, 2022 WL 329342, at *21. Accordingly, the need for *some* enforcement of a policy on officers’ duty to intervene if another officer is using unreasonable force was “so obvious that the failure ... is deliberate[ly] indifferen[t] to constitutional rights.” *Brown v. Bryan Cty. Okla.*, 219 F.3d 450, 460 (5th Cir. 2000).⁴⁰⁵

⁴⁰² Ex. 11, Staniszewski Deposition, 63:2–63:25.

⁴⁰³ Ex. 11, Staniszewski Deposition, 56:4–8.

⁴⁰⁴ Ex. 11, Staniszewski Deposition, 63:2–63:25.

⁴⁰⁵ See also *Benjamin v. Baytown Police Dep’t*, No. 4:17-CV-01198, 2018 WL 1033255, at *2 (S.D. Tex. Feb. 21, 2018) (denying motion to dismiss where plaintiff alleged a lack of training for officers regarding hearing aids lead officers to remove his hearing aids during booking, then to use excessive force while in jail because he appeared noncompliant with commands he could not hear).

Finally, the policymaker had every opportunity to review Nissen’s conduct in this incident. Over a year after Ambler’s death, APD released the body-camera footage, and the public discourse became focused on the same principle issues as this litigation—the fact that Ambler was already subdued, audibly pleading that “I can’t breathe,” and not resisting.⁴⁰⁶ This media scrutiny has continued for years with the development of criminal cases against the deputies.⁴⁰⁷ Despite this, APD’s internal investigation into Nissen was closed without discipline over two years after Ambler’s death.⁴⁰⁸ The City likewise testified that Nissen adhered to City policy,⁴⁰⁹ and the City argues in its motion that “[t]he Chief of Police found that Nissen did not violate any APD policies.” Doc. 165, p. 4. As Nissen’s misconduct is on video and has been heavily scrutinized in local media, the City’s position reflects deliberate indifference; despite seeing Nissen’s unreasonable conduct, it has chosen to give his behavior its blessing. *See, e.g., Bishop v. Arcuri*, 674 F.3d 456, 469 (5th Cir. 2012) (reversing summary judgment in *Monell* claim where police witnesses unequivocally endorsed the underlying conduct by agreeing it was consistent with policy).

Accordingly, Plaintiffs have shown admissible evidence which, if credited by the jury, proves the City enacted official policies with deliberate indifference to Ambler’s constitutional rights. Thus, the City’s motion for summary judgment on the § 1983 claims should be denied.

⁴⁰⁶ Ex. 47, *Texas police chase ends in death as ‘Live PD’ cameras roll. ‘I can’t breathe,’ the man cries*, USA Today (June 8, 2020) available at <https://www.usatoday.com/story/news/investigations/2020/06/08/texas-police-chase-ends-death-i-cant-breathe-man-cries/3137476001/>.

⁴⁰⁷ Ex. 48, *New Travis Co. DA pushing to present Ambler, Ramos cases to grand jury before end of March*, CBS Austin (Jan. 14, 2021) available at <https://cbsaustin.com/news/local/new-travis-co-da-pushing-to-present-ambler-ramos-cases-to-grand-jury-before-end-of-march>

⁴⁰⁸ Ex. 20, IA Complaint Control Sheet.

⁴⁰⁹ Ex. 11, Staniszewski Deposition, 141:16–142:3.

C. In the alternative, the Court should find a dispute of material fact because of the destroyed video evidence.

The City of Austin failed at multiple phases to preserve key video evidence in this case—which was also key evidence in the pending criminal case—despite knowing this litigation was anticipated and also knowing the criminal case was pending.⁴¹⁰ It has no excuse, reflecting the loss of the evidence was in bad faith.⁴¹¹ Thus, a reasonable jury could infer that this evidence was unfavorable to the City, independently precluding summary judgment.

“Courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party.” *Quantlab Techs. Ltd. (BGI) v. Godlevsky*, No. 4:09-CV-4039, 2014 WL 651944, at *7 (S.D. Tex. Feb. 19, 2014). When litigants breach their duty to preserve, collect, and produce documents, the Court has inherent and explicit authority to sanction this failure. FED. R. CIV. P. 37; *see, e.g., Bayoil, S.A. v. Polembros Shipping, Ltd.*, 196 F.R.D. 479, 481 (S.D. Tex. 2000) (striking personal jurisdiction defense as sanction under Court’s inherent power where party deleted documents). Appellate review of sanctions is narrow because “the imposition of sanctions is often a fact-intensive inquiry, for which the trial court is given wide discretion.” *Mercury Air Group, Inc. v. Mansour*, 237 F.3d 542, 548 (5th Cir. 2001).

The appropriate sanction in this case is, at a minimum, an adverse inference instruction: that the jury may infer that the evidence destroyed would have been unfavorable to the City if it determined that the evidence was in the control of the City, that it had an obligation to preserve it, that the destroyed evidence was relevant to the litigation, and that the evidence was destroyed

⁴¹⁰ *See supra*, pp. 11–12.

⁴¹¹ *See supra*, pp. 12–14.

intentionally and in bad faith. *See Union Pump Co. v. Centrifugal Technology Inc.*, 404 Fed. Appx. 899, 903–904 (5th Cir. 2010) (noting such an instruction was given, although not appealed).

“An ‘adverse inference’ is said to be ‘the oldest and most venerable remedy’ for spoliation.” *Baggett v. Yamaha Motor Co.*, No. 3:06CV184TSL-JCS, 2008 WL 11506271, at *3 (S.D. Miss. Jan. 11, 2008). “[A]n adverse inference of spoliation can be relevant on summary judgment.” *Schreane v. Beemon*, 575 F. App’x 486, 490 (5th Cir. 2014) (quoting *Byrnie v. Cromwell, Bd. of Educ.*, 243 F.3d 93, 107 (2d Cir. 2001) (“[A]n inference of spoliation, in combination with some (not insubstantial) evidence for the plaintiff’s cause of action, can allow the plaintiff to survive summary judgment.”)).

[A] party seeking the sanction of an adverse inference instruction based on spoliation of evidence must establish that:

- (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed;
- (2) the evidence was destroyed with a culpable state of mind; and,
- (3) the destroyed evidence was “relevant” to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615 (S.D. Tex. 2010). These elements are satisfied here.

1. *The City was obliged to preserve the videos when it forfeited possession of them and failed to prevent their destruction.*

In this case, the “duty to preserve had arisen”—Ambler’s death prompted a criminal investigation and also obviously posed risks of civil litigation.⁴¹² *Rimkus*, 688 F. Supp. 2d at 642.

“The duty to preserve evidence arises when a party has evidence that it knows or should know is relevant to a claim that is in litigation or is likely to be litigated.” *Edwards v. 4JLJ, LLC*, No. 2:15–CV–299, 2018 WL 2981154, *2 (S.D. Tex. June 14, 2018); *Rimkus*, 688 F. Supp. 2d at

⁴¹² Ex. 11, Staniszewski Deposition, 166:11–21.

612–13. Here, the City caused the video to be destroyed by first permitting the camera crew to leave the crime scene—which was under its control—and then doing absolutely nothing to try to find them until months later—despite being responsible for the investigation and the collection of evidence.⁴¹³ The City of course immediately knew there was a criminal investigation, before it let the videos leave its physical control at the scene, and also knew civil litigation was likely because of Ambler’s death.⁴¹⁴ This was certainly true by the time the videos were destroyed approximately thirty days later.⁴¹⁵

2. *The City forfeited possession of key evidence in this case and permitted the videos’ destruction to avoid developing evidence of its own misconduct, thus imperiling Plaintiffs’ case.*

The City has no excuse for allowing the videos to leave its possession and then be destroyed. Indeed, to do so, it had to violate its own policies by abandoning key evidence in a criminal investigation—leading to its destruction. This reflects bad faith.

The lack of an explanation for causing the destruction of evidence supports an inference of bad faith for three reasons. *Rimkus*, 688 F. Supp. 2d at 644. First, the City admits it had control of the scene and was obliged to stop the videos from even leaving in the first place.⁴¹⁶ Second, the City also admits it was in charge of the investigation and was obliged to preserve evidence—including the videos—after it errantly let them leave the scene.⁴¹⁷ Third, there was nothing preventing the City from doing both of these things.⁴¹⁸ The camera crew could have been stopped;

⁴¹³ Ex. 19, APD Ambler General Offense Report, pp. 49, 60; Ex. 11, Staniszewski Deposition, 159:1–7; 164:6–18; 168:18–169:4.

⁴¹⁴ Ex. 11, Staniszewski Deposition, 166:16–21.

⁴¹⁵ Ex. 11, Staniszewski Deposition, 167:3–12; Ex. 22, “Live PD” – Williamson County Access Agreement, p. 3.

⁴¹⁶ Ex. 11, Staniszewski Deposition, 163:13–164:5; 170:18–171:3.

⁴¹⁷ Ex. 11, Staniszewski Deposition, 166:11–167:8; 170:18–171:15.

⁴¹⁸ Ex. 11, Staniszewski Deposition, 167:9–12.

but even after they were allowed to leave, their names were known to the City and officers simply had to follow up within the thirty day retention period to recover the evidence.⁴¹⁹

Courts have found bad faith under similar circumstances. *See, e.g., Brown v. Tellermate Hold. Ltd.*, No. 2:11-cv-1122, 2014 WL 2987051, *20 (S.D. Ohio, July 1, 2014) (“it cannot be a defense to spoliation that the party inadvertently failed to place a ‘litigation hold’ or ‘off switch’ on its document retention policy”) (citing *Mosaid Tech., Inc. v. Samsung Elec. Co.*, 348 F.Supp.2d 332, 339 (D. N.J. 2004)).

3. *The destroyed videos were relevant.*

The destroyed videos are critically relevant because they would have shown more information about Ambler and the officers’ conduct, and from a different perspective. Nissen’s footage is the clearest available, but it is low resolution and so close to Ambler that it is less clear what Ambler is doing than a view from within arms’ reach, like the Live PD cameras, would have been. Moreover, because it is attached to Nissen’s chest, the body-worn camera footage makes it very difficult to see most of what Nissen is doing. The dash-board camera provides a wider view, but in black and white with terrible resolution. In contrast, the TV cameras would have also been in full color, but with superior resolution to the body-camera and a slightly wider view of the scene, able to capture Nissen’s conduct as well as everything Ambler did.⁴²⁰

4. *The unfair prejudice of the videos’ destruction requires an adverse inference instruction.*

The City has destroyed uniquely compelling evidence so there can be no cure short of an adverse inference.

⁴¹⁹ Ex. 11, Staniszewski Deposition, 168:12–169:4

⁴²⁰ *See* Ex. 5, Dash Camera Footage, at 1:46:11; *see, e.g.,* Ex. 49, LivePD Footage from Different Incident.

The destruction of these documents “compromise[s]” plaintiff’s “ability to present [his] case.” *Quantlab*, 2014 WL 651944, *11. “The discovery that was destroyed ... may have been essential to [the aggrieved party’s position], and without it, [the party] is certainly disadvantaged.” *Moore*, 735 F.3d at 318; *see also Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 17 (Tex. 2014) (“Testimony as to what the lost or destroyed evidence might have shown will not always restore the nonspoliating party to an approximation of its position if the evidence were available; sometimes a picture is indeed worth a thousand words”).

Here, the parties dispute whether Ambler was resisting, short of breath, or otherwise obviously in medical distress.⁴²¹ The parties also dispute whether Nissen was exerting a dangerous degree of force, such as to cause the signs of suffocation and bruising on Ambler’s body, and contribute to his death, or only using “soft-hand force.”⁴²² A higher quality video would likely speak to all of these disputes.

An adverse inference is more than reasonable here, as the more serious civil “death penalty” has been levied for less severe prejudice. *See Moore v. CITGO Ref. & Chem. Co.*, 735 F.3d 309, 317 (5th Cir. 2013) (affirming dismissal sanctions for failing to preserve written notes and emails, among other misconduct); *Frost v. Ft. Worth Indep. Sch. Dist.*, 5 F.3d 1495 (5th Cir. 1993) (affirming dismissal of pro se party’s claims when he failed to attend his deposition); *Emerick v. Fenick Indus., Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976) (affirming entry of default judgment sanction for failure to comply with discovery obligations and previous court orders, though no documents were destroyed); *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1305

⁴²¹ *See* Ex. 10, Kadar Declaration, pp. 2–3; Ex. 15, Baden Declaration, pp. 5–6; Ex. 1, Clark Report, pp. 24–28.

⁴²² *Compare* Ex. 6, Autopsy Report; Ex. 10, Kadar Declaration, pp. 2–3; Ex. 15, Baden Declaration, pp. 5–6; Ex. 1, Clark Report, pp. 24–28 *with* Doc. 165, p. 2.

(5th Cir. 1988) (affirming entry to default judgment sanctions); *Bratka v. Anheuser-Busch, Inc.*, 164 F.R.D. 448, 456 (S.D. Ohio Dec. 11, 1995) (entering judgment on liability, and reserving for trial the amount of plaintiff’s damages); *Laukus v. Rio Brands, Inc.*, 292 F.R.D. 485, 514 (N.D. Ohio, Mar. 11, 2013) (granting dismissal sanction).⁴²³

In *Moore*, the plaintiffs failed to search for, retain, and produce relevant emails. *Moore*, 735 F.3d at 314–15. After repeatedly failing to comply with discovery obligations, the district court sanctioned the plaintiffs by dismissing their claims. The Fifth Circuit affirmed: though “dismissal is a severe sanction” it is appropriate where necessary to “penalize those whose conduct may be deemed to warrant such a sanction” and to “deter those who might be tempted to such conduct.” *Id.* at 315–16 (citing *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). The conduct here is worse, as in *Moore* the sanctioned parties had not destroyed the evidence—they just dallied in producing it in that case.

Accordingly, regardless of whether the other evidence presents disputes of material fact (though it does so easily), the City’s spoliation on top of the egregious misconduct shown by the remaining evidence militates against summary judgment, as a jury will be entitled to infer that the destroyed evidence would have been favorable to Plaintiffs.

V. CONCLUSION

As there are many material factual disputes when viewed in the light most favorable to the Plaintiffs on each of their claims, the City’s Motion for Summary Judgment should be denied.

Dated: May 5, 2023.

⁴²³ In *Bratka*, defense counsel obstructed and delayed discovery for years, but the relevant evidence was eventually produced. 164 F.R.D. at 456. Though the *Bratka* plaintiff was significantly prejudiced, he eventually got the evidence he needed. Here, that is impossible, because the evidence was destroyed.

Respectfully submitted,

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MICHELLE BEITIA AS NEXT FRIEND OF
J.A.A., A MINOR**

CERTIFICATE OF SERVICE

By my signature above, I certify that a true and correct copy of the foregoing has been served on all counsel of record through the Electronic Case Files System of the Western District of Texas. Those exhibits hereto that have been filed traditionally have been placed in the mail addressed to counsel of record.

By /s/ Jeff Edwards
Jeff Edwards

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION No. 1:20-cv-01068-LY
	§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	
Defendants.	§	

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 16
CAD Report Excerpts**

(COA 0182)

FILED UNDER SEAL



AUSTIN POLICE DEPARTMENT
CAD Call HARDCOPY
CP# 2019-870090

Confidential



AUSTIN POLICE DEPARTMENT
CAD Call HARDCOPY

CP# 2019-870090

Narrative Text**Type** COMPLAINT COMMENT**Subject** CAD Complaint Comments**Author** AP7966 - KNIGHT, JENNIE**Related Date** Mar-28-2019 *****

03/28/2019 01:26:40AP7966 WILCO IN PURSUIT OF VEH //ORIGINAL STOP WAS FOR HAVING HIGH BEAMS ON // 28 - VVF4DV - 2015 HONDA CARRY ALL WHITE IN COLOR

03/28/2019 01:26:53AP7966 ON WILCO CALL 1

03/28/2019 01:27:11AP7966 ASKING IF THEY CAN PATCH TO REG LAW 1

03/28/2019 01:27:11AP6277 CCC

03/28/2019 01:27:34AP7966 HEADING EB ON WELLS BRANCH

03/28/2019 01:27:40AP7966 HEADING TO 35

03/28/2019 01:27:58AP7966 SM DISP SEE 190870090 - GB WILCO PURSUIT INTO APD

03/28/2019 01:28:08AP6277 SM WC, LT632 SEE 190870090 IN EDWD

03/28/2019 01:28:21AP7966 90 MPH - LIGHT TRAFFIC SB ON 35

03/28/2019 01:28:27AP7966 ON REGIONAL LAW 1

03/28/2019 01:28:36AP7966 35 SB NOW COMING UP ON FARMER

03/28/2019 01:28:38AP8693 GBD EDWD

03/28/2019 01:28:59LT632 CLR

03/28/2019 01:29:00AP7966 # 3 LANE SB -

03/28/2019 01:29:05AP7966 ON 35 STILL

03/28/2019 01:29:09WC5 CLR

03/28/2019 01:29:10AP8306 GBD IDA

03/28/2019 01:29:32AP7966 PASSING BRAKER STILL SB

03/28/2019 01:29:44AP7966 NOW IN EXCESS OF 100 MPH

03/28/2019 01:29:47AP8732 GBD APT

03/28/2019 01:29:51AP8297 E805 GBD HENR

03/28/2019 01:29:52AP7742 E805 GBD BAKR

03/28/2019 01:30:00AP9017 E805 GBD ADAM

03/28/2019 01:30:06AP8327 GBD GRGE

03/28/2019 01:30:14AP7966 WILCO REQ SPIKE STRIPS

03/28/2019 01:30:16AP8714 E805 GB'D FRNK

03/28/2019 01:30:28AP8855 GB'D CHAR

03/28/2019 01:30:35LT643 CLR, SINCE THIS IS NOT AN OFFENSE THAT WE CAN PURSUE FOR, APD UNITS MAY NOT ENGGE IN TEH PURSUIT, BUT MAY ASSIST WITH STOP STICKS OR AT THE TERMINATION OF THE PURSUIT

03/28/2019 01:31:06AP7966 TAKING RUNDBERG EXIT

03/28/2019 01:31:21AP8480 E805 GBD DAVD

03/28/2019 01:31:25AP8855 BACKED UP E805 WITH AIR2

03/28/2019 01:31:32AP8693 BACKED UP E805 WITH E808

03/28/2019 01:31:33AP8855 AIR2 SWITCHING TO REG LAW 1

03/28/2019 01:31:42AP8306 I809 SETTING UP AT AIRPORT/35 W SPIKES... WSITCHING TO REG LAW 1

03/28/2019 01:32:13AP8693 E808 HEADED ON THE SVRD SB

03/28/2019 01:32:25AP7966 COMING UP TO ANDERSON LANE

03/28/2019 01:32:41AP8693 E805 STILL SB ON THE SVRD // HEADING INTO IDA

03/28/2019 01:32:49AP7966 LIGHT TRAFFIC // APD BEHIND WILCO UNIT

03/28/2019 01:33:09AP7966 35 FRONTAGE NOW..STILL SB



AUSTIN POLICE DEPARTMENT

CAD Call HARDCOPY

CP# 2019-870090

TITLE 01400242184081521 ISSUED 07/08/2015 ODOMETER 596 REG DT 07/24/2017
 2015,HOND,PIL,LL,5FNYF3H38FB027880,PASS-TRK,COLOR: WHI, PRICE \$ 33670.00 PREV
 OWN CLEO BAY HONDA KILLEEN TX OWNER JAVIER AMBLER JR,ID#=N/A,JAVIER AMBLER SR,
 5703 SULFUR SPRINGS DR,,KILLEEN,TX,76542 LIEN 06/09/2015,AMERICAN HONDA
 FINANCE CORP,,PO BOX 997512,,SACRAMENTO,C
 A,95899 PLATE AGE: 2 LAST ACTIVITY 08/05/2017 RENEW OFC: 014 REMARKS
 ACTUAL MILEAGE.DATE OF ASSIGNMENT:2015/06/09.PAPER TITLE. MRI: 92177847
 IN: MVDWS 9192 AT 28MAR2019 01:53:06 OUT: ASX1 1508 AT 28MAR2019 01:53:06
 [SHARED]
 03/28/2019 01:54:42AP8306 BACKED UP I809 WITH I890 [SHARED]
 03/28/2019 01:55:44EM3008 ENGL8 >>>CPR IN PROGRESS<<< [SHARED]
 03/28/2019 01:56:10PAGINGSERVICE PAGING GROUPS NOTIFIED:ALL - ACTIVE 911
 [SHARED]
 03/28/2019 01:56:23FD002497 ENGL8 REQUESTING SECOND UNIT FOR CPR [SHARED]
 03/28/2019 01:57:32EM2144 [PAGE] *****ADDITIONAL FIRE UNIT NEEDED*****
 [SHARED]
 03/28/2019 01:59:06AP8306 SECONDARY LOCATION FOR I890: BETHUNE AVE / E ST
 JOHNS AVE, BETHUNE AVE / E ST JOHNS AVE,AUSTIN, TX 78752. [SHARED] 03/28/2019
 01:59:28AP8306 BACKED UP I809 WITH I803 [SHARED]
 03/28/2019 02:13:33AP8624 M14 PALMER,JAKE EM2808.....ROSENACKER,KRISTY EM2571
 [SHARED]
 03/28/2019 02:14:39AP8624 ENGL8 ANGUIANO,CARLO FD002049....LEDET,EUGENE
 FD002354....RONQUILLO,JERRY FD002366....TAYLOR,JAMES FD002103 [SHARED]
 03/28/2019 02:17:16AP8732 QNT18 PERSONNEL: ETHEREDGE, JONATHAN FD1603 //
 JOHNSON, SCOTT FD 1702 // LISCANO JR, ARTURO FD2356 // PUTMAN, SKYLAR FD1488
 [SHARED]
 03/28/2019 02:17:36AP8732 DC05 PERSONNEL: MARTIN, JAMES EM1497 [SHARED]
 03/28/2019 02:21:2410E905 TRANSPORTED PERSON GENDER IS MALE [SHARED]
 03/28/2019 02:21:56EM3008 DC05 WILL BE TRANSPORTING WITH CPR IN PROGRESS.
 CLOSEST FAC IS DSMC @ 06:09 [SHARED]
 03/28/2019 02:23:38AP8732 M14 XPORT'G TO DELL SETON [SHARED]
 03/28/2019 02:24:15AP8732 [PAGE] PROBLEM CHANGED FROM *ASSIST NON
 EMERGENCY TO XASSIST OTHER POLICE AGENCY BY AUSTIN PD [SHARED]
 03/28/2019 02:32:31AP8624 I890 SM OOC PLS PAGE SIU FOR I890 REF 190870090
 [SHARED]
 03/28/2019 02:35:13AP8306 SGT GRIFFIN AP4670 PAGED FOR I890 [SHARED]
 03/28/2019 02:43:46AP8306 SM EDWD,CHAR PER LT732... ALL UNITS ONSCENE SHOULD
 KILL THEIR BODY WORN CAMERAS AND DMAVS [SHARED]
 03/28/2019 02:50:11I803 TOD 0237 DR. HURST [SHARED]
 03/28/2019 02:53:10ENGL8 [FIRE] HAS CLOSED THEIR INCIDENT [19031937]
 03/28/2019 02:54:28AP6277 CCC ON UPDATE [SHARED]
 03/28/2019 02:54:47AP6277 SM WC SEE UPDATE IN 190870090 IN IDA [SHARED]
 03/28/2019 02:54:49AP8306 I890 SM OOC PLS HAVE ONCALL IA DET 21 I890 @
 ***? OCA 190870090 [SHARED]
 03/28/2019 03:00:10AP8306 IA931/BEALAND AP4413 PAGED FOR I890 [SHARED]
 03/28/2019 03:01:3810E905 [AUSTIN-TRAVIS COUNTY EMS] HAS CLOSED THEIR INCIDENT
 [19087-0019]
 03/28/2019 03:11:07AP6277 APD CITIZEN DEATH PAGE SENT PER WC5 [SHARED]
 03/28/2019 03:12:57AP6277 VH2/HORN AP2764 PAGED FOR NOTIFICATION PER WC5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.		§	
	Plaintiffs,	§	
		§	
v.		§	CIVIL ACTION No. 1:20-cv-01068-LY
		§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF		§	
AUSTIN,		§	
	Defendants.	§	

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 21
Nissen TCOLE Personal Status Report**

(COA 0317)

FILED UNDER SEAL

**Texas Commission On Law Enforcement
Personal Status Report**

Name	TCOLE ID (P ID)	STATUS
MICHAEL J. NISSEN	407366	

Citizen	Race	Gender
Yes	White	Male

Career/Professional Training

Institution	Hours	Education	From	To
	0	High School		
Total Higher Education Hours	<u>0</u>			

Military Service Time Training Credit

Branch	Hours	From	To
Military Service Time Training Credit	6617		
Total Higher Education Points	<u>0</u>		
Total Military Training Hours	<u>6617</u>		
Total	<u><u>6617</u></u>		

Service History

Appointed As	Department	Award	Service Start Date	Service End Date	Service Time
Peace Officer (Full Time)	AUSTIN POLICE DEPARTMENT	Peace Officer License	11/28/2012		9 years, 9 months

Total Service Time

Description	Service Time
Peace Officer	9 years, 9 months
Total officer time	9 years, 9 months

Texas Commission On Law Enforcement

Personal Status Report

Award Information

Award	Type	Action	Action Date
Peace Officer License	License	Granted	11/28/2012
Basic Peace Officer	Certificate	Certification Issued	3/4/2014
Basic Instructor Proficiency	Certificate	Certification Issued	1/25/2016
Intermediate Peace Officer	Certificate	Certification Issued	6/22/2021
Advanced Peace Officer	Certificate	Certification Issued	11/25/2021
Master Peace Officer	Certificate	Certification Issued	7/22/2022

Academy History

Completed	Date	Institution	Course Title
Completed	11/7/2012	Austin Police Academy	Basic Peace Officer

Courses Completed

09/01/2021 - 08/31/2023

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
3187	87th Session State and Federal Law Update	8/3/2022	4	MyTCOLE 3 online	87th Session State and Federal Law Update
355	Annual Firearms Qualification 1701.355	6/14/2022	0	Austin Police Academy	
3345	Less Lethal Impact Weapons Training (Bean Bag/Impa	3/7/2022	5	Austin Police Academy	
Unit Hours			9		

09/01/2019 - 08/31/2021

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
3271	Advanced Human Trafficking	6/28/2021	8	MyTCOLE 3 online	Human Trafficking
7887	Interacting with drivers deaf or hard of hearing	6/22/2021	4	Capital Area Council of Governments	Interacting with drivers deaf or hard of hearing (Intermediate)
394	Cultural Diversity Web with Exercises	6/14/2021	8	MyTCOLE 3 online	Cultural Diversity (Intermediate)
6030	Tactical Vehicle Traffic Stops & Extractions	5/20/2021	2	Austin Police Academy	

8/30/2022

Page Number: 2

COA 0318

Texas Commission On Law Enforcement

Personal Status Report

Courses Completed

09/01/2019 - 08/31/2021

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
355	Annual Firearms Qualification 1701.355	4/22/2021	0	Austin Police Academy	
8815	Building Search	3/29/2021	3	Austin Police Academy	
8815	Building Search	3/22/2021	3	Austin Police Academy	
3344	Less Lethal Electronic Control Device Training	12/4/2020	12	Austin Police Academy	
3186	86th Legislative Session Legal Update	5/11/2020	3	Austin Police Academy	86th Session State and Federal Law Update
3310	SWAT Inservice Training	3/10/2020	20	Austin Police Academy	
355	Annual Firearms Qualification 1701.355	2/12/2020	0	Austin Police Academy	
6014	Tactical Entry Training	2/7/2020	40	Austin Police Academy	
4000	Bombs and Explosive Devices	1/6/2020	3	Austin Police Academy	
2025	Organized Crime	12/12/2019	40	Austin Police Academy	
6014	Tactical Entry Training	12/4/2019	20	Austin Police Academy	
3851	Breathalyzer / Intoxilyzer	9/12/2019	2	Texas Department of Public Safety LEA	
Unit Hours			168		

09/01/2017 - 08/31/2019 *

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
3517	Suicide Prevention	5/10/2019	4	Austin Police Academy	
3038	Agency Operations (General)	5/10/2019	4	Austin Police Academy	
2096	Arrest, Search & Seizure (Non-Intermediate Core Co	5/9/2019	8	Austin Police Academy	
3940	Community Policing	5/8/2019	8	Austin Police Academy	
30418	Civilian Interaction Training	5/8/2019	2	Austin Police Academy	Civilian Interaction Training Program
1849	De-escalation Tech (SB 1849)	5/7/2019	8	Austin Police Academy	De-escalation Tech (SB 1849)
3702	Field Training Officer	2/28/2019	40	Austin Police Academy	
1850	Crisis Intervention Training 40hr	2/7/2019	40	Austin Police Academy	Crisis Intervention Training (Mandate) Crisis Intervention Training 40hr (Intermediate)
355	Annual Firearms Qualification 1701.355	1/24/2019	0	Austin Police Academy	

Texas Commission On Law Enforcement

Personal Status Report

Courses Completed

09/01/2017 - 08/31/2019 *

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
3305	Active Shooter Response	8/16/2018	4	Austin Police Academy	
3185	85th Legislative Session Legal Update	8/15/2018	4	Austin Police Academy	85th Session State and Federal Law Update
3305	Active Shooter Response	6/8/2018	40	Austin Police Academy	
2040	Defensive Tactics	5/10/2018	3	Austin Police Academy	
3836	Concealed Carry for Law Enforcement Officers	5/3/2018	10	Austin Police Academy	
8158	Body Worn Camera	4/26/2018	2	Austin Police Academy	
2040	Defensive Tactics	2/22/2018	3	Austin Police Academy	
355	Annual Firearms Qualification 1701.355	2/2/2018	0	Austin Police Academy	
2055	Firearms	2/2/2018	2	Austin Police Academy	
3851	Breathalyzer / Intoxilyzer	1/25/2018	28	Texas Department of Public Safety LEA	
Unit Hours			210		

09/01/2015 - 09/30/2017

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
3320	Terrorism & Homeland Security (General)	8/16/2017	16	Austin Police Academy	
3232	Special Investigative Topics	7/11/2017	8	Austin Police Academy	Special Investigative Topics (Intermediate)
4068	Child Safety Check Alert List (Intermediate/Advanc	7/11/2017	1	Austin Police Academy	Child Safety Check Alert List (Advance) Child Safety Check Alert List (Intermediate)
394	Cultural Diversity Web with Exercises	7/10/2017	8	TCOLE Online	Cultural Diversity (Intermediate)
3718	Advanced Field Training Officer	7/6/2017	20	Austin Police Academy	
8158	Body Worn Camera	5/30/2017	4	Austin Police Academy	
3907	MultiCultural Diversity/Awarness for L.E. Prof.	5/17/2017	10	Austin Police Academy	
3717	Social Media-Networking	5/11/2017	24	Austin Police Academy	
355	Annual Firearms Qualification 1701.355	3/13/2017	0	Austin Police Academy	
2055	Firearms	3/13/2017	3	Austin Police Academy	

Texas Commission On Law Enforcement
Personal Status Report

Courses Completed

09/01/2015 - 09/30/2017

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
3184	84th Legislative Session Legal Update	2/28/2017	4	Austin Police Academy	84th Session State and Federal Law Update
3304	Hostage and Barricade Suspect Situations	2/24/2017	5	Austin Police Academy	
3844	Crisis Training/Peer support	10/27/2016	10	Austin Police Academy	
3258	Racial Profiling Update	7/24/2016	2	Austin Police Academy	
2178	S.F.S.T. Practitioner Update	4/28/2016	8	Austin Police Academy	
3718	Advanced Field Training Officer	4/27/2016	32	Austin Police Academy	
3305	Active Shooter Response	3/23/2016	10	Austin Police Academy	
2046	Driving	2/8/2016	10	Austin Police Academy	
3308	Officer Safety/Survival	1/19/2016	8	Austin Police Academy	
3341	Police K9 Training	12/4/2015	20	Austin Police Academy	
1014	Basic Instructor Course	11/6/2015	40	Austin Police Academy	
21004	Explosives Recognition and Awareness	9/10/2015	8	Austin Police Academy	
Unit Hours			251		

09/01/2013 - 08/31/2015

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
3320	Terrorism & Homeland Security (General)	8/27/2015	8	Austin Police Academy	
2055	Firearms	8/19/2015	10	Austin Police Academy	
2055	Firearms	7/6/2015	1	Austin Police Academy	
2055	Firearms	6/5/2015	1	Austin Police Academy	
3702	Field Training Officer	5/29/2015	40	Austin Police Academy	

Texas Commission On Law Enforcement

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Courses Completed

09/01/2013 - 08/31/2015

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
4001	Mental Health Officer Training Course	5/21/2015	40	Austin Police Academy	Crisis Intervention Training (AdvPOC) issued prior to 4-1-18 Crisis Intervention Training (Intermediate) issued prior to 4-1-18 Peace Officer Intermediate Options Peace Officer Intermediate Options 1987-01 Peace Officer Intermediate Options 2005-01 Peace Officer Intermediate Options 2006-01 Peace Officer Intermediate Options 2009-09
3830	General First Aid Training	5/18/2015	3	Austin Police Academy	
2055	Firearms	5/8/2015	1	Austin Police Academy	
4100	Information Technology (General)	5/4/2015	10	Austin Police Academy	
3312	ALERRT Update	5/1/2015	4	Hays Co. Sheriff's Academy	
782096	DPS - Interdiction for Protection of Children	3/11/2015	16	Austin Police Academy	Missing and Exploited Children (Advance) Missing and Exploited Children (Intermediate)
54011	Incident Resp. Terror Bombing NMTech	2/25/2015	8	Austin Police Academy	
3183	83rd Legislative Session Legal Update	1/24/2015	4	Austin Police Academy	83rd Session State and Federal Law Update
2055	Firearms	11/18/2014	1	Austin Police Academy	
2055	Firearms	10/31/2014	1	Austin Police Academy	
3342	Tactical Firearms Training	8/6/2014	10	Austin Police Academy	
3835	Tactical Trauma Care	8/4/2014	4	Austin Police Academy	
2055	Firearms	7/18/2014	1	Austin Police Academy	
3322	Patrol Rifle	7/16/2014	20	Austin Police Academy	
2046	Driving	7/1/2014	10	Austin Police Academy	
62040	Defensive Tactics - Canine Encounters (Proprietary)	6/19/2014	4	Austin Police Academy	Canine Encounter (Intermediate) Canine Encouter (Advance)
2055	Firearms	6/13/2014	1	Austin Police Academy	
2047	Officer Survival/Weapon Retent	5/29/2014	10	Austin Police Academy	
2055	Firearms	5/2/2014	1	Austin Police Academy	

Texas Commission On Law Enforcement
Personal Status Report

Courses Completed

09/01/2013 - 08/31/2015

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
2055	Firearms	4/11/2014	1	Austin Police Academy	
3722	Peace Officer Field Training	2/28/2014	160	Austin Police Academy	Peace Officer Field Training
4100	Information Technology (General)	2/6/2014	10	Austin Police Academy	
3320	Terrorism & Homeland Security (General)	1/27/2014	8	Austin Police Academy	
2055	Firearms	11/5/2013	1	Austin Police Academy	
2055	Firearms	10/4/2013	1	Austin Police Academy	
2055	Firearms	9/6/2013	1	Austin Police Academy	
Unit Hours			391		

09/01/2011 - 08/31/2013

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
2055	Firearms	8/19/2013	1	Austin Police Academy	
2055	Firearms	7/16/2013	1	Austin Police Academy	
4052	Hearing Disabilities	6/24/2013	2	Austin Police Academy	
2055	Firearms	6/21/2013	1	Austin Police Academy	
3404	Traffic Stops	6/17/2013	3	Austin Police Academy	
3270	Human Trafficking	6/7/2013	4	Austin Police Academy	Human Trafficking
3182	82nd Legislative Session Legal Update	5/27/2013	4	Austin Police Academy	82nd Session State and Federal Law Update
2055	Firearms	5/17/2013	1	Austin Police Academy	
2055	Firearms	4/9/2013	1	Austin Police Academy	
2105	Child Abuse Prevention and Investigation (Interm.)	11/21/2012	24	Austin Police Academy	Child Abuse Prevention and Investigation (Intermediate)
3232	Special Investigative Topics	11/19/2012	8	Austin Police Academy	Special Investigative Topics (Intermediate)
3255	Asset Forfeiture	11/18/2012	2	Austin Police Academy	Asset Forfeiture (Intermediate)
3277	Identity Theft	11/18/2012	3	Austin Police Academy	Identity Theft (Intermediate)
2106	Crime Scene Investigation (Intermediate)	11/16/2012	32	Austin Police Academy	Crime Scene Investigation (Intermediate)

Texas Commission On Law Enforcement

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Courses Completed

09/01/2011 - 08/31/2013

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
1000	Basic Peace Officer	11/7/2012	618	Austin Police Academy	82nd Session State and Federal Law Update Crisis Intervention Training (Mandate) Cultural Diversity (Mandate) S.F.S.T. NHTSA24hour Practitioner Special Investigative Topic (Mandate)
2108	Arrest, Search, and Seizure (Intermediate)	11/5/2012	15	Austin Police Academy	Arrest, Search, and Seizure (Intermediate)
3939	Cultural Diversity	11/2/2012	8	Austin Police Academy	Cultural Diversity (Intermediate)
3344	Less Lethal Electronic Control Device Training	10/26/2012	8	Austin Police Academy	
4043	Mobile Video Training	10/23/2012	8	Austin Police Academy	
3841	Crisis Intervention Training	10/12/2012	16	Austin Police Academy	Crisis Intervention Training (AdvPOC) issued prior to 4-1-18 Crisis Intervention Training (Intermediate) issued prior to 4-1-18 Peace Officer Intermediate Options Peace Officer Intermediate Options 1987-01 Peace Officer Intermediate Options 2005-01 Peace Officer Intermediate Options 2006-01 Peace Officer Intermediate Options 2009-09
66800	FEMA National Resp Plan Intro (FEMA IS-800b)	9/25/2012	3	Austin Police Academy	
66700	FEMA National ICS (FEMA IS-700a)	9/25/2012	3	Austin Police Academy	
66201	FEMA ICS Single Res/Initial Incident (FEMA IS-200b)	9/25/2012	3	Austin Police Academy	
66094	FEMA Intro ICS Law Enforcement	9/25/2012	3	Austin Police Academy	
3256	Racial Profiling	9/7/2012	4	Austin Police Academy	Racial Profiling (Intermediate)
3270	Human Trafficking	8/27/2012	4	Austin Police Academy	Human Trafficking
2067	S.F.S.T. Practitioner	8/10/2012	24	Austin Police Academy	
3807	TCIC/NCIC for Less than Full Access Operators	7/31/2012	8	Austin Police Academy	

Texas Commission On Law Enforcement
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Courses Completed

09/01/2011 - 08/31/2013

Course No.	Course Title	Course Date	Course Hours	Institution	Training Mandates
3343	Less Lethal Chemical Weapons Training (OC, Mace, e	7/19/2012	2	Austin Police Academy	
2107	Use of Force (Intermediate)	6/29/2012	13	Austin Police Academy	Use of Force (Intermediate)
2109	Spanish for Law Enforcement (Intermediate)	6/1/2012	20	Austin Police Academy	Spanish for Law Enforcement (Intermediate) Spanish for Telecommunicators (Intermediate)
3910	Sexual Harassment Recognition	4/24/2012	1	Austin Police Academy	
1999	Personnel Orientation by Dept. Basic Proficiency	4/23/2012	0	Austin Police Academy	Personnel Orientation
Unit Hours			848		
Total Hours			1877		

Total Hours

Total Career/Professional Hours	6617
Total TCOLE Course Hours	1877
Total Hours	8494

*Courses submitted between 09/01/2017 and 09/30/2017 will be credited to the 2015-2017 and 2017-2019 training unit, but will only count once toward total training hours.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.		§	
	Plaintiffs,	§	
		§	
v.		§	CIVIL ACTION No. 1:20-cv-01068-LY
		§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF		§	
AUSTIN,		§	
	Defendants.	§	

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 23
Use of Force Related Discipline List**

FILED UNDER SEAL

CASE_NUMBER	CASE_MADE	TYPE_OF_COMPL	INITIATED_DESC	INCIDENT_DATE	OFFICER_NAME	RANK	CRITICAL_INCID	USE_OF_FORCE	OFFENSE_NUM	AD_CASE_STATI	CLASSIFICATION	GENERAL_ORDE	GO_SUB1	GO_SUB2	GO_SUB3	COMMAND_DEI	DISCIPLINARY_V
2022-0054	01/23/22	Formal	Internal	12/02/21	Lantsberger, Tes	POLICE OFFICER	None	Y	2021-3360090	Closed	B	Chapter 3	303 Body Worn	303.3 Departme	303.3.1 When D	Sustained	Oral Reprimand
2021-1121	11/04/21	Formal	Internal	10/23/21	Johnson, Jelani	POLICE OFFICER	None	Y	2021-2961443	Closed	B	Chapter 2	200 Response to 200.2	De-Escalat 200.2.1	Assessm Sustained	Written Reprimand (EBD Completed)	
2021-1120	11/04/21	Formal	Internal	09/04/21	Miller, Richard	POLICE OFFICER	None	Y	2021-2471745	Closed	B	Chapter 2	211 Response to 211.4	Employee 211.4.1	Employ Sustained	Written Reprimand	
2021-0577	06/01/21	Formal	Internal	04/17/21	Sanchez, Luis	POLICE OFFICER	None	Y	2021-1070515	Closed	A	Chapter 2	200 Response to 200.2	De-Escalation	Sustained	Suspension	
2021-0449	04/28/21	Formal	Internal	03/14/21	Schramm, Ellis	POLICE OFFICER	None	Y	2021-0730256	Closed	B	Chapter 2	200 Response to 200.2	De-Escalat 200.2.1	Assessm Sustained	Written Reprimand (EBD Completed)	
2021-0317	03/29/21	Formal	Internal	12/20/20	Bryans, Jamie	POLICE OFFICER	None	Y	2020-3550967	Closed	B	Chapter 2	200 Response to 200.2	De-Escalat 200.2.1	Assessm Sustained	Written Reprimand (EBD Completed)	
2021-0316	03/29/21	Formal	Internal	03/12/21	Alzola, Katherine	POLICE OFFICER	None	Y	2021-0710134	Closed	A	Chapter 2	200 Response to 200.1	Purpose a 200.1.3	Duty to Sustained	Suspension	
2020-1770	12/03/20	Formal	Internal	11/24/20	Lester, Tommy	POLICE OFFICER	None	Y	2020-3291207	Closed	B	Chapter 2	206 Control Dev 206.7	Pain Com 206.7.1	Use of F Sustained	Written Reprimand (EBD Completed)	
2020-1683	11/07/20	Formal	External	10/22/20	Bowman, Joseph	POLICE OFFICER	None	Y		Closed	B	Chapter 2	200 Response to 200.6	Reporting 200.6.1	Notifica Sustained	Written Reprimand	
2020-1609	10/22/20	Formal	External	09/19/20	Mattingly, Rober	POLICE OFFICER	None	Y		Closed	B	Chapter 3	301 Responsibili 301.2	Impartial Attitude and Cour	Sustained	Oral Reprimand	
2020-1550	09/30/20	Formal	Internal	07/25/20	Dranguet, Jonat	POLICE OFFICER	None	Y	2020-2070773	Closed	B	Chapter 2	214 Vehicle Purs 214.3	Pursuit Co 214.3.3	Factors t Sustained	Suspension	
2020-1541	09/28/20	Formal	Internal	05/30/20	Childress, Thom	POLICE OFFICER	None	Y	2020-1510503	Closed	A	Chapter 2	200 Response to 200.4	Response 200.4.1	Determ Sustained	Written Reprimand (EBD Completed)	
2020-1331	08/10/20	Formal	Internal	06/01/20	Roe, Christopher	POLICE OFFICER	None	Y	2020-1530551	Closed	A	Chapter 2	200 Response to 200.4	Response 200.4.1	Determ Sustained	Written Reprimand (EBD Completed)	
2020-1229	07/20/20	Formal	External	05/30/20	Cherne, Gregory	POLICE OFFICER	None	Y		Closed	A	Chapter 3	301 Responsibili 301.2	Impartial Attitude and Cour	Sustained	Oral Reprimand	
2020-1132	07/01/20	Formal	External	07/01/20	Franklin, Travis	POLICE OFFICER	None	Y	2020-1830864	Closed	B	Chapter 3	301 Responsibili 301.2	Impartial Attitude and Cour	Sustained	Oral Reprimand	
2020-1125	06/30/20	Formal	Internal	05/30/20	Cobaugh, Timott	POLICE OFFICER	None	Y		Closed	A	Chapter 2	200 Response to 200.4	Response 200.4.1	Determ Sustained	Written Reprimand (EBD Completed)	
2020-1062	06/19/20	Formal	Internal	05/30/20	Cast, Joseph	POLICE OFFICER	None	Y		Closed	A	Chapter 2	200 Response to 200.4	Response 200.4.1	Determ Sustained	Written Reprimand (EBD Completed)	
2020-0870	06/05/20	Formal	External	05/31/20	Ash, Christopher	POLICE OFFICER	None	Y	20-5021502	Closed	A	Chapter 8	803 Duty Firearm 803.2	Safe Handling of Firearms	Sustained	Written Reprimand (EBD Completed)	
2020-0869	06/05/20	Formal	Internal	06/01/20	Hollis, Ricky	POLICE OFFICER	None	Y	2020-1540947	Closed	B	Chapter 8	803 Duty Firearm 803.2	Safe Handling of Firearms	Sustained	Written Reprimand (EBD Completed)	
2020-0802	06/03/20	Formal	External	05/30/20	McRae, William	POLICE OFFICER	None	Y	20-1510503	Closed	A	Chapter 3	303 Body Worn	303.3 Departme 303.3.1	When D Sustained	Oral Reprimand	
2020-0716	06/02/20	Formal	External	05/31/20	Spitler, Richard	POLICE OFFICER	None	Y		Closed	A	Chapter 2	200 Response to 200.4	Response 200.4.1	Determ Sustained	Written Reprimand (EBD Completed)	
2020-0685	06/01/20	Formal	External	05/30/20	Jackson, Charles	POLICE CORPOR	None	Y		Closed	A	Chapter 9	900 General Con 900.3	General C 900.3.4	Personal Sustained	Written Reprimand (EBD Completed)	
2020-0662	05/28/20	Formal	External	05/25/20	Linsalata, Philip	POLICE SERGEAN	None	Y	2020-1460484	Closed	A	Chapter 9	914 Equal Empl 914.3	Prohibited 914.3.2	Harassm Sustained	Suspension	
2020-0440	04/17/20	Formal	Internal	03/17/20	Gonzalez, Marco	POLICE OFFICER	None	Y	2020-0770357	Closed	B	Chapter 2	208 TASER Devic 208.4	Use of the 208.4.1	Applicat Sustained	Written Reprimand (EBD Completed)	
2020-0406	04/07/20	Formal	Internal	02/21/20	Whitener, Micha	POLICE CORPOR	None	Y	2020-0521661	Closed	B	Chapter 2	200 Response to 200.2	De-Escalat 200.2.1	Assessm Sustained	Written Reprimand	
2020-0395	04/02/20	Formal	Internal	03/10/20	Cortez, Gregory	POLICE OFFICER	None	Y	2020-700625	Closed	B	Chapter 2	206 Control Dev 206.7	Pain Com 206.7.1	Use of F Sustained	Written Reprimand (EBD Completed)	
2020-0394	04/02/20	Formal	Internal	01/20/20	Sanchez, Ramon	POLICE OFFICER	None	Y	2020-0200230	Closed	B	Chapter 9	900 General Con 900.4	Requirem 900.4.3	Neglect Sustained	Written Reprimand (EBD Completed)	
2020-0349	03/24/20	Formal	Internal	02/06/20	Gonzalez, Marco	POLICE OFFICER	None	Y	2020-0370263	Closed	A	Chapter 2	208 TASER Devic 208.4	Use of the 208.4.6	Report Sustained	Oral Reprimand	
2020-0347	03/24/20	Formal	Internal	02/03/20	Arce, Moses	POLICE OFFICER	None	Y	2020-0341763	Closed	B	Chapter 8	804 Department 804.2	General Operation of Depa	Sustained	Written Reprimand	
2020-0327	03/17/20	Formal	Internal	03/13/20	Childress, Thom	POLICE OFFICER	None	Y	2020-0731765	Closed	A	Chapter 2	200 Response to 200.2	De-Escalation	Sustained	Suspension	
2020-0305	03/12/20	Formal	External	02/25/20	Scott, Justin	POLICE OFFICER	None	Y	2020-0561291	Closed	B	Chapter 3	301 Responsibili 301.2	Impartial Attitude and Cour	Sustained	Oral Reprimand	
2020-0123	02/04/20	Formal	Internal	12/22/19	Teng, Jeffrey	POLICE OFFICER	None	Y	2019-3561386	Closed	B	Chapter 9	900 General Con 900.3	General C 900.3.4	Personal Sustained	Written Reprimand	
2019-1402	12/26/19	Formal	External	12/25/19	Hutchison, Jeffre	POLICE OFFICER	None	Y	2019-3590968	Closed	A	Chapter 3	301 Responsibili 301.2	Impartial Attitude and Cour	Sustained	Oral Reprimand	
2019-1358	12/11/19	Formal	External	11/24/19	Menezes, Sean	POLICE OFFICER	None	Y	2019-3280372	Closed	B	Chapter 9	900 General Con 900.3	General C 900.3.4	Personal Sustained	Oral Reprimand	
2019-1172	10/25/19	Formal	Internal	04/20/19	Neel, Michael	POLICE OFFICER	None	Y	2019-1101891	Closed	B	Chapter 2	208 TASER Devic 208.4	Use of the 208.4.2	Prohibit Sustained	Written Reprimand	
2019-1043	10/01/19	Formal	Internal	09/30/19	Black, Bryan	POLICE OFFICER	None	Y		Closed	A	Chapter 9	902 Administrat 902.4	Complaint 902.4.1	Coopera Sustained	Indefinite Suspension / Sworn	
2019-0980	09/19/19	Formal	Internal	09/01/19	Dale, Mark	POLICE OFFICER	None	Y	2019-2440265	Closed	B	Chapter 2	200 Response to 200.2	De-Escalat 200.2.1	Assessm Sustained	Written Reprimand	
2019-0924	09/06/19	Formal	External	07/23/19	McSpadden, Jus	POLICE OFFICER	None	Y	2019-2041023	Closed	B	Chapter 2	200 Response to 200.2	De-Escalat 200.2.1	Assessm Sustained	Written Reprimand	
2019-0805	08/05/19	Formal	External	08/04/19	Neel, Michael	POLICE OFFICER	None	Y	2019-2161643	Closed	B	Chapter 3	301 Responsibili 301.2	Impartial Attitude and Cour	Sustained	Written Reprimand	
2019-0743	07/18/19	Formal	Internal	06/25/19	Reyes, Nelson	POLICE OFFICER	None	Y	2019-1761845	Closed	B	Chapter 3	303 Body Worn Camera Systems	Sustained	Written Reprimand		
2019-0098	01/25/19	Formal	Internal	01/13/19	Brito, Luis	PATROL OFFICER	None	Y	2019-0130914	Closed	B	Chapter 2	208 TASER Devic 208.4	Use of the 208.4.1	Applicat Sustained	Written Reprimand (EBD Completed)	
2018-0503	05/31/18	Formal	Internal	04/25/18	Edwards, Joseph	POLICE OFFICER	None	Y	2018-1150054	Closed	B	Chapter 2	200 Response to 200.2	De-Escalation	Sustained	Written Reprimand (EBD Completed)	
2018-0399	04/30/18	Formal	Internal	04/17/18	Aquino, Mario	POLICE OFFICER	None	Y	2018-1071866	Closed	A	Chapter 2	200 Response to 200.2	De-Escalation	Sustained	Suspension	
2018-0176	03/01/18	Formal	Internal	02/16/18	Petratis, Donald	POLICE OFFICER	None	Y	2018-0471704	Closed	A	Chapter 2	200 Response to 200.6	Reporting the Response to	Sustained	Indefinite Suspension / Sworn	
2017-1233	10/13/17	Formal	Internal	10/06/17	Mathis, Robert	POLICE OFFICER	None	Y	2017-2790814	Closed	A	Chapter 2	200 Response to 200.4	Response to Resistance	Sustained	Indefinite Suspension / Sworn	
2017-0948	08/01/17	Formal	Internal	07/26/17	McCurley, Steve	POLICE DETECTI	None	Y	2017-1960475	Closed	A	Chapter 1	110 Organizator 110.4	Employee 110.4.4	Insurb Sustained	Indefinite Suspension / Sworn	
2017-0658	05/31/17	Formal	Internal	05/08/17	Lehman, Derrick	POLICE OFFICER	None	Y	2017-1280091	Closed	B	Chapter 2	214 Vehicle Purs 214.6	Approved 214.6.3	Precisior Sustained	Written Reprimand (EBD Completed)	
2017-0614	05/22/17	Formal	External	05/21/17	Miller, Richard	POLICE OFFICER	None	Y	2017-1410155	Closed	B	Chapter 9	900 General Con 900.4	Requirem 900.4.3	Neglect Sustained	Written Reprimand (EBD Completed)	
2017-0279	03/01/17	Formal	External	02/17/17	Kosarek, Russell	EVIDENCE SUPPL	None	Y	2017-0481493	Closed	B	Chapter 9	900 General Con 900.1	Purpose a 900.1.1	Respons Sustained	Written Reprimand	
2017-0161	02/07/17	Formal	Internal	02/06/17	Barrick, Jeffrey	POLICE CORPOR	Officer Involved	Y	2017-0370047	Closed	Administrative Ir	Chapter 9	900 General Con 900.4	Requirem 900.4.3	Neglect Sustained	Written Reprimand	
2017-0127	01/30/17	Formal	Internal	01/17/17	Limmer, Christo	POLICE OFFICER	None	Y	2017-0170481	Closed	A	Chapter 2	208 TASER Devic 208.3	Verbal Warnings	Sustained	Suspension	
2016-1400	12/16/16	Formal	Internal	11/08/16	Paranich, Robert	POLICE OFFICER	None	Y		Closed	A	Chapter 9	900 General Con 900.5	Responsibility to Coworker	Sustained	Oral Reprimand	
2016-0966	09/21/16	Formal	Internal	09/13/16	Avila, Benjamin	POLICE OFFICER	None	Y	2016-2571822	Closed	B	Chapter 2	214 Vehicle Purs 214.5	Pursuit Un 214.5.1	Primary Sustained	Written Reprimand	
2016-0943	09/13/16	Formal	Internal	08/11/16	Draper, Nicolas	POLICE OFFICER	None	Y	2016-2241340	Closed	B	Chapter 9	900 General Con 900.4	Requirem 900.4.3	Neglect Sustained	Written Reprimand (EBD Completed)	
2016-0941	09/12/16	Formal	Internal	08/12/16	Delossantos, Eric	POLICE SERGEAN	None	Y	2016-1791225	Closed	B	Chapter 2	211 Response to 211.7	Level 2 In 211.7.1	Supervi Sustained	Written Reprimand	
2016-0937	09/12/16	Formal	Internal	07/15/16	Spitler, Richard	POLICE OFFICER	None	Y	2016-1970101	Closed	A	Chapter 3	301 Responsibili 301.2	Impartial Attitude and Cour	Sustained	Suspension	
2016-0909	09/06/16	Formal	Internal	07/18/16	Williams, Irvin	POLICE SERGEAN	None	Y	2016-2001448	Closed	A	Chapter 3	301 Responsibili 301.2	Impartial Attitude and Cour	Sustained	Oral Reprimand	
2016-0853	08/16/16	Formal	Internal	09/26/15	Jelesijevic, Mark	POLICE SERGEAN	None	Y	2015-2690247	Closed	B	Chapter 2	211 Response to 211.8	Level 3 Incident Inquiry, Re	Sustained	Oral Reprimand	
2016-0795	07/28/16	Formal	Internal	03/17/16	Jimenez, Vanessa	POLICE OFFICER	None	Y	2016-0770116	Closed	A	Chapter 2	208 TASER Devic 208.4	Use of the 208.4.1	Applicat Sustained	Suspension	
2016-0793	07/27/16	Formal	Internal	03/27/16	Hicks, Allen	POLICE LIUTENI	None	Y	2016-0770116	Closed	A	Chapter 1	110 Organizator 110.2	Sworn Rar 110.2.4	Lieuteni Sustained	Suspension	
2016-0764	07/19/16	Formal	Internal	06/15/15	Richter, Bryan	POLICE OFFICER	None	Y	2015-1660828	Closed	Administrative Ir	Chapter 2	200 Response to 200.4	Response 200.4.1	Determ Sustained	Written Reprimand	
2016-0682	06/24/16	Formal	Internal	01/17/16	Martinez, Stever	POLICE OFFICER	None	Y	2016-0171480	Closed	A	Chapter 2	211 Response to 211.4	Employee Responsibilities	Sustained	Suspension	

Discipline list - re Ambler 30b6 - Confidential per protective order

2016-0653	06/20/16	Formal	External	06/20/16	Allegretti, Antho	POLICE OFFICER	None	Y	2016-1720084	Closed	A	Chapter 4	402 Incident Rep 402.1 Purpose a 402.1.1 General	Sustained	Written Reprimand
2016-0607	06/07/16	Formal	Internal	01/17/16	Martinez, Stever	POLICE OFFICER	None	Y	2016-0171480	Closed	A	Chapter 9	900 General Con 900.3 General Cr 900.3.4 Personal	Sustained	Suspension
2016-0600	06/06/16	Formal	Internal	04/22/16	Murphy, Matthe	POLICE OFFICER	None	Y	2016-1130054	Closed	A	Chapter 2	206 Control Dev 206.7 Pain Com; 206.7.1 Use of F	Sustained	Written Reprimand (EBD Completed)
2016-0248	03/21/16	Formal	Internal	03/17/16	Caldwell, Camen	POLICE OFFICER	None	Y	2016-0770116	Closed	A	Chapter 2	206 Control Dev 206.4 Chemical 206.4.1 Prohibit	Sustained	Suspension
2016-0155	02/19/16	Formal	External	02/19/16	Mendoza, Orlan	POLICE OFFICER	None	Y		Closed	A	Chapter 9	900 General Con 900.1 Purpose a 900.1.1 Respons	Sustained	Resigned Under Investigation
2016-0115	02/08/16	Formal	Internal	02/08/16	Freeman, Geoff	POLICE OFFICER	Officer Involved	Y	2016-0390552	Closed	Administrative Ir	Chapter 2	200 Response to Resistance	Sustained	Indefinite Suspension / Sworn
2015-1073	12/01/15	Formal	Internal	11/24/15	Attridge, Michae	POLICE OFFICER	None	Y	2015-3280269	Closed	B	Chapter 2	204 Leg Restrain 204.4 Procedure	Sustained	Oral Reprimand
2015-1029	11/17/15	Formal	Internal	11/11/15	Perez, Armando	POLICE OFFICER	None	Y	2015-3150957	Closed	B	Chapter 3	304 Digital Mobi 304.3 Digital Mc 304.3.3 When D	Sustained	Written Reprimand
2015-1015	11/13/15	Formal	Internal	10/31/15	Manley, Mark	POLICE OFFICER	None	Y	1511-0002	Closed	A	Chapter 9	900 General Con 900.1 Purpose a 900.1.1 Respons	Sustained	Indefinite Suspension / Sworn
2015-0798	09/15/15	Formal	Internal	08/27/15	Van Buren, Chris	POLICE OFFICER	None	Y	2015-2391807	Closed	A	Chapter 2	200 Response to 200.4 Response 200.4.1 Determ	Sustained	Suspension
2015-0744	08/21/15	Formal	External	08/15/15	Gallenkamp, Zac	POLICE OFFICER	None	Y		Closed	A	Chapter 3	301 Responsibili 301.2 Impartial Attitude and Cour	Sustained	Written Reprimand (EBD Completed)
2015-0542	06/16/15	Formal	Internal	06/07/15	Leonard, Dawn	POLICE OFFICER	None	Y	2015-1580148	Closed	B	Chapter 3	301 Responsibility to the Community	Sustained	Oral Reprimand
2015-0506	06/08/15	Formal	Internal	02/28/15	Heinz, Eric	POLICE OFFICER	None	Y	2015-059176	Closed	B	Chapter 4	402 Incident Rep 402.2 Incident Ri 402.2.4 Report V	Sustained	Written Reprimand (EBD Completed)
2015-0362	04/28/15	Formal	Internal	04/25/15	Copeland, Eric	POLICE OFFICER	None	Y	2015-1151037	Closed	A	Chapter 2	200 Response to 200.4 Response to Resistance	Sustained	Suspension
2015-0360	04/27/15	Formal	Internal	04/15/15	Garcia, Alfredo	POLICE OFFICER	None	Y	2015-1050360	Closed	B	Chapter 8	803 Duty Firearm 803.2 Safe Handling of Firearms	Sustained	Suspension
2015-0310	04/07/15	Formal	External	03/25/15	Van Buren, Chris	POLICE OFFICER	None	Y		Closed	B	Chapter 3	301 Responsibili 301.2 Impartial Attitude and Cour	Sustained	Written Reprimand
2015-0235	03/11/15	Formal	Internal	02/15/15	DuBoise, Otho	POLICE CORPOR.	None	Y	2015-0460217	Closed	A	Chapter 4	402 Incident Rep 402.1 Purpose and Scope	Sustained	Written Reprimand
2015-0175	02/18/15	Formal	Internal	02/12/15	Garcia, Nicholas	POLICE OFFICER	None	Y	2015-0430409	Closed	B	Chapter 8	803 Duty Firearm 803.2 Safe Hand 803.2.1 General	Sustained	Written Reprimand
2014-1122	12/30/14	Formal	Internal	12/19/14	Nolen, Anthony	POLICE OFFICER	None	Y	2014-12-0048	Closed	A	Chapter 10	1000 Departmer 1000.3 General I 1000.3.1 Prohibi	Sustained	Indefinite Suspension / Sworn
2014-0788	09/09/14	Formal	Internal	09/08/14	Glasgow, Scott	POLICE CORPOR.	Officer Involved	Y	2014-2511591	Closed	Administrative Ir	Chapter 8	801 Equipment e 801.5 Plain Clothes Attire	Sustained	Oral Reprimand
2014-0557	07/01/14	Formal	Internal	06/24/14	Garcia, Alfredo	POLICE OFFICER	None	Y	2014-1750366	Closed	B	Chapter 8	803 Duty Firearm 803.2 Safe Handling of Firearms	Sustained	Suspension
2014-0260	04/02/14	Formal	Internal	02/19/14	Stanesic, James	POLICE CORPOR.	None	Y		Closed	A	Chapter 9	900 General Con 900.5 Responsib 900.5.1 Supporti	Sustained	Written Reprimand
2014-0084	03/28/14	Formal	External	01/27/14	Nickel, David	POLICE OFFICER	None	Y		Closed	B	Chapter 3	301 Responsibili 301.2 Impartial Attitude and Cour	Sustained	Written Reprimand
2013-1016	10/09/13	Formal	External	10/04/13	Slayton, Jonatha	POLICE OFFICER	None	Y	2013-2770647	Closed	B	Chapter 3	301 Responsibili 301.2 Impartial Attitude and Cour	Sustained	Written Reprimand
2013-0990	10/03/13	Formal	Internal	09/10/13	Foster, Robert	POLICE OFFICER	None	Y	2013-2531994	Closed	B	Chapter 3	323 Booking and 323.2 Booking G 323.2.1 Securing	Sustained	Written Reprimand
2013-0989	10/03/13	Formal	Internal	10/02/13	Garcia, Randy	POLICE OFFICER	None	Y	2013-2750857	Closed	B	Chapter 3	306 Search and S 306.2 Search an 306.3.1 Search P	Sustained	Written Reprimand
2013-0760	07/24/13	Formal	Internal	07/22/13	O'Neill, Dane	POLICE OFFICER	None	Y	2013-2031698	Closed	A	Chapter 2	208 TASER Devic 208.3 Verbal Warnings	Sustained	Written Reprimand
2013-0454	05/08/13	Formal	Internal	05/08/13	Boehm, Justin	POLICE OFFICER	Officer Involved	Y	2013-1280390	Closed	A	Chapter 2	200 Response to 200.4 Response 200.4.1 Determ	Sustained	Indefinite Suspension / Sworn
2013-0378	04/17/13	Formal	Internal	03/27/13	Yarger, Brian	POLICE OFFICER	None	Y	2013-0861360	Closed	B	Chapter 2	200 Response to 200.4 Response to Resistance	Sustained	Written Reprimand
2013-0306	03/25/13	Formal	External	03/18/13	Hopkins, Jermair	POLICE OFFICER	None	Y	2013-771655	Closed	B	Chapter 3	301 Responsibili 301.2 Impartial Attitude and Cour	Sustained	Oral Reprimand
2013-0284	03/20/13	Formal	Internal	11/28/12	Burnham, Darrel	POLICE SERGEAN	None	Y	2012-3330155	Closed	B	Chapter 2	214 Vehicle Purs 214.4 Pursuit Guidelines	Sustained	Suspension
2013-0260	03/15/13	Formal	Internal	03/08/13	Conner, Kenneth	POLICE SERGEAN	None	Y	2013-0672137	Closed	A	Chapter 2	200 Response to 200.4 Response to Resistance	Sustained	Suspension
2013-0036	06/10/13	Formal	Internal	08/26/10	Caraballo, Gilber	Police Officer	None	Y	2010-2380085	Closed	B	A201 Code of Cc A201.02 Individu	5	Sustained	Written Reprimand
2012-1159	11/13/12	Formal	Internal	11/09/12	Hernandez, Jose	Police Officer	None	Y	2012-3142227	Closed	B	Chapter 2	202 Firearm Disc 202.9 Report of 202.9.1 Reportin	Sustained	Oral Reprimand
2012-0986	09/25/12	Formal	Internal	09/15/12	Housmans, Shan	Police Officer	None	Y	2012-2591720	Closed	B	Chapter 8	804 Department 804.2 General Operation of Depai	Sustained	Written Reprimand
2012-0976	09/21/12	Formal	Internal	08/09/12	Kingsley, Jeffrey	Police Officer	None	Y	2012-2221418	Closed	B	Chapter 8	804 Department 804.2 General Operation of Depai	Sustained	Written Reprimand
2012-0907	09/07/12	Formal	Internal	06/20/12	Lillie, Ryan	Corporal	None	Y	2012-1820370	Closed	B	Chapter 4	400 Officer Resp 400.2 Emergenc 400.2.2 Code 2 (Sustained	Written Reprimand
2012-0874	08/27/12	Formal	Internal	08/23/12	Stallings, Nathan	Police Officer	None	Y	12-2362047	Closed	B	Chapter 3	303 Body Worn (303.2 Departme 303.2.2 When D)	Sustained	Written Reprimand
2012-0833	08/17/12	Formal	Internal	08/08/12	Hanna, Gary	Sergeant	None	Y	12-2211373	Closed	A	Chapter 3	301 Responsibili 301.1 Purpose and Scope	Sustained	Written Reprimand
2012-0771	08/07/12	Formal	Internal	07/23/12	Vasquez, Gabriel	Police Officer	None	Y		Closed	B	Chapter 9	934 Court appea 934.2 Duty relat 934.2.2 General	Sustained	Oral Reprimand
2012-0765	08/06/12	Formal	Internal	07/27/12	Zimmerman, Kei	Police Officer	None	Y	2012-2092087	Closed	B	Chapter 8	804 Department 804.2 General Operation of Depai	Sustained	Oral Reprimand
2012-0645	07/05/12	Formal	Internal	05/03/12	Shemo, Justin	Police Officer	None	Y	2012-1241863	Closed	B	Chapter 2	214 Vehicle Purs 214.4 Pursuit Guidelines	Sustained	Oral Reprimand
2012-0510	06/01/12	Formal	External	05/31/12	De La Rue, Kevin	Police Officer	None	Y	2012-1521219	Closed	B	Chapter 3	301 Responsibili 301.2 Impartial Attitude and Cour	Sustained	Suspension
2012-0470	05/17/12	Formal	Internal	05/02/12	Crochet, Phillip	Commander	None	Y		Closed	B	Chapter 8	804 Department 804.2 General Operation of Depai	Sustained	Written Reprimand
2012-0440	05/09/12	Formal	Internal	04/05/12	Boytim, Justin	Police Officer	None	Y	2012-0961634	Closed	B	Chapter 8	804 Department 804.2 General Operation of Depai	Sustained	Oral Reprimand
2012-0431	05/08/12	Formal	Internal	04/24/12	Metz, Michael	Police Officer	None	Y	2012-1150814	Closed	B	Chapter 8	804 Department 804.2 General Operation of Depai	Sustained	Oral Reprimand
2012-0427	05/08/12	Formal	Internal	04/02/12	Lakey, Bryan	Police Officer	None	Y		Closed	B	Chapter 9	934 Court appea 934.2 Duty related court appea	Sustained	Oral Reprimand
2012-0388	04/26/12	Formal	Internal	01/29/12	Hendricks, Carl	Sergeant	None	Y	2012-0290503	Closed	B	Chapter 2	214 Vehicle Purs 214.4 Pursuit Guidelines	Sustained	Written Reprimand
2012-0280	03/27/12	Formal	Internal	03/24/12	Osegueda, Elias	Police Officer	None	Y	C12-10634	Closed	A	Chapter 9	900 General Con 900.1 Purpose a 900.1.1 Respons	Sustained	Indefinite Suspension / Sworn
2012-0270	03/23/12	Formal	Internal	12/31/11	McWhorter, Sea	Police Officer	None	Y	2011-3651959	Closed	B	Chapter 2	200 Response to 200.4 Response to Resistance	Sustained	Suspension
2011-1432	12/29/11	Formal	Internal	12/28/11	Hugonnett, Thor	Detective	Officer Involved	Y	2011-3621220	Closed	A	Chapter 9	900 General Con 900.4 Requirements of Duty	Sustained	Written Reprimand
2011-1358	12/05/11	Formal	Internal	12/05/11	Allen, Christoph	Police Officer	Officer Involved	Y	2011-3390300	Closed	A	Chapter 2	200 Response to 200.4 Response 200.4.1 Determ	Sustained	Indefinite Suspension / Sworn
2011-1280	11/14/11	Formal	Internal	10/31/11	Brewer, Christop	Police Officer	None	Y	2011-3040242	Closed	B	Chapter 2	214 Vehicle Purs 214.3 Pursuit Co 214.3.5 Pursuit (Sustained	Written Reprimand
2011-1018	08/31/11	Formal	External	08/31/11	Gish, Michelle	Police Officer	None	Y	2011-2430111	Closed	A	Chapter 2	200 Response to 200.4 Response 200.4.1 Determ	Sustained	Suspension
2011-0999	08/25/11	Formal	Internal	07/23/11	Soler, Luis	Corporal	None	Y	2011-2040867	Closed	B	B101 Use of Force		Sustained	Suspension
2011-0920	08/04/11	Formal	Internal	07/23/11	Jones, Michael	Police Officer	None	Y	2011-2041156	Closed	B	B101 Use of Force		Sustained	Oral Reprimand
2011-0206	02/24/11	Formal	Internal	02/11/11	Williams, Blayne	Police Officer	None	Y	2011-0422109	Closed	A	A201 Code of Cc A201.01 Compliance Required		Sustained	Suspension
2011-0142	02/07/11	Formal	External	02/06/11	Hall, Lando	Police Officer	None	Y	2011-0380006	Closed	B	A201 Code of Cc A201.03 Responsibility to the Community		Sustained	Suspension
2011-0009	01/05/11	Formal	Internal	12/31/10	Moreno, Melvin	Police Officer	Officer Involved	Y	2010-3650250	Closed	B	A304 Firearms Discharge Situations		Sustained	Suspension
2010-1444	11/30/10	Formal	External	11/28/10	Gabrielson, John	Police Officer	None	Y	2010-3320320	Closed	A	A201 Code of Cc A201.03 Responsibility to the Community		Sustained	Suspension
2010-1244	10/06/10	Formal	External	10/05/10	Vasquez, Rodolfo	Corporal	None	Y	2010-2781163	Closed	A	A201 Code of Cc A201.03 Responsibility to the Community		Sustained	Written Reprimand
2010-0931	07/27/10	Formal	Internal	06/25/10	Pippin, Aaron	Police Officer	None	Y	2010-1760812	Closed	B	A318 Mobile Video Recorder Operation		Sustained	Written Reprimand
2010-0743	06/16/10	Formal	Internal	06/10/10	Harris, Joseph	Police Officer	None	Y	2010-1611974	Closed	B	B101 Use of Fort B101.06 Use of Force to Seize Evidence		Sustained	Written Reprimand

Discipline list - re Ambler 30b6 - Confidential per protective order

2010-0528	05/05/10	Formal	Internal	10/10/09	Quintana, Leona Police Officer	None	Y		Closed	A	A201 Code of Cc A201.01 Compliance Required	Sustained	Indefinite Suspension / Sworn	
2009-1449	11/09/09	Formal	Internal	11/01/09	Chapman, Judso Police Officer	None	Y	2009-3052560	Closed	A	A201 Code of Conduct	Sustained	Suspension	
2009-0605	05/11/09	Formal	Internal	05/11/09	Quintana, Leona Police Officer	Officer Involved	Y	2009-1310302	Closed	A	A318 Mobile Video Recorder Operation	Sustained	Suspension	
2009-0168	02/03/09	Formal	Internal	02/03/09	Hernandez, Isma Police Officer	None	Y	2009-0340191	Closed	A	A201 Code of Cc A201.02 Individual Responsibilities	Sustained	Retired Under Investigation	

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	§	Plaintiffs,
	§	
v.	§	CIVIL ACTION No. 1:20-cv-01068-LY
	§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 60
Sanders and Smith Shooting**

(COA 175310)

FILED UNDER SEAL

**Internal Affairs Division
Personnel Complaint Control Sheet**

Class A

Internal

IAD Case #2009-0605

Date Occurred 5/11/2009	Date Received 5/11/2009	Date Investigation Completed 8/11/2009	180-Day Deadline 11/7/09
Complainant's Information			
Name	Al Eells		
Incident Location	6409 Springdale		
Employee's Information			
Name	Employee #	Rank	Assignment
Leonardo Quintana	4426	Officer	Central Bureau
Employee's Chain of Command			
Sergeant	Lieutenant	Commander	Assistant Chief
Erin Zumwalt	Todd Gage		Sam Holt <i>[Signature]</i>
Allegations Investigated			
Allegation(s) (Enter Appropriate G.O. & Specific Title)	Final Classification	Commander/Assistant Chief Signature	
A306b Mobile Video Operation .01	<i>SUSTAINED</i>	<i>[Signature]</i>	
B204a - Interviews, Stops, and Arrests .01 & .02	<i>EXONERATED</i>	<i>[Signature]</i>	
1c - Responsibility to the Department (9) (h)	<i>EXONERATED</i>	<i>[Signature]</i>	
B101a - Response to Resistance - .02 & .03	<i>EXONERATED</i>	<i>[Signature]</i>	
B101a - Response to Resistance - .02 & .03	<i>EXONERATED</i>	<i>[Signature]</i>	
Required Signatures		Employee #	Date
City Legal Review			
Investigator's Signature	<i>[Signature]</i>	4209	11-9-09
IAD Commander	<i>[Signature]</i>	2930	11/5/09
Chief or Assistant Chief	<i>[Signature]</i>	6227	11/5/2009

Discipline decided by employee's chain-of-command:

- Oral Counseling
 Oral Reprimand
 Written Reprimand
 Temp Suspension (# of Days 15)
 Demotion
 Resigned/Retired under Investigation
 Indefinite Suspension

If applicable, attach page 2 (Other Factors).

Complaint Summary

Officer Leonardo Quintana #4426

Officer John (Alex) Hitzelberg #3759

Officer Mohammad Siddiqui #6088

The complaints will be addressed as follows:

1. MVR - Addressed in Allegation #1
2. Identifying Self as Police Officer - Addressed in Allegation #2
3. Neglect of Duty - Addressed in Allegation #3
4. Response to Resistance, Nathaniel Sanders - Addressed in Allegation #4
5. Response to Resistance, Sir Smith - Addressed in Allegation #5
6. Firearms Discharge – Addressed in Other Policies Considered

Allegation #1

It is alleged that on May 11, 2009, Officers Quintana and Siddiqui failed to activate their in-car MVR when they arrived at the Walnut Creek Apartments to attempt to take into custody potentially armed suspects.

The complaint, in its entirety, is in file. (A-1)

Subjects – Officers Quintana and Siddiqui

Policy Associated to Allegation #1

General Order

A306b - Mobile Video Recorder Operation

The use of Mobile Video/Audio Recording (MVR) equipment provides an unbiased recording of events that officer's encounter. These recordings can be useful for the documentation of evidence, the preparation of offense reports, and future court testimony. These recordings can also protect officers from false allegations of misconduct and be of use when debriefing incidents or evaluating performance.

.01 Operation of Police Vehicles Equipped with Mobile Video/Audio Recording Equipment

- E. Officers driving MVR equipped vehicles will record all:
1. Traffic stops;
 2. Pedestrian stops (by audio when out of camera range);
 3. Sobriety tests; and
 4. Pursuits, until completion of enforcement action.

Conclusion to Allegation #1

Internal Affairs concludes that Officers Quintana and Siddiqui violated the Austin Police Department's General Orders when they failed to activate their Mobile Vehicle Recorders when required.

When Officer Quintana was confronted with having to quickly exit his patrol vehicle to detain the driver he inadvertently failed to activate his MVR. After the initial suspect was handcuffed and secured in Officer Quintana's patrol vehicle, he had the opportunity to activate his MVR but failed to do so.

A review of Officer Siddiqui's in-car video indicates that he turned on his MVR while en route to assist Officer Quintana, but turned it off prior to his arrival. Officer Siddiqui did not recall activating or turning off his MVR. Upon Officer Siddiqui's arrival at the complex, he stated that he believed the vehicle was unoccupied and did not think that he needed to turn on his MVR. When Officer Siddiqui determined there were other occupants in the vehicle he had the opportunity to activate his MVR but failed to do so.

Internal Affairs confirmed that both Officers Quintana and Siddiqui had been trained on the operation of the MVR. Both of them acknowledged that they had received the proper training and were familiar with the requirements of the policy.

It should be noted that Quintana's assertion that suspects are tipped off by seeing the red "record" light on police units raises a possible equipment-related issue that may deserve consideration by the Department. However, Quintana clearly stated during his IA interview that he believed that Franklin knew that the police were following him (**B2-5, line 4331**) and expected that he was going to be pulled over. (**B2-B, line 4342**) That being the case, there should not have been any reason for Quintana not to activate his camera earlier. Even if there were, it would not absolve Quintana of the responsibility for activating his MVR once contact was initiated with the suspects.

As a result of this administrative investigation, Internal Affairs recommends the allegation be classified as **Sustained** for Officer Quintana and Officer Siddiqui.

Note: A separate, parallel investigation was conducted concerning MVR usage by Officer Quintana for the 6 months preceding the shooting. See **Folder M** in the investigative case file.

Allegation #2

It is alleged that on May 11, 2009, Officer Quintana failed to identify himself when he initiated contact with a potentially armed suspect at the Walnut Creek Apartments.

Subject – Officer Quintana

Policy Associated to Allegation #2

General Orders:

B204a – Interviews, Stops and Arrests,

.01 Types of Resident Contacts

Officers dealing with persons must be aware of the type of contact in which they are engaged, and its legal significance. There are three types of duty-related contacts with persons made by police officers. In terms of legal significance, they are arranged from least to most intrusive as follows:

- A. Interviews;
- B. Stops; and
- C. Arrests.

.02 Explanations to Persons

- A. Officers shall act with as much restraint and courtesy toward persons interviewed, stopped or arrested as is possible under the circumstances.
- B. The initiating officer shall explain the reason for the contact and, when practical, the purpose of anticipated police action.
- C. **Officers shall identify themselves when they initiate a duty-related contact with a person, unless their identity is obvious.**

Conclusion to Allegation #2

All of the verbal interaction between Officer Quintana and Nathan Sanders was captured on Officer Hitzelberg's in-car video. It is clear that Officer Quintana never verbally identified himself as an officer, either before or while he was attempting to wake up Sanders. On the enhanced version of the audio portion of the videotape, he can be heard to say what sounds like either "Police, police," or "Police, freeze." However, Quintana stated that, at the time he said that, he believed he was retreating after struggling with Sanders and had already backed up to the rear wheel of the Mercedes and was no longer in sight of Sanders. (B2-B, line 4776)

When asked in his IA interview how he would routinely handle a "person down unknown" (unconscious person) call, Quintana stated that he would, ". . . *probably wake him up and be identify myself as I'm waking him up.*" (B2-B, line 4243) But, he went on to say that if he believed that the person may be possibly armed he might handle the

situation differently: *"I don't want to be yelling, you know, 'Police' as I'm waking him up. Um, I think I'd rather make eye contact with them or – or have him somewhat awake uh, so – and to have him comprehending that I'm the police as he's, you know, looking at me or – or making some kind of eye contact with me."* (B2-B, line 4253) When asked if he had ever been trained specifically to do that method, Quintana replied, *"No sir, I haven't."* (B2-B, line 4260)

The following exchange occurred during Quintana's IA interview:

Q: Is there a tactical reason why you would not identify yourself as you're rubbing his chest?

A: *Um, you know, I can't really think of one right now. I – in – in this instance I actually did think that I identified myself until watching the video. Um, I actually did think that I was waking him up and saying, "Police," uh, somewhere in there. But I think because I never really had his full uh, attention until he looked up at me but by that time it was too later to say, "Police."* (B2-B, line 4288)

On Officer Hitzelberg's in-car video, as Officer Quintana is attempting to wake up Sanders, he can be heard patting Sanders with his hand and making comments such as, "Hey man, wake up. Hello." But, when asked if he felt like he had time to say "police" during this time he replied, *"No. I didn't, uh not from the – from the first time I put hands on him, no."* (B2B, line 4812)

Quintana acknowledged his familiarity with the previous case IA case involving Officer Gary Griffin, in which a critical issue was Griffin's failure to identify himself before engaging with a sleeping, intoxicated subject; in reply to a question concerning why he would use two different methods of identifying himself while attempting to awaken subjects, he stated, *"Um, well it may have something to do with Gary Griffin's incident um, waking up a guy on the bench and the guy wakes up and I guess they said he never identified himself although he was in full uniform."*(B2-B, line 4272)

During his IA interview, Officer Quintana stated that Sanders looked up at him prior to them struggling over the pistol. Quintana said that Sanders looked at him for, *"Um for ... half a second. Uh, a second. Probably a second."* (B2-B, line 4378) He expressed the opinion that this glance would have enabled Sanders to have recognized him as a police officer. However, that is pure speculation on his part. Internal Affairs finds it unreasonable to assume that Sanders, waking up from a drugged sleep, under subdued lighting conditions – and with a flashlight shining toward him – would have been able to make that instant mental connection.

The policy requires officers to identify themselves when initiating a duty-related contact with a person **unless their identity is obvious**. The term "obvious" is not defined in policy and is open to interpretation. What constitutes "obvious" will vary with the situation, depending on factors such as the officer's attire (uniform or plainclothes), lighting/visibility, and the physical and mental capacity of the person being contacted. It is the opinion of Internal Affairs that, under the circumstances in which this contact was made, Officer Quintana's identity would not have been obvious to Sanders.

The issue of Quintana identifying himself has implications that reach far beyond whether or not he committed a minor policy violation. It has a direct bearing on whether Sanders's actions can be interpreted as those of a suspect who intentionally took armed, aggressive action against someone he knew to be a police officer, or the instinctive defensive reaction of someone, awoken from a sound sleep, in response to feeling someone grabbing his gun. Internal Affairs believes that a possible startled reaction is something that Officer Quintana should have anticipated and could have possibly prevented by verbally identifying himself as an officer.

As a result of this investigation, Internal Affairs finds that Quintana was required by policy to identify himself when he initiated contact with Sanders unless his "identity is obvious." The evidence clearly shows that Quintana failed to identify himself verbally and, under the circumstances, his identity would not have been obvious. Consequently, Internal Affairs recommends that this allegation be **sustained**.

Allegation #3

It is alleged that on May 11, 2009, Officers Leonard Quintana, Alex Hitzelberg, and Mohammad Siddiqui were present at a deadly force encounter at the Walnut Creek Apartments, during which the officers may have failed to follow standardized department training and tactics if it was objectively reasonable to do so, and may have failed to employ sound judgment, in their decision to confront and attempt to take into custody potentially armed suspects.

The complaint, in its entirety, is in file. (A-1)

Subjects – Officers Quintana, Hitzelberg, Siddiqui

Policy Associated to Allegation #3

General Orders:

A201c - Responsibility to the Department

Employees are at all times individually responsible for conducting themselves in a professional and ethical manner and for treating coworkers with respect and dignity. The intent of this policy is to clearly state that unprofessional behavior will not be tolerated in the workplace. Employees shall maintain loyalty to the Department as is consistent with the law and personal ethics.

9. Neglect of Duty

Employees shall satisfactorily perform their duties. Examples of unsatisfactory performance include, but are not limited to:

- a. Lack of knowledge of the application of laws required to be enforced.
- b. Unwillingness or inability to perform assigned tasks.
- c. Failure to take appropriate action on the occasion of a crime, disorder, investigation or other condition deserving police attention.
- d. Failure to respond to any call or to perform any police duties assigned to them by appropriate authorities.
- e. Absence without leave.
- f. Repeated poor evaluations.
- g. Written record of repeated infractions of rules, regulations, directives or orders of the Department.
- h. Failure to follow department standardized training and tactics when it was objectively reasonable to do so.

Patrol Operations – Standard Operating Procedures

.05 Personnel Duties, Authority and Responsibilities

L. High-Risk Traffic Stops

High-risk traffic stop procedures should be used whenever appropriate.

Below are guidelines when stopping a vehicle whose occupant(s) is dangerous and possibly armed.

1. Verbally notify the dispatcher of the intent to stop the suspect's vehicle and provide the following information:
 - a. Location
 - b. License plate number of the vehicle
 - c. Number of occupants in the vehicle
 - d. Weapons possibly in possession of the occupants
 - e. Reason for the stop
2. Once the primary officer and back-up officers are in position, initiate the stop.
3. Once the suspect vehicle has been stopped, initiate high-risk traffic stop procedures.
4. Document the high-risk stop per General Order B107.

Conclusion to Allegation #3

The focus of Internal Affairs' investigation into this allegation was to assess whether the tactics and approach utilized by the officers were consistent with their training and appropriate and objectively reasonable for the situation. In order to make that determination, IA found it necessary to first answer the following questions:

1. Based on the information known to the officers, what situation were they faced with?
2. What training had they received concerning dealing with such situations?

Each question will be addressed separately:

1. The situation:

The information the officers had received led them to believe that the Mercedes may be occupied by suspects involved in some recent armed robberies. The same suspects were also possibly linked to several "shots fired" incidents at the apartment complex. Because of the uniqueness of the vehicle description (at least for that area of town) and its proximity to the complex when spotted, the officers had sufficient reason to believe that it was in fact the vehicle described to them by witnesses two days earlier. Further, the officers had sufficient reason to believe that there was a strong possibility that there may be firearms in the vehicle. However, the information was "old," received 48 hours previously, and, at the time Officer Quintana stopped and detained Michael Franklin, the officers lacked any specific information that the occupants were armed at that time.

That situation was altered after Officer Quintana questioned Michael Franklin. As he clearly articulated several times during his interviews, based upon the deceptive way Franklin answered him when he asked if there were guns in the car, Quintana believed that Franklin was lying and that there was in fact a gun in the car. *“And I just – and I knew – in – in my mind I was thinking he’s probably got it in his seat or the passenger has it on him.”* (B2-B, line 3669) The fact that Michael Franklin lied to Quintana when he asked him how many people were in the car should have strengthened Quintana’s belief that he was lying about the guns as well. So, in Quintana’s mind he was dealing with a sleeping subject (he was initially aware only of one) in a vehicle who either had a gun or had **immediate access** to a gun. In his SIU interview, Quintana described when Franklin yelled and tried to wake up the front seat passenger: *“I said, ‘Hey man, don’t wake him up,’ and I pull him back and I close the door. I pulled him away from the car, ‘cause I didn’t want to have that guy awake while I’m dealing with this guy, and, and in my mind, I, you know, I was, uh, thinking that they’re gonna re– you know, they’re armed robbery suspects, and they’re (unintelligible) armed.”* (B2-A, line 317)

Quintana never communicated this belief to Officers Hitzelberg and Siddiqui. While they both believed that there was the potential that the occupants might be armed, they lacked that additional information. Once they determined that there two occupants in the vehicle, they were under the impression that they were dealing with two sleeping subjects in a vehicle and that there was a **strong possibility** that there might be guns in the car.

2. Training

Following is a summary of the information gathered from the officers and their former Academy instructors concerning their prior training:

- All three officers had received training on “Felony/High Risk Traffic Stops.” While the name of the class changed over time, the basic content was the same. The purpose of the class was described by Sgt. Jason Mutchler: *“The overall purpose is to control the apprehension of possibly dangerous people that are in a vehicle, a stopped vehicle. Or it could be in a house or some type of structure. It’s setting yourself in a position of relatively good cover. It’s learning to give very precise commands to the people that you are trying to take control of and bring it to a point that you can safely take them into custody.”* (E23, line 474). The basic concept behind the class was that the officers should remain behind cover, keeping the subjects at gunpoint, and order them to exit the vehicle and come back to the officers, rather than approaching the vehicle. Students were taught to deal with only one subject at a time. A main component was that all officers involved in the stop would have clearly communicated roles and areas of responsibility to prevent confusion in the event action was required. (See High-Risk Traffic Stop lesson plan, **Folder N1-B**; note that the actual lesson plan used during Quintana’s academy is no longer available but was substantively the same.)
- The officers and all of the instructors agreed that the “Felony/High Risk Traffic Stop” was taught and demonstrated as a rolling, moving maneuver to be used to stop another vehicle. Joe Stinson: *“That’s how we teach it. Uh, but my understanding, you know, the way we’ve always teach it, was in connection with a rolling vehicle. It’s a – it begins when some type of – it has something to do with traffic, being a car. So*

it's a rolling situation. And that's how we always taught it. (E-18 line 963). However, the consensus among the instructors was that it was a technique that could be utilized in a variety of situations, not just traffic stops. Jason Mutchler: *"But a high risk car stop could be adapted to a stationary vehicle. It could be adapted to a structure, whether it's a house or a business. Ah, its concepts can be adapted for those environments."* (E-23, line 564). Eric Miesse: *"And they wanted to get rid of the term, kind of Felony Car Stop, because of the, um, that label that it has to be a felony when you make - when you use the tactic, and they wanted to incorporate a high risk so that way to try to help officers understand that there's more than just felony you could use it for, might be other situations that - that this tactic could apply."* (E-20, line 210). Regarding what might constitute a "high risk," Elaine Garrett stated, *"... every stop is unknown, pretty much, but when you feel it's elevated to a different point, where you know that the - the subject was involved, ah, with a firearm, he might have been involved in something violent. So you have other information to tell you that there might be something else to this stop."* (E-25, line 214). From the High Risk Traffic Stop lesson plan: *The stop may deal with suspects who are considered armed or where there is a likely potential for felonious assault. It does not have to be a felony stop and requires extreme caution combined with sound tactics.* (N1-B)

- All of the officers stated that they were familiar with the "Felony/High Risk" concepts and had either used them or seen them in use on the street. Officer Hitzelberg: *"And they would be used at a time that you would consider high risks where there's possibly weapons involved on the suspect's part."* (C2-B, line 204)
- Some of the instructors said they had discussed the advantages of using a stealth approach in a variety of situations (such as alarm calls) but there had been no specific instruction on how to apply it to approach subjects in vehicles. Quintana recalled receiving Academy instruction on using a stealth approach when responding to alarm calls (B2-B, line 1297) but not any specific instruction on how to apply it to other types of calls. Hitzelberg said he had received some instruction on stealth approaches in the military but could not recall any details. Siddiqui could not recall ever receiving any training on stealth approaches.
- None of the officers could recall receiving specific instruction on techniques to awaken sleeping subjects. Quintana said that he had learned the "chest rub" method for waking people up while working in the Travis County Jail. (B25, line 1205) The instructors said that they did not teach cadets specifically how to wake people up. Elaine Garrett said that there was role-play training involving sleeping subjects, and made the comment, *"And if he's, ah, - um, the suspect or whoever's in the vehicle, is - has - let's say he's already been involved in something, ah, you, - we don't have a clue, but people are gonna respond waking up startled. They're gonna be - they're gonna respond that way. They're - they're surely gonna want to defend themselves, thinking something else is wrong, so people will respond differently."* (E25, line645)
- Quintana stated he believed that his training and experience preparing him for handling this type of incident. (B2-B, line 7207) He stated that there was no additional training that he would have liked to have had that would have better prepared him for this incident. (B2-B, line 7234)

Based upon their training background, Internal Affairs concludes that the officers had received sufficient training to recognize what constitutes a “high risk” vehicle. Internal Affairs also concludes that there was more than enough information available to Officer Quintana to indicate that this was a “high risk” vehicle. Internal Affairs also concludes that he and the other officers had received sufficient training on the safe techniques for dealing with such a situation. Although the “high risk” training they had received was presented in the context of a traffic stop, the underlying concepts and techniques utilized in the training is adaptable to a stationary vehicle as well. As stated in the High Risk Traffic Stop lesson plan: *You never know who you have behind the wheel of a vehicle stop. Because every encounter is different officers must learn to be flexible. No rigid set of guidelines work for every stop.* (N1-B)

Patrol SOP states, “*High-risk traffic stop procedures should be used whenever appropriate.*” Internal Affairs concludes that the situation facing the officers was one for which high-risk traffic stop procedures was appropriate.

Based on his statements, it would appear that, initially, Officer Quintana did view the vehicle as high risk and planned to treat it that way. When asked how he had planned to approach the vehicle if Michael Franklin had not gotten out, Quintana replied, “*My – my plan I guess back to your question was that if Alex pulled in, I was gonna tell him, ‘Let’s go out on them.’ And uh, just the way me and Alex would – would’ve done it. But we would’ve pulled in like this and jumped out and – and ordered the driver out at gunpoint.*” (B2-B, line 3083) So, in essence, he had initially planned to use modified “high risk” techniques. Note that this was before he had spoken to Franklin and obtained the “gut feeling” that Franklin was lying to him about guns being in the car and before he learned that Franklin had lied to him about how many occupants were in the vehicle. After talking to Franklin, Quintana should have had a **heightened** awareness that high risk tactics were called for.

It is unclear why, if Quintana initially planned to use high risk techniques, he chose not to do so once Franklin was in custody. What is clear is that, once Hitzelberg and Siddiqui arrived, Officer Quintana did not communicate to them a complete picture of the overall situation; he did not share with them his belief regarding the presence of guns in the vehicle, vital information which was directly related to their officer safety. He allowed them to both walk directly up to the vehicle and look in the windows. Then, without any real planning or discussion, the three officers transitioned to a “stealth approach,” - attempting to sneak up on the subjects while they were still asleep – a tactic which none of them had ever received any training on.

During their interviews, the officers stated that they felt that the approach they took provided them with a tactical advantage. But, as was clearly demonstrated, their tactics were uncoordinated and actually left them exposed and with few options once the time came to take action:

- None of the officers took advantage of available cover.
- Although Hitzelberg was supposed to be covering Quintana and Siddiqui was supposed to be watching Smith, neither of them had a firearm or Taser drawn and

neither was capable of providing immediate lethal or less-lethal support. Note that in his IA interview, Quintana described how he and Hitzelberg had handled previous calls involving someone passed out in a vehicle:

A: *I – I would say one go hands on and the other have uh, cover to cover me.*

Q: Can you explain the hands on?

A: *Uh, trying to either wake the subject up, pull him out of the car um, something – something to that effect. And uh, obviously since I’ve had both my hands in – in use, him to be covering me*

Q: Okay.

A: . . . *with either less lethal, taser or lethal. (B2-B, line 474)*

- Hitzelberg was not in position to see Sanders’s hands while Quintana was dealing with him.
- Quintana was positioned between Hitzelberg and the passenger compartment, so that Hitzelberg could not physically assist Quintana with handling Sanders or provide lethal/less lethal support.
- Once the shooting started the only option available to Hitzelberg was to retreat backwards.
- Siddiqui was caught in the open and was forced to dive and crawl to find cover.
- Siddiqui was forced to abandon his primary assignment – watching Smith – giving Smith the opportunity to exit the vehicle and charge toward Quintana.
- Once he started moving, Officer Quintana lost sight of the other officers, setting up a potential “friendly fire” scenario (explored in more detail in the “Other Policies Considered” section.)

In the High Risk training, students are taught the importance of planning, timing, and coordination, and the division of critical tasks among officers. (N1-B) None of these factors were discussed by the officers prior to them beginning their approach. There was no discussion between the three officers of tactics, roles and responsibilities, or contingencies should the need to take actions arise; nor did the officers discuss other options for handling the situation;

From Quintana’s interview:

Q: Okay. Was the um, did you ever discuss with Officer Hitzelberg this soft shoe approach? And in other words, the uh, stealth mode kind of approach? Did you ever have any conversations about that?

A: *No sir.*

Q: Okay. Other than hands on, did you discuss any options as far as how to handle . .

A: *No sir.*

Q: . . the occupants after Franklin was put in your car?

A: *No sir.*

Q: Okay.

A: *We did not. (B2-B, line 4054)*

From Hitzelberg’s interview:

Q: Did you discuss any other options of approach?

A: *No, we did not.*

Q: Had you thought of any other options of approach but did not discuss them with the other two officers?

A: *I can't say I did. (C2-B, line 1275)*

From Siddiqui's interview:

Q: Did they give you any instructions on what to do?

A: *No. No. They started to make their way and I started to make my way. Um ...*

Q: Did you a – assume your – your duties . . .

A: *Well, what happened was, because I – how – however Officer Quintana knew that the – they were asleep in the vehicle, 'cause he had commented on that. So, ah, no, nobody said, you know, 'Do this or do that.'*” (D2-B, line 1320)

Later in the same interview:

Q: Any options – options discussed on how to handle this?

A: *Um . . .*

Q: Additional options. Whether it be back off, call SWAT. Do a high-risk stop. Hands on – hand – hand on type of thing? Any other options discussed?

A: *No, we didn't discuss calling – calling SWAT or . . . (D2-B, line 1878)*

In their interviews Officers Quintana and Hitzelberg both discussed the unspoken understanding they have between them, due to the amount of time they have worked together, that allows them to anticipate each other's actions and coordinate without verbally discussing plans. However, Officer Siddiqui was fairly new to their shift and he did not share this working relationship with them. In this situation, planning and coordination was required involving all officers present.

According to the officers, their location influenced their decision on how to approach the vehicle. The High Risk technique calls for giving loud verbal commands to the vehicle occupants. The officers expressed the concern that giving loud directions to the vehicle occupants – for, example, over their PA system – would wake up the complex and draw a crowd to them. The officers had prior experiences and knowledge of the complex, its residents, pedestrians, and its history of being anti-police. The officers said that, in the past, they had been taunted and cursed at and they wanted to avoid drawing more attention to them and potentially causing a crowd to gather and jeopardize their officer safety. While this may constitute a legitimate concern, Internal Affairs does not find it to be a legitimate reason for avoiding a “high risk” effort. There was nothing that would have prevented the officers from calling for additional backup if they were concerned about the crowd. There was no urgency – the High Risk training teaches that *time needs to be to your advantage*; (N1-B) the officers could have maintained watch on the two subjects in the vehicle from behind cover as they took whatever time was necessary to set up a protective perimeter. And the whole argument does not carry any weight when it is obvious, from the audio of Officer Hitzelberg's in-car video, that the possibility of drawing a crowd was not an issue the officers discussed before beginning their action.

Internal Affairs recognizes that the officers had never seen this exact scenario addressed in any of their prior training. However, there should never be an expectation that training will provide officers with specific direction on how to deal with every potential situation they might face in their jobs. Rather, training is designed to provide officers with tools that, combined with common sense, experience, and good judgment, can be applied to a variety of situations, as the circumstances dictate. Internal Affairs believes that the officers were equipped with the adequate “tools in their toolbox” to handle this job.

Internal Affairs concludes that this was a “high risk” situation and that “high risk” techniques should have been utilized. Internal Affairs concludes that the primary responsibility for determining the approach in this situation rested with Officer Quintana. He initiated the stop and it was “his” call; Hitzelberg and Siddiqui were his backups and, although Quintana was not technically “in charge,” they were following his lead. Quintana was the one who spoke to Michael Franklin and obtained the information that led him to believe that there guns in the vehicle. It was his responsibility to inform his backups of his belief and he failed to do so. By neglecting to do so and allowing them to approach the vehicle, he placed them in great danger. Rather than ordering Sanders out of the vehicle from a place of safety, he placed himself in a position to have to physically struggle with Sanders over the pistol, leaving him with no other option other than deadly force. If different tactics had been employed the necessity to use deadly force may have been avoided.

Internal Affairs finds that Officer Quintana failed to follow department standardized training and tactics when it was objectively reasonable to do so. Further, Internal Affairs finds that Officer Quintana failed to employ sound judgment in his decision to confront and attempt to take into custody potentially armed suspects. Consequently, Internal Affairs recommends that the allegation against Officer Quintana be **sustained**.

Internal Affairs finds that the level of culpability for Officers Hitzelberg and Siddiqui does not rise to that of Quintana. They lacked the information Quintana possessed and they were following his lead. While their tactics were unsafe at times, their actions – based on the information available to them at the time – were not unduly unreasonable. Internal Affairs finds that the actions of Officers Hitzelberg and Siddiqui do not rise to the level of a policy violation. Consequently, Internal Affairs recommends that the allegation against Officer Hitzelberg and Officer Siddiqui be classified as **Exonerated**.

Allegation #4

It is alleged that on May 11, 2009, Officer Leonardo Quintana was present at a deadly force encounter at the Walnut Creek Apartments, during which he may have failed to follow standardized department training and tactics if it was objectively reasonable to do so, and may have failed to employ sound judgment, in his decision to confront and attempt to take into custody potentially armed suspects.

The complaint, in its entirety, is in file. (A-1)

Response to Resistance - Nathaniel Sanders.

Subject - Officer Quintana

Policy Associated to Allegation #4

General Orders:

B101a. - Response to Resistance

.02 Use of Objectively Reasonable Force

- A. Officers may use only that amount of force to achieve lawful law enforcement objectives that is objectively reasonable based on the totality of the circumstances they confront. This test of objective reasonableness embodies allowance for the fact that officers often are forced to make split second judgments about the amount of force that is necessary in circumstances that are tense, uncertain, and rapidly evolving. "Reasonableness" is judged from the perspective of a reasonable officer, not with the 20/20 vision of hindsight. This test of reasonableness is not capable of precise definition or mechanical application – it requires careful attention to the circumstances of the particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively resisting or attempting to evade arrest by flight or concealment.
- B. Officers must be able to articulate the facts and circumstances that made the use of force objectively reasonable. Factors that may be considered in determining whether a use of force is objectively reasonable may include, but are not limited to:
1. Information reported to the officer;
 2. Opportunity for de-escalation;
 3. Opportunity to develop a coordinated plan or approach;
 4. The subject's response or lack of response to police commands;
 5. Actions of the subject, including the degree of resistance by the subject;
 6. Statements of intent by the subject;
 7. Availability and utility of lesser force options;
 8. The severity of any crime at issue;

9. The degree and immediacy of any threat posed by the subject;
 10. The potential for injury to the officer, subject, bystanders, or other persons;
 11. Risks posed by escape of the subject;
 12. Physical differences between the subject and the officer that may affect the level of threat posed (including age, size, strength, skills, injuries, level of exhaustion);
 13. Influence of drugs or alcohol on a subject;
 14. Possession or proximity of weapons;
 15. Experience and skill level of the officer;
 16. Relative numbers of subjects and officers; or
 17. Any exigent circumstances.
- C. This policy provides guidance on specific situations, and the use of specific techniques and weapons, the violation of which may result in discipline. The department recognizes, however, that unusual or unanticipated circumstances do occur. **The ultimate test is whether the use of force was objectively reasonable.**

.03 Use of Deadly Force in Response to Resistance

- A. Deadly force may only be used when the officer has an objectively reasonable belief that lethal force is reasonably necessary to defend the officer's or another's life that is in imminent danger of serious physical injury or death, based on the totality of the circumstances. This test applies to all situations including those in which the subject is attacking and when the subject is fleeing but still presents an imminent danger of serious physical injury or death to the officer or another.
- B. Verbal Warning to Subject:
A verbal warning to submit to police authority shall be given prior to using lethal force if reasonable and if the warning will not significantly increase the danger to the officer or another.
- C. Warning Shots Prohibited:
The firing of a warning shot(s) is prohibited.
- D. Display of Firearms:
Firearms shall not be displayed or pointed in a threatening or intimidating fashion unless it is objectively reasonable to believe that there is a substantial risk that the situation may escalate to the point where lethal force would be permitted. If it is later determined that lethal force is not necessary, the firearm shall be secured or re-holstered as soon as reasonably practical.

State Law Associated with Allegation #4

Texas Penal Code, Chap. 9 – Justification Excluding Criminal Responsibility

Sec. 9.01. DEFINITIONS - (3) "Deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

Sec. 9.22. NECESSITY. Conduct is justified if:

- (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
- (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
- (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

Sec. 9.31. SELF-DEFENSE.

(a) Except as provided in Subsection (b), a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

Sec. 9.32. DEADLY FORCE IN DEFENSE OF PERSON.

- (a) A person is justified in using deadly force against another:
- (1) if he would be justified in using force against the other under Section 9.31;
 - (2) if a reasonable person in the actor's situation would not have retreated; and
 - (3) when and to the degree he reasonably believes the deadly force is immediately necessary:
 - (A) to protect himself against the other's use or attempted use of unlawful deadly force; or
 - (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Sec. 9.33. DEFENSE OF THIRD PERSON. A person is justified in using force or deadly force against another to protect a third person if:

- (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
- (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

Penal Code Sec. 1.07. DEFINITIONS. (a) In this code:

- (42) "Reasonable belief" means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor.

***Graham v Connor*, 109 S. Ct.1865, 1989, US Supreme Court.**

APD General Order B101 mirrors the United States Supreme Court standard for the use of deadly force in *Graham v Connor*.

Conclusion to Allegation #4

As described in the conclusion to Allegation #3, Quintana's choice of tactics and his approach to Sanders contributed directly to the chain of events that followed, which ultimately led to Quintana using deadly force against Sanders. If different tactics had been employed, the necessity to use deadly force may have been avoided entirely. However, for the purpose of examining this allegation, the use of force against Sanders is treated separately, outside of the larger situational context.

Officer Quintana stated that, as he was attempting to awaken Nathan Sanders, he observed a handgun in Sanders's waistband. As Officer Quintana attempted to take control of the firearm, Sanders struggled to maintain control of the weapon. As Quintana lost control of the weapon, he observed Sanders drawing the weapon from his waistband. Officer Quintana believed that lethal force was reasonably necessary to defend his own life and the life of his fellow officers. Officer Quintana believed he was in imminent and immediate danger. It was not reasonable for Officer Quintana to give any type of verbal warning prior to using lethal force. If Officer Quintana had entered the vehicle or stopped to give verbal commands Sanders may have seriously injured or killed him or the other officers present.

The statements given by Officers Hitzelberg and Siddiqui were consistent with that of Officer Quintana. The physical evidence (forensic and ballistic evidence) supports Officer Quintana's version of events. The impact pattern and bullet trajectories on the vehicle match Quintana's description of the shots taken. The trajectory of the bullet recovered from the torso of Nathan Sanders indicates that it was fired through the rear window and, at the time it struck Sanders, he was seated with his body turned to his left, with his left shoulder facing the rear of the vehicle, as if he was in the process of turning and moving to exit the vehicle. The trajectory of the bullet recovered from the dashboard of the vehicle indicates that it was fired through the rear window, to the right of the first shot, consistent with Quintana's story that he was moving to his right while firing two rounds in quick succession. The trajectory of the bullet recovered from Sanders's head indicates that it entered the back right passenger window and travelled through one of the rear head rests before striking Sanders, indicating that Sanders was upright, with his head up, as described by Quintana when he took his third shot. When Sanders was removed from the vehicle, a pistol matching the description given by Quintana was found on the car seat where he had been sitting.

Sir Smith remembered very little of the incident and had no knowledge of the shooting of Sanders. Michael Franklin corroborated Officer Quintana's version of events up to the point where he was placed in the back of Officer Quintana's patrol car. From that vantage point his view was partially blocked and he stated that he ducked down once the shots started. However, he described witnessing a struggle between Quintana and Sanders, and he observed Quintana first engaging Sanders, then Smith, as described by the Officers. He did not witness any officer other than Quintana fire their weapon.

The witnesses located in the parking lot at the time of the shooting were all affiliated in some way with the three subjects in the Mercedes. Internal Affairs found their statements to be generally consistent with Officer Quintana's version of events up to the point where he placed Franklin in custody. After that, their stories diverged from each other and from that of the involved officers. It is unknown whether the differences constitute an intentional attempt by the witnesses to be deceptive or is simply a reflection of their varying perceptions of the event. Based upon the physical evidence, it is clear that much of what was described by the witnesses could not – and did not – happen. A few examples:

- Persephony and Precious Felder and Dorie Houston all stated that Sanders was holding his hands up the air. The forensic/ballistic evidence indicates that his arms were not in that position when he was shot.
- Destiny Robinson claimed to hear Sanders say, "Hey man, what you all doing?" She also said that she heard one of the officers yelling "fire" (F4-D1) It is clear from the audio of Officer Hitzelberg's in-car video that neither of those comments were made.
- The witnesses claimed that more than one officer shot into the vehicle, when the evidence indicates that only Quintana fired his weapon.

Consequently, Internal Affairs finds that the witnesses' accounts of the shootings lack credibility.

Internal Affairs concludes that Officer Quintana's use of force was objectively reasonable in light of the factors stated in APD General Orders and applicable law. Internal Affairs concludes that Officer Quintana did not violate the Austin Police Departments General Orders Polices and Procedures and was within policy when he used deadly force against Nathan Sanders.

As a result of this administrative investigation, Internal Affairs recommends the allegation be classified as **Exonerated**.

Allegation #5

It is alleged that on May 11, 2009, Officer Leonard Quintana was present at a deadly force encounter at the Walnut Creek Apartments, during which he may have failed to follow standardized department training and tactics if it was objectively reasonable to do so, and may have failed to employ sound judgment, in his decision to confront and attempt to take into custody potentially armed suspects.

The complaint, in its entirety, is in file. (A-1)

Response to Resistance - Sir Smith

Subject – Officer Quintana

Policy Associated to Allegation #5

General Orders:

B101a. - Response to Resistance

.02 Use of Objectively Reasonable Force

- B. Officers may use only that amount of force to achieve lawful law enforcement objectives that is objectively reasonable based on the totality of the circumstances they confront. This test of objective reasonableness embodies allowance for the fact that officers often are forced to make split second judgments about the amount of force that is necessary in circumstances that are tense, uncertain, and rapidly evolving. “Reasonableness” is judged from the perspective of a reasonable officer, not with the 20/20 vision of hindsight. This test of reasonableness is not capable of precise definition or mechanical application – it requires careful attention to the circumstances of the particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively resisting or attempting to evade arrest by flight or concealment.
- B. Officers must be able to articulate the facts and circumstances that made the use of force objectively reasonable. Factors that may be considered in determining whether a use of force is objectively reasonable may include, but are not limited to:
1. Information reported to the officer;
 2. Opportunity for de-escalation;
 3. Opportunity to develop a coordinated plan or approach;
 4. The subject’s response or lack of response to police commands;
 5. Actions of the subject, including the degree of resistance by the subject;
 6. Statements of intent by the subject;
 7. Availability and utility of lesser force options;
 8. The severity of any crime at issue;

9. The degree and immediacy of any threat posed by the subject;
 10. The potential for injury to the officer, subject, bystanders, or other persons;
 11. Risks posed by escape of the subject;
 12. Physical differences between the subject and the officer that may affect the level of threat posed (including age, size, strength, skills, injuries, level of exhaustion);
 13. Influence of drugs or alcohol on a subject;
 14. Possession or proximity of weapons;
 15. Experience and skill level of the officer;
 16. Relative numbers of subjects and officers; or
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- C. Warning Shots Prohibited:
The firing of a warning shot(s) is prohibited.
- D. Display of Firearms:
Firearms shall not be displayed or pointed in a threatening or intimidating fashion unless it is objectively reasonable to believe that there is a substantial risk that the situation may escalate to the point where lethal force would be permitted. If it is later determined that lethal force is not necessary, the firearm shall be secured or re-holstered as soon as reasonably practical.

State Law Associated with Allegation #5

Texas Penal Code, Chap. 9 – Justification Excluding Criminal Responsibility

Sec. 9.01. DEFINITIONS - (3) "Deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

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- (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
- (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
- (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

Sec. 9.31. SELF-DEFENSE.

(a) Except as provided in Subsection (b), a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

Sec. 9.32. DEADLY FORCE IN DEFENSE OF PERSON.

- (a) A person is justified in using deadly force against another:
- (1) if he would be justified in using force against the other under Section 9.31;
 - (2) if a reasonable person in the actor's situation would not have retreated; and
 - (3) when and to the degree he reasonably believes the deadly force is immediately necessary:
 - (A) to protect himself against the other's use or attempted use of unlawful deadly force; or
 - (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Sec. 9.33. DEFENSE OF THIRD PERSON. A person is justified in using force or deadly force against another to protect a third person if:

- (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
- (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

Penal Code Sec. 1.07. DEFINITIONS. (a) In this code:

- (42) "Reasonable belief" means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor.

Case Law

***Graham v Connor*, 109 S. Ct.1865, 1989, US Supreme Court.**

APD General Order B101 mirrors the United States Supreme Court standard for the use of deadly force in *Graham v Connor*.

Conclusion to Allegation #5

Based upon the available evidence, Internal Affairs believes the following to be an accurate account of Officer Quintana's contact with Sir Smith:

Sir Smith was dressed in a manner that would have allowed him to conceal a handgun in his waistline as did Nathan Sanders. Officer Quintana had visually inspected Smith's dress prior to confronting Nathan Sanders. The information on the occupants of the Mercedes indicated they could be armed and, after speaking with Michael Franklin, Officer Quintana had formed the strong belief that there were guns in the vehicle.

Nathan Sanders was found to be in possession of a pistol and Officer Quintana was forced to utilize deadly force against Sanders to defend himself from the potential use of deadly force by Sanders. At one point while shooting at Sanders Quintana was struck by glass and believed that Sanders was shooting back and he had been hit by gunfire. While Officer Quintana was still actively engaged with Nathan Sanders, Sir Smith exiting the vehicle from the front passenger's seat. He immediately ran straight at Officer Quintana in a bent over position with his hands at his waist. His head was up and he was looking directly at Officer Quintana. Officer Quintana was forced to redirect his attention from Sanders to a new threat approaching from a different direction. Forced to make an instantaneous assessment, Quintana believed that Smith was pulling a handgun from his waistband and attacking him. Through his police training Officer Quintana knew that a threat could extend beyond one person and responded instinctively by using deadly force against Smith. Officer Quintana reasonably believed that lethal force was necessary to defend his own life and the life of his fellow officers. Officer Quintana believed he was in imminent and immediate danger. It was not reasonable for Officer Quintana to give any type of verbal warning prior to using lethal force. If Officer Quintana had stopped to give verbal commands Smith may have seriously injured or killed him. After he was shot, Smith exposed his hands and went to the ground. At that time Officer Quintana determined that he was not an immediate threat and discontinued the use of deadly force.

Officer Hitzelberg observed Smith exit the vehicle and run at Officer Quintana. He believed that Smith was attacking Quintana. Officer Siddiqui's back was to the Mercedes and he did not witness Smith exit the vehicle and he did not turn around until Smith was falling to the ground.

The physical evidence (ballistic and forensic evidence) supports Officer Quintana's version of the events. The path of the bullet that struck Smith shows that it entered his upper left chest, exited his lower abdomen, and then struck left leg, indicating that Smith was bent forward as described by Quintana. The trajectories of the two shots fired at Smith (indicated by the damage to the two vehicles) show that Smith's door was open and he was not in the vehicle when the rounds were fired.

The shooting of Smith takes place out of view on Hitzelberg's in-car video, but Quintana is in view when he takes the shots at Smith. Almost immediately after taking his third

shot at Sanders, he can be seen almost imperceptibly refocusing his attention to his right. His first shot at Smith is taken almost immediately after his last shot at Sanders. When Smith comes into view his right hand is visible and empty, and Quintana can be seen tracking Smith with his weapon as Smith falls to the ground, but Quintana does not fire again.

Sir Smith had only a vague recollection of the incident. He said that when he heard the first shot (at Sanders) he thought something bad was happening and his instinct was get out of the car and run. He said he did not know the police were outside the car. He did not know who shot him. No firearm was found in Smith's possession after he was shot.

Michael Franklin's view was partially obstructed and he ducked down while the shots were being fired. He reported seeing Quintana firing in the direction of Smith and Smith falling to the ground.

As described in the conclusion to Allegation #4, the details of the shooting provided in the statements given by the witnesses in the parking lot are not consistent with that of the involved officers. Internal Affairs did not find the witness statements to be credible.

Internal Affairs noted that, once Smith was on the ground, a considerable amount of time passed before Quintana frisked him for weapons and it appears that Quintana did not keep always Smith within his view prior to frisking him. If Quintana did in fact believe that Smith had been possibly going for a weapon in his waistband, it would seem that an immediate frisk would have been called for. When asked about this, Quintana stated he could see Smith's hands and he was more immediately concerned about the threat from Sanders.

The investigation revealed that Sir Smith was not in possession of a firearm and his action of running at Quintana was a startled reaction to hearing the gunshots and not an attempt to attack Quintana. Despite the fact that Quintana's interpretation of Smith's actions and intent proved to be incorrect, his belief when he took the shots was not objectively unreasonable under the circumstances. Consequently, Internal Affairs concludes that Officer Quintana's use of force was objectively reasonable in light of the factors stated in APD General Orders and applicable law. Internal Affairs concludes that Officer Quintana did not violate the Austin Police Departments General Orders Polices and Procedures and was within policy when he used deadly force against Sir Smith.

As a result of this administrative investigation, Internal Affairs recommends the allegation be classified as **Exonerated**.

Other Policies Considered

Although not treated as a separate allegation, Internal Affairs believes that the following provision in General Orders may have relevance in this case:

B101a - Response to Resistance

.05 Firearms

- B. Firearms shall not be discharged:
- a. As a warning;
 - b. Unless the officer has an objectively reasonable belief that deadly force is reasonably necessary to defend the officer's or another's life that is in imminent danger of serious physical injury or death:
 - (i) In any misdemeanor case;
 - (ii) From a moving vehicle, or at a moving or fleeing vehicle; or
 - (iii) To effect the detention or arrest of an individual attempting to escape
 - c. When circumstances do not provide a probability of striking the intended target; or
 - d. **When there is significant risk to the safety of an innocent bystander or other police officer and that risk exceeds any imminent risk posed by the subject**

Considering the fact that Officer Quintana was moving at the time he fired all five of his shots, the shots appear to be well-placed. However, it is clear from his interviews that, at the time he took the shots, he did not know where Officers Hitzelberg and Siddiqui were. It is also clear that, when he was shooting at Sanders, he was unaware of Sir Smith's exact location or whether he may have moved into his line of fire. Excerpts from his interviews:

- Describing where Hitzelberg was while was trying to wake up Sanders: *"I knew he was behind me or somewhere to my back, to my left side. Uh, exactly where he was at, I don't even know. I don't know if he was on the other side of the door or I don't know if he was right on my hip. I don't know exactly where he was at."* (B2-B, line 5023)
- Regarding where Hitzelberg was located when he started backing out of the doorway:

Q: Okay, what was Officer Hitzelberg doing at this time?

A: *At this time? Uh, he was behind me so I'm not sure, um, you know, Alex is a lot taller than me. I don't even know if he had his light shining over my head at the time. Uh, I couldn't say. I don't – I don't know.* (B2-B, line 5342)

- Regarding where Hitzelberg and Siddiqui were when he fired his first shot:
Q: When you first fired the – when you fired the first shot, were you conscious of where Officer Hitzelberg and Siddiqui were?
A: *Yes sir.*
Q: Okay. Did you know where they were?
A: *Uh, exactly where they were at, no sir. I knew uh, where we were at, where we were all posted at. Um, but uh, the second I shot the first round, I'm pretty sure they were in their same spots or the – in the vicinity. I know Alex had moved because he was right with me. And by me yelling '32', I'm pretty sure Siddiqui kind of took some cover and might have moved or somehow got out of the way. But uh, uh, to say exactly he was here and he was there, I wouldn't be able to say that. (B-2B, line 5387)*

Later in the same interview:

- Q: Now you said as you moved back you knew Alex was moving with you. Is that correct?
A: *Yes sir.*
Q: So you saw him. Was he walking backwards? Running backwards? Was he running?
A: *Uh, the only reason why I could say I knew he was uh, moving backwards is because when all this started he was right here on my hip right behind me somewhere. And as fast as I moved back uh, it's just logical. I mean I – I didn't see him moving uh, in any direction.*
Q: So . . .
A: *I didn't see him. I was focused . . . (B2-B, line 5424)*

Later in the interview, regarding Siddiqui:

- A: *And uh, Siddiqui I'm – yeah, I'm sure that he was where he was at right before – right before I – I uh . . .*
Q: Did you see . . .
A: *. . . pulled the trigger.*
Q: . . . see Siddiqui?
A: *Uh, no sir.*
Q: Any chance that he might've moved?
A: *From where he was at at the doorway? Absolutely, yeah. (B-2B, line 5456)*
- Concerning Sir Smith's location when he was shooting at Sanders:
Q: Um, as far as shots one through three, could you ever see the front passenger?
A: *No sir. (B2-B, line 4651)*
- Regarding where Siddiqui was when he fired at Smith:
Q: Where was – did you see Officer Siddiqui before you engaged the second suspect?
A: *Uh, I did not see him, no. (B2-B, line 6034)*

- Describing when he engaged Smith in his SIU interview: ***“I don’t remember where, uh, Officer Hitzelberg went. I don’t remember where Officer Siddiqui was. I didn’t see him.”*** (B2-A, line 606)

Officer Quintana stated in his IA interview that although he wasn’t always sure where the two other officers were, he was positive they were not in his line of fire when he shot. However, he also admitted to have experienced a bit of tunnel vision: ***“Um, at the time everything uh, the – where it got pretty tunnel vision to me I think was after the very first shot. Um, then at that point everything kind of – kind of closed in a little bit.”*** (B2-B, line 5408)

It was clear in Officer Hitzelberg’s in-car video that Officer Quintana was unaware that Officer Siddiqui was crawling on the ground, almost at his feet, as he engaged Smith. If Siddiqui had not vacated his position he would have been in the direct line of fire.

Once again, this situation speaks to the officers’ failure to plan and coordinate their actions. By failing to establish clear roles and areas of responsibility, they placed themselves in a position that could have led to the accidental shooting of Officers Hitzelberg and Siddiqui or the inadvertent shooting of Sir Smith.

Other Factors:

- During the investigation of the officer involved shooting, a video audit of Officer Quintana's in car camera tapes was conducted by Detective Paul Kaderli and Detective Sam Kreider. The audit was for the six months prior to the shooting incident (January 2009 through June 2009). The results of the audit found that over the six month period, Officer Quintana had 174 calls that he was required to record with his MVR per departmental policy. Of those 174 calls, it was found that on 13 occasions he failed to turn on his camera, or turned it on after the call began. Each call was reviewed to include the CAD report, radio traffic, and Versadex report if one existed. At the conclusion of the audit, Officer Quintana was interviewed by Internal Affairs on the thirteen calls. Below is a summary of the types of calls or circumstances;
 - 1 – Probationary officer in operation of MVR and failed to turn camera on.
 - 1 – Probationary officer in operation of MVR and turned camera on late into the call.
 - 1 – Officer Quintana in control of MVR and turned camera on late into the call.
 - 5 – Officer Quintana in control of MVR and failed to turn MRV on for entire call.
 - 2 – Incidents were Officer Quintana self initiated a subject stop in order to get something to eat instead of taking a lunch break.
 - 3 – Described as consensual stop / citizen contacts by Officer Quintana.

During this period, Officer Quintana, a Field Training Officer, had three rookie officers assigned to him. They were Probationary Officers Jensen #6460, Holmstrom #6457 and Ortiz #6477. The MVR tapes for these officers were obtained and reviewed by Detectives Kaderli and Kreider. In addition the three officers were interviewed by internal affairs.

(See interviews and ADORS reports in their entirety; PPO Jensen E-12, PPO Holmstrom E- 11 and PPO Ortiz E-14)

The three officers were questioned regarding all aspects of their training with specific emphasis on MVR, high risk stops, waking sleeping subjects, policy, officer safety and tactics.

The officers stated that Officer Quintana stressed MVR usage more than what policy required. They were questioned about practices of not turning on the camera when required to do so, in order to avoid subjects seeing the red light. All stated they had heard of this but were never trained to do this. Additionally, they stated a directive had come out for the Northeast Command, which was previously issued, by then Commander Holt, which instructed officers that all calls would be recorded. This was confirmed by Officer Quintana during his IAD

interview and later by now Assistant Chief Holt. The complete audit can be located in section "M" of the investigative case file.

- During the investigation, Internal Affairs conducted an audit of MDC messages sent by officers on the shooting call. The audit consisted of checking messages from the time the call was initiated at 5:07 a.m. on May 11, 2009 until 9:06 p.m. on May 11th. The memorandums for the CAD message audit can be found in section "L" in the investigative file.
- Throughout the investigation, Internal Affairs had great difficulty in locating accurate lesson plans/outlines on trainings classes attended by the officers involved in this case. It was determined that the records retention policy used by the department allowed lesson plans to be deleted or destroyed. It is vital that all lesson plans be archived so accessibility to these records can be made long after the officer has attended the training. This information will then be available to the department for any and all administrative and criminal investigations as well as for civil defense. Additionally, it was found that the department has no set method on how new tactics are disseminated to officers throughout the department. By creating a method to train or update officers, it would allow for that tactic to become standardized and used by officers throughout the department.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	Plaintiffs,	§
		§
v.		§ CIVIL ACTION No. 1:20-cv-01068-LY
		§ JURY DEMANDED
MICHAEL NISSEN AND CITY OF		§
AUSTIN,		§
	Defendants.	§

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 62
Licon, Alan APD Internal Affairs Report**

(COA 175495)

FILED UNDER SEAL

**Internal Affairs Division
Personnel Complaint Control Sheet**

Class A

Internal

IAD Case #2010-1444

Date Occurred 11/28/2010	Date Received 11/30/2010	Date Investigation Completed 4/5/2011	180-Day Deadline 5/27/2011
Complainant's Information			
Name	Lt. Kevin Leverenz		
Incident Location	7 th St and IH35 west frge south bound		
Employee's Information			
Name	Employee #	Rank	Assignment
John Gabrielson	5342	Officer	Edward night Region 2 patrol
Employee's Chain of Command			
Sergeant	Lieutenant	Commander	Assistant Chief
Yates	Gamel	S. Baker	Munguia
Allegations Investigated			
Allegation(s) (Enter Appropriate G.O. & Specific Title)	Final Classification	Commander/Assistant Chief Signature	
B101a.05(C):Response to Resistance	SUSTAINED	<i>[Signature]</i> 5/11/32	
A201b.01(B) Responsibility to the Community	SUSTAINED	<i>[Signature]</i> 5/11/32	
01a.02.1 Code of Conduct-Honesty	UNFOUNDED	<i>[Signature]</i> 11/32	
Required Signatures			
City Legal Review		Employee #	Date
Investigator's Signature	<i>[Signature]</i>	2565-	5/25/11
IAD Commander	<i>[Signature]</i>	2180	5/26/11
Chief or Assistant Chief	<i>[Signature]</i> 11/32	1132	5/25/11

Discipline decided by employee's chain-of-command:

- Oral Counseling
 Oral Reprimand
 Written Reprimand
 Temp Suspension (# of Days 5)
 Demotion
 Resigned/Retired under Investigation
 Indefinite Suspension

If applicable, attach page 2 (Other Factors).

Enter IAD Case #

Other Factors Addressed By the Chain-of-Command (Attach Separate Sheet if Necessary)			
Issue	Action Taken	Supervisor's Name	Date

Confidential

AUSTIN POLICE DEPARTMENT
INTERNAL AFFAIRS UNIT
INVESTIGATIVE SUMMARY

To: Art Acevedo
Chief of Police

Via: Michael Jung
Commander, Internal Affairs Unit

Fred Fletcher
Lieutenant, Internal Affairs Unit

From: Brad L. Fithian
Sergeant, Internal Affairs Unit

Date: April 5, 2011

Subject: Investigative Summary - IAD Control # 2010-1444

INTRODUCTION

On November 28, 2010 walking beat Officer John Gabrielson witnessed a single vehicle collision with a pole at the north curblineline of 7th street and the west frontage of IH-35 southbound. Officer Gabrielson was on foot at the same intersection with Officer Justin Berry. Officer Gabrielson started walking towards the vehicle when he observed it back up from the pole. Officer Gabrielson drew his duty weapon and began giving verbal commands to the driver to stop him from attempting to drive forward. Officer Justin Berry and Officer Gabrielson moved to the driver-side of the vehicle and the driver was taken from the vehicle to the ground. The driver was handcuffed by other responding walking beat officers and, after an investigation, arrested for DWI by Officer Gabrielson.

Complaint and Allegations

The allegations were taken directly from the Chain of Command Internal Affairs Complaint.

It is alleged that you might have violated APD policy for failing to report a Response to Resistance incident, used Excessive Force and failed to give an accurate account of your actions (Honesty) as to your conduct/actions related to call 2010-3320320 on November 28, 2010.¹

¹ Complaint in section A-1.

General Order B101a.04.A.1.2 Response to Resistance-Force used-

General Order A201a.02.1.Code of Conduct-Honesty-

General Order B101c.02.A. Response to Resistance-Reporting-²

Synopsis of incident and Investigation

The following synopsis is derived solely and exclusively from evidence obtained during this investigation and which is included in the case file as referenced here and in the associated Table of Contents. Such evidence includes witness statements and affidavits, the subject officer's statement, police reports and affidavits, photographs, video accounts of the incident, physical evidence and reports and other items. No one has presented any information to suggest that any of this evidence or any of the information presented in this synopsis has been contested, contradicted or is the subject of any discrepancy.

On November 28, 2010 Officer John Gabrielson and Officer Justin Berry, both walking with their bicycles, were escorting two females who had flagged them down with concerns and fear of a possible disturbance with a male who had threatened them in a cell phone conversation. Officer Gabrielson and Officer Berry were walking with the females to their vehicle and had made it to the intersection of 7th street and IH-35 west-frontage southbound when Officer Gabrielson observed a red pick-up strike a light pole. The single vehicle crash with the pole was at the northwest corner of the same intersection where Officer Gabrielson, Officer Berry and the females were standing at.

Officer Gabrielson walked into the street to check on the driver and investigate the collision. As Officer Gabrielson approached, the red pick up truck backed away from the pole it had struck.

Officer Gabrielson was giving verbal commands while walking towards the pick up truck but after it backed away from the pole and into a lane of east bound traffic he stopped walking.

While in the intersection Officer Gabrielson drew his duty weapon and continued to give verbal commands to the driver to stop.

Officer Berry notified dispatch, "One at gun point, hold the air."

The driver, while still in the driver seat, put his hands up.

Officer Gabrielson with his duty weapon in his hands moved to the driver side of the pick-up truck.

² General Orders located in section F-1.

Officer Berry also moved to the driver side of the pick-up.

On the driver side of the pick-up truck, Officer Berry had his Taser drawn and Officer Gabrielson still had his duty weapon out.

Once out of the vehicle, the driver went to his knees, and then Officer Berry used the drivers hand to "*direct*"³ the driver to a face down position on the ground. At that time, Officer Vance and Officer Zimmerman approached and, together, the three officers handcuffed the driver with out incident.

The approximate duration of time from Officer Berry notifying dispatch of a single vehicle collision to updating dispatch that there was one in custody was 21.86 seconds.

Corporal Forshee, who was the acting supervisor, responded to the scene since he heard the radio traffic of "one at gun point". Cpl Forshee responded to the scene and checked for any response to resistance or supervisory issues.

Officer Gabrielson conducted an investigation at the scene which ended with the driver providing a breathe specimen of .176 and .163 and was booked into TCSO for DWI.

The single vehicle crash occurred at the end of the shift. Right after the crash at showdown Officer's Zimmerman, Mistic, Berry, and Vance went to Corporal Forshee in regards to the above detailed incident. At the beginning of the next shift Sgt Yates requested memo's from all involved officers from the single vehicle crash.

After a review of the memos, Lt Leverenz notified Internal Affairs of concerns based on the officer's memos and an IA investigation was initiated.

Civilian Witnesses Interview:

On January 19, 2011, I interviewed Alan Licon, who was the driver of the pick-up and arrested for DWI by Officer Gabrielson. The interview took place at 407 west 18th Street apartment #200, the residence of Alan Licon. Rolando Delgado of the Office of Police Monitor was also present during the interview.

I asked Alan to recall the actions of the APD officers on scene and he stated,

*"And they were - they were being polite - they were being nice."*⁴

I asked Alan if he recalled any officer with a Taser, gun, nightstick, pressure points, or a boot being placed on him and he said no to each question.

Alan did not recall any verbal commands or anything an officer said to him and he replied,

³ Berry statement page 7 line 271.

⁴ Licon statement page 3 line 103.

*"No I really don't. I - I - like I remember him asking me if I was drunk and I told him right away yes, or if I - if I'd been drinking. I told him I had".*⁵

I asked Alan if he tried to drive away after he crashed and he stated, "No."⁶

I asked Alan if the conduct of the officers was professional and he stated,

*"Yeah, for the most part, but not when I told you about the wallet."*⁷

At the time of the arrest for DWI Alan Licon was under the age of twenty one. He was booked into TCSO for DWI under the name of Jackson Muse, the name from a driver's license in his wallet. The wallet issue that Alan mentioned is that he stated he did not present the drivers license with the name Jackson Muse but he recalled an unknown officer at the BAT bus looked at the correct driver's license he had in his wallet but disregarded it and used the driver's license with the wrong name which was also in his wallet. Alan stated he did not try to correct the officer from using the wrong name for any part of the arrest.⁸

Copies of the versedex reports documenting Jackson Muse reports of his stolen driver's license are located in section C.

Police Witness Interviews:

Officer Mistic Interview

On February 7, 2011, Sgt. Stresing and I interviewed Officer Jason Mistic in the presence of Louis Gonzales from the Office of Police Monitor. The complete interview and memo of the incident is located in folder/ section D-1 of this investigation.

During the interview Officer Jason Mistic referred to his previously written memo to refresh his memory. Jason stated he responded to the intersection of the crash on his bike as he heard the radio broadcast of a subject being held at gunpoint.

Officer Mistic stated that as he arrived he heard officers giving verbal commands to the driver of the vehicle which had crashed.

I asked Officer Mistic what else he heard besides verbal commands and he stated,

Uh, I heard (John Gabrielson) giving him, uh, well saying things. Not necessarily commands....

⁵ Licon statement page 6 line 236 and 237.

⁶ Licon statement page 10 line 410.

⁷ Licon statement page 5 line 206.

⁸ See section C for versedex reports documenting the APD reports of Jackson Muse stolen drivers license.

*Um, he - he seemed pretty amped about the whole situation and I heard him tell the guy that if he ran over him he would blast him or "fucking blast him."*⁹

Officer Mistic stated when he heard Officer Gabrielson make the comments it took place on the sidewalk and the suspect was already face down on the sidewalk.

I asked Officer Mistic if he thought Officer Gabrielson's utterance was threatening as a direct threat. Or do you think it was letting off steam?

Mistic stated, "*Um, yeah that's - that - that's my, uh, that's - that's the best I can do. I mean he - it seemed like he was just blowing off steam. Um, and it's a funny way to blow off steam*"¹⁰.

Officer Mistic stated he did not see Officer Gabrielson draw his duty weapon but he did see it being pointed at the subject.¹¹

I asked Officer Mistic if he saw any physical contact between Officer Gabrielson and the driver and he stated, "*Uh, he, um, I remember he had his foot somewhere on the back of the guy. Either the top of his back or base of his neck. Um, seemingly to hold him in place as he was being handcuffed. However he was com- the subject was compliant.*"¹²

During the interview, Officer Mistic drew a rough sketch of the crash scene and the position of the officers and the driver.

Corporal Forshee Interview

On February 8, 2011, Sgt. Catherine Johnson and I interviewed Corporal Maurice Forshee in the presence of Rolando Delgado from the Office of Police Monitor. The complete interview and memo of incident is located in folder/ section D-2 of this investigation.

Corporal Forshee stated he was the acting supervisor and heard an officer state on the radio, "one at gun point," so he responded to the scene for the response to resistance aspect. Once at the scene Corporal Forshee stated he spoke with Officer Gabrielson in regards to the pointing of the firearm and did not speak with the driver who was in handcuffs sitting on the curb.

I asked Corporal Forshee how it came to his attention that there might have been issues during the arrest of the driver and he stated,

"There was Officer (Zimmerman), (Vance), (Mistrick) - those three were in the office and they had told - what they did was they shut the door and they said, you know, "Corporal I need to talk

⁹ Mistic statement page 4 line 126 thru 146.

¹⁰ Mistic statement page 8 line 303 thru 305.

¹¹ Mistic statement page 6 line 237.

¹² Mistrice statement page 6 line 221 thru 224.

to you,” and basically they outlined at that point their version of events that were different I guess would be the best way to say it.”¹³

Corporal Forshee went on to say that Officer Zimmerman was most concerned with the lack of officer safety as he felt Gabrielson had flagged¹⁴ several officers with his duty weapon during the arrest. Forshee recalled Officer Vance thought Officer Gabrielson was out of control and Officer Mistic informed him that Gabrielson had put his foot on the suspect’s neck or shoulder and pointed his weapon at the suspects head.

I asked Corporal Forshee if Gabrielson was the odd man out on the shift and that is why the officers came to him so they could get him off the shift and he replied,

“There’s some personality conflicts amongst them when it comes to Officer (Gabrielson) and I - I really believe and honestly that these guys don’t have - wouldn’t have had an issue with Officer (Gabrielson) had they been able to approach him in the past with certain things that occurred and ‘cause they believe that he’s unapproachable and he’s not able to take constructive criticism - instead it’s just criticism. So yes, you know, is he the odd man out - yes, but had they - had it been one of the other guys I don’t know.”¹⁵

Corporal Forshee stated he did not feel the shift had an agenda to get rid of Officer Gabrielson but that there had been a past issue with a subject with a knife and afterwards the shift tried to talk with him over how he handled the call and it was not received well by Officer Gabrielson. Corporal Forshee stated that after Sgt Yates counseled Gabrielson on the subject with a knife he seemed to understand.

Corporal Forshee stated he wanted to clarify on the use of force question he asked Officer Gabrielson and specifically it was,

“What I - what I asked him was was there a use of force that needed to be documented and he told me that he pointed a firearm and that’s where - I was like okay. I left it at that.”¹⁶

Corporal Forshee stated if he had been told by Officer Gabrielson that he had placed his foot on the suspects back to affect the arrest he would have added a response to resistance level three code to document it.

Corporal Forshee described the behavior of Officer Gabrielson at the scene as excited and “amped up”¹⁷

¹³ Forshee statement page 4 line 130 thru 134.

¹⁴ Flagged defined by Zimmerman in his statement page 12 line 483 as “waving the gun around as he looking around”.

¹⁵ Forshee statement page 5 line 176 thru 182.

¹⁶ Forshee statement page 7 line 259 thru 261.

¹⁷ Forshee statement page 7 line 304.

Officer Vance Interview

On February 10th, 2011, Sgt. Catherine Johnson and I interviewed Officer Jeffrey Vance in the presence of Rolando Delgado from the Office of Police Monitor. The complete interview and memo of incident is located in folder/ section D-2 of this investigation.

I asked Officer Vance to describe what occurred on the scene when he arrived to the collision and he stated,

*"As I got off my bike um, I saw who I thought to be the suspect uh, proned out position on the sidewalk on the north curb line. Officer Berry was to his left and uh, Officer (Gabrielson) was to his right closest to the truck. Um, as I got off my bike, saw Officer Berry had his Taser on the suspect. Officer (Gabrielson) had his uh, duty weapon drawn, and as I got closer um, I saw Officer (Gabrielson) put his left foot on the other suspect's back - upper back or his neck. Um, and as he was doin' that he - I saw him bring down his duty weapon in uh, close proximity to his head, probably within about one foot, and uh, I can't remember his exact words, but it was somethin' to, "If you move, I'm gonna shoot you," or, "If I move I'm gonna shoot you in the head." And Officer Zimmerman and I - Officer Zimmerman came from - to the suspect's left, I came to the suspect's right with the intentions of uh, securing him in handcuffs. Um, and at that point when I came down to the suspect's right, I had to physically push Officer (Gabrielson) with my right arm - basically pushing his duty weapon and his arms away from the suspect um, so I mean, uh, just to avoid accidental discharge or somethin' like that. Uh, I think at that point, myself and Officer Zimmerman grabbed the suspect's arms. He grabbed his left, I grabbed his right, Officer Berry holstered his Taser, came in, secured him in handcuffs."*¹⁸

Officer Vance stated he did not think the suspect knew the gun was pointed at him as he was prone out and face down. Officer Vance stated he did not see any one else with hands on the suspect, just Officer Gabrielson's foot.

I asked Officer Vance why he felt it necessary to step in and handcuff the suspect and he stated,

*"Uh, I didn't feel it was necessary. I don't know. I wasn't on scene to see what happened before for him to think he needed to draw his - his duty weapon, but when I got on scene, I felt that, at that time it wasn't necessary 'cause the suspect wasn't presenting any - any physical threat to anybody. He was prone down on the - lying on the sidewalk, and there's no reason at all for him to have his duty weapon out, and I feel that we needed to come in, take control of the scene, and - and get everything calmed down."*¹⁹

Officer Vance described the behavior of Officer Gabrielson on the scene as,

*"Um, it was just - it was just kinda like a out - out of body, you know, kinda like by himself."*²⁰

¹⁸ Vance statement page 3 line 86 to 105.

¹⁹ Vance statement page 5 line 168

²⁰ Vance statement page 11 line 463-and 464.

Officer Vance stated he has seen Officer Gabrielson agitated before but always calmed himself down and, ... *“that’s why it was so ah - you know weird about the way he acted that night. I’ve never seen him do that”*.²¹

Officer Vance completed a rough sketch of the scene it is located in section D-3.

Officer Berry Interview

On February 10, 2011, Sgt. Catherine Johnson and I interviewed Officer Justin Berry in the presence of Rolando Delgado from the Office of Police Monitor. The complete interview and memo of incident is located in folder/ section D- 4 of this investigation.

Officer Berry stated he and Officer Gabrielson were in the process of escorting three females to their vehicles. They had made it to the southeast corner of 7th street and IH-35 southbound west frontage when a red pick-up *“center punched the light pole”*²² at the north west corner of the same intersection.

Officer Berry stated the intersection they had just crossed was full of traffic and as it was a very busy time downtown with the bar closings.

Officer Berry stated the pick-up truck had *“... pretty extensive damage from what I observed, saw lots of steam comin’ from the radiator, a lotta fluids bein’ flung out from the bottom”*²³

Officer Berry described the actions of Officer Gabrielson as,

“Um, without hesitation when the vehicle began to back up Officer (Gabrielson), um, begins to enter the intersection focusing on the vehicle. When he gets to right about here he begins to draw his duty weapon and starts to side step it - oh, no it’s more of this - it’s not to scale so you’ll have to forgive me. But he runs at a diagonal angle while pulling his gun out while he’s running and begins to side step to where he’s now - this car had moved and the suspect vehicle had moved forward a little bit more to right about here. Officer (Gabrielson) places himself directly in front of the suspect vehicle with his gun drawn out after having already had it out and side stepping this way to get in front of the suspect vehicle. I stayed where I was at, um, and the reason why I stayed where I was - ‘cause like I said I just was really concerned about this traffic still moving. ‘Cause it’s - we just had a green light and, you know, in my mind the green light was still there and, you know, people aren’t paying attention, the music’s goin’, you know, a lot of - not a good area. And so he - so I now kinda initially became concerned that Officer (Gabrielson) ran across into traffic so quickly and was now placing himself in front of the suspect vehicle with his gun out - of an intoxicated driver”.²⁴

²¹ Vance statement page 14 line 612 and 613.

²² Berry statement page 4 line 126.

²³ Berry statement page 4 line 115 and 116.

²⁴ Berry statement page 6 line 231 to 248.

Officer Berry described his actions while Officer Gabrielson was moving to the crashed pick-up truck as,

“Once all - once I could tell the other drivers were stopped and not going anywhere I began to approach. I pull out my Taser and I see these two hands stick out the driver’s side window like this, full view, full everything. Um, I knew at this point that the - the person was being compliant at this time and - and at that initial moment I could tell that he had nothing in his hands. I still had my Taser out, I come around the side of the vehicle, I order the driver out, driver gets out, hands are still in the air. I have my Taser on him just in the event he decided to evade or - or fight at that moment, um, we could respond appropriately. Sus- I then ordered the suspect to get on his knees and his belly. I can tell just by the look on his face - just from my experience that I’ve had that he was really confused as to what was goin’ on and clearly in shock. He wasn’t listening to the first commands the first time but then again....”

Officer Berry went on to describe what occurred once the suspect was out of the vehicle and on the sidewalk as,

“So I kept my Taser on him in the event that that changed. Um, and I secured my, uh, left foot on the back of his shoulder blade to hold him down on the ground thinking that - it was at this time that Officer (Gabrielson) would holster his weapon and place him in handcuffs and then we could figure out our investigation, go from there. Instead Officer (Gabrielson) got really close to the guy, pointed his weapon just inches and just from the guy’s head and began just to yell at the suspect saying that, “If you ever try running me over,” um, reference my report. And he yelled out, “I’ll blow your fucking head off if you ever try to run me over like that again.” Um, and what I was gonna say in this - this is when I knew that he’s not gonna handcuff and effect the - the detention or the arrest so I holster my - my Taser. A- at which time I could tell in my peripheral vision I see two, uh, bike officers approaching, um, in the distance. At which time I heard them yell, “Holster your weapon, holster your weapon, I got you.” And when I heard, “I got you,” that’s when they helped me effect p- place the person in handcuffs.”²⁵

I asked Officer Berry how many inches Officer Gabrielson’s duty weapon was from the suspects head and he stated,

“It was real close I mean it was maybe that - like just a couple of inches away. Like.. ...a inch or two”²⁶.

Officer Berry stated he had his knee on the suspect’s back and described Officer Gabrielson in a bent over, knees bent, gun in right hand stance when his duty weapon was close to the suspects head. Officer Berry described Officer Gabrielson as being,

²⁵ Berry statement page 7 line 276 to 291.

²⁶ Berry statement page 10 line 404 to 409.

*" it was my impression that he pretty much lost control of the situation as well as control of his actions at that point in time. He got, you know, I guess tunnel vision is what it is. And got overly amped up over a situation that he kinda placed himself.."*²⁷

Officer Berry explained that he felt it was an arrest situation and his experience helped him stay in a calm manner.

In the diagram that Officer Berry drew to use as a reference during the interview he had shown that he followed Officer Gabrielson and also crossed in front of the red pick up after it had backed away from the pole and was attempting to drive forward.

Officer Berry explained his actions as,

*"Um, we- after making sure that it seemed secure and by this time the driver's hands are already outta the vehicle away from the steering wheel and stuff. I - I was concerned which is why I was hesitant to move - slow to move to see what the vehicle was doing. You know, at this point Officer (Gabrielson)'s still yelling at the guy and, you know. So I said before I made sure this intersec- traffic was stopped to make sure that this vehicle is - I was very slo- I wasn't running over there I was - I was actually walking at a slow pace over there. At which time - which is when I realized everything's secure enough for me to cross in front of the vehicle."*²⁸

I also asked Officer Berry to clarify the fact that he had also put his foot on the suspect's back and he stated,

*"Yes, sir I did."*²⁹

Officer Berry stated he believed he told his corporal that he had put his foot on the suspects back, and then stated he did not recall if he had told him.

I asked Officer Berry to describe his decision to cross in front of the vehicle and he stated,

*"His hands were out the window so it was my belief, now, that he wasn't gonna drive off and I quickly got around in front of the vehicle. I - uh, there was no other way to go around it. I - I couldn't go behind it, couldn't go - that was the only way to go around it to help effect the arrest."*³⁰

I pointed out the similarities to Officer Berry of the tactics he used and how they were similar to Officer Gabrielson except he had less lethal force, while Officer Gabrielson had his duty weapon drawn. Officer Berry explained,

²⁷ Berry statement page 11 line 452 to 455.

²⁸ Berry statement page 12 line 509 to 517.

²⁹ Berry statement page 12 line 525.

³⁰ Berry statement page 14 line 577 to 581.

....”just from my perception it was that ju- in my - my point of view on this is is that if Officer (Gabrielson)’s in front of -- he placed himself in front of a moving vehicle with no protection -- had this guy come forward, placing Officer (Gabrielson) life in danger and Officer (Gabrielson) shot and killed the sus- killed the driver, I mean it’s my opinion he placed himself in that situation. There was other ways to have handled this call besides running out and getting in front of a drunk driver who you know is tryin’ to leave the scene and now you pretty much force your hand to have to kill a person”.³¹

I asked Officer Berry how the situation on the sidewalk could have been handled differently by Officer Gabrielson and he stated,

“It was my opinion Officer (Gabrielson) placed himself in that situation which then created a situation that got to where it got to. Where Officer (Gabrielson) thought he - this guy was gonna run him over which amped him up. Um, you know, I think get him on the ground, get him in handcuffs, takin’ a few deep breaths, c- clear head and dump some adrenalin and then go back and do your DWI investigation would have been the appropriate way to have handled it.”³²

I asked Officer Berry if the tactics that Officer Gabrielson used could have been the factors that kept the driver from driving forward and he replied,
“Yeah, and I - I n- I never thought of it in that light of manner before. Um, I mean I guess you can go either way. I guess in the sense that since no one was killed and no one got ran over I can say yes i-it”³³ ...

Officer Berry drew a rough sketch of the scene and it is located in section D-4.

Officer Zimmerman Interview:

On February 10th, 2011, Sgt. Catherine Johnson and I interviewed Officer Tracy Zimmerman in the presence of Rolando Delgado from the Office of Police Monitor. The complete interview and memo of incident is located in folder/ section D-5 of this investigation.

I asked Officer Zimmerman to tell what occurred at the scene of the crash when he arrived and he stated,

“So we come up and we see the guy - the suspect I guess - layin’ on the ground and, uh, Officer Berry’s off to the side, uh, he has his a- a- and I initially thought that he had his pistol out. I - I later found out that he had his Taser out. And, uh, and then, uh, Officer (Gabrielson) was standin’, uh, t- sort of like what would be the suspect’s right shoulder - like maybe his, uh, like in between so his ribs and shoulder like off to the side but kind of up a bit. And, uh, he had, uh, he had his pistol out and he had, uh, his foot on the guy’s back and his - had his pistol out at the back of the guy, you know. The guy was face down so he had his pistol at his, uh, the back kind of like - you could tell Officer (Gabrielson) was sort of, uh, amped up about the situation. I - I

³¹ Berry statement page 14 line 607-614.

³² Berry statement page 15 line 652 to 658.

³³ Berry statement page 16 line 703-705.

*didn't hear any of the - the part about how the truck had tried to hit him really -- at this point. All I could see was that the suspect was on the ground and (unintelligible). So, uh, he had the gun pointed at his back. He said, uh, you know, "Don't move, I'm gonna shoot ya - shoot ya in the back of the head." And, uh, he saw us comin' up as we were rollin' up and, uh, lookin' back at us and his gun's kinda wavin' around...."*³⁴

Officer Zimmerman stated he stepped in to handcuff the suspect as he saw Officer Gabrielson with his duty weapon out and in no position to handcuff and the guy was in that position for a reason so he handcuffed him.

Officer Zimmerman stated he heard Officer Gabrielson tell the suspect,

*"Don't move or I'm gonna shoot you in the back of the - back of the fuckin' head."*³⁵

Officer Zimmerman stated he thought Officer Gabrielson was amped up when he was making that statement to the suspect.

Officer Zimmerman drew a rough sketch of the scene and is located in section D-5.

Subject Officer Gabrielson Interview

On March 3, 2011, Sgt. Catherine Johnson and I interviewed Officer John Gabrielson in the presence of Rolando Delgado from the Office of Police Monitor. The complete interview and memo of incident is located in folder/ section B-3 of this investigation.

Officer Gabrielson gave the following account of what occurred when the vehicle crashed into the pole,

"we're at the 7th and Frontage there by the Tiger Mart and we're waiting to cross the street. There was kind of chaotic because we had a rollover collision that had just occurred at 6th and the Frontage so we had units over there, that was backed up. The traffic was backed all the way up into the 7th Street intersection and as you know it was maybe 30, 40 minutes past bar closing. So you still had all the foot traffic exiting into the parking lot. Well, we're just standing there chilling and all of the traffic was backed up on 7th Street. And I was looking - (Barry) was gathering with the girls and I - I was looking out at traffic and I remember seeing a red truck just flying down the outside lane, so it caught my attention. So I was just watching him. As I'm sitting there watching him, I just see him - didn't even really appear to lose control. He just kinda swerved and just hit the pole and stopped. And I was like, "Hey dude. (Barry), I just saw that truck hit the pole man. I'll take care of that...."

"...As soon as I stepped off the curb, man, that truck backed up on me. And all I thought about was, "Holy cow. Where's this guy gonna go?" I've got a blocked intersection. If he backs up and goes into the intersection he plows into stopped vehicles. If he turns heads down 7th Street,

³⁴ Zimmerman statement page 3 line 97 thru 112.

³⁵ Zimmerman statement page 7 line 267 and 268.

there's people in the crosswalk. He could hit them. If he turns, he's gonna hit me because I'm now coming towards him and I'm screaming at him, "Austin Police. Stop the car. Austin Police. Stop the car," as loud as I could and he was just in his own world and he was sitting there pulling on the steering column and that's all I remember seeing was him pulling that because he had backed up, stopped, and he couldn't get it into drive. I went ahead and drew my duty weapon and was screaming at him, "Austin Police, Austin Police." And he looked at me. I know he saw me. And I - I don't remember if the windows were up or down....."

"...the best way I can describe it, if this is the car I was to an angle. I didn't wanna get directly in front of the vehicle because there's too much of a threat to get run over. But I, I knew I had to be somewhat in front of the vehicle 'cause he had to see me, so I was just off that front I guess - what is that? Right quarter panel? And I knew that he couldn't be allowed to leave the scene because we were now no longer - as I saw it we were no longer dealing with an LTS. I'm now dealing with a 3000 pound weapon that's gonna kill or hurt somebody..."

"...I calculated that if I'm here I'm off to the A- the A post but I have a good shot right down the center. He can see me. He can hear me. And like I said I don't know - I think I said in my memo I don't know how far back I was, maybe 6 to 8 feet. Somewhere in there. Maybe 10. I don't know. Screaming at him. He looks at me. I said, "Stop." And I probably said, "I'm gonna f'ing shoot you." And as I was saying that I had moved my finger from the rail to my trigger and screamed it and he looked straight at me and I saw him throw his hands up in the air and I thought I heard him - or at least read his lips saying, "I'll stop. I'll stop. I'll stop. I'll stop." At that point, I knew that I had got my point across and my finger went straight back to the rail...."

."And (Barry) actually opened the door and I remember (Barry) then kinda taking him - he didn't - I wouldn't - I'm not gonna call it a vehicle extraction, but (Barry) had a hand on him and just controlled him to the ground. And I still had my weapon out but I had dropped it down to a low ready at that point..."

"I don't remember everything that (Barry) did, but he handcuffed and while he handcuffed I maintained cover of the bad guy and the vehicle and so my head was scanning basically this way, this way. 'Cause I - I didn't - hadn't cleared that yet. We had him on the ground..."³⁶

Officer Gabrielson stated when Corporal Forshee walked to the crash scene he told him,

"Moe walked up and (Moe) was like, "Hey, well, what happened?" I said, "Hey man, you know he hit the pole," and basically told what I just told y'all. I said, "Hey, I just wanna let you know for policy I drew my weapon. I pointed at him. You know, I just mark the study thing, right?" He's like, "Yeah. Just mark the study. Justify why you did what you did and you're golden..."³⁷

Officer Gabrielson told me he was "hyped up"³⁸ from all the previous fights and calls³⁹ that had occurred prior to the crash and then he went higher when he actually saw the crash.

³⁶ Gabrielson statement pages 9 and 10 lines 354 thru 424 (not continuous).

³⁷ Gabrielson statement page 10 lines 435-440.

³⁸ Gabrielson statement page 11 line 441.

³⁹ Printouts of the Visinet for prior call activity located in section F-2.

Officer Gabrielson went on to explain the use of his foot on the back of the suspect as,

*"I've obviously - you presented - I've seen everything now, so from what everything it appears is that he was on the ground, um. I don't remember doing this, but I guess I did because all the officers said that I did. I must of put my foot on his upper back. I - it's been done a million times and I've done it a million times. It's very common downtown for us to do that, especially when you have a officer or two officers engaged with a suspect. You'll lightly - you don't - you're not stomping on him, you're not hurting him. You're not using force. It's more or less a - a non-verbal communication. A, I'm here, don't roll over. Don't move."*⁴⁰

*....."So that's why I was kinda taken back by that one, but, you know, if putting my foot on him is considered use of force then, you know, I'll plead guilty. I didn't put that - I put my foot on his back."*⁴¹

Officer Gabrielson explained that he wears clip in bike shoes and felt that the metal cleat would have left a mark on the neck of the suspect if he had put his foot there.

Officer Gabrielson explained that he did not recall pointing his weapon at the suspects head and stated,

*"I did have my weapon out all the way until he was handcuffed because I still felt he was a threat. I don't remember pointing at anybody's head. But, you know, a couple of the officers said that I did. I may have even said to him something like, "Man, I almost shot you. I can't believe you did that." Because that's my way of getting my frustrations out. So it's very likely that I was saying things like that. Once he was on the ground he wasn't resisting at all. There - I mean there was no resisting so there was no reason to use force."*⁴²

"⁴³I do not remember putting any weapons at anybody's head. I remember having my weapon in a low ready. I remember having it pointed at my feet. When I read (Zimmerman)'s memo, it was like that's what I did. Um, I - if - if - I can't imagine I would point a weapon at anybody's head, especially when they weren't resisting. I have no reason to. One, it's not my nature."

I asked Officer Gabrielson if he told the suspect he would blast him in the head, shoot you mother fucker and he stated:

"When he was on the ground, I had no intention on shooting him. But I would of darn - I've done it a million times (unintelligible). I will darn well tell you once you're being in handcuffs, "Your dumbass made bad decisions and this is what was fixing to happen to you. And now it's not but you're lucky and I hope this is a learning lesson and this will never happen again." That's the kinda stuff that I would of been saying. And could that have been misconstrued as, you know, "I'm gonna blow your f'ing head off," or whatever the other officers said I said,

⁴⁰ Gabrielson statement page 11 lines 451-459.

⁴¹ Gabrielson statement page 11 line 476 thru 479.

⁴² Gabrielson statement page 11 lines 464 thru 471.

⁴³ Gabrielson statement page 35 line 1569 thru 1573.

*absolutely. I - I would definitely been saying stuff to him, but it would of been along the lines of, "I almost shot you in the head. I can't believe you did that." Stuff like that."*⁴⁴

I asked Officer Gabrielson if this incident was the closest he had ever come to using deadly force and he stated this crash and one other time when he came face-to-face with suspects in a burglary of vehicle incident.

I asked Officer Gabrielson to describe the intersection at the crash scene when the pick-up truck was attempting to drive forward and he stated,

*"Uh, I know that there was some cars in the intersection. I know there was foot traffic here. I don't think there was anybody actually in the crosswalk here. And then there were these vehicles. There was no foot traffic on this sidewalk."*⁴⁵

Sgt Johnson asked Officer Gabrielson for his definition of tunnel vision as he had used that term during the interview and he stated:

*"You got a single focus. That's my definition. That's what I'm - when I say tunnel vision, all I saw was driver pulling on thing, that's it."*⁴⁶

In response to how the suspect was booked into T.C.S.O. under the wrong name Officer Gabrielson did not recall going thru his wallet or seeing another driver's license. He just used the one that was handed to him for the faster DWI process.

I asked Officer Gabrielson if he felt he was the odd man out on the shift and he detailed how and why he felt he was. Officer Gabrielson stated he had received a four on his evaluation by Sergeant Yates based on how he handled two calls, which he described in detail during the interview. He said he had tried to transfer twice but due to Sergeant Yates marking the "not recommended for transfer" and putting a note of his need to address some issues he did not even turn in the transfer paperwork.⁴⁷

I asked Officer Gabrielson what he would have done differently during this incident and he said he would have holstered his weapon once he and Officer Berry had moved to a position that they could see the suspect's hands and he wasn't resisting. Also, he would have gotten on the radio which he stated would have helped him to slow down and "think"⁴⁸

⁴⁴ Gabrielson statement page 36 line 1583 thru 1593.

⁴⁵ Gabrielson statement page 16 lines 685 thru 688.

⁴⁶ Gabrielson statement page 60 line 2697 and 2698.

⁴⁷ Copy of Sworn Transfer request form in section B-4.

⁴⁸ Gabrielson statement page 19 line 826.

Investigative actions

- Interviewed the officers involved in the incident.
- Interviewed the driver of the red pick-up truck.
- Reviewed the versedex report, crash report, visinet sheets and TCSO booking sheet.
- Review of in-car video 10-vt23007.
- Attempted to locate cameras in the area of the collision which might have recorded incident. No cameras located.
- Collected a copy of Rocha video recording of crashed pick-up that tow driver made.
- Collected a copy of dispatch and officers radio transmissions.
- Photographed the red pick-up to show actual damage from striking the pole.
- Attempted to locate the females Officer Berry and Officer Gabrielson were escorting at the time of the collision.

Sgt. Brad L. Fithian #2565
Sgt. Brad L. Fithian #2565

4/14/11
Date

Lt. Fred Fletcher #2643
Lt. Fred Fletcher #2643

7/20/11
Date

Cmdr. Michael Jung #2180
Cmdr. Michael Jung #2180

4/22/11
Date

Confidential

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	§	Plaintiffs,
	§	
v.	§	CIVIL ACTION No. 1:20-cv-01068-LY
	§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 79
Aguado IA Use of Force File**

(COA 174557)

FILED UNDER SEAL

IA Liaison: Sergeant Michael Cowden

**Internal Affairs
Personnel Complaint Control Sheet**

Class A Internal IA Case #2015-0362

Assigned Investigator: Sergeant Deanna Lichter

Date Occurred 4-25-15	Date Investigation Received 4-28-15	Date Investigation Completed 7-27-15	180-Day Deadline 10-22-15
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Complaint Information

Complainant's Name Cmdr. Wright	Incident Location 5300 Jimmy Clay Dr.
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Employee's Information

Officer M. Bergeson	Employee No. 7531	Rank Officer	Current Assignment Charlie 500s
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Employee's Chain of Command

Sergeant Urias	Lieutenant Disher	Ops Lieutenant Harrison	Commander Eveleth	Assistant Chief Ockletree
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Allegations Investigated

Policies Associated with Allegations	Final Classification	Signature of Person Determining Classification	Date Signed
APD Policy 402.2 - Report writing	Unfounded	<i>Michael Eveleth 2504</i>	9/7/15
APD Policy 211.4.1(d) - Response to Resistance Inquiry, Reporting, and Review	Unfounded	<i>Michael Eveleth 2504</i>	9/7/15

Discipline Administered by Chain of Command

Oral Reprimand <input type="checkbox"/>	Written Reprimand <input type="checkbox"/>
Temp Suspension - No. of Days <input type="checkbox"/>	Demotion <input type="checkbox"/> Indefinite Suspension <input type="checkbox"/>

Required Signatures

Required Signatures	Employee No.	Date
Investigator's Signature <i>[Signature]</i>	2532	9-15-15
City Legal Review <i>(Required on DRH)</i>		
Chief of Staff <i>(Required on Critical Incidents)</i>		
Chief of Police <i>Patrick Ockletree</i>	1290	9/9/15

(All Control Sheets must be signed by the COP or an Assistant Chief before returning to IA)

IA Commander Signature *[Signature]*

Date 9/10/15

IA Liaison: Sergeant Michael Cowden

**Internal Affairs
Personnel Complaint Control Sheet**

Class A Internal IA Case #2015-0362

Assigned Investigator: Sergeant Deanna Lichter

Date Occurred 4-25-15	Date Investigation Received 4-28-15	Date Investigation Completed 7-27-15	180-Day Deadline 10-22-15
--------------------------	--	---	------------------------------

Complaint Information

Complainant's Name Cmdr. Wright	Incident Location 5300 Jimmy Clay Dr.
------------------------------------	--

Employee's Information

Officer ERIC Copeland	Employee No. 6766	Rank Officer	Current Assignment Ida 100s
--------------------------	----------------------	-----------------	--------------------------------

Employee's Chain of Command

Sergeant Hubbs	Lieutenant Yarbrough	Ops Lieutenant Mason	Commander Krause	Assistant Chief McIlvain
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Allegations Investigated

Policies Associated with Allegations	Final Classification	Signature of Person Determining Classification	Date Signed
APD Policy 200.2- Response to resistance	Sustained	<i>[Signature]</i>	10/19/15
APD Policy 301.2- Impartial attitude and courtesy	Sustained	<i>[Signature]</i>	10/19/15
APD Policy 402.2 - Report writing	Sustained	<i>[Signature]</i>	10/19/15

Discipline Administered by Chain of Command

Oral Reprimand <input type="checkbox"/>	Written Reprimand <input type="checkbox"/>
Temp Suspension - No. of Days <u>90</u> <input checked="" type="checkbox"/>	Demotion <input type="checkbox"/> Indefinite Suspension <input type="checkbox"/>

Required Signatures

	Employee No.	Date
Investigator's Signature <i>[Signature]</i>	2532	10-20-15
City Legal Review <i>(Required on DRH)</i> <i>[Signature]</i>		10-22-15
Chief of Staff <i>(Required on Critical Incidents)</i>		
Chief of Police <i>[Signature]</i>	6227	10/19/15

(All Control Sheets must be signed by the COP or an Assistant Chief before returning to IA)

IA Commander Signature *[Signature]*

Date 10/21/15

AUSTIN POLICE DEPARTMENT
CLASS A ADMINISTRATIVE INVESTIGATION
CASE SUMMARY

To: Art Acevedo
Chief of Police

Via: Patrick South
Commander, Professional Standards

Todd Smith
Lieutenant, Internal Affairs

From: Deanna Lichter
Sergeant, Internal Affairs

Date: July 23, 2015

Subject: **IA Case 2015-0362 Officer Eric Copeland 6766, Officer Mark Bergeson 7531**
(180 Deadline 10/22/2015)

Introduction

On April 25, 2015, a hotshot disturbance with violence in Region IV, Frank Sector, at 5300 Jimmy Clay Dr. #3102 was broadcast city wide. Ida Day Patrol Officer Eric Copeland, and Charlie Evening Patrol Officer Mark Bergeson responded from their sectors. Officer Bergeson arrived on scene first. One of the victims directed Officer Bergeson to the apartment. A second victim told Officer Bergeson that "he", identified later as Adrian Aguado, was inside and Adrian had hit her. Officer Bergeson entered the apartment and found it in disarray with water all over the floor. Officer Bergeson located Mr. Aguado in an angry state drinking a bottle of beer. Officer Bergeson ordered Mr. Aguado to put the beer down. Officer Bergeson drew his Taser and pointed it at him, and verbally warned Mr. Aguado he would be Tased if he did not follow directions. Mr. Aguado slowly responded to Officer Bergeson's commands. Officer Bergeson took Mr. Aguado into custody and escorted him to his patrol vehicle.

While Officer Bergeson was escorting Mr. Aguado, Officer Copeland arrived along with David Sector Day Patrol Officer Gabriel Vasquez. Officer Copeland and Officer Vasquez began speaking to one of the victims. Officer Copeland heard enough to establish the arrest of Mr. Aguado for family violence related assaults. He told Officer Bergeson he needed to get the assault victim statement paperwork together for the arrest. Officer Copeland told Officer Bergeson he would watch Mr. Aguado. Officer Vasquez left the scene, prior to the response to resistance (R2R), while Officer Bergeson was collecting information from the victims and

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Officer Copeland was watching Mr. Aguado.

Officer Copeland had a civilian rider with him named Amber Turner. Officer Copeland and Ms. Turner were seated in the patrol vehicle watching Mr. Aguado. While watching Mr. Aguado, Officer Copeland reviewed Mr. Aguado's Austin Police Department (APD) involvement. Officer Copeland discussed Mr. Aguado's history with Ms. Turner and described Mr. Aguado as a person that would eventually have an incident with a police officer where a response to resistance would be required along with various other comments. This conversation was captured on Officer Copeland's Digital Mobile Audio Video (DMAV).¹ As the discussion about Mr. Aguado concluded, Officer Copeland shut off his DMAV. Mr. Aguado was continuously recorded on Officer Bergeson's DMAV.²

While seated and handcuffed in the rear of the patrol vehicle, Mr. Aguado periodically yelled anti-police and profanity laced statements. Mr. Aguado used the seatbelt fastener to bang against the plastic seat. Officer Copeland heard the banging and checked on Mr. Aguado. Officer Copeland's opening of the patrol car driver door reactivated his DMAV.³ When Officer Copeland made contact with Mr. Aguado, he initiated the conversation by asking Mr. Aguado if he took medications. Mr. Aguado responded sarcastically by citing various medications such as Xanax. Officer Copeland asked if he used something for, "*Mental retardation*" because Mr. Aguado seemed "*Slow*". The conversation continued with Officer Copeland trading insults with Mr. Aguado. Mr. Aguado challenged Officer Copeland to a fight. Officer Copeland responded to the challenge, "*You know where I work,*" and "*Come find me*". Mr. Aguado slipped his left hand from the handcuff and challenged Officer Copeland to fight right then and there.⁴

Officer Copeland radioed for Officer Bergeson to assist him with Mr. Aguado. When Officer Bergeson arrived at the patrol car, Officer Copeland told him, "*He slipped his cuff, we are going to have to take him out.*" They moved to the passenger side of the car and Officer Bergeson unlocked the doors. Officer Copeland opened the rear door and told Mr. Aguado to "*Turn around.*" Mr. Aguado began to exit the vehicle and he was told a second time to turn around by Officer Copeland as he exited the patrol car. Officer Copeland had already drawn his Taser, and he deployed the Taser before Mr. Aguado's second foot hit the ground as he exited the car. Mr. Aguado brought his hands to his chest, went to his knees and then to the ground face down. Once on the ground, Officer Copeland dropped his body weight onto Mr. Aguado using his right knee to the left shoulder area of Mr. Aguado. Officer Copeland administered a second Taser cycle as soon as the first cycle ended. Officer Bergeson re-handcuffed Mr. Aguado.⁵

Sgt. Jeff Greenwalt responded as the reviewing supervisor for the R2R. Mr. Aguado sustained a broken nose and scrapes to his face during the R2R. Mr. Aguado told his mother, EMS, and Sgt. Greenwalt that Officer Copeland had caused the injury to his face. He made the same claim to

¹ Folder E DMAV Copeland DMAV wmv Prt 1 20150507-135600

² Folder E DMAV Bergeson back seat

³ Folder E DMAV Copeland wmv Prt 2 20150622-165637

⁴ Folder E DMAV audio and video Bergeson; audio Copeland Prt 2 20150622-165637

⁵ Folder E DMAV Bergeson

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staff at Brackenridge Hospital. Sgt. Greenwalt interviewed Officers Copeland and Bergeson, civilians Amber Turner and Mr. Aguado. Sgt. Greenwalt reviewed the DMAV of the incident the next day to complete the R2R review. He heard the dialog between Officer Copeland and Mr. Aguado, and viewed the subsequent R2R. He brought the case to the attention of the Region IV Command.

Allegation and Associated Policies

On April 27, 2015, Region IV Commander Nick Wright signed an internal complaint requesting Internal Affairs to investigate Officer Copeland for possible policy violations regarding impartial attitude and use of force.⁶

During review of the incident, IA noted Officer Copeland's report to Sgt. Greenwalt and his supplement had some discrepancies with the DMAV. Officer Bergeson's written report had some discrepancies with the DMAV as well. Additionally, Officer Copeland and Officer Bergeson spoke briefly while on scene about the R2R prior to their report to Sgt. Greenwalt. Officer Copeland sent Officer Bergeson a portion of his supplement with R2R information via Mobile Data Computer (MDC). These reporting issues and the sending of Officer Copeland's report to Officer Bergeson may also constitute a violation of APD policy.

APD Policies reviewed and may be applicable:⁷

- APD Policy 200 Response to Resistance
 - APD Policy 200.2 Response to Resistance
 - APD Policy 200.2.1 Determining the Objective Reasonableness of Force
 - APD Policy 200.2.2 Use of Force to affect a Detention, an Arrest or to Conduct a Search
- APD Policy 208 Taser Device Guidelines
 - 208.3 (a) (1) (2) Verbal Warnings
 - 208.4.5 (a) (1) (2) Multiple Applications of the Taser
- APD Policy 211 Response to Resistance Reporting Guidelines
 - 211.4.1(d) Employee Reporting Guidelines for all Force Level Incidents
- APD Policy Responsibility to the Community
 - 301.2 Impartial Attitude and Courtesy
- APD Policy 402 Incident Reporting and Documentation
 - 402.2.2 (a) (b) Report Writing
- APD Policy 900 General Conduct and Responsibilities
 - 900.4.3 (h) Neglect of Duty

⁶ Folder A Complaint

⁷ Folder A Policies

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Investigation

The IA investigation included the following actions:

- Reviewed Sgt. Greenwalt, Officer Bergeson, and Officer Copeland's DMAV
- Interviewed Cmd. Wright, Lt. Stephen Barnes, Sgt. Greenwalt, Sgt. Steve Urias, Ofc. James McDonald, Ofc. Bergeson and Ofc. Copeland
- Obtained memos from Sgt. Robin Orten, Sgt. Michael Fitzgerald, Det. Ken Casaday
- Interviewed civilians Adrian Aguado, Amber Turner
- Reviewed Versadex Report 15-1151037, Visinet 151151037
- Reviewed MDC messages for Ofc. Bergeson and Ofc. Copeland
- Reviewed Level 2 Response to Resistance packet

DMAV

Officer Bergeson⁸

Officer Bergeson's back seat video captured Mr. Aguado seated in the back of the patrol car. While seated, he yelled profanities and anti-police statements. At one point it appears as if he attempted to slip his handcuff, but does not take the handcuff all the way off. The video captured Mr. Aguado banging the seatbelt latch against the plastic seat. It also captured Mr. Aguado and Officer Copeland's interaction, during which Mr. Aguado slipped his left hand from the handcuff. The video captured the subsequent response by Officer Copeland and Officer Bergeson to get Mr. Aguado back into handcuffs. The rear of the patrol car blocks the view of Mr. Aguado while he was on the ground being re-handcuffed.

Officer Copeland⁹

Officer Copeland has two videos of this incident. His first video begins with his travel to Frank Sector and arrival on scene, and ends with his conversation with his civilian rider, Ms. Turner. The second video activated when Officer Copeland exited the driver door to check on Mr. Aguado. The second video has audio of the interaction between Mr. Aguado and Officer Copeland, and subsequent actions and statements of Officer Copeland. It did not capture video of the R2R.

Sgt. Greenwalt¹⁰

Sgt. Greenwalt's DMAV captured the R2R inquiry. Sgt. Greenwalt spoke to Officer Copeland, Amber Turner, Officer Bergeson, and Adrian Aguado in that order.

⁸ Folder E DMAV Bergeson

⁹ Folder E DMAV Copeland

¹⁰ Folder E DMAV Greenwalt

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Interviews

Adrian Aguado

Mr. Aguado was interviewed by IA on May 7, 2015. Mr. Aguado said he had a verbal exchange with an officer, identified by DMAV as Officer Copeland. He said during the verbal exchange, he slipped off his handcuff. He said he was initially angry regarding the statements made to him by Officer Copeland. He said they both taunted each other to fight, but he had no intention of fighting a police officer. He said he was told to get out of the car and to turn around. Mr. Aguado described being Tased and re-handcuffed:¹¹

“Once I put on my second foot out of the door he was tasing me and that's when I was going down on the floor. I didn't even go straight down to the floor, I didn't slam or nothing, I was going down slowly and then he kept the holding it until I went down and then I have – I was like I was having – I have both hands in front of me. And then he said put your hands behind your back, that's when I said I can't, I'm stuck, I'm stuck and he pressed it again, that's when he started holding it again. And that's when the other cop holding – grabbed my hand and put it behind my back and then once – both held my hands at the back handcuffed up already. That's when he – the other cop put his hand – put his feet on the top of my back of my head and slam it to the ground with his feet, I was already on the ground. That's when I had broke my nose already, I fractured my nose”

Mr. Aguado later confirmed in his statement that his face was forced to the ground during the second Taser cycle when his hands were already behind his back. He said his face was about five inches above the ground and that was when his face was forced to the ground by Officer Copeland by applying pressure with his foot to the back of Mr. Aguado's head.¹² Mr. Aguado said he told Sgt. Greenwalt there were problems with the Tasing because he was not given an opportunity to turn around before he was Tased.¹³

Amber Turner

Ms. Turner was interviewed by IA on May 26, 2015. Ms. Turner was a student at Austin Community College and was completing a school project by riding out with an officer. She did not know Officer Copeland prior to the ride out. She has not had contact with Officer Copeland since the ride out other than sending a required thank you note to him. Ms. Turner said Officer Copeland was professional in his conversation with her about Mr. Aguado. She believed the conversation was Officer Copeland giving her his perspective on Mr. Aguado. She said Officer Copeland went to check on Mr. Aguado when they heard banging. She could see Mr. Aguado moving in the back of the car but could not see if his handcuff was off. She could not hear the interaction between Mr. Aguado and Officer Copeland.

She said Officer Bergeson came out and unlocked the door. She could see Mr. Aguado get out of the car but did not see what he was doing. She saw Mr. Aguado go to the ground when he was Tased and described it as if he had slipped and fell forward, with his hands crumpled. She said she did not see his face hit the ground but she was certain it happened when he fell. She saw

¹¹ Folder C Aguado lines 108 - 120

¹² Folder C Aguado lines 270-281

¹³ Folder C Aguado lines 136-140

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blood when he moved. She saw the blood prior to Officer Copeland applying his body weight to Mr. Aguado's back. She saw Officer Copeland make contact with Mr. Aguado's back. She said she never saw any pressure applied to Mr. Aguado's head because he was able to move his head.

Region IV Chain of Command Response to Resistance Review¹⁴

Sgt. Greenwalt, Lt. Barnes, and Cmd. Wright were interviewed by IA regarding their R2R review. Sgt. Greenwalt stated he was working overtime as the F500's supervisor and responded to the request for a supervisor. He said he interviewed all parties and a civilian rider as a witness. The next day he reviewed the DMAV and saw the interaction between Officer Copeland and Mr. Aguado. He said Officer Copeland's verbal interaction with Mr. Aguado was antagonistic and unprofessional. He had concern about the reasonableness of the R2R based on the statements made to him by the officers and what he saw on video. He said there were discrepancies with Officer Copeland's statement to him and what he observed on DMAV. He said he would have asked clarifying questions had the case not been referred to IA. He had issues with the tactics of the officers in getting the subject back into handcuffs. He reported the incident to Lt. Barnes. Lt. Barnes and Cmd. Wright also had concern with the unprofessional conversation between Officer Copeland and Mr. Aguado. They had issues regarding tactics employed by the officers. They both stated they needed more information to make a determination on the reasonableness of the use of force to get Mr. Aguado back into handcuffs.

Sgt. Steve Urias

Sgt. Urias was interviewed by IA on May 28, 2015. Sgt. Urias is Officer Bergeson's supervisor. Sgt. Urias said he became aware of the incident when Officer Bergeson called him to ask about charging Mr. Aguado with resisting arrest. He said Officer Bergeson requested to speak to him about the incident. He said Officer Bergeson reviewed his video in an effort to determine what happened regarding Mr. Aguado slipping his handcuff. When Officer Bergeson reviewed the video, he had concerns with Officer Copeland agitating Mr. Aguado to the point of Mr. Aguado slipping the handcuff. Sgt. Urias assured Officer Bergeson the supervisor that responded would review the incident.

Officer Bergeson¹⁵

Officer Bergeson was interviewed by IA on June 16, 2015. He was interviewed as a witness officer to the response to resistance and as a subject officer for report writing and group reporting. Officer Bergeson said when he heard Officer Copeland call for him over the radio, he heard Mr. Aguado in the background. He ran out to Officer Copeland and was told Mr. Aguado slipped his handcuff. Since he had handcuffed Mr. Aguado he assumed his slipping the handcuff was his fault and it was the only thing he heard Officer Copeland tell him.

He said when they went around to the other side of the vehicle, it was his impression they were going to get Mr. Aguado out of the vehicle to re-handcuff him. He unlocked the doors and Officer Copeland opened the rear passenger door and told Mr. Aguado to "turn around." He said Officer Copeland told Mr. Aguado to "turn around" at least two times. Officer Bergeson

¹⁴ Folder D Officer statements

¹⁵ Folder B2 Accused Employee Bergeson Statement

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said that Mr. Aguado came out of the car and moved in a direction toward Officer Copeland. He said Officer Copeland Tased Mr. Aguado. He said initially Mr. Aguado fell like a plank with his hands to his side. However, upon reviewing the video during the interview, he corrected stating Mr. Aguado folded his arms in and he went to his knees then rolled onto the ground. He explained the discrepancy was he had been going off his memory, and in his mind he saw it different and it was wrong. He said, *"I guess we see things differently than it really happened sometimes."*¹⁶ Officer Bergeson also believed that Mr. Aguado was coming out of the car heading toward Officer Copeland and did not realize Mr. Aguado had been Tased while still exiting the vehicle. He said in his mind Mr. Aguado was walking toward Officer Copeland. He said he thought Mr. Aguado was either coming out of the car toward Officer Copeland or he was getting out to turn around. He was surprised when Officer Copeland Tased him.

Officer Bergeson reviewed DMAV during the interview and was asked what occurred when Mr. Aguado was Tased. He said it appeared Officer Copeland went straight to a knee on the subject to prevent him from getting up.¹⁷ He said, *"I wouldn't say dropping his body weight, I would say just holding him down. Using his body weight to hold him down. I wouldn't say, ya know, he dropped h- but - like a knee or anything but just holding him down so that he can't move."*¹⁸ Officer Bergeson said Officer Copeland made contact with his knee on Mr. Aguado's left shoulder area. When asked if it was the application of Officer Copeland's body weight to Mr. Aguado that caused the injury to his nose, Officer Bergeson said, *"Not that I would know of. He didn't place his, uh, his knee or anything like that towards the g- toward his face at all. It was up on his shoulder."*¹⁹ He said it was never in his mind that the injury occurred by the application of Officer Copeland's body weight. When asked if it was necessary for Officer Copeland to hold Mr. Aguado down with his body weight, he said, *"I mean if a per- if a subjects being combative and they have just been tased you don't know how they're gonna react after that five seconds is done. He still has a weapon in his hand. So I don't see anything wrong with holding him down until I got over there."*²⁰ Officer Bergeson could not recall how he brought Mr. Aguado's arms back behind him in order to re-handcuff him, but he did re-handcuff Mr. Aguado.

Officer Bergeson said he did not review his video prior to writing his report. He said he did view the video at some point during the same night. After seeing the video he thought the interaction between Mr. Aguado and Officer Copeland was unprofessional. He said the incident may still have happened, but Officer Copeland's remarks did not help the situation and may have provoked it. He said he reported it to his supervisor, Sgt. Urias.

Officer Bergeson said the brief on scene conversation he and Officer Copeland had regarding the R2R did not influence his report to Sgt. Greenwalt, and it did not influence his written report. During the conversation, Officer Copeland told Officer Bergeson, *"I didn't tell him to get out, I told him to turn around in the car."*²¹ Officer Bergeson said he did not ask Officer Copeland to

¹⁶ Folder B2 Accused Employee Bergeson line 712

¹⁷ Folder B2 Accused Employee Bergeson line 869-870

¹⁸ Folder B2 Accused Employee Bergeson line 875-878

¹⁹ Folder B2 Accused Employee Bergeson line 928-932

²⁰ Folder B2 Accused Employee Bergeson line 989-992

²¹ Folder E DMAV Copeland prt 2

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send him his supplement. He said it is common practice for officers to send their reports to each other for affidavits. He did not read Officer Copeland's supplement prior to writing his report. He said he wrote his report based off his knowledge of the incident.

He acknowledged one discrepancy in his report and what the DMAV showed. He wrote Officer Copeland ordered Mr. Aguado to put his hands behind his back when Officer Copeland actually told Mr. Aguado to turn around twice. In regard to the section where he wrote Mr. Aguado completely disregarded Officer Copeland's orders, was in regard to Officer Copeland's order to turn around. Officer Bergeson noted in his report that neither officer instructed Mr. Aguado to get out of the vehicle. IA pointed out neither officer instructed Mr. Aguado to stay in the vehicle as well. When asked what he expected Mr. Aguado to do when the door opened, he said he thought Mr. Aguado was either coming out aggressively to attack them both or Officer Copeland, or he was getting out to turn around and place his hands behind his back. He said he did not provide instruction to Mr. Aguado, because Officer Copeland opened the door and started issuing commands. He did not want to confuse Mr. Aguado by telling him to do one thing while Officer Copeland told him to do something else.

Officer Bergeson acknowledged that he and Officer Copeland could have taken a moment to create a plan. Officer Bergeson said he did not know what Officer Copeland was thinking and he went into this blind. He took responsibility for the handcuff being loose enough for Mr. Aguado to pull his hand out. He said had he known at the time of the incident of the interaction between Officer Copeland and Mr. Aguado, he would not have allowed Officer Copeland to continue his involvement with Mr. Aguado.

Officer Copeland²²

Officer Copeland was interviewed by IA on June 24, 2015. Officer Copeland was asked about his conversation with Ms. Turner regarding Mr. Aguado. He said after being with Ms. Turner for several hours, he let his guard down and their conversation became more friendly instead of remaining professional. Officer Copeland was asked to explain his comments to Ms. Turner about Mr. Aguado.²³ He said they were related to the larger nationwide events they had talked about earlier. He explained that if people comply with police commands, nothing is going to happen and that the police have a job to do. He acknowledged his comment, "*if you act like you're going to fight with me, you are going to get hurt*" was poorly worded. He said he was trying to explain an officer does not have to wait to be injured before using force. He acknowledged force is used to maintain control and not to impose injury. In regard to Mr. Aguado, he said his use of force was not retaliatory due to Mr. Aguado acting like he wanted to fight him. Officer Copeland said his conversation with Ms. Turner was an extension to the conversations they had been having that day regarding national events. He used Mr. Aguado as an example of the type of person that may have a violent police encounter. It was not his intent to have that encounter with him.²⁴

²² Folder B2 Accused Employee Copeland statement

²³ Folder E Copeland DMAV prt1

²⁴ Folder B2 Accused Employee Copeland statement lines 2878 - 2906

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Officer Copeland said he shut off his DMAV because he thought he was done taking police action for the rest of the call and had not planned on getting out of his car again. When he heard banging he went to check on Mr. Aguado. Officer Copeland acknowledged his conversation with Mr. Aguado was unprofessional. Officer Copeland had not interacted with Mr. Aguado prior to his making contact with him. He said when he asked Mr. Aguado if he took any medications it was a sincere inquiry. According to Officer Copeland, Mr. Aguado did not act like a normal person and he seemed a little unbalanced. He said when he asked him about mental retardation, he did not expect Mr. Aguado to “blow up” the way he did. He said he was not trying to “poke fun” of Mr. Aguado. He said he recognized that Mr. Aguado had taken offense to his statements. He was asked why he did not try to de-escalate the situation. He said,²⁵

“I, you know, I don't know if it was a combination of just, you know, personal frustration from having to have gone across town at the end of the day, and be there, you know, feeling like it was taking - maybe doing somebody else's job and some of those frustrations, just - they got the best of me from my professionalism and, yeah, it - it just - the fact, seeing it, you know, him hitting his mom and his apartment tore up and his sister crying, everybody crying, I think it just got me - it did, it got the best of me.”

He said it was not his intention to agitate Mr. Aguado, he just let the situation get the best of him. He said his comments played a part in Mr. Aguado slipping his handcuff, but Mr. Aguado may have slipped the handcuff even without their conversation. He acknowledged that he definitely agitated Mr. Aguado.

Officer Copeland said when Mr. Aguado slipped off the handcuff and Officer Bergeson responded to assist, he took the lead and did not formulate a plan with Officer Bergeson. When he told Officer Bergeson that “we need to go ahead and take him out”, Mr. Aguado may have heard this. He said he had a plan to re-handcuff Mr. Aguado, but he did not communicate that plan with Officer Bergeson. His plan was to have Mr. Aguado turn around while still seated in the car, face away and have him put his hands behind his back to have him re-handcuffed in the car. He said he just rushed and did not tell Officer Bergeson or Mr. Aguado. He said he did not warn Mr. Aguado he would be Tased if he did not follow direction because he understood the verbal warning was for other officers who had lethal coverage so that they do not discharge their weapon when the Taser is discharged. When Mr. Aguado told him he was not afraid of the Taser, he did not take that opportunity to warn Mr. Aguado that he would be Tased if he did not follow instructions because he was rushing through his steps. He acknowledged that Mr. Aguado was not given clear direction on what to do.

Officer Copeland said he Tased Mr. Aguado because at the time of the incident he was not watching Mr. Aguado's feet. He said his perception was that Mr. Aguado stood up out of the car, and his hands were up, not down or back. He said the look on Mr. Aguado's face was not one of compliance, but taunting or anger. He thought Mr. Aguado was going to fight, so he deployed his Taser. Initially he described Mr. Aguado as falling to the ground like a board. However, after reviewing the video he said Mr. Aguado fell to his knees and then fell forward.

²⁵ Folder B2 Accused Employee Copeland lines 690 -696

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He explained he was watching Mr. Aguado from the waist up and did not watch his feet. He said he fell straight down after going to his knees. Officer Copeland said Mr. Aguado hit his face when he fell. When he applied his body weight to Mr. Aguado's shoulder area Mr. Aguado was facing away from him. He did not see the blood until he was sat up. He said he never applied any type of pressure to the back of Mr. Aguado's head.

Officer Copeland was asked to explain why he felt the need to hold Mr. Aguado down. He said since Mr. Aguado had been angry and wanting to fight, once the Taser cycle ended and the effect wore off he wanted to make it more difficult for Mr. Aguado to stand up or roll over and offer resistance. The application of his body weight was to maintain control of Mr. Aguado to get him handcuffed. Officer Copeland said he applied his body weight pretty close to the second Taser deployment, but was not sure exactly when it was. He said he deployed the second Taser to try and get some sort of response from Mr. Aguado that he was not going to resist. He said his asking Mr. Aguado if he "*wanted it again*" was his way of warning Mr. Aguado he would be Tased again, and to get his hands back.

Officer Copeland was asked about the amount of force he used to apply his body weight. He said,

*"I don't think it was even with force that would be like a knee strike that you see if you're actually on the ground fighting with somebody, where you, you know, position back and you go. I don't think - like a jump step on - I mean it's - it's force, it's enough force to, uh, get my knee on his back and let him know hey, I've got my body weight on you, you're not getting up from the ground, we're not gonna fight. You know, we're not doing that. But it wasn't any retaliation or, um, no evil intent or whatever you want to call behind it. I wasn't trying to - trying to hurt him."*²⁶

Officer Copeland said he believes the amount of force he used to apply his body weight was the minimum amount of force necessary to gain physical control of Mr. Aguado. It was a way to maintain control without having to deliver any strikes, continue to discharge the Taser, wrestle or fight with him.

Officer Copeland was asked about his report to Sgt. Greenwalt and his written report. Officer Copeland said he did not review the incident on video before speaking to Sgt. Greenwalt or writing his report. He admitted that his description to Sgt. Greenwalt that he walked up and saw Mr. Aguado trying to slip his handcuffs and that he told Mr. Aguado not to slip them, was not a good description of what happened. He said he rushed through and gave more a brief summary of what happened and why. He said he did not tell Sgt. Greenwalt about the verbal interaction with Mr. Aguado because he really did not think about and did not consider it as being a part of the R2R review. He acknowledged it was embarrassing and he did not want to think about it. He assumed Sgt. Greenwalt would watch the video and they would talk about it. He said that he gave a poor summary of what happened. He told Sgt. Greenwalt that Mr. Aguado took a step toward him and was Tased, that Mr. Aguado "face planted." He said that had been his

²⁶ Folder B2 Accused Employee Copeland lines 1852-1860

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perception of what Mr. Aguado did at the time.

In Officer Copeland's supplement he wrote, *"I heard loud banging from the back of Bergeson's patrol vehicle. I approached to see what was going on. Aguado was banging and attempting to slip his cuffs off."*²⁷ He said this was an accurate statement, but lacking in detail. He said he did not omit information, but rushed through the work because he had been on duty for approximately twelve hours. He added, while walking up to the car after hearing banging, he thought Mr. Aguado had slipped his handcuff and wrote the report by memory rather than reviewing the video. Officer Copeland also wrote that Mr. Aguado was, *"instantly confrontational, aggressive and threatening."*²⁸ He said that he *"lumped"* Mr. Aguado's whole demeanor regarding his time seated in the rear of the patrol car, but that it was not an accurate statement. Officer Copeland admitted his statement, *"I told Aguado that we were going to put his cuffs back on, and he needed to turn around. When we opened the door, Aguado ignored commands and got out of the vehicle"*²⁹ was not an accurate statement, but what he had planned in his head. He said when he used the word *"placing"* to describe how he applied his body weight to Mr. Aguado it was in the same manner as he had been trained. He used the example of takedowns being written as, *"I assisted so-and-so to the ground."*³⁰

Officer Copeland said he sent Officer Bergeson his supplement just as a way to cover bases to make sure he had everything he needed for the arrest. He said he routinely sends this type of information to other officers, but was not sure if he specifically had done so regarding R2R reports. He did not remember having a conversation with Officer Bergeson while on scene about the R2R until he reviewed the DMAV. He said this conversation was more his way of expressing his frustration. He said it was not his intention to sway Officer Bergeson's reporting by having that conversation with him or by sending Officer Bergeson his supplement.

When asked what he would do differently he cited many things. He said he would not have engaged Mr. Aguado, he said he would have tried to de-escalate the incident. He would have come up with a game plan to get Mr. Aguado re-handcuffed with Officer Bergeson, and he would use Officer Bergeson to speak to Mr. Aguado rather than himself. He would have taken more time to report the R2R by reviewing video and reviewing his report before submitting it.

Officer McDonald:

Officer McDonald was interviewed by IA on May 21, 2015. Officer McDonald relieved Officer Bergeson at Brackenridge hospital and transported Mr. Aguado to Travis County Central Booking upon his release from the hospital. Officer McDonald said neither he, nor did Brackenridge staff have any problems with Mr. Aguado. He said Mr. Aguado was diagnosed with a hair line fracture to his nose. He said Mr. Aguado told the jail nurse that his injury was from being *"stomped"* on. He said the officer he relieved told him, when Mr. Aguado was Tased, he was not able to protect himself with his hands and his face hit the ground when he fell.

²⁷ Folder E Versadex 15-1151037

²⁸ Folder E Versadex 15-1151037

²⁹ Folder E Versadex 15-1151037

³⁰ Folder B2 Accused Employee Copeland lines 2434-2455

PD 0093 Rev July 2012

Investigative Summary - IA Case 2015-0362 Officer E. Copeland #6766 M. Bergeson #7531

180 Deadline 10-22-2015

Memos

Mr. Aguado stated in his interview he told an officer at Brackenridge hospital that the officer had broken his nose, not the fall to the ground. IA obtained memos from Sgt. Robin Orten, Sgt. Michael Fitzgerald, and Det. Ken Casaday - the three officers that worked Brackenridge Hospital during the time Mr. Aguado would have been seen. All three could not recall interacting with Mr. Aguado or Officer Bergeson, nor remember being told an officer had caused his injury.

Summary of Facts

- Officer Bergeson and Officer Copeland responded to a disturbance with violence, incident 15-1151037 in Region IV from their own sectors of Charlie and Ida
- Officer Bergeson was just starting his day on patrol, and Officer Copeland was nearing the end of his patrol day
- Officer Bergeson arrived on scene first and was able to take Mr. Aguado into custody without incident
- Officer Copeland had a conversation with his civilian rider regarding Mr. Aguado and his prior involvement with APD, his potential for a violent encounter with police, and police response
- Officer Copeland shut his DMAV off believing he was done with police action for this call and he did not plan on getting out of the patrol car
- While seated in the rear of the patrol car, Mr. Aguado yelled profanities and anti-police statements, and banged the seat belt fastener against the hard plastic seat
- Officer Copeland checked on Mr. Aguado when he heard the banging of the seat belt fastener. He believed Mr. Aguado may have slipped his handcuff
- Officer Copeland engaged Mr. Aguado in a conversation where they traded insults and Mr. Aguado challenged him to fight
- Officer Copeland responded to Mr. Aguado's challenge to fight by telling Mr. Aguado he knew where Officer Copeland worked and to come find him
- Mr. Aguado slipped his left hand from the handcuff and challenged Officer Copeland to fight at that moment
- Officer Copeland called for Officer Bergeson over the radio. When Officer Bergeson arrived to assist, he told Officer Bergeson, Mr. Aguado slipped the handcuff and they needed to get him out
- Officer Bergeson believed they were going to get Mr. Aguado out of the car
- Officer Copeland told Mr. Aguado to turn around twice. Before Mr. Aguado was fully out of the car, he deployed his Taser prior to Mr. Aguado's second foot hitting the ground
- Mr. Aguado said he was not given the opportunity to turn around before he was Tased
- Office Copeland, Officer Bergeson, and civilian rider Amber Turner stated Mr. Aguado's face hit the ground as a result of the initial Taser deployment when he fell to the ground
- Officer Copeland deployed his Taser a second time and held Mr. Aguado down with his body weight to maintain control of him in order to get him re-handcuffed

- Officer Copeland said he used the minimum amount of force necessary to apply his body weight to Mr. Aguado. It was not a retaliatory action for Mr. Aguado's behavior
- Mr. Aguado told EMS, his mother, Sgt. Greenwalt, Brackenridge staff, the jail nurse, and IA that Officer Copeland caused the injury to his nose by applying his foot to the back of his head when he was on the ground
- Mr. Aguado sustained a broken nose in the R2R
- Officer Bergeson said he wrote his report from memory and the only discrepancy with it and DMAV was his citing Officer Copeland told Mr. Aguado to put his hands behind his back when he actually said turn around
- Officer Bergeson said that the statement in his report about Mr. Aguado completely disregarding Officer Copeland's commands was in regard to Mr. Aguado not turning around
- Officer Bergeson said that he did not ask Officer Copeland to send him his supplement nor did he read the supplement prior to writing his report
- Officer Bergeson said neither the supplement nor his conversation with Officer Copeland influenced his reporting of the response to resistance
- Officer Copeland said it was not his intention to sway Officer Bergeson's report of the incident by speaking to him about the response to resistance or by sending him his supplement
- Officer Copeland acknowledged his conversations with Ms. Turner and Mr. Aguado were not professional
- Officer Copeland said his conversation with Mr. Aguado may have played a part in his slipping his handcuff off, but Mr. Aguado may have slipped it any way
- Officer Copeland and Officer Bergeson admitted they did not make a plan to get Mr. Aguado handcuffed
- Officer Copeland said he rushed telling Sgt. Greenwalt what occurred and he did not provide a good account of what happened
- Officer Copeland said he rushed writing his supplement and did not review video or the supplement
- Officer Copeland said he sent the supplement to Officer Bergeson just to make sure Officer Bergeson had everything he needed


Sergeant Deanna Lichter #4648

7/23/15
Date


Lieutenant Todd Smith #3016

7.23.15
Date


Commander Patrick South #2526

7/27/15
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	Plaintiffs,	§
		§
v.		§ CIVIL ACTION No. 1:20-cv-01068-LY
		§ JURY DEMANDED
MICHAEL NISSEN AND CITY OF		§
AUSTIN,		§
	Defendants.	§

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 83
Martinez IA Use of Force File**

(COA 174609)

FILED UNDER SEAL

IA Liaison: Sgt. Mark Herring #2763

**Internal Affairs
Personnel Complaint Control Sheet**

Class A

Internal

IA Case #2015-0798

Assigned Investigator: Sgt. Mark Herring #2763

Date Occurred 8/27/2015	Date Investigation Received 9/15/2015	Date Investigation Completed 10/28/2015	180-Day Deadline 2/23/2016
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Complaint Information

Complainant's Name Cmdr. M. Eveleth	Incident Location 2706 Gonzales St.
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Employee's Information

Officer C. Van Buren	Employee No. 7563	Rank Officer	Current Assignment Region III, Patrol C500
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Employee's Chain of Command

Sergeant S. Urias	Lieutenant J. Disher	Ops Lieutenant W. Harrison	Commander M. Eveleth	Assistant Chief P. Ockletree
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Allegations Investigated

Policies Associated with Allegations	Final Classification	Signature of Person Determining Classification	Date Signed
200.2.1 – Determining the Objective Reasonableness of Force	SUSTAINED	<i>[Signature]</i>	1/12/16
208.4.1 – Application of TASER Device	SUSTAINED	<i>[Signature]</i>	1/12/16

Discipline Administered by Chain of Command

Educational Based Discipline <input type="checkbox"/> (Number Days in Lieu) _____	Oral Reprimand <input type="checkbox"/>	Written Reprimand <input type="checkbox"/>
Temp Suspension – No. of Days <u>90</u> <input checked="" type="checkbox"/>	Demotion <input type="checkbox"/>	Indefinite Suspension <input type="checkbox"/>

Required Signatures

Required Signatures	Employee No.	Date
Investigator's Signature <i>[Signature]</i>	2763	1-12-16
City Legal Review (Required on DRH) <i>[Signature]</i>		1/12/15
Chief of Staff (Required on Critical Incidents) <i>[Signature]</i>	2174	1/12/2016
Chief of Police <i>[Signature]</i>	6227	1/12/2016

(All Control Sheets must be signed by the COP or an Assistant Chief before returning to IA)

IA Commander Signature *[Signature]*

Date 1/12/16

HARDSHIP FOR 1/3 APPROVED
Page ___ of ___ (Attach Additional Pages if Applicable)

Control Sheet IA 2015-0798
Page 2 of 2 (Attach if Applicable)

Other Factors Addressed By the Chain-of-Command			
Issue	Action Taken	Supervisor's Name	Date

Confidential

AUSTIN POLICE DEPARTMENT
IA DIVISION
INVESTIGATIVE SUMMARY

To : Art Acevedo #6227
Chief of Police

Via : Patrick South #2526
Commander, Internal Affairs Division

: Frank Dixon #2746
Lieutenant, Internal Affairs Division

From : Mark Herring #2763
Sergeant, Internal Affairs Division

Date : October 28, 2015

Subject : **IAD Control # 2015-0798 Officer Christopher Van Buren #7563**
(180 day deadline 2/23/2016)

Introduction

On August 27, 2015, Officer Christopher Van Buren #7563 and Officer Daniel Jackson #7853 were dispatched to 2706 Gonzales Street for a report of a man urinating in public. After speaking with witnesses, Officers Van Buren and Jackson searched the area for the subject. Officer Jackson located the subject, later identified as Armando Martinez, laying under a tree in a nearby park. Officer Jackson approached Mr. Martinez on foot, while Officer Van Buren drove his police vehicle to Mr. Martinez. Mr. Martinez was laying on his back, with his head resting on his hands and using a black duffel bag for a pillow. Officer Jackson gave Mr. Martinez commands to “*show me your hands*” as he approached him. Officer Van Buren approached, and stated to Mr. Martinez, “*Stand up, I’m not playing with you*” and “*Get off the ground*”. Officer Van Buren gave Mr. Martinez additional commands to, “*Walk in front of that vehicle. Walk in front of that vehicle, or I’m going to tase you now. Go.*” When Mr. Martinez did not comply, Officer Van Buren tased him. Officer Jackson handcuffed Mr. Martinez and placed him under arrest for Disorderly Conduct – Exposure and Public Intoxication. Emergency Medical Services (EMS) was requested to remove the Taser barb from Mr. Martinez’s arm. EMS determined that Mr. Martinez was hyperglycemic and needed to be taken to the hospital. After guarding Mr. Martinez at the hospital for over four hours, Officer Jackson was given permission to issue Mr. Martinez citations and release him. He was issued citations for Disorderly Conduct – Exposure and Public Intoxication.

IA Case 2015-0798

Officer Christopher Van Buren #7563

Complaint and Allegation¹

On September 15, 2015, Commander Michael Eveleth #2564 signed a complaint requesting Internal Affairs (IA) conduct an administrative investigation to determine if any violations of Department Policies, Civil Service Rules or State Laws were committed.

The following Austin Police Department Policies (APD) are applicable to this investigation:

- *Policy 200.2.1 – Determining the Objective Reasonableness of Force*

Investigative Actions

IA reviewed the following documentation:

- Computer Aided Dispatch Report for 15-2391807
- APD VERSADEx Report 15-2391807
- APD VERSADEx Report 15-0121050
- Digital Mobile Audio Video (DMAV) 15-2391807
- DMAV 15-0121050
- Special Investigations Unit (SIU) 15-5041067

IA interviewed the following persons:

- Officer Christopher Van Buren
- Officer Daniel Jackson

SIU Investigation

IA was directed to send a referral to SIU so they could conduct a criminal investigation. Detective Joshua Blake #4662 conducted numerous interviews related to the criminal aspect of this case and documented his investigation under report 2015-5041067. While reviewing the SIU interview, it was discovered that Officer Van Buren stated to Detective Blake, *"I mean it's Charlie sector and the whole - you know, ho ass law, teeth sucking thing, those are all things that you hear on a daily basis."* Officer Van Buren stated hearing comments like that do not upset him, but added, *"...it's not like we work Baker sector and everybody's, like, giving us cookies and stuff like that. The place where we work people don't like the police. It's just the way it is."*

The report and supplements with complete information related to the criminal investigation can be found in the IA case link.²

SIU presented the case to Assistant District Attorney Susan Oswalt for review. As of October 28, 2015, the District Attorney has not determined if they will pursue charges

¹ Tab A-1

² Tab E-7

against Officer Van Buren.

DMAV Review³

IA reviewed DMAV from Officers Van Buren and Jackson. Officer Jackson's DMAV did not record the interaction with Mr. Martinez because his vehicle was positioned away from Mr. Martinez. Officer Van Buren's DMAV captured the entire interaction. The following is a summary of the DMAV with associated time stamps.

- 20:50:20 Officer Jackson made contact with Mr. Martinez and ordered him to show his hands
- 20:50:22 Officer Van Buren ordered Mr. Martinez to stand up
- 20:50:30 Mr. Martinez began to sit up with his hands in front of his body
- 20:50:35 Officer Van Buren told Mr. Martinez to *"Walk in front of the vehicle or I'm going to tase you."*
- 20:50:39 Officer Van Buren deployed his Taser, successfully striking Mr. Martinez
- 20:50:59 Officer Jackson handcuffed Mr. Martinez

During the IA interview with Officer Van Buren, he mentioned he was involved in a previous Level 2 Response to Resistance (R2R) which influenced his decision to tase Mr. Martinez.⁴ IA located the previous R2R under APD case 15-0121050 and reviewed the DMAV. The DMAV showed Officer Van Buren struggling with a homeless person who had started a campfire. Due to the location of Officer Van Buren's vehicle, the DMAV did not clearly show the R2R.

IA Interviews

Interview of Officer Daniel Jackson⁵

Officer Jackson was interviewed by IA on September 21, 2015. Officer Jackson stated he was the first officer on scene, and spoke to several witnesses. The witnesses told him Mr. Martinez was urinating near the Sonic Drive-In, exposing himself to people in the area. Officer Jackson stated while searching on foot for Mr. Martinez in a nearby park, a witness pointed to Mr. Martinez, saying he was the suspect. Officer Jackson stated as he approached Mr. Martinez, he noticed he was laying on a duffle bag and his hands were behind his head. Officer Jackson stated he gave Mr. Martinez several commands to *"Show me your hands"*, but Mr. Martinez refused. Officer Jackson stated Officer Van Buren arrived and ordered Mr. Martinez to stand up. When he refused, Officer Van Buren tased Mr. Martinez. While dealing with Mr. Martinez, Officer Jackson stated he observed several beer cans and a bottle of liquor near Mr. Martinez. Officer Jackson was asked if he knew Mr. Martinez was intoxicated before he made contact with him. He stated he could not recall anything specific, but stated, *"...like at the end of the day this guy is drunk, that's why he's out here peeing in the Sonic."*

³ Tab E-4

⁴ Tab E-5

⁵ Tab D-1

IA asked Officer Jackson how intoxicated subjects typically react. He stated intoxicated people can have a slow response time or be confused, depending on how much they have had to drink. IA asked Officer Jackson if there was any previous information he or Officer Van Buren had that made them think Mr. Martinez may be aggressive or combative. Officer Jackson stated *"Not that I remember."* IA asked Officer Jackson if Mr. Martinez did anything to indicate he was ready to fight, or preparing to fight. Officer Jackson stated, *"Preparing to fight, no."*

Officer Jackson stated he did not review the DMAV prior to writing his report. IA showed Officer Jackson his report, where he wrote Mr. Martinez refused to show his hands or comply with orders given to him. IA showed Officer Jackson the DMAV, specifically where it showed Mr. Martinez sat up with his hands in front of him, and was in the process of standing up when Officer Van Buren tased him. After reviewing the DMAV, Officer Jackson was asked if he would have used his Taser on Mr. Martinez. He stated, *"I don't think so."* He explained, *"Um, I probably could've physically grabbed him maybe used an arm-bar or something and go ahead and cuffed him at that point maybe. Um, I mean the guy's sitting up, he's not really complying, he's not getting up but he's just kind of sitting there. So he wasn't coming after us or anything. So, um, it was different than I remembered, you showed 'em to me..."*

Officer Jackson wanted to further explain his interpretation of the incident after watching the DMAV. *"I'm still just kind of taken aback of that the video was different than the way I remember it so I'm kind of freaked out about that. Like it's not what I - I mean - I don't know. It was just not what I was expecting when I watched that video."*

Interview of Officer Christopher Van Buren⁶

Officer Van Buren was interviewed by IA on October 13, 2015. Officer Van Buren started the IA interview by reading a pre-written two page statement explaining his involvement in the incident. The pre-written statement was consistent with his VERSADEx report and his SIU interview. IA asked Officer Van Buren to describe how intoxicated people can behave. He stated it depended on their level of intoxication and agreed their reactions could be slowed or diminished and they could be confused. IA asked if he knew Mr. Martinez was intoxicated when he first approached him. Officer Van Buren stated he could smell alcohol on Mr. Martinez and since the call was a subject urinating in public, *"...those things, kind of, go hand in hand usually."* Officer Van Buren stated as he approached, Mr. Martinez was laying on the ground with his hands behind his head using a black duffel bag as a pillow. His eyes were open, but he did not acknowledge Officer Van Buren or Officer Jackson. IA asked Officer Van Buren if he felt threatened by Mr. Martinez. He stated, *"...the reason I felt threatened by him was the fact that he was just not compliant. We were just so close to him. When he demonstrated the whole sucking of the teeth thing. It was - I felt that we needed to go hands on. I've had past experiences, um, the last (unintelligible) happened about a year*

⁶ Tab B-2

ago, uh, the subject did the same thing to me except that at that time I didn't react accordingly and I, kind of, gave him slack and things escalated to the point that he ended up grabbing my partner. It turned into a fist fight."

IA asked Officer Van Buren about the current incident and requested he further explain his reason for using his Taser on Mr. Martinez. Officer Van Buren stated, *"It was the - the sucking of the teeth the demeanor change. And I knew that I needed to go hands on with him, but the - my biggest concern I had was the bag. Because if I were to try and grab him when he was sitting on the ground and he pulled me to the ground what - now were on top of the bag fighting or were on top of each other fighting on the ground where he's within arm's reach of this bag. So if he were to grab a weapon and use it against me or, you know, (Jackson) or something like that then someone was gonna get injured before were able to react accordingly."* IA asked if the bag was a concern, why was it not moved from the area after successfully tasing Mr. Martinez? Officer Van Buren stated after watching the DMAV and reflecting on the call, he felt the bag should have been moved from the area immediately. IA asked Officer Van Buren why Mr. Martinez was not allowed to stand up before he was tased. He stated, *"Um, it was because of the sucking the teeth thing. Once he did that, it was probably two seconds for it to process. And then I deployed the Taser on him. After that."* Numerous times throughout the interview, Officer Van Buren referred to Mr. Martinez *"sucking his teeth"*. IA asked Officer Van Buren to explain what *"sucking his teeth"* meant to him. He stated, *"It's like someone balling their fists at you or taking a fighting stance, like, my experience that every person that's ever done that to me has always lead to them resisting or fighting."* Officer Van Buren further explained he felt it was *"preparatory aggression"*. IA asked Officer Van Buren to explain how Mr. Martinez's demeanor changed. He replied, *"He went from pretty much confused to very angry in his face, like his eyes were, kind of, like, I don't know I guess the best word to use is, like, the death stare, but the glaring at me. And then he began to suck his teeth at me a few times."* IA asked Officer Van Buren numerous times to further explain his reasons for tasing Mr. Martinez. Officer Van Buren continued to state Mr. Martinez's change in demeanor, *"sucking his teeth"* and proximity to his bag were the reasons for deploying his Taser. Officer Van Buren added there were other people in the area *"and the totality of the circumstances that led me to use the Taser versus going hands on with him."*

IA showed Officer Van Buren the DMAV and went frame by frame with him, allowing him to explain his actions. Officer Van Buren reiterated his concerns about the duffel bag and Mr. Martinez's change in demeanor and *"sucking his teeth"*.

HERRING: And I know we've asked this, but I just since we're watching the video I want to make sure that - that this is still how you feel and we're still clear. There is nothing that indicates on the video that he was getting ready to fight, hurt, assault you other than his change in demeanor that - that you saw. Like I said, it's difficult to see on the video.

VAN BUREN: Yeah absolutely.

HERRING: So there - other than so there was still just the change in demeanor?

VAN BUREN: It was the change in demeanor and the - and the, uh, sucking of the

teeth. I'm, like - like, I said, like, you can't physically see him clench his fist and you can't - he doesn't take a fighting stance. There's not physical signs, but to me standing there looking at him this distance that we are, you know, a couple feet. I can see the demeanor change. I can see the preparatory aggression that he is showing towards me. Obviously the camera doesn't catch it because I mean the (unintelligible) is not gonna catch everything. But that's what the report is for.

IA asked Officer Van Buren if, after reviewing the DMAV and reflecting on the call, did he feel tasing Mr. Martinez was the only appropriate response. He stated, *"From the situation I was in yes. Can it handle - be handled a different way? Absolutely, I could have been like hey (Jackson) move the bag, you know, go hands on or something like that. But like I said I had a split - I had seconds that I had to respond."* IA asked Officer Van Buren if he encountered this situation again, would he do anything differently. He replied, *"I think I would probably step back. Let him probably, um, since he's in a sitting position I would have just stepped back more and just let him do what he's gonna do and address it from there. I would've definitely had (Jackson), uh, move that bag."*

Officer Van Buren R2R history⁷

IA was provided a summary of Officer Van Buren's R2R history by his chain of command. A review indicated he had been involved in approximately eight R2Rs since joining APD in December 2013. Of those eight R2Rs, five of them involved Officer Van Buren deploying his Taser. His Taser deployments were successful two times. IA reviewed the reports associated with Officer Van Buren's R2Rs. None of the reports mentioned any suspects sucking their teeth prior to the actual R2R.

IA located the previous R2R Officer Van Buren referred to in his IA interview⁸. The previous R2R occurred on January 12, 2015, and was documented in APD report 15-0121050. The following is a brief summary of the January 12th incident, according to the DMAV and VERSADEX report.

Officer Van Buren and Officer James Looker #7706 noticed a small fire in the area of Levander Loop and Ed Bluestein Boulevard. They located a male who had started a small fire under a bridge to keep warm. The officers asked the male to extinguish the fire. He refused and walked away, going toward his personal belongings. The male was told again to stop and when he refused, Officer Van Buren deployed his Taser. The Taser was unsuccessful due to the subject wearing several layers of clothes. Officers Van Buren and Looker attempted to take the subject into custody and a struggle ensued. Officer Van Buren struck the subject in the head with a closed fist and eventually had to drive-stun the subject in order to take him into custody.

⁷ Tab E-7

⁸ Tab E-5

The R2R was reviewed by the Region III chain of command and determined to be objectively reasonable and within department policy. There was no mention of the suspect sucking his teeth in the report.

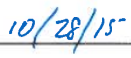
Summary of Facts

- On August 27, 2015, Officer Van Buren and Officer Jackson were dispatched to 2706 Gonzales Street for a report of a subject urinating in the bushes.
- Officer Jackson located the subject, later identified as Armando Martinez, laying on his back under a tree in a nearby park. Mr. Martinez had his hands under his head, resting on a duffel bag.
- Officer Jackson approached Mr. Martinez and ordered him to show his hands.
- Officer Van Buren arrived and ordered Mr. Martinez to stand up. When he did not stand, Officer Van Buren told Mr. Martinez he would be tased if he did not get up and walk toward the police vehicle.
- Mr. Martinez sat up with his hands in front of him, and stated, "You're going to tase me?"
- Officer Van Buren successfully deployed his Taser, striking and incapacitating Mr. Martinez.
- Officer Jackson handcuffed Mr. Martinez and placed him under arrest.
- When Officer Van Buren gave Mr. Martinez the first verbal command to "stand up" to when Mr. Martinez was tased was approximately 19 seconds.
- EMS transported Mr. Martinez to Brackenridge Hospital for high blood sugar.
- After waiting for over four hours, Officer Jackson was given permission to issue Mr. Martinez field release citations for Disorderly Conduct – Exposure and Public Intoxication.


 2763
Sergeant Mark Herring #2763


Date

 2746
Lieutenant Frank Dixon #2746


Date

 2526
Commander Patrick South #2526


Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	Plaintiffs,	§
		§
v.		§ CIVIL ACTION No. 1:20-cv-01068-LY
		§ JURY DEMANDED
MICHAEL NISSEN AND CITY OF		§
AUSTIN,		§
	Defendants.	§

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 84
McDonald APD Internal Affairs Report**

(COA 175662)

FILED UNDER SEAL

IA Liaison: Sgt. Debbie Trevino

**Internal Affairs
Personnel Complaint Control Sheet**

Class A Internal IA Case #2016-0600

Assigned Investigator: Sergeant Debbie Trevino

Date Occurred 04/22/2016	Date Investigation Received 06/06/2016	Date Investigation Completed 09/25/2016	180-Day Deadline 10/19/2016
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Complaint Information

Complainant's Name Chris Vallejo	Incident Location 9616 North Lamar Boulevard, Austin, TX
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Employee's Information

Officer Matthew Murphy	Employee No. 7617	Rank Officer	Current Assignment Region 2 Patrol Edward 800
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Employee's Chain of Command

Sergeant Billy Hurst	Lieutenant Chris Vallejo	Ops Lieutenant Allen McClure	Commander Todd Smith	Assistant Chief Troy Gay
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Allegations Investigated

Policies Associated with Allegations	Final Classification	Signature of Person Determining Classification	Date Signed
200.6.1 Use of Force to Seize Evidence	SUSTAINED	<i>[Signature]</i> 2016	10/14/16
321.3.1(c) Transporting Arrested Persons	SUSTAINED	<i>[Signature]</i> 2016	10/14/16

Discipline Administered by Chain of Command

Educational Based Discipline <input checked="" type="checkbox"/> (Number Days in Lieu) <u>3</u>	Oral Reprimand <input type="checkbox"/>	Written Reprimand <input type="checkbox"/>
Temp Suspension - No. of Days <u> </u> <input type="checkbox"/>	Demotion <input type="checkbox"/>	Indefinite Suspension <input type="checkbox"/>

Required Signatures

Required Signatures	Employee No.	Date
Investigator's Signature		
City Legal Review <i>(Required on DRH)</i>		
Chief of Staff <i>(Required on Critical Incidents)</i>		
Chief of Police	<u>2124</u>	<u>10/18/16</u>

(All Control Sheets must be signed by the COP or an Assistant Chief before returning to IA)

IA Commander Signature

[Signature] 2957

Date 10/21/16

AUSTIN POLICE DEPARTMENT
CLASS A ADMINISTRATIVE INVESTIGATION
CASE SUMMARY

To: Art Acevedo
Chief of Police

Via: Kurtis Krause
Commander, Internal Affairs

Jennifer Stephenson
Lieutenant, Internal Affairs

From: Debbie Trevino
Sergeant, Internal Affairs

Date: September 25, 2016

Subject: **IA Case 2016-0600 Officer Matthew Murphy #7616**
(180 Deadline 10/19/16)

Introduction

On April 22, 2016, at approximately 12:36 a.m. Austin Police Department (APD) Officer's Matthew Murphy #7617 and Tony Bishop #7758 were approached by a known transient who provided information of possible drug activity behind a business at 9616 North Lamar Boulevard, Austin, Texas. Behind the business officers encountered two males and a female later identified as Joe McDonald, Anthony Waits, and Jessica Farrow. All three subjects acted suspicious, were nervous, and appeared to try to conceal items and leave quickly. Officers frisked and handcuffed all three subjects and Officer Murphy placed Mr. McDonald and Ms. Farrow in the back of his patrol unit and Mr. Waits was placed in the back of Officer Bishop's patrol unit. While in the back of Officer Murphy's unit Mr. McDonald then retrieved suspected drugs from his front pocket and attempted to ingest them. Mr. McDonald also retrieved suspected drugs from Ms. Farrow's bra and attempted to ingest it. Upon reviewing DMAV Officer Murphy learned Mr. McDonald and Ms. Farrow passed suspected drugs between them and that Mr. McDonald attempted to conceal the evidence by placing it in his mouth and possibly ingesting it. Officer Murphy was concerned for the well being of Mr. McDonald due to the unknown amount and type of suspected drugs he ingested and requested EMS to the scene to evaluate Mr. McDonald. When Mr. McDonald learned he was going to be evaluated by EMS he became agitated and verbally combative and was placed in Officer Murphy's patrol unit. Mr. McDonald moved his handcuffs to the front of his body and began to yell, move

Investigative Summary - IA Case 2016-0600 Officer M. Murphy #7617
180 Deadline 10-19-2016

around in the back seat, and hit the window. EMS arrived on scene and spoke with Mr. McDonald through the rolled down window of the police unit, Officer Murphy noticed Mr. McDonald had the suspected drugs in his mouth. Officer Murphy asked Mr. McDonald to spit out what he had in his mouth but he refused to comply. DMAV showed Officer Murphy removed Mr. McDonald from the unit onto the ground. Officers Bishop and Brenda Glasgow #7421 assisted Officer Murphy and attempted to gain control of Mr. McDonald and get him to spit out what he had in his mouth but Mr. McDonald refused to comply. Officers stated Mr. McDonald resisted them as he kicked his legs and moved his handcuffed hands up and down the front of his body. Officer Murphy used his Taser to apply one drive stun cycle to Mr. McDonald's hip area which resulted in Mr. McDonald to spit out some of the suspected drugs. Mr. McDonald was then placed onto the EMS stretcher and his hands were properly secured with handcuffs to the stretcher. Officer Murphy noticed Mr. McDonald still had suspected drugs in his mouth and ordered him to spit it out and he complied.

Allegation and Associated Policies

Lieutenant Chris Vallejo #2662 submitted a signed complaint to APD Internal Affairs (IA) on June 5, 2016, to conduct an Administrative Investigation to determine if any violation of departmental policy, civil service rules or state law had been committed by Officer Murphy.¹

The alleged behavior might constitute violations of the following APD Policies:²

- APD Policy 200.2.1 Determining the Objective Reasonableness of Force
- APD Policy 206.6.1 Use of Force to Seize Evidence

Investigation

For this administrative investigation, IA reviewed the following:

- 16-1130054 case file
- 16-1130054 Versadex Report
- 16-1130054 CAD Sheet
- 16-1130054 DMAV
- 16-1130054 Digital Photos
- 16-1130054 Level 2 R2R Inquiry Memo
- 16-1130054 Taser Report
- 16113-0006 EMS Run Sheet

IA interviewed the following persons:

- Officer Tony Bishop #7758
- Officer Brenda Glasgow #7421

¹ Complaint Tab A-1

² Policy 200.2.1, 206.6.1 Tab A-2

- Officer Joseph Gordon #8061
- Officer Matthew Murphy #7617
- Austin-Travis County EMS Medic Tom Holman EM1585

Timeline

The following timeline was determined from Officer Murphy's DMAV³

- 00:41:59 McDonald removed suspected drugs from pocket and placed in mouth
- 01:17:12 EMS assessed McDonald through rolled down window
- 01:30:45 Murphy opened unit door, shined light at McDonald's mouth and asked him to open his mouth
- 01:31:04 Murphy, "I need you guys to back up for a second, he still has the crack in his mouth"
- 01:31:15 Murphy opened unit door and told Mr. McDonald "spit it out," 2x
- 01:31:18 Murphy put hand on back of Mr. McDonald's shoulder, he pulled away from Murphy who then pulled him from unit onto the ground
- 01:32:32 Murphy, "Take my cartridges off"
- 01:31:35 Glasgow, "You're gonna get tased," 2x
- 01:31:36 Murphy, "Spit it out now," 3 x
- 01:31:55 Murphy, "Taser, Taser, Taser"
- 01:31:58 Taser deployment can be heard
- 01:32:02 Murphy, "I'm telling you right now, spit it out or get it again"
- 01:32:10 Glasgow, "You're going to die if you swallow it, spit it out"
- 01:32:22 Murphy, "Spit it out," 2x
- 01:32:26 Murphy, "Spit it out or get tased again"
- 01:32:34 Murphy, "Spit it out," 2x
- 01:32:55 Murphy, "If you spit it out I will not charge you with tampering. I'm telling you right now as my word." "I just don't want you to die"
- 01:33:26 Murphy, "Put your hand behind your back"

IA Interview

IA interviewed **Officer Tony Bishop** on August 3, 2016.⁴ Officer Bishop stated he and Officer Murphy were in the parking lot in the 800 block of Rutland Drive when they were approached by a known transient who informed them of individuals behind the Whataburger who were possibly involved in illegal drug activity. Officer Bishop stated Officer Murphy informed him of a blanket Criminal Trespass Notice in place for that property and no one should be back there. Officer Bishop stated when they drove up he saw Ms. Farrow sitting down with Mr. McDonald and Mr. Waits was standing and they began to gather their belongings and walk away. Officer Bishop stated Officer Murphy

³ Officer Murphy DMV – Tab E

⁴ Officer Bishop statement – Tab D

took the lead and began speaking to them and they detained all three subjects. Officer Bishop stated he frisked and handcuffed Mr. Waits and then saw items in plain view where all three subjects had been that consisted of clear plastic baggie's containing a white powdery substance, a scale with green leafy substance, and a box. Officer Bishop stated Officer Murphy frisked and handcuffed Mr. McDonald and Ms. Farrow and placed both of them in Officer Murphy's patrol unit.

Officer Bishop stated Officer Murphy called for a female officer and Officer Glasgow arrived and searched Ms. Farrow and found suspected marijuana and cocaine in Ms. Farrow's bra. Officer Bishop stated at some point Officer Murphy reviewed his DMAV and saw Mr. McDonald conceal suspected narcotics in his mouth that Ms. Farrow had on her person. Officer Bishop stated he remembered Officer Murphy confronted Ms. Farrow and Mr. McDonald about what he saw them do in the back seat. IA asked Officer Bishop to describe Officer Murphy's demeanor when he said that. Officer Bishop stated:⁵ *He was - it was loud. Uh, he was - I mean, he wasn't - like I said, he wasn't talkin' like you and I were. His - his voice was elevated. Um, he appeared to be upset and concerned about an in-custody death. Is - is the way I took it. He - he was very concerned about the fact that some - possibly narcotics was ingested while (McDonald) was in the backseat of his patrol car, in his custody, and he was worried that - i- from what I - from what I - I can't speak for him. I don't know. But from what I gathered, he was, uh, I guess, upset that he was in danger of, you know, harmin' himself or something.*

Officer Bishop stated EMS was called for Mr. McDonald and they assessed him while he sat in the back seat of the patrol unit. Officer Bishop stated after a few minutes of EMS assessing Mr. McDonald, Officer Murphy said, "Hey he's got dope in his mouth," and then said, "We're gonna have to get him out." Officer Bishop stated he put his gloves on and went over to Officer Murphy's unit. Officer Murphy pulled Mr. McDonald out and guided him to the ground. Officer Bishop stated he did not know what happened or why Mr. McDonald did not just step out on his own. Officer Bishop stated Mr. McDonald "stiffened" his body, was "twisting and turning," and slipped his handcuffs to the front of his body. Officer Bishop stated he placed his knee on Mr. McDonald's torso to keep him from twisting and turning. IA asked Officer Bishop what verbal commands were given by Officer Murphy. Officer Bishop stated:⁶ *He kept saying, Spit it out. Spit it out. Um, uh, he said somethin', like, If you spit it out, I'm not gonna charge you with tampering. I just don't want you to die.*

Officer Bishop stated he did not see if Officer Murphy attempted to apply any kind of pressure point to Mr. McDonald to retrieve what he had in his mouth prior to using his Taser. Officer Bishop stated Officer Murphy had his Taser out and asked him to take the Taser cartridge off which he did. Officer Murphy drive stunned Mr. McDonald one time and he spit out a bag of suspected drugs. Officer Bishop stated Mr. McDonald said, "I don't have any more fight left in me," and was compliant and no longer twisted or turned his body. Officer Bishop stated when they placed Mr. McDonald on the stretcher Officer

⁵ Officer Bishop statement – Tab D – lines: 1387-1393, 1397-1399

⁶ Officer Bishop statement – Tab D – lines: 1691-1692

Murphy noticed he still had something else in his mouth and eventually spit out a bloody bag of suspected drugs.

Officer Bishop stated he never gave Mr. McDonald any verbal direction to do anything because Officer Murphy spoke the entire time. Officer Bishop stated he did not know what type of compliance Officer Murphy was trying to gain when he deployed his Taser. IA asked Officer Bishop if Officer Murphy used the Taser to retrieve narcotics from Mr. McDonald's mouth if he thought that was an appropriate level of force to use. His statement:⁷

TREVINO: So do you think Officer (Murphy)'s use of the taser was objectively reasonable to retrieve the evidence? If that's what he was using it for.

BISHOP: I do. Well, I'm not saying I would've done it, but I can understand, um, if that...if the reason why he did tase was to retrieve the narcotics, um, I mean, at that point in time - well, it was a lot of s- it was a lot of stuff in his mouth. So if - if that was his only way of, you know, gettin' it out of his mouth, then I could see that bein' a reason, um, as to why he might've, but I - I can't - I - I don't know exactly why.

Officer Bishop stated he was concerned for Mr. McDonald's safety and what he had in his mouth that he could potentially swallow. He said he felt Officer Murphy was more concerned than anyone about Mr. McDonald dying.

IA interviewed **Officer Brenda Glasgow** on August 3, 2016.⁸ Officer Glasgow stated she arrived on scene to perform a female search on Ms. Farrow and located five plastic baggie's of suspected marijuana in her bra. Officer Glasgow stated EMS had been called to the scene by Officer Murphy to evaluate Mr. McDonald for possible drug ingestion. Officer Glasgow stated Mr. McDonald was placed in Officer Murphy's unit to wait for EMS. She stated she noticed Mr. McDonald slipped his handcuffs to the front of his body and made it obvious to the officers what he had done. Officer Glasgow stated EMS arrived and did an assessment of Mr. McDonald while he sat in the back of the patrol unit. Officer Glasgow stated she thought Officer Murphy attempted to remove Mr. Donald from his unit so EMS could evaluate him and when she looked over again she saw Officer Murphy and Mr. McDonald on the ground. Officer Glasgow stated she went to assist and saw Officer Bishop, Officer Murphy and Mr. McDonald on the ground. Officer Glasgow stated Mr. McDonald moved his handcuffed arms up and down the front of his body, kicked his legs, turned his body back and forth, and turned his head back and forth to keep from what he had in his mouth from being discovered. Officer Glasgow stated she used her body weight to try to keep Mr. McDonald from moving around. IA asked Officer Glasgow what commands Officer Murphy gave Mr. McDonald. She stated:⁹ *Um, Spit it out. Spit it out. You're gonna get tased. You could die." I think I told*

⁷ Officer Bishop statement – Tab D – lines: 2100-2101, 2166, 2064-2068

⁸ Officer Glasgow statement – Tab D

⁹ Officer Glasgow statement – Tab D lines: 484-485

him, "Spit it out, man. You're gonna get tased.

IA asked Officer Glasgow to describe Mr. McDonald's actions during that time. She stated:¹⁰ *I know at one point, when I was holding an arm and hi- I had my body weight on - on him, um, I think Officer (Murphy) - he had brought his arms, like, down on mur- Officer (Murphy)'s arm. And... (Joe McDonald) i- had, like - I think his - Officer (Murphy)'s arms, like, trapped at one point, and then he jerked it out And, like, doing all he could with his arms that a person can while being handcuffed. You know, you can't fist fight, but you can - you can thrash your arms about. And he's thrashing his arms. Um, Officer (Murphy) was able to get his arm free, 'cause I think it was, like, d- at his waist. Um, (Joe) - (Joe)'s handcuffed arms and Officer (Murphy)'s arms was trapped, like, at the waist at one point, but Officer (Murphy) was able to get it out.*

Officer Glasgow stated her primary concern was to re-secure Mr. McDonald's hands to his back and the secondary concern was to prevent Mr. McDonald from hurting himself by swallowing what he had in his mouth. However, he refused to comply and did not want his handcuffs switched to his back. Officer Glasgow stated Officer Murphy asked Officer Bishop to remove his Taser cartridge, and he did. Officer Glasgow stated Officer Murphy gave a Taser warning and drive stunned Mr. McDonald for one cycle. Officer Glasgow stated the drive stun was effective and Mr. McDonald quit resisting and spit out what was in his mouth. Officer Glasgow stated she believed Officer Murphy used the least amount of force possible in order to get Mr. Murphy to stop fighting, to spit out what he had in his mouth and to prevent causing injury to him. IA asked Officer Glasgow if she thought Officer Murphy used his Taser to gain compliance against Mr. McDonald's resistance, or to retrieve whatever he had in his mouth. She stated:¹¹ *First off, resisting. With that as a secondary, um, if that came of it because - you know, if - if he would've just quit fighting after that, at some point we still would've needed to get what was in his mouth out of his mouth. Hopefully so that he wouldn't swallow it.*

IA asked Officer Glasgow if she thought Officer Murphy's use of the Taser was objectively reasonable. Her statement:¹²

TREVINO: Do you think that Officers - Officer (Murphy)'s use of the taser was objectively reasonable?

GLASGOW: I do.

TREVINO: Why?

¹⁰ Officer Glasgow statement – Tab D lines: 485-488, 492-494, 517-523

¹¹ Officer Glasgow statement – Tab D lines: 745-748

¹² Officer Glasgow statement – Tab D lines: 760-789

GLASGOW: *Um, he wasn't quitting fighting us. And by "fighting," again, I mean the thrashing and the kicking and the - he wasn't allowing us to re-cuff him. He didn't want any part of that. Um, I don't know if he would've stopped that fight if he wouldn't of drive stunned him.*

TREVINO: *Okay. So do you think there was anything else that could've been done instead of drive stunning him to accomplish what you all were tryin' to accomplish? Which was to get him to cooperate and not, um, and stop resisting?*

GLASGOW: *Um, I believe that if - if, um, at that point, you know, we could've maybe tried pressure points. Sometimes just holding onto them is hard enough. Um, I know if I'm fi- if I'm physically trying to overpower somebody or gain control of them, my main goal is to not let go of whatever body part I've managed to hold onto. So pressure points don't really - aren't really effective for me to use. I think maybe we could've attempted a pressure point if - if one of us was able to let go of whatever hold we had, to find that point.*

TREVINO: *But you never saw Officer (Murphy) attempt any kind of pressure point...*

GLASGOW: *I did not. No.*

TREVINO: *...to retrieve the narcotics?*

IA asked Officer Glasgow if Mr. McDonald was no longer resisting after being drive stunned why she thought Officer Murphy would threaten to use the Taser again. Her statement:¹³

TREVINO: *So after Officer (Murphy) tased, did he, um, ever say he was gonna use his taser again?*

GLASGOW: *I believe he gave a warning, if he didn't cooperate he was gonna get it again.*

TREVINO: *So what was (Joe McDonald) doing to not cooperate to get Officer (Murphy) to say, you know, whatever he said or get tased again?*

GLASGOW: *I'm not sure at what point he said that. If it - if - if (Joe) was still thrashing or not.*

TREVINO: *So do you think Officer (Murphy) said, "Spit it out or get tased again"?*

¹³ Officer Glasgow statement – Tab D lines: 882-891, 917-923, 929-930

GLASGOW: *I don't know if those - I - I think he said that.*

TREVINO: *But do you think that was the goal of Officer (Murphy)? If (Joe McDonald) was already compliant with, um, in regards to no longer resisting? Wh- what else would Officer (Murphy) be trying to accomplish, to threaten to use his taser again?*

GLASGOW: *If he had already quit thrashing around - if that's when he said it, to get him to spit it out.*

IA asked Officer Glasgow if policy allows you to use a Taser on someone to retrieve narcotics from someone's mouth. She stated:¹⁴ *I don't think you are. No.* Officer Glasgow was asked if anything could have been done differently. She stated:¹⁵ *I'm not sure how he got out of the car. If I was to do it over, I would say try to have at least two officers there when you're tryin' to get him out of the car, and it might not have gone to the ground that way. Maybe they would've had more control on it. I don't know if it was just Officer (Murphy) that took him out. I'm not sure how he got to the ground in the first place, but if we can avoid the fight by doing something like that, that's something that I would say could've done differently.*

Officer Glasgow stated:¹⁶ *I truly believe that the main concern was him not ingesting something that could potentially kill him. It's - I don't want anybody to die 'cause they want to escape a felony charge. I think the concern was legitimate. Um, I hate that he fought us, because if he wouldn't of fought us, I don't think the tasing wouldn't have happened. He wouldn't of ended up on the ground. You know, we still would've tried to get out what was in his mouth, but it wouldn't of been physical, on the ground fight. You're not gonna take someone to the ground - do that if all they're doing, I'm gonna try to get what's in your mouth, but at the end of the day, if you want to swallow it, you're gonna swallow it. I'm not gonna fight you to prevent you from swallowing it. But if you're - if you're fighting, well, then you've taken it to a different level. Our first goal might've been to try to persuade him what was - to get rid of what was in your mouth, but once he took it physical, well, then that's where it is and we have to get him controlled and it happened to be with the drive stun - he, you know - we - that's where it went.*

IA interviewed **Officer Joseph Gordon** on August 23, 2016¹⁷. Officer Gordon stated when he arrived on scene he saw Officer Murphy and Officer Glasgow holding Mr. McDonald on the ground, who was mostly on his stomach, and kicking his legs. Officer Gordon stated it appeared the officers were trying to keep Mr. McDonald still and under control but were not struggling with him. Officer Gordon stated he got out of his vehicle, approached, and saw Officer Murphy with his Taser on Mr. McDonald's back and heard

¹⁴ Officer Glasgow statement – Tab D lines: 965

¹⁵ Officer Glasgow statement – Tab D lines: 1029-1039

¹⁶ Officer Glasgow statement – Tab D lines: 1158-1176

¹⁷ Officer Gordon statement – Tab D

Officer Murphy say, *"Spit it out, Spit it out, if you don't spit it out, I'm gonna tase you again."* Officer Gordon stated Officer Murphy continued to give commands to spit it out and said, *"If you just spit it out, I won't charge you with tampering. I just don't want you to die."* Officer Gordon stated Mr. McDonald spit out a plastic bag and he picked it up.

Officer Gordon stated he did not witness Officer Murphy use his Taser but knew that he had based on Officer Murphy's comments. Officer Gordon stated he did not immediately know Mr. Murphy was handcuffed because they were to the front of his body. Officer Gordon stated he did not know what caused Officer Murphy to deploy his Taser but believed it was because Mr. McDonald's hands were in front of him and he could have acted aggressive toward the officers. Officer Gordon also stated Mr. McDonald had something in his mouth that was a safety concern for Officer Murphy based on the comments he made about not charging Mr. McDonald with tampering and not wanting him to die. IA asked Officer Gordon if he felt that using the Taser to retrieve evidence or narcotics from a suspect's mouth was an objectively reasonable amount of force to use. He stated:¹⁸ *Well I think, um, the use of force well, um, was, um, looked to be used to try to prevent him from dying. Prevent him from swallowing the drugs and dying. And I don't, um, for me I don't think I would have used the Taser but, it seemed to me, uh, that it was, um - um, that if he was gonna tase him it was more for his safety and not to just use that force on him. And if I thought he was tryin' to be excessive with the force I woulda tried to stop him.*

Officer Gordon stated when Mr. McDonald was placed onto the EMS stretcher his hands were handcuffed to the rails and Officer Murphy noticed he had something else in his mouth. Several commands were given by Officer Murphy and himself, and eventually Mr. McDonald spit out a bloody plastic bag without any force being applied on him. Officer Gordon also stated he did not see Officers Murphy or Glasgow attempt by other means to retrieve what Mr. McDonald had in his mouth or use any other force.

IA interviewed **Medic Tom Holman** on August 18, 2016.¹⁹ Medic Holman stated when he arrived on scene one of the police officers communicated to him the need to evaluate and treat a patient in custody who swallowed drugs. Medic Holman stated his evaluation of patient McDonald was verbal as he sat in the back seat of the patrol unit and spoke with him through the back seat window. He stated Mr. McDonald denied ingesting any drugs and appeared to be awake, alert and oriented and looked to the officers for guidance on whether to transport. Medic Holman stated he noticed Mr. McDonald's hands were handcuffed to the front of his body and brought it to the attention of one of the police officers prior to Mr. McDonald being removed from the vehicle. Medic Holman stated he thought officers removed Mr. McDonald from the unit to get his handcuffs readjusted. Medic Holman stated he initially heard verbal commands of, *"Give me your hands,"* and then, *"Spit it out- spit it out, or I'm gonna tase you."* Medic Holman stated one of the officers drive stunned Mr. McDonald and he eventually spit out what was in his mouth and they were able to secure his hands and get him on the

¹⁸ Officer Gordon statement – Tab D lines: 613-615, 627-633

¹⁹ Medic Holman statement – Tab C

stretcher. Medic Holman stated he thought the officer tased Mr. McDonald to gain compliance to spit out the drugs he had in his mouth. He stated he was not in a good position to see what Mr. McDonald was doing with his head, hands or body. Medic Holman stated from what he saw he did not witness officers handle Mr. McDonald in an inappropriate manner and Mr. McDonald did not complain of pain, and there were no visible injuries.

IA interviewed **Officer Matthew Murphy** on August 25, 2016.²⁰ Officer Murphy stated he and Officer Bishop were flagged down by a known transient who directed them to the area behind 9616 North Lamar Boulevard where there were individuals possibly engaged in illegal activity. Officer Murphy stated he believed the illegal activity the transient referred to consisted of drug activity. He stated he knew there was a standing Criminal Trespass Notice for the property and no one was supposed to be there. Officer Murphy stated as they drove up to the location he saw three individuals sitting on a concrete slab who were later identified as Joe McDonald, Jessica Farrow, and Anthony Waits. Officer Murphy stated he saw Ms. Farrow put items down the front of her shirt, Mr. McDonald put something behind the dumpster, and Mr. Waits grabbed his bags and tried to walk away. Officer Murphy stated they stopped all three individuals and frisked them for weapons, handcuffed them, and detained them for violation of the Criminal Trespass Notice. Officer Murphy stated he felt he had reasonable suspicion for the detention and intended to identify them and issue a Criminal Trespass Notice. Officer Murphy stated he placed Mr. McDonald in the back of his unit and asked him if he or anyone else had any drugs on them. Officer Murphy stated he began to conduct a narcotics investigation based on information the transient provided and the suspicious actions the subjects displayed when they arrived.

Officer Murphy explained when he placed Mr. McDonald in his unit no one kept visual contact of him. Officer Murphy stated when he frisked and handcuffed Ms. Farrow in the front of his unit he did not notice Mr. McDonald moving around in the back seat. Officer Murphy stated he suspected Ms. Farrow had illegal items in her bra and called for a female officer to search her. Officer Murphy stated Officer Bishop checked the area where all three had been and in plain view observed suspected crack cocaine and a scale with suspected marijuana on it.

Officer Murphy stated he placed Mr. McDonald and Ms. Farrow together in the back seat and intentionally gave them free reign to move around. He stated he hoped they would forget about the camera and speak freely about who was holding narcotics, or ask the other to claim responsibility, or simply toss the evidence in the back seat. Officer Murphy stated placing both individuals together was an investigative technique he had used in past narcotics investigations where he attempted to catch suspects on DMAV speaking freely about holding drugs or who claims ownership. Officer Murphy stated it did not occur to him if Mr. McDonald or Ms. Farrow were holding any illegal contraband or narcotics on their person they would try to ingest the evidence instead of trying to conceal it within the backseat. Officer Murphy stated he understood it was their

²⁰ Officer Murphy statement – Tab B2

responsibility to maintain a visual of Mr. McDonald and Ms. Farrow once he placed them into his unit.

Officer Murphy stated Officer Glasgow arrived and he explained to her they recovered suspected narcotics and contraband in plain view and wanted her to do a probable cause search on Ms. Farrow. Officer Murphy stated he removed Mr. McDonald from his unit to search him and seized a small bag of suspected marijuana from his front shirt pocket. Officer Murphy then reviewed his DMAV and learned Mr. McDonald and Ms. Farrow passed suspected drugs back and forth and Mr. McDonald attempted to ingest several items of suspected drugs. Officer Murphy stated as he reviewed DMAV, the amount of suspected drugs he witnessed Mr. McDonald attempt to ingest continued to grow which prompted him to request EMS. Officer Murphy stated he felt Mr. McDonald's life could be in danger. IA asked Officer Murphy why he believed Mr. McDonald's life was in danger and if requesting EMS was normal procedure. His statement:²¹

TREVINO: Okay. And you said that, um, you felt that, uh, (McDonald) 's life was in danger?

MURPHY: Well I - from the video it looked like he swallowed what appeared to be like a significant amount of narcotics. I didn't know what the narcotics was laced with. I didn't know what he had taken prior to that.

TREVINO: So is that somethin' that you would normally do once you learn, um, the subject that you're dealing with has potentially swallowed, um, narcotics or dangerous drugs?

MURPHY: Yes, ma'am.

TREVINO: What - what went through your mind once you saw that? What (McDonald) was back there doin'? That he had possibly ingested various types of unknown narcotics.

MURPHY: Um, honestly from that point on pretty much to the hospital, um, I was really hopin' that he didn't just almost kill himself. Um, to avoid bein' arrested for somethin'. I thought - I thought that he was gonna like overdose right there in front of us.

TREVINO: So did you feel that there was an exigency for EMS to get there and treat him?

MURPHY: Yes, ma'am.

Officer Murphy stated he directed Mr. McDonald to the front of his unit to observe him

²¹ Officer Murphy statement – Tab B2 lines: 589-709, 747-749

until EMS arrived. Officer Murphy stated Mr. McDonald did not want to sit while they waited for EMS to arrive and he became verbally aggressive and can be heard on DMAV saying, "I'm not that nigga. I'm not that nigga." Officer Murphy directed him to sit on his push bar and Mr. McDonald said, "I go hard," "You don't know." Mr. McDonald attempted to walk away and Officer Murphy stated he placed him back into his unit to wait for EMS. Officer Murphy stated almost immediately Mr. McDonald moved his handcuffs to the front of his body and began to yell, hit, and kick at the door and window. Officer Murphy stated he did not try to intervene or felt it was an immediate safety concern since he was contained in the back seat. Officer Murphy stated he monitored him until EMS arrived.

Officer Murphy stated when EMS arrived they spoke with Mr. McDonald through the window of the backseat since his handcuffs were still in front of his body. Officer Murphy stated he appeared to be calm as he spoke with EMS and then noticed Mr. McDonald had something in his mouth. Officer Murphy stated he saw the corner of a plastic bag and suspected it was drugs. Officer Murphy stated he relayed this information to Officer Bishop and requested his assistance. Officer Murphy stated he hoped he could gain compliance from Mr. McDonald and he would spit it out. IA asked Officer Murphy if EMS was on scene why didn't he let them begin treating Mr. McDonald. His statement:²²

TREVINO: So if EMS was standing by why was it still of concern for you to try to retrieve possible narcotics from his mouth if EMS is already on scene?

MURPHY: 'Cause I still didn't want him to swallow it. Any - any more of it.

TREVINO: Why?

MURPHY: 'Cause it's still a detriment to him. I mean if he's continuing to harm himself or continuing to put himself at risk it's still something we're compelled to stop.

TREVINO: Okay. So - so that was your goal? Just tryin' to - to continue to preserve his life?

MURPHY: Yes, ma'am. Um, ya know, I - I talked with my supervisors about it, um, after the fact. And I know their concerns were, um, whether or not I was just tryin' to, um, retrieve evidence, um, which I guess is what it looks like.

TREVINO: Were you?

MURPHY: Um, I - I really wasn't. Um, we had already found the drugs in plain view, um, and we already had several felonies. Um, and I didn't feel

²² Officer Murphy statement – Tab B2 lines: 1072-1096, 1123-1126, 1132-1136

like anything in his mouth was gonna set that to the next offense level or anything like that. Um, m- my main concern - an honest main concern was to make sure that he didn't die right there in front of us.

TREVINO: *So wh- I - I guess I just don't understand why you wouldn't just allow that to happen. If EMS is already there and I mean that's - that's their job now to - was to treat him because that seemed to be your - your concern now. Was getting him treated for whatever he ingested.*

MURPHY: *No I mean I understand your viewpoint. Um, but like I said it was m- my thought process that he was in our custody, I didn't want him to harm himself anymore. Um, and his handcuffs were in front of him. He was already aggressive towards us. Um, I didn't wanna put EMS in that position if I felt that, um, we could prevent him from harming himself any further.*

Officer Murphy stated he opened the door to his unit and asked Mr. McDonald to spit out what he had in his mouth several times and he refused to comply. Officer Murphy stated he reached into the vehicle to try to secure his head to attempt a pressure point and Mr. McDonald pulled away. Officer Murphy stated he removed Mr. McDonald from the vehicle to maintain control over him and took him down to the ground. Officer Murphy stated the only verbal direction he provided Mr. Murphy was to, *"Spit it out,"* and did not give Mr. McDonald an opportunity or ask him to step out of the vehicle. Officer Murphy stated even with the help of Officer's Bishop and Glasgow he was not able to gain control of Mr. McDonald's head to prevent him from swallowing what he had in his mouth. Officer Murphy described Mr. McDonald's resistance as active aggression and stated as he tried to grab his head Mr. McDonald actively resisted and pulled Officer Murphy's arm away and turned his body away and kicked his feet. Officer Murphy stated he gave several verbal commands for Mr. McDonald to spit it out and he did not comply. IA asked Officer Murphy why he did not give any verbal commands to stop resisting. He stated:²³ *Um, I mean he was aware of what he was doing. We were aware of what he was doing. Um, everyone on scene was aware of what was goin' on. He was aware of what he was doing so no I didn't, um, vocalize the stop resisting or anything like that. I told him to spit out the drugs and everything like that, ma'am. I - I'm aware that I didn't say, "Stop resisting." Um, but I felt that he was aware of his actions and he knew what he was doing.* Officer Murphy stated when Mr. McDonald continued to resist and trapped his arm with his handcuffs he decided to use his Taser. Officer Murphy stated he applied a drive stun for one five-second cycle. Officer Murphy stated the drive stun was effective because Mr. McDonald immediately stopped pulling on Officer Murphy's arm, he stopped turning his body away, and stopped kicking his feet. Officer Murphy stated they continued to tell Mr. McDonald to spit out the drugs and he began to spit out the drugs and comply and said, *"There's not fight left in me."*

IA asked Officer Murphy if the reason why he tased Mr. McDonald was to retrieve what

²³ Officer Murphy statement – Tab B2 lines: 1252-1255, 1274-1276

he had in his mouth. His statement:²⁴ *I tased him because he resisted us from retrieving what was in his mouth.* Officer Murphy stated he knew the maximum amount of force authorized by policy to retrieve evidence or narcotics from a subject's mouth is pressure points. Officer Murphy stated he did not feel he violated policy and stated:²⁵ *Because as I tried to retrieve the drugs - as I tried to secure his head to effect a pressure point to do anything else he was actively preventing me from doing that. He was actively resisting me. So as his resistance went up that's when I drew my Taser device and everything else. Um, and deployed the Taser device is when he was physically resisting me from achieving that ultimate goal of preventing him from swallowing the narcotics.* IA asked Officer Murphy why he didn't include anywhere in his report the reason he tased Mr. McDonald was for life saving measures. He stated:²⁶ *"I don't know ma'am."*

IA asked Officer Murphy if he would do anything differently next time. His stated:²⁷ *Um, I would ha- I guess it would depend on what part of the incident that we're talkin' about. Um, if he's still down on the ground resisting us from achieving our ultimate goal, um, I mean I think that there's other use of force options available. Like I said tryin' to physically restrain him, completely reposition him, um, get his handcuffs, ya know, pinned against him so we can secure his head, do somethin' like that. Um, I think there is a million and ten different ways to handle any specific incident. Um, but I honestly thought that I was doin' the right thing at the time.*

Discrepancies

- When Officer Murphy confronted Mr. McDonald as he sat in the back seat of the unit, he stated he attempted to secure Mr. McDonald's head in an effort to apply a pressure point or restrain his head to prevent him from swallowing. However, DMAV does not reflect that and Officer Murphy did not document this effort in his report.
- Officer Murphy stated he drive stunned Mr. McDonald in an effort to prevent him from hurting himself further by swallowing any more suspected drugs and to preserve his life, however, Officer Murphy did not document this in his report.

Summary of Facts

- On April 22, 2016, Officers Murphy and Bishop were flagged down about possible drug activity behind the business at 9616 North Lamar.
- Officers encountered two males and a female who were detained, frisked, handcuffed and placed in patrol units.
- Subjects were later identified as Joe McDonald, Jessica Farrow, and Anthony

²⁴ Officer Murphy statement – Tab B2 lines: 1358

²⁵ Officer Murphy statement – Tab B2 lines: 1463-1469

²⁶ Officer Murphy statement – Tab B2 lines: 1454

²⁷ Officer Murphy statement – Tab B2 lines: 1688-1695

Waits.

- Officer Murphy suspected Mr. McDonald and Ms. Farrow had illegal contraband or suspected drugs on their person and placed them together in his unit and hoped to capture information on DMAV about who had drugs.
- Officer Murphy reviewed DMAV and saw Mr. McDonald and Ms. Farrow passed drugs and Mr. McDonald attempted to ingest the suspected drugs.
- Officer Murphy requested EMS for Mr. McDonald and was concerned he could over dose and die in their presence.
- Mr. McDonald moved his handcuffs to the front of his body while he waited for EMS in the back seat of Officer Murphy's unit, became agitated and began to yell, hit, and kick the window.
- EMS arrived and spoke with Mr. McDonald through the backseat window and Officer Murphy noticed Mr. McDonald had suspected drugs in his mouth.
- Officer Murphy attempted to gain compliance from Mr. McDonald and asked him to spit out what he had in his mouth but he refused.
- Officer Murphy pulled Mr. McDonald from the vehicle onto the ground and Officers Bishop and Glasgow attempted to gain control of Mr. McDonald who had his hands handcuffed in front of his body.
- Officers described Mr. McDonald as not complying and resisted by moving his arms up and down the front of his body, he kicked and turned his body. No officers can be heard on DMAV giving commands to stop resisting.
- Officer Murphy gave several verbal commands for Mr. McDonald to spit the drugs out or get Tased.
- Officer Murphy drive-stunned Mr. McDonald on his hip/abdominal area and he spit out a bag of suspected crack cocaine.
- Mr. McDonald was placed onto an EMS stretcher where he was handcuffed to the rails.
- Mr. McDonald had another bag of suspected drugs in his mouth and spit it out.

Debbie Trevino 3082
 Sergeant Debbie Trevino #3082

9/28/16
 Date

Jt J St 3019
 Lieutenant Jennifer Stephenson #3019

9-28-16
 Date

K. Krause #2951
 Commander Kurtis Krause #2951

9-28-16
 Date

Confidential

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	Plaintiffs,	§
		§
v.		§ CIVIL ACTION No. 1:20-cv-01068-LY
		§ JURY DEMANDED
MICHAEL NISSEN AND CITY OF		§
AUSTIN,		§
	Defendants.	§

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 94
Soto-Torres Use of Force IA File**

(COA 175727)

FILED UNDER SEAL

IA Liaison: Sergeant Santiago Torres

**Internal Affairs
Personnel Complaint Control Sheet**

Class A Internal IA Case #2017-0948

Assigned Investigator: Sergeant Santiago Torres

Date Occurred 07/26/2017	Date Investigation Received 08/01/2017	Date Investigation Completed 01/04/2018	180-Day Deadline 01/22/2018
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Complaint Information

Complainant's Name Lieutenant Oliver Tate	Incident Location 2901 S. Capitol of Texas Highway
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Employee's Information

Officer Steven McCurley	Employee No. 4280	Rank Detective	Current Assignment Criminal Conspiracy Team 1
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Employee's Chain of Command

Sergeant	Lieutenant R. Richman	Ops Lieutenant	Commander T. Officer	Assistant Chief J. Chacon
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Allegations Investigated

Policies Associated with Allegations	Final Classification	Signature of Person Determining Final Classification	Date Signed
APD Policy 110.4.4-Insubordination	<i>Sustained</i>	<i>[Signature]</i>	1-19-18
APD Policy 200.2.1-Determining the Objective Reasonableness of Force	<i>Sustained</i>	<i>[Signature]</i>	1-19-18
APD Policy 211.4-Employee Responsibilities for All Force Level Incidents	<i>Sustained</i>	<i>[Signature]</i>	1-19-18
APD Policy 900.3.1-Honesty	<i>Sustained</i>	<i>[Signature]</i>	1-19-18
APD Policy 902.4.1 (a)-Cooperating with Assigned Investigators	<i>Administratively Closed - dup to 110.4.4</i>	<i>[Signature]</i>	1-19-18

Discipline Administered by Chain of Command

Educational Based Discipline <input type="checkbox"/> (Number Days in Lieu) _____	Oral Reprimand <input type="checkbox"/>	Written Reprimand <input type="checkbox"/>
Temp Suspension - No. of Days _____ <input type="checkbox"/>	Demotion <input type="checkbox"/>	Indefinite Suspension <input checked="" type="checkbox"/>

Required Signatures

	Signature	Employee No.	Date
Investigator's Signature	<i>[Signature]</i>	4407	1-19-18
City Legal Review <i>(Required on All DRHs)</i>	<i>[Signature]</i>		1-19-18
Chief of Staff <i>(Required on All Critical Incidents)</i>			
Chief of Police	<i>[Signature]</i>	2184	1-19-18

(All Control Sheets must be signed by the COP or an Assistant Chief before returning to IA)

IA Commander Signature *[Signature]* Date 1/19/2018

PD 0095
Rev. July 2012

Acting Comd.
Page 1 of 1

(Attach Additional Pages if Applicable)

IA Liaison: Sergeant Santiago Torres

**Internal Affairs
Personnel Complaint Control Sheet**

Class A Internal IA Case #2017-0948

Assigned Investigator: Sergeant Santiago Torres

Date Occurred 07/26/2017	Date Investigation Received 08/01/2017	Date Investigation Completed 01/04/2018	180-Day Deadline 01/22/2018
-----------------------------	---	--	--------------------------------

Complaint Information

Complainant's Name Lieutenant Oliver Tate	Incident Location 2901 S. Capitol of Texas Highway
--	---

Employee's Information

Officer Bryan Richter	Employee No. 6824	Rank Officer	Current Assignment Criminal Conspiracy Team 2
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Employee's Chain of Command

Sergeant R. Dear	Lieutenant R. Richman	Ops Lieutenant	Commander T. Officer	Assistant Chief J. Chacon
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Allegations Investigated

Policies Associated with Allegations	Final Classification	Signature of Person Determining Final Classification	Date Signed
APD Policy 200.2.1-Determining the Objective Reasonableness of Force	<i>Sustained</i>	<i>[Signature]</i>	1-19-18
APD Policy 211.4-Employee Responsibilities for All Force Level Incidents	<i>Sustained</i>	<i>[Signature]</i>	1-19-18
APD Policy 900.3.1-Honesty	<i>Sustained</i>	<i>[Signature]</i>	1-19-18

Discipline Administered by Chain of Command

Educational Based Discipline <input type="checkbox"/> (Number Days in Lieu) _____	Oral Reprimand <input type="checkbox"/>	Written Reprimand <input type="checkbox"/>
Temp Suspension - No. of Days _____ <input type="checkbox"/>	Demotion <input type="checkbox"/>	Indefinite Suspension <input checked="" type="checkbox"/>

Required Signatures

	Employee No.	Date
Investigator's Signature <i>[Signature]</i>	4409	1-19-18
City Legal Review <i>[Signature]</i> <i>(Required on All DRHs)</i>		1-19-18
Chief of Staff <i>(Required on All Critical Incidents)</i>		
Chief of Police <i>[Signature]</i>	2184	1-19-18

(All Control Sheets must be signed by the COP or an Assistant Chief before returning to IA)

IA Commander Signature *[Signature]* 3531
Acting Cmdr.

Date 1/19/2018

AUSTIN POLICE DEPARTMENT
INTERNAL AFFAIRS
INVESTIGATIVE SUMMARY

To: Brian Manley
Chief of Police

Via: Pat Connor #4259
Commander, Professional Standards

Michael Earley #3531
Lieutenant, Internal Affairs

From: Santiago Torres #4407
Sergeant, Internal Affairs

Date: 01/04/2018

Subject: IAD Case # 2017-0948
Bryan Richter #6824
Steven McCurley #4280
(180 Deadline 01/22/2018)

Introduction

On July 26, 2017, multiple units within the Organized Crime Division (OCD) of the Austin Police Department (APD) took part in an operation to arrest Abel Soto-Torres for narcotics-related offenses and an outstanding 3rd degree felony assault warrant. During the operation, Soto-Torres was followed around Austin, eventually leading officers to the Barton Creek Mall parking lot where he was taken into custody. When Soto-Torres was taken into custody Officer Bryan Richter #6824 and Detective Steven McCurley #4280 used force while effecting the arrest. Neither Officer Richter nor Detective McCurley reported the use of force to a supervisor at the scene. After Soto-Torres' arrest and while still on scene, Officer Richter and Detective McCurley approached Soto-Torres' unoccupied vehicle and breached the windows on the passenger side to clear the interior of the vehicle.

At the OCD office after the operation, Officer Richter approached Sergeant Randy Dear #4422 and informed him there might have been a response to resistance (R2R)/use of force incident during the arrest. After two separate conversations, Sergeant Dear noted inconsistent details regarding Officer Richter's account of the incident in regards to his possible R2R/use of force incident. Officer Richter was directed to contact Air One and inquire if there was video of the operation. Upon receiving video from Air One, Sergeants Randy Dear and Kevin Yates #2202 noted the details provided by Officer

Richter about his involvement were not consistent with what was captured in the video. Additionally, Sergeants Dear and Yates noted the video showed Detective McCurley had struck Soto-Torres on more than one occasion.

The Austin Police Department (APD) Special Investigations Unit (SIU) conducted a concurrent investigation into this incident. At the time of this summary, the SIU case was suspended pending Officer Richter's decision to give a statement for their case.

Background

Officer Richter was approached by a detective from the Criminal Conspiracy Team, on July 25, 2017. The Detective asked for assistance in attempting to locate Abel Soto-Torres who had an outstanding felony warrant. Officer Richter became the case agent and began to work on an operation to track and arrest Soto-Torres. During the operation planning, Officer Richter researched Soto-Torres' criminal history and involvement. The research revealed Soto-Torres had weapons involvement and also showed that he had a propensity to use violence toward law enforcement. Officer Richter created an operational plan that was conducted on July 26, 2017. The plan included multiple units within OCD to covertly follow Soto-Torres until an opportunity presented itself to take Soto-Torres into custody while away from his vehicle. Officer Richter inserted himself as part of the team that would arrest Soto-Torres. The other officers in the arrest team were Vincent Garcia #5917, Ricardo Aguilar-Lopez #5319 and Detective Steven McCurley #4280.

During the operation, Soto-Torres was followed throughout Austin for over two hours. During the follow off OCD requested assistance from Air One to help track Soto-Torres. Soto-Torres eventually led officers into the Barton Creek Mall parking lot where his vehicle was momentarily lost and subsequently confused with another similar vehicle by officers. After reacquiring Soto-Torres and his vehicle, he was taken into custody outside the Dillard's parking lot in the northeast part of the mall parking lot. During the arrest Officer Richter and Detective McCurley used force on Soto-Torres to take him into custody. After taking Soto-Torres into custody, Officer Richter, Detective McCurley and two Hays County Deputies approached Soto-Torres' parked vehicle. Officer Richter and Detective McCurley later noted that due to the momentary loss of Soto-Torres' vehicle in the parking lot, they were not sure if any additional people might be inside the vehicle and cited this as the reason why they, along with the two Hays County deputies, approached the vehicle to clear it. Officer Richter and Detective McCurley breached windows on the passenger side of Soto-Torres' vehicle to clear the inside. After both the arrest and vehicle scenes were declared safe, numerous OCD units began to converge on both scenes. Among the units that arrived at both scenes were Sergeants Dear, Yates and Robbie Volk. While at the scene, Officer Richter and Detective McCurley reported the damage to Soto-Torres' vehicle to Sergeant Yates and Sergeant Dear, respectively. Neither Officer Richter nor Detective McCurley mentioned their R2R/use of force during the arrest to any supervisor at the scene.

After leaving the mall and arriving at the OCD office, Officer Richter approached Sergeant Dear and inquired if an R2R needed to be done since the operation was planned.

Sergeant Dear asked Officer Richter if an R2R had taken place during the operation and Officer Richter told Sergeant Dear that Soto-Torres was directed to the ground during the arrest. Sergeant Dear, not believing that force had been used during that initial conversation with Officer Richter, told him they would talk about it further the next day. Only July 27, 2017, Sergeant Dear met with Officer Richter and learned that force had been used. Officer Richter gave Sergeants Dear and Yates a detailed series of events of his actions during the arrest. Officer Richter was directed to contact Air One and determine if they had any footage of the operation. Later that afternoon, Air One footage was sent to Officer Richter via email link. The footage was viewed by Sergeants Dear and Yates. During their review of the footage, both sergeants noted that what Officer Richter described he had done during the arrest was not consistent with what was shown on the footage. Both sergeants also noted the footage showed Detective McCurley had struck Soto-Torres during the arrest on more than one occasion.

Allegations and Associated Policies

On August 1, 2017, Lieutenant Oliver Tate signed an Internal Complaint¹ Memorandum requesting Internal Affairs (IA) investigate possible policy violations by Officer Bryan Richter and Detective Steven McCurley.

The alleged behavior could constitute violations of the following APD policies:

- APD Policy 110.4.4-Insubordination
- APD Policy 200.2.1-Determining the Objective Reasonableness of Force
- APD Policy 211.4-Employee Responsibilities for All Force Level Incidents
- APD Policy 900.3.1-Honesty

Investigation

IA reviewed all the information in this case file, to include the following documentation:

- Officer Bryan Richter's IA history, training records, GAP activation history and commendation record
- Detective Steven McCurley's IA history, training records, GAP activation history and commendation record
- Versadex report # 17-1960475
- Computer Aided Dispatch (CAD) incident detail report 171960475 & 172070891
- VisiNet Unit Activity report-Unit 1512 (Bryan Richter)
- Felony Warrant Service 17-1960475 OCD operations plan
- Various e-mail correspondence between Officer Richter, Detective McCurley and their supervisors
- Text messages from Sergeant Dear to Detective McCurley and Officer Richter
- Text messages from Sergeant Yates to Detective McCurley

¹ Tab A-Complaint Information

- Text message from Officer Richter to Sergeant Dranguet (Air Unit)
- Sergeants Dear and Yates cell phone records
- Air One Digital Mobile Audio Video (DMAV)
- Dillard's store surveillance
- APD radio channel OCD 7 (open) radio traffic & David Radio channel-warrant confirmation traffic
- On scene photographs of SUV damage
- SIU interviews, statements from officers and a civilian
- SIU audio/video files

During the course of this investigation, IA interviewed the following individuals:

- Officer Thomas Lopatowski #4888
- Hays County Deputy Michael Bishop #5731
- Hays County Deputy Benjamin Heverda #4420
- Sergeant Kevin Yates #2202
- Sergeant Randy Dear #4422
- Detective Luke Serrato #6281
- Officer Ricardo Aguilar-Lopez #5319
- Officer Vincent Garcia #5917
- Detective Steven McCurley #4280
- Officer Bryan Richter #6824

Versadex Review: Soto-Torres Involvement²

IA reviewed Abel Soto-Torres' Versadex involvement. The involvement revealed over 20 criminal charges from 2007 thru 2017 that included theft of firearms, unlawful carrying of a weapon (UCW), deadly conduct, aggravated assault on a police officer, unlawful possession of a firearm by felon, as well as various drug-related and alcohol-related offenses.

Report Review: Use of Force Details³

IA reviewed the force details page entered by Officer Richter for this incident. IA noted on the "Force Used" tab, Officer Richter did not fill out the "subject's conduct" and "subject's resistance" tabs. Additionally, Officer Richter noted "yes" under the supervisor responded tab indicating Sergeant Dear responded to the scene of the R2R.

DMAV Review: Air One⁴

IA reviewed the video that captured part of the incident for this investigation. Times noted are drawn from the DMAV source noted above using the 24-hour clock.

² Tab F-Versadex-Soto-Torres Involvement

³ Tab F-Versadex-Force Details Page

⁴ Tab D-DMAV-Air One

- 13:27:12** Officer Richter made contact with Soto-Torres and performed a take down.
- 13:27:17** Detective McCurley pushed Officer Aguilar-Lopez. Soto-Torres was seen on the ground.
- 13:27:18** Detective McCurley delivered a kick, with his right foot, to Soto-Torres' right abdominal area. The kick made Soto-Torres' shoulders move. Soto-Torres' hands were seen behind his back.
- 13:27:20** Detective McCurley placed his right foot on Soto-Torres' right forearm. Soto-Torres' hands were seen behind his back.
- Officer Richter placed his right foot on Soto-Torres' head. Officer Richter took a stutter step that made his left foot completely leave the ground while his right foot was still on Soto-Torres' head.
- 13:27:22** Officer Richter removed his right foot from Soto-Torres' head. Soto-Torres' hands were seen behind his back.
- 13:27:26** Officer Garcia made contact with Soto-Torres and took him into custody.
- 13:27:27** Officer Richter was seen jogging away from the arrest scene toward the area where Soto-Torres' vehicle was parked.
- 13:27:28** Detective McCurley delivered a strike, with his right foot, to Soto-Torres' right side.
- 13:27:44** Officer Richter was seen taking cover to the rear and next to a vehicle, about two parking spots away from Soto-Torres' vehicle. Two Hays County Deputies were seen forming up behind Officer Richter.
- 13:27:51** Detective McCurley was seen walking away from the arrest scene toward the area where Soto-Torres' vehicle was parked.
- Officer Richter and the deputies moved up one parking spot behind Soto-Torres' vehicle.
- 13:28:03** Detective McCurley arrived at a vehicle parked one spot next to Soto-Torres'. Detective McCurley was at the front of the vehicle.
- 13:28:04** All officers move up to Soto-Torres' vehicle's passenger side. Detective McCurley approached from the front. All other officers approached from the rear.
- 13:28:08** Detective McCurley and Officer Richter were seen striking the windows on the passenger side of Soto-Torres' vehicle with the barrel of their rifles.

SIU Interview

SIU Detectives J. Riley and R. Gilbert interviewed civilian **Abel Soto-Torres**⁵ on August 9, 2017, at the Travis County Correctional Complex (TCCC) in Del Valle, Texas. Soto-Torres told detectives he went to the mall, got out of his vehicle and walked across the parking lot. He said there was no indication that police officers were there to arrest him and added that he only saw a truck, everybody hopped out, told him he was under arrest and threw him on the ground. Soto-Torres told detectives that while he was on the ground handcuffed one officer put his foot on the left side of his face. Soto-Torres said he thought it was unnecessary and told detectives he was not supposed to have any pressure on his face due to a fractured eye socket from an incident back in 2013-2014. Soto-Torres told detectives while the officer had his foot on his head, he felt pressure/pain and added he had headaches afterwards.

Soto-Torres told detectives when he saw three windows to his vehicle had been broken he asked why they had done that. He was told it was because the vehicle was locked. He said he felt it was unnecessary for the windows to have been shattered.

During the interview, Detective Riley noted Soto-Torres had the following visible injuries which Soto-Torres attributed to having been thrown to the ground by police;

- Abrasion/road rash to left elbow
- Abrasion/road rash to inside of left knee

IA Witness Officer Interviews

APD Officer Thomas Lopatowski #4888 was interviewed by IA on September 18, 2017. Officer Lopatowski is a Chief Tactical Flight Officer (TFO) with the Department's Air Support Unit. Officer Lopatowski explained one of his main functions, as a TFO, is to handle most of the technology in the aircraft which includes the cameras. Another of his functions, he explained, is to scan the area where police operations are taking place looking for potential threats to officers.

Officer Lopatowski stated he was contacted by a representative of OCD, on July 26, 2017, requesting assistance with their operation. Officer Lopatowski said it was close to an hour before the aircraft was "flight ready" after having gotten the request for assistance. He stated the aircraft was about two or three minutes out from arriving at Barton Creek Mall when he heard, over the radio, that the target had parked by the Dillard's and was getting ready to walk inside the mall. Officer Lopatowski explained:

LOPATOWSKI: *Now, we were flying our newest aircraft with the newest technology camera. Um, which has a pretty phenomenal zoom capability. Um, so one of the things I did was while we're still responding is I zoomed into the mall just in hopes that I could start trying to pick up some landmarks as these officers were moving around. Um, at one point I*

⁵ Tab E-7-Abel Soto-Torres

*did hear them say that there was a truck getting ready to, but he was, he, so he was out of his vehicle walking to the - to the mall. And I heard them say that there was a truck pulling down possibly the same, um, lane that he was in, the - the - the drive lane. So I saw a truck, I saw a person, I just took a shot thinking okay, well that maybe this is him, I have no idea. So I zoomed in as far as I can.*⁶

Officer Lopatowski added when he hit the record button, the aircraft was not on scene and estimated their location was somewhere on the east side of Mopac. IA asked Officer Lopatowski if he looked at the DMAV screen and saw what happened. He explained:

LOPATOWSKI: *...one of my jobs while multitasking is trying to keep this event in frame shot. So I'm glancing, and then back out, glancing and back, so you do, you, I'm sure you'll see, um, corrections on the camera like someone's operating it 'cause I am. I'm operating it. But, um, 'cause the reality is I'm not - I'm not focused on it, you know, recording like this. I'm primarily looking out of the aircraft.*⁷

When asked if he saw anything when he looked out the window he stated:

LOPATOWSKI: *...as - as far as we were, um, you know, I may be able to see that there were, you know, people, but again, that's not really where my focus was because at that point, we're still far enough out that I was still trying to locate the scene. I didn't know that that was the scene. I just, you know, I heard them say on the radio a truck just pulled down the same lane that he's walking, um, and I saw a truck and a - a person. So that was the first one I saw, I zoomed my camera in and I went right back out to searching 'cause I - I mean, I had a, ah, I would say there was more than a 50/50 shot. I mean, there's probably a lot of people, a lot of trucks in the mall. So I just saw the first one, zoomed in and then immediately started scanning, not only that Dillard's and that parking lot, the other side of that Dillard's but the other Dillard's.*⁸

Officer Lopatowski stated they were informed, shortly thereafter, the aircraft was no longer needed and they departed the scene.

Hays County Deputy Ben Haverda #4420 was interviewed by IA on September 21, 2017. Deputy Haverda is assigned to the Hays County Narcotics Task Force. Deputy Haverda had been assigned to the midlevel OCD narcotics division of APD for training and observation when the incident occurred. Deputy Haverda stated he and Deputy Michael Bishop #5731 saw a lone APD officer approach the suspect vehicle in the Barton Creek Mall parking lot and they went to assist. Deputy Haverda stated shortly thereafter a second APD officer also approached with them to clear the vehicle. Deputy

⁶ Tab C-Ofc. Lopatowski IA Statement Lines 147-156

⁷ Tab C-Ofc. Lopatowski IA Statement Lines 255-260

⁸ Tab C-Ofc. Lopatowski IA Statement Lines Lines 321-332

Haverda stated he and Deputy Bishop followed both APD officers' lead to clear the vehicle. IA asked Deputy Haverda about why the windows to the vehicle were breached. He replied:

HAYERDA: *Um, the w- the two APD officers that were in the front of the vehicle - again I - I j- remember, uh, the - the windows are completely darked. I mean, all the windows on that passenger side at least you could not see into this vehicle. So the APD officers - I - I do - I couldn't tell you which one - I remember of them said, "I'm porting." He said - he said the term port and that's when they broke out the front passenger window with the - with the, uh, barrel of the rifle. Um, and then they cleared that one and they moved back to where we were and they ported the passen- the rear - the second seat passenger window. Cleared that and then there - the SUV has the back window in the back and they ported that, uh, ported a hole in there to clear every section of the vehicle.⁹*

When asked if he thought the breaching of the windows was necessary, Deputy Haverda replied:

HAYERDA: *My opinion, I - I mean, I would say yes due - due to the fact that we still have an unknown - possible unknown suspect, uh, subjects in the vehicle and due to the darkness of the tint, uh, absolutely. I mean, I would - I would probably say it was probably necessary 'cause you don't know what's in there. And I can't - if I can't see through a window, I mean, it's like lookin' through this table. I can't see in there.¹⁰*

IA asked Deputy Haverda if, given the same situation, he would have breached the windows. He replied, "Yes." Deputy Haverda did not see the arrest team take anyone into custody.

Hays County Deputy Michael Bishop #5731 was interviewed by IA on September 21, 2017. Deputy Bishop is assigned to the Hays County Narcotics Task Force. Deputy Bishop had been assigned to the midlevel OCD narcotics division of APD for training and observation when the incident occurred. Deputy Bishop stated while in the Barton Creek Mall parking lot they saw an APD officer approach the subject vehicle to hold security on it. Deputy Bishop stated he and Deputy Haverda went to assist the officer. Deputy Bishop stated shortly thereafter, a second APD officer approached, they moved up and cleared the vehicle. IA asked:

TORRES: *And who made the decision to move up? Was it somethin', uh, like, somebody gave a signal or a audible or some or kinda was...*

⁹ Tab C-Hays County Deputies-Heverda-IA Statement Lines 485-494

¹⁰ Tab C-Hays County Deputies-Heverda-IA Statement Lines 576-581

BISHOP: *Yes, the second APD officer that showed up, uh, I - I don't remember what the first exchange was between the two but I do specifically remember him saying, "Grab a pod and move up."*¹¹

Deputy Bishop explained when they moved up to clear the vehicle, the two APD officers breached windows on the passenger side to make sure no one was inside. When asked if he thought the breaching of the windows was necessary, Deputy Bishop replied, "Yes." Deputy Bishop added:

BISHOP: *I know that with my training in vehicle assaults that's how we're trained. If we move up to a vehicle and we need to be able to see into that vehicle then we need to do what we need to do to be able to do that. Uh, that being said I've not been in that situation. We haven't had briefings or anything like that.*¹²

Deputy Bishop did not see the arrest team take anyone into custody.

APD Sergeant Kevin Yates #2202 was interviewed by IA on September 28, 2017. Sergeant Yates has been the supervisor for the detectives in the Criminal Conspiracy Team and Organized Crime Division for the last four years.

Sergeant Yates told IA about a conversation he had with Officer Richter, prior to the briefing, in which he inquired about a vehicle assault and a vehicle pursuit. Sergeant Yates stated:

YATES: *Um, and, um, it was on Tuesday, uh, that Officer Richter actually came to - he was gonna be the Case Agent for the deal so he was the one planning the whole operation because he actually came up to me, um, talked about the operation and asked me what I thought about doing a vehicle assault on this guy and I was like, "Absolutely no vehicle assaults..."*

*...So, he said, "Okay." And then he also, um, he says, "Well, you know, if this guy tries to run from us, um, can we pursue him?" And I was like, "You know, that's not a question to have before an operation. That is something where you supervisors at the time he runs will take in all the factors into account and that's when we'll give a decision whether we're gonna pursue or not. We are not gonna give you blanket permission to pursue somebody." So he's like, "Okay."*¹³

Sergeant Yates said he did not agree with the tactic that Officer Richter had inserted himself as part of the arrest team. Sergeant Yates said he would not have let Officer Richter be actively involved in the operation in that capacity because as a case agent he needed to be in a position to manage the operation. Sergeant Yates said Officer Richter

¹¹ Tab C-Hays County Deputies-Bishop-IA Statement Lines 375-380

¹² Tab C-Hays County Deputies-Bishop-IA Statement Lines 527-530

¹³ Tab C-Sgt. Yates-IA Statement Lines 60-78

had been told in the past it was preferred that a case agent not be in a position like that.

When Sergeant Yates arrived at the Dillard's parking lot, it was about 15-20 minutes after Soto-Torres had already been arrested. Sergeant Yates had been inside the mall looking for the white female that exited Soto-Torres' vehicle just before he was taken into custody. Sergeant Yates stated:

YATES: *As I'm walking up, Richter starts walking towards me and, um, I can see behind Richter the target's vehicle and it's got - the whole passenger side all the windows were broken. And at that point, okay, I'm a little pissed because I think they did a vehicle assault. And - which, you know, was - they were told, "Absolutely no vehicle assaults." So, I - I said, you know, "W- what the hell happened to the window?" And he said, "We didn't." I said, "Did you vehicle assault that?" He goes, "No, no, no. We didn't - we took him down over here." And he pointed like kinda behind me and the car was, you know, I mean, there was probably - I'm guessing from where he said it and where the car was, 30 - 30 yards difference and rows of cars between 'em. And I was like, "Then why are all windows broken?" He goes, "Well, we had to see if anybody was in it."¹⁴*

Sergeant Yates said Officer Richter did not report anything else to him at that point. Sergeant Yates was asked if he was on scene long enough, that if anyone needed to report anything, he would have been on scene and available. Sergeant Yates stated he was on scene for approximately ten minutes, but added Sergeant Dear and Sergeant Volk were on scene for about 20-30 minutes prior to that.

When asked if there were conditions or elements that needed to be present in order for a tactic to be considered a vehicle assault, Sergeant Yates replied:

YATES: *If you're doing it right, you've got two good blocks and you've got people working pods down one side. You've got, you know, like four people doing four pods and then you've got an LOD which is your line of defense on the other side that's watching the other side. You know, that's the perfect tactical vehicle assault. But if you block somebody in and you restrict their movement and you jump out of the vehicle - even if you jump out of both sides. If you run up yelling and screaming, 'Get out of the vehicle.' That's just an ugly vehicle assault. Um, but in this case, you know, if you - you know, if the vehicle's separated - you know, if it can leave. Um, if you're just walking up and you know, yeah, you walk up a team. You're goin' and standing and you're lookin' in windows and you break the windows to look in. That's just - that's just walkin' up to a vehicle to clear a vehicle and breakin' windows." It's not - they didn't assault that vehicle. Um, they just - they just walked up to a vehicle to clear it. Like we would clear any*

¹⁴ Tab C-Sgt. Yates-IA Statement Lines 153-164

vehicle. But instead of opening up the doors or peeking in windows, they did the lazy way and they broke all the windows out.

TORRES: *Okay. So you're saying that wasn't a vehicle...*

YATES: *That was not a vehicle assault.*¹⁵

Sergeant Yates told IA about a phone call he received, from Sergeant Dear, the afternoon of July 26. Sergeant Yates said:

YATES: *I drove home and then Randy called me on my way home and we talked for quite a while and he's pissed. And he said that Richter said, "Hey, there may have been, you know, an R2R is what Randy said he said to him. And I s- and I said, "Really?" And I said, "He's just now telling you?" And he goes, "Yeah." And, um, but he said that, you know he really - how'd he put it? He said he really didn't take him down, he just guided him to the ground. Um, and that, you know, it probably wasn't really an R2R and then I think Randy said he asked (Vinnie) 'cause (Vinnie) was there and (Vinnie)'s like, "Nah, he just kinda guided him down." And then Richter's reply that to that and it's like, "Well, we don't do, you know, Level 3's on Operations anyway. Aren't they just on the After Action?" And he's like, "What's that?" And I said, "That's bullshit." I said, "We haven't done that for over a year."*

And, um, I said, "But that - that's been over a year and everybody knows that." And, uh, I said, "We've done it. He knows it. I th- that's just him, you know, lookin' for an excuse I think." ¹⁶

Sergeant Yates said Sergeant Dear told him he would talk to Officer Richter more about it the next day. Sergeant Yates stated the next morning, July 27, he was called into Sergeant Dear's office as he talked to Officer Richter. Inside the office, Sergeant Yates stated:

YATES: *Randy tells Bryan, "Will you, uh, explain what you told me, uh, to Sergeant Yates?" And I said, "Okay Bryan." But I said, "Let's go ahead and start from the beginning and I may stop you as we go and ask you some questions." And he said, "Okay." Well, he tells me, um, he goes, "The first thing is, we came up to him. I got out of the vehicle and I gave him multiple commands to, uh, to get down on the ground." He goes, "He just kinda looked at me. And, um, you know, kinda confused and wasn't answering me so, you know, I just, you know, took him to the ground." And I said, "Well, when you say you gave him multiple commands." I said, "So, I mean, to be able to get*

¹⁵ Tab C-Sgt. Yates-IA Statement Lines 555-574

¹⁶ Tab C-Sgt. Yates-IA Statement Lines 180-198

multiple commands out, there has to be some distance between you as you approach, right?" I said, "I mean, you know, multiple commands? Are you talking 10, 12, 13 feet? Is that what you're talking about?" He goes, "Yeah, that's probably about it." You know? I said, "So, he's about 10 or 12 feet from you. You get out of the vehicle. You're approaching. You're giving him commands to get on the ground and he doesn't comply?" He goes, "Yes. That's - that's right." Um, I said, "Okay. And then you say you take him down." I said, "Did you guide him to the ground or did you do a hip throw? And throw him to the ground." He goes, "Well, I did a hip throw and threw him to the ground." I said, "So, you did a Level 3." I said, "'Cause I don't think you can do a hip throw and put somebody on the concrete without causing some kind of pain." And he goes, "Well, yes sir." And he goes - and I said, "Now - and then what?" And he goes, "Well." Then he goes, "I got down and I put my knee in his back, holding him down." And he goes, "He - his head was moving a lot and I thought he was looking around for somebody." And he goes, "And I..." And he was - he was very like clear to us at this time - he kept saying, "And I - and I do this every so gently. I promise I did this lightly. I - I barely touched him but I took my - my foot and I - I held his head down, um, with my foot." He goes - but - but - but he goes, "But I promise Sarge, it was just every so lightly. Just very gently." And I said, "And your knee was on his back at that time and your left foot did that?" And - and I'm kinda thinking to myself, "Okay, that's gonna be hard to do but if he was truly doing that, there's no way he could be putting too much force on the guy if all of his weight's on a knee. It would be difficult at best to make that - that scenario happen. But if it truly happened like that, I can't imagine there being much force on his head." And I said, "Well, okay. I mean, I could understand if you did have all your weight on your knee, that probably couldn't cause him too much pain." I said, "But if your f- foot's still up around his head and if it caused him any kind of pain, you know, we're still lookin' at the force, you know? I mean, potentially, you know, getting up around Level 2. Okay?"¹⁷

Sergeant Yates stated Officer Richter was told to contact Air One and inquire if they had taken video. Sergeant Yates stated he walked into the OCD office later that afternoon and noticed officers around Officer Richter's desk watching something. Sergeant Yates stated:

YATES: *And so I walked over and, uh, I looked at it over their shoulders and, um, I said, "Richter, send it to Randy's desk." I said, "Randy, go in the office. We gotta talk." And, um, what I saw on the video was not what we were told by Richter in the office. And I told Randy - I said, "It's not anything like he told us."*

¹⁷ Tab C-Sgt. Yates-IA Statement Lines 209-247

Um, when the door opened, he was on top of the guy. Um, there was no commands and, um, not that that's a problem. I mean, the dude was violent. The only problem was, you know, with that is that it wasn't what was reported to us. Um, and that's the issue I had. And then also, he didn't kneel on his back. He was standing up and stood with his foot on his head which wasn't what he told us and I had issues with that obviously.¹⁸

Sergeant Yates explained, after realizing what was reported to them was not consistent with what was on the video, he and Sergeant Dear called Officer Richter back into the office. Sergeant Yates said they pointed out discrepancies and the problems with those discrepancies to Officer Richter. Sergeant Yates stated he believed Officer Richter was trying to justify his actions and not necessarily mislead or lie to them.

When asked if Officer Richter's take down of Soto-Torres was a reasonable use of force, Sergeant Yates replied:

YATES: *Yes, absolutely. I mean, he - he had no choice. If you watch the video, he was put on top of a very dangerous guy. I mean, when he was dumped out of the car, he was arm lengths from the guy.*

I mean, he - he was - he was put in a position that he had to do that. I didn't agree with him being put into that position. Um, but nevertheless, he was. The problem was with how he reported it.¹⁹

When asked if Officer Richter putting his foot on Soto-Torres' head was a reasonable use of force. Sergeant Yates replied:

YATES: *I mean, you know, I don't think it's anything we train but if it didn't cause the guy any pain? If there wasn't any weight, I mean, you know, short of - of talking to the guy and to Richter, I have - I have no idea. I can't sit here and say it was unreasonable if - if he didn't have any weight on the guy.²⁰*

You know, if he says, "Yes, like he put a lot of force on me and it hurt." Then I would I think it would be unreasonable. But I think that if it didn't cause him any pain, if Richter didn't use force - if his foot was just on there keeping the guy from looking around and there wasn't any pressure being put on him, then it would be reasonable.²¹

Sergeant Yates stated when he saw the video he also noticed Detective McCurley had used force on Soto-Torres. IA asked Sergeant Yates what he recalled in regards to

¹⁸ Tab C-Sgt. Yates-IA Statement Lines 262-273

¹⁹ Tab C-Sgt. Yates-IA Statement Lines 1241-1248

²⁰ Tab C-Sgt. Yates-IA Statement Lines 1268-1272

²¹ Tab C-Sgt. Yates-IA Statement Lines 1447-1451

Detective McCurley. He replied:

YATES: *I remember that, um, there was I believe, three times that his foot made contact with the guy.*

Um, there was one that seemed a little harder than the others. It seemed like one that looked - appeared to be little bit lighter. And one where his foot was placed on his back.²²

IA asked Sergeant Yates if he believed any of the three contacts were kicks. Sergeant Yates replied:

YATES: *Well, two of 'em looked like kicks.*

TORRES: *Okay.*

YATES: *Whether they are hard or soft, I don't know.*

TORRES: *Okay.*

YATES: *The th- well, the one, I said it looks like he placed his foot on his back and then pull it off. According to McCurley, he placed it on his back to show him where he wanted him to put his hands. But that looked like a hand there kind. Kind of moved it up and lift it back down. Um, but two of 'em, like I said that, you know, I mean, if you - if you make contact with somebody, I mean, I'm saying that's a kick. But you just don't know how hard it was. You know?²³*

When asked if he had been trained by the Department to kick individuals to gain compliance or their attention, Sergeant Yates replied:

YATES: *I mean, am I trained to kick a defenseless man and cause him pain? Absolutely not. You know? Um, you know, uh, can I get somebody's attention without causing them pain with my foot? Absolutely. You know? I mean, no, we are not trained to kick people and cause them pain on the ground and they're complying or not. But, you know, can I use my foot to get somebody's attention without causing them pain or doing an R2R? Yeah, I can.*

And if he caused that guy pain, it was absolutely wrong. You know, we're not trained to hit people with our fists. You know, just to cause 'em pain. We're not trained to do it with our feet. We're not trained to head-butt people and cause 'em pain. We're not trained to do that. People we're takin' under control. If they're being compliant.²⁴

²² Tab C-Sgt. Yates-IA Statement Lines 1609-1616

²³ Tab C-Sgt. Yates-IA Statement Lines 1685-1698

²⁴ Tab C-Sgt. Yates-IA Statement Lines 1731-1747

Sergeant Yates had a phone conversation with Detective McCurley on the evening of July 27. Sergeant Yates stated the phone call was mainly about making sure Detective McCurley watched the video and that he wrote a supplement. Sergeant Yates stated he told Detective McCurley:

YATES: *"And, uh, write it the way you remember and what you see in the video."*²⁵

In regard to Detective McCurley's explanation for the kicks, Sergeant Yates stated:

YATES: *Um, what he was making it sound like was that, you know, he was - he wasn't striking the guy, he was getting his attention telling him where to put it. Um, which, you know, depending on what the guy says could be good or bad.*

*Um, then after looking at the video, you know, I mean, it could - you know, it's yeah, it happened more than it - he said it happened. Um, you know, it looks bad. It's going to, you know, we're going to have to - I mean, it should have been reported. I mean, even if happened the way he said, it should have been reported out there...*²⁶

IA asked Sergeant Yates if, after reading Detective McCurley's report from July 26, he reasonably concluded that Detective McCurley had been involved in an R2R. Sergeant Yates replied:

YATES: *Nah, I didn't - I mean, I didn't believe he'd been involved in an R2R or possible R2R until I saw the video.*²⁷

When asked if, after reading Detective McCurley's second supplement from July 28, he reasonably concluded that force was used Sergeant Yates replied, *"Oh yeah...Absolutely."*²⁸

IA asked Sergeant Yates:

TORRES: *Do you think that the - his articulation in this report from July 28, uh, clearly represents what's the video shows?*

YATES: *Like if - if I was writing the report personally? I would put - I, uh, "I kicked (Soto Torres) multiple times, you know, to - to gain a physical ad- advantage." And I - and I would put that I didn't - if I didn't think it caused him pain, I would say, "I didn't believe it to cause him pain." Or - or - I would articulate it -- excuse me -- a little bit more. In*

²⁵ Tab C-Sgt. Yates-IA Statement Line 1857

²⁶ Tab C-Sgt. Yates-IA Statement Lines 2008-2018

²⁷ Tab C-Sgt. Yates-IA Statement Lines 1792-1793

²⁸ Tab C-Sgt. Yates-IA Statement Lines 2326-2330

*that respect I think. Um, but I would use the word kick because that's what I do.*²⁹

APD Sergeant Randy Dear #4422 was interviewed by IA on October 5, 2017. Sergeant Dear has been the supervisor for officers in the Criminal Conspiracy Team since March 2017. Sergeant Dear learned about the operation on the morning of July 26. He stated Officer Richter made a comment during the operation briefing about a vehicle pursuit having been pre-approved. Sergeant Dear stated he interjected by saying there was no pre-approved vehicle pursuit and added that it would be handled on a case-by-case basis.

Sergeant Dear added that Sergeant Yates told everyone during the briefing there would be no vehicle assault during the operation. Sergeant Dear commented he took responsibility for not realizing Officer Richter had inserted himself to be part of the arrest team and added a case agent's job was to watch the operation.

Sergeant Dear arrived at Dillard's parking lot after the suspect had already been taken into custody. Sergeant Dear stated he was near the suspect's SUV and stated:

DEAR: *And, um, I - I - I'm just sittin' there and, um, Detective (McCurley) comes up and says, "Sergeant Dear, I wanna notify you that there's damage to the suspect vehicle." I said, "Oh okay, cool." You know, and I - I'm not even thinkin' what that might be. So I get out of the vehicle and I walk over and I look and there's three smashed-out windows and I'm pissed. I'm, like, "I thought we said no vehicle assault."*³⁰

IA asked Sergeant Dear if Detective McCurley reported anything else to him at that time. Sergeant Dear replied:

DEAR: *No, sir. To this day he has never said, "I had a R2R."*³¹

When asked, Sergeant Dear stated that no other officer reported anything else to him while he was at the scene. He stated he was in the middle of the scene between where the takedown took place and where the vehicle was parked. He added he did not go over to the location where the takedown took place because there were plenty of officers there and everything appeared to be taken care of.

When asked what he considered a vehicle assault to be, Sergeant Dear replied:

DEAR: *Well, that's kind of up to interpretation. My interpretation was a vehicle assault was when you come up you pin a vehicle, you use your tactics or your pods, and you attack the vehicle and extract the driver or the passengers or whoever whatever your agenda is. That's my definition. Uh, evidently anything that represents the tactics of a*

²⁹ Tab C-Sgt. Yates-IA Statement Lines 2365-2373

³⁰ Tab C-Sgt. Dear-IA Statement Lines 132-138

³¹ Tab C-Sgt. Dear-IA Statement Line 547

*vehicle assault is a vehicle assault. You don't necessarily have to have the vehicle pinned by another vehicle.*³²

When asked if, in his opinion, Officer Richter and Detective McCurley conducted a vehicle assault in the mall parking lot. Sergeant Dear replied:

DEAR: *Yes and no, man, I mean, knowin' the definition now I'd say absolutely. Knowin' that definition...*

*...my thought process of no vehicle, I just - it - it's left for interpretation because it - it's hard to say.*³³

Sergeant Dear explained he received clarification, from his chain of command, on what constituted a vehicle assault after this incident. IA asked Sergeant Dear if, prior to having received clarification, he would have considered this incident a vehicle assault. He replied, "No."

Sergeant Dear stated he learned from Officer Richter that he and Detective McCurley were the two APD officers involved in breaking the windows. Sergeant Dear said he was informed the reason the windows had been broken was because officers believed someone could be inside the vehicle and because officers were not able to see inside.

Sergeant Dear had an encounter with Officer Richter at the OCD office after the operation. Sergeant Dear stated:

DEAR: *...and now it's, like, 3:30, 4 o'clock. I walk into the bay and you know, everybody's kinda millin' around and I am standin' in front of Lieutenant (Richmond)'s office and (Richter) goes, "Hey, uh, you know, since this was a planned operation do we still have to do a R2R?" And I f- blurted out, "Are you fucking kidding me?" And I go, "Absolutely," you know, and I said, "So do we have one?" And he goes, "Well, I - you know, I just guided him to the ground, you know, I gave him a buncha commands and, you know, you could tell in his face that he didn't know what was goin' on so I just guided him to the ground." I go, "Did you take him down or did you guide him?" "I guided him." I said, "Okay." Officer (Garcia) was sittin' across the desk and I knew he was in the takedown vehicle, I said, "(Vinnie), is that correct?" "Yes, sir." I said, "Cool, we'll talk about this tomorrow."*³⁴

IA asked Sergeant Dear if he believed Officer Richter had been involved in an R2R or had used force when he reported the incident. Sergeant Dear replied, "No." Sergeant Dear explained he was not sure what Officer Richter meant about it being a planned operation and reporting R2Rs. Sergeant Dear called Sergeant Yates for clarification:

³² Tab C-Sgt. Dear-IA Statement Lines 414-419

³³ Tab C-Sgt. Dear-IA Statement Lines 1490-1496

³⁴ Tab C-Sgt. Dear-IA Statement Lines 153-165

DEAR: *So I call Sergeant (Yates) and I go, "Hey man, this is what happened." He goes, "Are you kiddin'?" I go, "No, I'm not kiddin' at all." And I go, um, "He was sayin' somethin' about an operation that - don't have to report an R2R." He goes, "That's bullshit." He goes, "That was taken away because street narcs was abusin' it and that's been taken away for over a year." And I went, "Okay," 'cause I didn't know anything about that.³⁵*

The next morning, July 27, Sergeant Dear called Officer Richter into the office and told him:

DEAR: *"Hey man, here's the deal. We're gonna have an R2R on this, plain and simple, we're goin' to." I said, "If we don't need it, who cares but we're gonna do it to make sure we at least have it." He goes, "Okay." And I said, "So with that bein' said, I want you to think about what you're saying because we have no videos. So that means we're probably gonna have to check with the mall and (Air One) and see if they have video, so is there anything that I need to know?" Well, he starts tellin' me about, "Well yeah, you know, we had to take him down," and, um, let me - let me go over here to this one right here. You know, and he talked about, uh, givin' him multiple commands, um, that he had grabbed him with both shoulders and took him down to the ground. So I go, "Hold up. Stop right there." I went and got, uh, Sergeant (Yates), brought him into the office, I said, "Sergeant (Yates), this is what happened. I want you to be in here when this goes down." He goes, "Cool." So he goes and he starts tellin' us all this, and so he says, "You know, I got him to the ground." I said, "Got him to the ground or hip toss?" And he comes back and says, "I - I hip tossed him, uh, took him to the ground and I had to put my knee in his back." Well, at that point he starts talkin' about gently, "I promise you, very, very gently I had to put my boot up on his head." And I'm, like, "Okay," 'cause I mean, the way he's describin' it is he's got his knee in his back and he's kinda, like, tryin' to hold him still, right. So I'm, like, "Okay. All right. Well, that's no big deal, you know." And he - he told us that a couple times and I was, like, all right.³⁶*

Sergeant Dear explained after this second conversation with Officer Richter there was no doubt he had been involved in an R2R. Sergeant Dear sent Officer Richter a text telling him to get the Air One video. Sergeant Dear was approached by Sergeant Yates later that afternoon and they had the following exchange:

DEAR: *Sergeant (Yates) goes, "Did you see this video?" I go, "No." I said, "I'm too scared to see it." He goes, "We need to go to your office." So we did and I told (Richter), I said, "Hey, send me that video." So he*

³⁵ Tab C-Sgt. Dear-IA Statement Lines 167-173

³⁶ Tab C-Sgt. Dear-IA Statement Lines 183-204

showed the video and I was, like, "Dear baby Jesus, are you kidding me? That was not what we were told," you know, and I was just, like, well, here we go.³⁷

Sergeant Dear described what he saw in the video:

DEAR: *Okay. Um, with Officer (Richter), you know, take in mind he'd already told me about how many verbal commands he's given, he can literally see this guy's expression where his (ooda-loop) is messed up and he's just not understanding what's goin' on to seein' the actual video when seconds pass and he's already on the ground. There's no way that those verbal commands coulda happened, there's no way he could have even seen his face because he grabbed him, hip tossed him to the ground, and then once that happens what I saw was a man that was so compliant that it - it kinda freaked me out. It's, like, all - this guy's history and this is what he's doin'? Literally layin' flat on his stomach, both hands in the middle of his back, not even movin'. You know? And so I'm, like, wow, I'd never seen anybody that compliant...*

...that's when you see him stand on this guy's head and from what I saw it looked like he actually kinda gave him a boot scoot across his head and made his head move. So that's what I saw of that video.³⁸

Sergeant Dear stated there was no doubt Officer Richter having placed his foot on Soto-Torres' head was some kind of R2R he just was not sure what level.

IA had the following exchange with Sergeant Dear:

TORRES: *Um, was Officer (Richter)'s - in your opinion was Officer (Richter)'s takedown reasonable use of force?*

DEAR: *The actual takedown itself? Yes.*

TORRES: *'Kay. Was him putting his foot on the guy's head reasonable use of force?*

DEAR: *No.*

TORRES: *Can you explain why not?*

DEAR: *Well, the guy was totally compliant. He's not doin' anything that would, um, be a safety hazard, you know?³⁹*

IA asked Sergeant Dear if he thought Officer Richter was dishonest, with regard to what

³⁷ Tab C-Sgt. Dear-IA Statement Lines 212-216

³⁸ Tab C-Sgt. Dear-IA Statement Lines 1082-1103

³⁹ Tab C-Sgt. Dear-IA Statement Lines 1168-1180

he reported, about his actions in the use of force/R2R incident. Sergeant Dear replied, "Absolutely."⁴⁰

In regards to Detective McCurley and what was on the video, Sergeant Dear told IA:

DEAR: *With, um, Detective (McCurley) I saw him jump out, I saw, um, Officer (Aguilar) come up, take lethal coverage, totally cool, we're all good. But what disturbed me was when Detective (McCurley), who's the big SWAT tactician guy comes and pushes a guy who's got less lethal away - I mean, lethal coverage away and then goes and kicks the guy to the point where his shoulders move. And then he writes in his report, uh, "Because I put my boot on him." I would say - and then, you know, he nudges him again, you know.*⁴¹

When asked if he recalled how many times Detective McCurley struck Soto-Torres. Sergeant Dear replied:

DEAR: *Uh, I'm gonna say three. Uh, there was, uh, a good kick, a small kick, and a step and drag on his ribs.*⁴²

Sergeant Dear stated none of the kicks delivered to Soto-Torres were reasonable. Sergeant Dear did not speak in detail with Detective McCurley about the content on the video. Sergeant Dear stated he initially told Sergeant Yates to make sure Detective McCurley wrote a supplement addressing the issues on the video.

Sergeant Dear said he got a call from Detective McCurley on the evening of July 27, but was not able to answer the call right away. Sergeant Dear stated:

DEAR: *I called him and he wanted to assure me that he just wanted to let me know that, "Hey, I wasn't bein' deceptive, I wasn't doin' anything, I didn't even know I kicked that guy." I go, "Okay, well, we'll talk about this tomorrow but understand we're going to make that an R2R and you're gonna have to address that." "Yes, sir." Done.*⁴³

On July 28, Sergeant Dear met with Detective McCurley and told him:

DEAR: *... "Hey, here's the deal. You're gonna write this at my direction, you're gonna write a supplement address- addressing your actions and, um, th- after watchin' that video to make sure you got everything squared away." And he goes, "Okay," he goes, "Will you help me?" I said, "Absolutely." And so he writes somethin' up and he goes, "Yeah, can you look at it?" "Sure." I looked at it and I go, "Dude, you didn't even put anything about kicking in there. You know, you used words*

⁴⁰ Tab C-Sgt. Dear-IA Statement Line 893

⁴¹ Tab C-Sgt. Dear-IA Statement Lines 1092-1099

⁴² Tab C-Sgt. Dear-IA Statement Lines 1319-1320

⁴³ Tab C-Sgt. Dear-IA Statement Lines 231-236

like, uh, 'put my foot on him,' you know, and things like that," and I said, "You didn't even mention anything about kicking, that's - we'll get that squared away in the R2R." And he just sat there and I walked out because now I'm goin', hey, this is gonna be some IA stuff so I need to be kinda careful where I go with this.⁴⁴

IA clarified with Sergeant Dear:

TORRES: *So, uh, I think that report was written on the 28th so that woulda been two days later. Uh, did you act- you mentioned it, I just wanna make sure we're clear, you told him, you read it and you said there's no mention of a kick here, you need to...*

DEAR: *Talk about that in the R2R.*

TORRES: *Okay. What was his reply to you, what did he say?*

DEAR: *He didn't. He didn't, he just sat there and I walked out 'cause at that point I knew we got problems because that report was so vague and it was so justifying versus explaining what and why it happened.⁴⁵*

When asked if, he believed, Detective McCurley intentionally misrepresented, omitted or mitigated information in his report, Sergeant Dear replied, "*Absolutely.*"⁴⁶

APD Detective Luke Serrato #6281 was interviewed by IA on October 23, 2017, to clarify an entry in his supplement. Detective Serrato has been with the Organized Crime Narcotics Team One since May 2017. He assisted with the surveillance and "follow-off" of Soto-Torres during this operation.

Based on his interview, IA determined Detective Serrato did not witness the actual takedown of Soto-Torres.

APD Officer Ricardo Aguilar-Lopez #5319 was interviewed by IA on October 26, 2017. Officer Aguilar-Lopez is assigned to the Criminal Conspiracy Team and was part of the arrest team for this operation. He was equipped with a less-lethal shotgun. Officer Aguilar-Lopez was seated on the right rear seat of the takedown vehicle, a dark colored Ford F-250 pick-up.

Officer Aguilar-Lopez identified the rest of the arrest team members as Officer Garcia, Officer Richter and Detective McCurley. Officer Aguilar-Lopez stated one of the sergeants mentioned during the briefing there would not be any type of vehicle assault. He added it is something OCD is not allowed to do anymore.

When asked what the term vehicle assault meant to him, Officer Aguilar-Lopez replied:

⁴⁴ Tab C-Sgt. Dear-IA Statement Lines 275-285

⁴⁵ Tab C-Sgt. Dear-IA Statement Lines 1293-1304

⁴⁶ Tab C-Sgt. Dear-IA Statement Line 1400

LOPEZ: *...So the way I was taught is the vehicle has to be pinned from either two, uh, cars or somewhere up against the wall without being able to move. Uh, and then from - once the car is pinned without being able to move, officers get out of the actual car, approach the vehicle. And either if you can't see ins- inside, you know, that's actually that - that you've been u- or been trained on is if you can't see inside, either you need to break a window and look inside, uh, as you're approaching the car. Uh, and there's different pods that you need to fill as you're approaching the car and depending on who's, uh, who's inside the car.*

TORRES: *Okay so if one of those elements is missing, like if a car is not pinned or blocked in...*

LOPEZ: *Mm-hm.*

TORRES: *...uh, and you use - any kind of tactics, do you know if that's considered a vehicle assault?*

LOPEZ: *No, uh, and I guess it depends how you - how you would phrase it. But, uh, my understanding what - when I - when they tell me vehicle assault, this, um, we use another vehicle or two vehicles to pin the car, not, uh, you know, that's how I always see a vehicle assault, pinning two cars and approaching the car using the tactics that - that, you know, we were taught. It's filling the pods. But it would contain having a vehicle to pin the car so it won't move at all.⁴⁷*

When asked if he witnessed Officer Richter and Detective McCurley breach the windows of the SUV, Officer Aguilar-Lopez stated, at one point, he looked up in the direction of the SUV and saw Officer Richter break one of the windows. Officer Aguilar-Lopez stated there was another APD officer with Officer Richter, but did not know who it was.

Officer Aguilar-Lopez stated the arrest team did not have a detailed plan about who was designated to be "hands on" for the actual arrest. He stated the plan depended on what side of their vehicle Soto-Torres ended up on when they decided to arrest him. When asked about the plan, as they approached Soto-Torres for the arrest, Officer Aguilar-Lopez stated once they opened the door, Soto-Torres would be right there and they could either take him down or give him commands and take him down. Officer Aguilar-Lopez stated Officer Richter ended up taking Soto-Torres down as he was being given commands. When asked if Soto-Torres was given an opportunity to comply with commands, Officer Aguilar-Lopez replied:

LOPEZ: *No. I think soon as we opened the door, we went out, put hands on and he kinda went down. And then we started, you know, giving commands*

⁴⁷ Tab C-Ofc. Aguilar-Lopez-IA Statement Lines 284-307

to either, uh, uh, "Let me see your hands," or something.⁴⁸

Officer Aguilar-Lopez described what he saw as he exited the vehicle. He stated:

LOPEZ: *So as I'm getting out, (Brian) opens the door. (Brian) comes out. We're giving commands to get down. Eh, (Brian), you know, we go - he goes hands-on, puts him on the ground. He's facing down on his stomach. I come back on his, uh, on his legs with my - with less lethal, um, holding cover and then this was, uh, I'm giving him commands to, you know, "Don't move," or something. Uh, (McCurley) - (Steve McCurley) comes up to my right. And that's when he kinda like struck the guy on the right side on his hands or something.⁴⁹*

IA asked if he believed the way Officer Richter took Soto-Torres to the ground was an R2R/use of force incident. Officer Aguilar-Lopez replied at the time he did not think so, but now thought that it was. When asked if Soto-Torres was resisting, Officer Aguilar-Lopez replied that Soto-Torres was not resisting, but did appear to be trying to push himself up.

IA asked Officer Aguilar-Lopez about Detective McCurley having pushed him. Officer Aguilar-Lopez told IA the contact was incidental to him and did not believe Detective McCurley had done it intentionally. Officer Aguilar-Lopez identified Detective McCurley's action as a kick. When asked if he considered Detective McCurley's kick an R2R or use of force incident, Officer Aguilar-Lopez replied, "Yes." When asked if he believed Detective McCurley's kick was reasonable, Officer Aguilar-Lopez replied, "No". When asked to explain, he said:

LOPEZ: *I think the guy was - was down. And I was - I was covering, uh, the guy when he came up to me. I think if any, you know, like I said, I was thinking of transitioning either my pistol - I'm sorry - my - my Taser or, uh, uh, or disengaging. Uh, you know, and maybe, you know, him trying to mo- I don't - 'cause I can't see what Detective (McCurley) saw. Maybe when he came around, if he saw the guy trying to get up or - or when. So that's hard for me to - to - to - to say. Uh, but if I would have done that, probably would have not maybe not done it or - or done something else besides that.⁵⁰*

APD Officer Vincent Garcia #5917 was interviewed by IA on November 2, 2017. Officer Garcia was assigned to the Criminal Conspiracy Team and was part of the arrest team for this operation. Officer Garcia was the driver of the takedown vehicle. Officer Garcia stated he was not sure when he found out he was assigned to the arrest team. He stated they talked about the operation the day before, but added that it was the morning of the briefing, July 26, when he saw his name on the raid board as being part of the arrest team.

⁴⁸ Tab C-Ofc. Aguilar-Lopez-IA Statement Lines 764-766

⁴⁹ Tab C-Ofc. Aguilar-Lopez-IA Statement Lines 775-781

⁵⁰ Tab C-Ofc. Aguilar-Lopez-IA Statement Lines 1520-1527

When asked if each member of the arrest team was assigned a task for the operation, Officer Garcia replied:

GARCIA: *I don't think so other than, uh, Officer (Aguilar), he had a - a less-lethal shotgun. So, um, other than that one, I don't think there was. I think we - from my recollection, it was on the raid board. I th- I know we talked a lot in the truck like, hey, if this happens, let's do this. If this happens, do that. Um, I knew I wanted to try and get ho- get the suspect on the passenger, uh, side of the vehicle. That way I'm not having to hop out or people having to shuffle over. Um, so, um, there could have been. But I don't remember.⁵¹*

Officer Garcia stated one of the sergeants mentioned during the briefing that there would be no vehicle assault during the operation. When asked why it was brought up during the briefing and he said:

GARCIA: *Uh, it was within past, uh, month or maybe that month or the month prior. Um, there were some issues with, um, vehicle assaults within the unit. And they weren't gonna be vehicle assaults with - within organized crime.⁵²*

When asked if there are elements that need to be present for a tactic to be considered a vehicle assault, Officer Garcia replied:

GARCIA: *Um, you definitely - well, it would have been in the - the briefing that if it turns to a vehicle assault, this vehicle will be pin or thi- these two vehicle will be the pinning team. And then, um, uh, you need at least four to conduct - four, uh, officers to conduct a - a vehicle assault. Um, there's always the plus-two rule. So however occupants plus two officers so, um, is kind of how it works. Um, but you need to pin the vehicle, uh, which means create contact between the - the, uh, assaulting vehicle and the suspect vehicle, pin it so that, um, that's basically the biggest, uh, weapon out there, is the 3,000-plus vehicle or pound vehicle, um, and pinning it so it doesn't - it doesn't look loud as in, um, you know, present a danger to other officers.⁵³*

In regards to making contact with Soto-Torres for the arrest, Officer Garcia stated as Officer Richter opened the door and stepped out, he gave multiple commands to Soto-Torres to get on the ground. Officer Garcia noted in his report Soto-Torres was not complying with commands. Officer Garcia was asked if Soto-Torres was given an opportunity to comply with commands. Officer Garcia replied:

GARCIA: *I think he did. I think he was just overwhelmed, um, and trying to*

⁵¹ Tab C-Ofc. Garcia-IA Statement Lines 250-256

⁵² Tab C-Ofc. Garcia-IA Statement Lines 364-366

⁵³ Tab C-Ofc. Garcia-IA Statement Lines 389-398

*process his like - like what's going on? Um, it was just, uh, I think he was just overwhelmed and not really processing things.*⁵⁴

IA asked Officer Garcia to explain his report entry where he described Officer Richter directing Soto-Torres to the ground by doing a passing movement.

TORRES: *So when you wrote that, um, from what you remember and when you say that Officer (Richter) directed (Soto) to the ground, is he like just guiding him down to the ground? Or did he actually force him down to the ground?*

GARCIA: *Um, so when I saw it, it - that's what it looked like. And that's what I wrote. Um, I think the next day I saw the Air1 video. And I saw - it looked - it was two hands, I think. So, uh, I wrote what I had seen.*

But when I saw the air footage, it, you know, it wasn't - it was definitely, um, something that needs to be practiced. So it's not - it's, uh, I think it's a training issue. Um, from what I wrote...

*...is what I saw.*⁵⁵

IA asked Officer Garcia if he believed Officer Richter's action to be an R2R at the time. Officer Garcia replied, "No." When asked what he believed now, Officer Garcia stated:

GARCIA: *Yeah, there's probably, um, we talked about it in the vehicle on the way back whether or not, you know, there was an R2R or not. I said I think something like I think, "I - I saw you - or I saw you direct him to the ground." Um, but then I think ultimately, it was just kinda like, "Hey, just let - let Sergeant (Dear) know when we get back." And that's what he did.*⁵⁶

When asked about whether Officer Richter inquired about having been involved in an R2R or not while heading back to the OCD office, Officer Garcia replied:

GARCIA: *I think he - he was confused whether or not it was one or not. Um, I think, uh, the other guys were talking about it as well. Uh, or I know they were talking about it as well. But, um, I don't remember exactly what anyone else stated. I just remember just saying, "Hey, just let Sergeant (Dear) know when we get back."*⁵⁷

IA clarified with Officer Garcia if after having watched the video, in his opinion, there should be any question in any officer's mind whether the takedown was an R2R. Officer Garcia stated:

⁵⁴ Tab C-Ofc. Garcia-IA Statement Lines 871-873

⁵⁵ Tab C-Ofc. Garcia-IA Statement Lines 925-941

⁵⁶ Tab C-Ofc. Garcia-IA Statement Lines 997-1001

⁵⁷ Tab C-Ofc. Garcia-IA Statement Lines 1402-1406

GARCIA: *Um, uh, I think if he would have done the tactic properly - I think it looks worse than it - it was because it - I think he - 'cause he was noncompliant, um, he just did it - he did a tactic wrong. So if he would a done it properly, I think it would have been fine. I think - I - I don't think that the suspect was resisting at the time.⁵⁸*

When asked if it appeared that Soto-Torres resisted officers at any point, Officer Garcia replied, "No." When asked if Soto-Torres was compliant with commands being given when he was handcuffed, Officer Garcia replied, "Yes."

Officer Garcia did not witness the breaching of the SUV windows.

Subject Officer Interviews:

Detective Steven McCurley #4280 was interviewed by IA on December 6, 2017. Detective McCurley has been with APD for approximately seventeen years. Detective McCurley is assigned to the Criminal Conspiracy Team.

Detective McCurley found out he was part of the arrest team the morning of July 26, when he saw his name on the briefing board. He said he ended up doing lethal coverage during the arrest. He was seated in the left rear passenger side of the arrest vehicle during the operation. When asked if he remembered any supervisor mention anything about a vehicle assault during the briefing, he replied:

MCCURLEY: *I'm not saying it didn't happen. I don't recall it because it's off the table. It wasn't an option anyway.⁵⁹*

Detective McCurley explained vehicle assaults were taken away from OCD by the chain of command because they were not happy about the way vehicle assaults were being used by other units within OCD.

With regard to the number of occupants in the target vehicle at the mall parking lot, Detective McCurley stated initially he had some confusion. He stated, however, as the vehicle entered the mall parking lot there was clarification that only a male and female were inside. Detective McCurley added there was also brief confusion when one of the officers in the follow off team started giving information on what turned out to be the wrong vehicle. Detective McCurley stated shortly thereafter another officer in the follow off team positively identified Soto-Torres as he walked away from his vehicle that had been parked by the Dillard's. Detective McCurley stated he was concerned about other occupants inside the vehicle and indicated that was the reason why the vehicle was approached and windows were breached. When asked, if he believed the vehicle needed to be cleared urgently, Detective McCurley cited Soto-Torres' use of counter surveillance and criminal history as exigent circumstances that justified the breaching of the windows.

⁵⁸ Tab C-Ofc. Garcia-IA Statement Lines 1471-1475

⁵⁹ Tab B2-McCurley-IA Statement Lines 397-398

When asked if he believed breaching the windows to clear the vehicle was the best course of action, Detective McCurley replied the target vehicle was elevated, had dark tint on the windows and they could not see inside. He added:

MCCURLEY: *- yeah, and like I said, uh, at - at - at the time with - with what I was feeling and information I was processing that was the quickest way to get that vehicle clear and 100% safe.*⁶⁰

When asked if any other considerations were made prior to having breached the windows, Detective McCurley replied, "No," and added he wished he would have slowed down and considered other options. When asked to explain the actions he took as he approached to clear the vehicle, he said he communicated to the other officers, "...*Hey, grab a window, or something to that effect.*"⁶¹

Detective McCurley broke the front passenger side window and was able to clear the front seat and a portion of the backseat. When asked if he knew why the rest of the windows were broken, he replied:

MCCURLEY: *I would assume to clear it. I don't know what those guys were thinking.*⁶²

IA had the following exchange with Detective McCurley:

TORRES: *Okay, so when somebody says, "Grab a pod and move up," what does that mean to you?*

MCCURLEY: *Uh, grab Pod 1, 2 or 3 and - and move up on the vehicle.*

TORRES: *Okay, and when somebody says, "I'm porting," what does that mean to you?*

MCCURLEY: *Uh, they're breaching a window.*⁶³

When asked if the terms "pod" and "porting" were commonly used outside of employing a vehicle assault, Detective McCurley said, "Yes," and added he learned those terms in SWAT during vehicle assault training.

After clearing the vehicle, Detective McCurley notified Sergeant Dear about the damage. He added shortly thereafter someone, at the scene, told him the sergeants were upset with him about having breached the windows. Detective McCurley stated all his focus shifted to why the sergeants were upset about that and indicated this as the reason why he did not report anything else to a supervisor at the scene.

⁶⁰ Tab B2-McCurley-IA Statement Lines 649-651

⁶¹ Tab B2-McCurley-IA Statement Line 689

⁶² Tab B2-McCurley-IA Statement Line 684

⁶³ Tab B2-McCurley-IA Statement Lines 901-908

When asked if he conducted a vehicle assault on the SUV during the operation, Detective McCurley replied:

MCCURLEY: *Um, the only thing I - I don't know who, but the only thing I can say is that by the way I was trained that was not a vehicle assault, and that's the definition I use. The definition I use is there - there's a immobilization of the vehicle that - that has to happen, uh, and that's basically coming behind and pinning the vehicle against another vehicle or immoveable object and the point of that is to take that vehicle out of the game as basically prevent us from introducing lethal - a deadly threat encounter, right? So, uh, my - my definition is, it starts with you having to pin that ve- you have to pin the vehicle and then the tactics are there's people take points of domination on one side and you have a line of defense down the other and you use communication to get up on the vehicle, get people out, uh, and make sure it's clear.*

TORRES: *So would you say that the pinning of the vehicles as you describe, is that a key element for a tactic to be considered a vehicle assault?*

MCCURLEY: *Yes, sir, in my opinion.*⁶⁴

When asked if, outside of employing a vehicle assault, he had been trained by the Department to breach windows while clearing a vehicle, Detective McCurley replied, "No."

In regards to the arrest team's plan to arrest Soto-Torres, Detective McCurley stated besides having designated Officer Aguilar as carrying less lethal and Officer Garcia being the driver, there was no actual plan as to how the arrest was going to be conducted. Detective McCurley described it as "*planning on the go.*"⁶⁵

During his contact with Soto-Torres, Detective McCurley stated he gave commands to Soto-Torres to stop moving his hands and to put his hands behind his back. When asked if Soto-Torres was given an opportunity to comply with those commands, Detective McCurley replied:

MCCURLEY: *Uh, no, I reacted rather quickly. Uh, I had concerns like with us being on top of him like that. Um, it doesn't take much for 4 dudes - 3, 4 guys, 3 of 'em with long guns for that to turn into a bad wrestling match right there, so my concern was not - not allowing him to get anything underneath him and so I was - I reacted with that first kick, um, right when I got up there and started giving commands 'cause his hands were still moving.*⁶⁶

⁶⁴ Tab B2-McCurley-IA Statement Line 832-847

⁶⁵ Tab B2-McCurley-IA Statement Line 423

⁶⁶ Tab B2-McCurley-IA Statement Lines 1177-1182

Detective McCurley told IA he considered Soto-Torres a threat as he came around the back of the truck and explained:

MCCURLEY: *Uh, so with (Richter) kinda moving around to - to his head, um, and not yet covering him and (Rick) on his feet with a less lethal shotgun, we've got this guy with a pretty extensive history with no lethal cover on him. Um, he was a threat on multiple levels to me. Uh, the first one being, I recall him kinda moving his hands forward when I like last saw him when I exited the vehicle, um, not knowing what he was doing, uh, maybe accessing a gun with his past, uh, I felt like we really needed to be careful with this guy. Uh, so I came around and (Rick) was at his feet with the less lethal. I kinda push (Rick) out of the way to get lethal cover on the guy and then I was just hard focused in on his hands and his waistline. Um, anything that - like I was saying this guy getting the slightest advantage could be really bad for us because we don't win either way having to shoot him in the parking lot or having to wrestle with him. So, I really felt the need to control him 100% and because of the gear that we had, uh, we kinda had limited options in my opinion and with being right on top of him.*

TORRES: *Okay, you mention pushing Officer (Aguilar) to get lethal coverage on him. Wh- why do you think that was necessary?*

MCCURLEY: *To - just so we could kinda have 50/50 on the guy as opposed to (Rick) and then me kinda being off on at a bad angle, just moving (Rick) over so that we have straight on.⁶⁷*

When asked if, when he pushed Officer Aguilar, Soto-Torres was exhibiting resistance, Detective McCurley replied:

MCCURLEY: *Uh, he wasn't - not - not like an active resistance, but he wasn't completely obeying commands. Uh, his hands were still moving, so, um, yeah, he - and like I said, I felt that we really need to stay ahead of this guy (oodaloop) and give him the chance to, uh, to get any - process any information and start making a plan...⁶⁸*

When asked to describe the level of resistance Soto-Torres exhibited when the first kick was delivered, Detective McCurley could not assign a level of resistance, but stated it was lower than active resistance. Detective McCurley was asked what options he had at that point to counteract the resistance. He replied:

MCCURLEY: *Uh, since I'm - my feet was the only thing that I could use, uh, from my experience, um, since I had a long gun in my hand.*

⁶⁷ Tab B2-McCurley-IA Statement Lines 1247-1268

⁶⁸ Tab B2-McCurley-IA Statement Lines 1311-1315

TORRES: *And what did you do?*

MCCURLEY: *Um, I kicked at his hands one time.*

TORRES: *Mm-hm.*

MCCURLEY: *And then I push - like I take my foot and push on his - on his hand another time and then give him the command say, "Don't move your hands." Uh, his hand moves a little bit a little bit later and then I just kinda swipe at his hands with my foot.⁶⁹*

Detective McCurley acknowledged he was involved in an R2R during the arrest and likewise agreed there were no conditions present at the scene that prevented him from reporting the R2R/use of force incident to a supervisor. Detective McCurley stated he believed all the contacts he made with his foot to Soto-Torres' body were reasonable. He explained:

MCCURLEY: *...because of his history, he's supposed to carry a gun when he's selling, um, narcotics. We watched him sell narcotics. Uh, his kinda erratic behavior in the parking lot the way he was walking away from it, so I think if you look at, like I said, the totality of the circumstances here, I think it was - they were reasonable uses of force.⁷⁰*

Detective McCurley stated the reason for having kicked Soto-Torres was to gain full compliance. When asked if kicking was a technique he normally employed to gain compliance, he replied:

MCCURLEY: *Um, when I don't have any other options as far as my hands being full with the long gun, um, yes. Now if I had a holster or, you know, I'm saying a pistol and I can holster up then, there's different options, but, uh, if you can control their hands with your feet and then still keep lethal cover, it makes it safer for everybody.*

TORRES: *So how often would you say you're involved where you're - both hands are occupied that you had to use this...*

MCCURLEY: *I - I can't - I mean, I've stepped on arms and wrists before to hold 'em down and I - I've put - I've kicked people before on search warrants, uh, I mean, so I - I can't tell you. I did 5 years up there doing entries in SWAT and then, you know, entries over here before - before this, so I can't give you a number.*

TORRES: *Is that a technique or tactic you were taught by the department?*

⁶⁹ Tab B2-McCurley-IA Statement Lines 1342-1354

⁷⁰ Tab B2-McCurley-IA Statement Lines 2257-2261

MCCURLEY: *I don't remember going to like a kicking school. Uh, but so then I'll answer no to that, I guess, 'cause I don't remember where I actually learned it, but when...*

BENOIT: *I - I guess since being in OCD have you applied that tactic before by kicking somebody?*

MCCURLEY: *Uh, yes.*

BENOIT: *And - and were those reported?*

MCCURLEY: *No, 'cause it was before.⁷¹*

Detective McCurley indicated the incidents where he had applied that tactic before would have fallen under the previous way of reporting R2Rs, which was typically done in after action reports. He explained that no documentation would have been filled out in Versadex, but a supervisor would have still been notified.

When asked if Soto-Torres exhibited resistance at any point, Detective McCurley replied, *"Uh, outside of him not keeping his hands perfectly still, no, not that I saw."⁷²*

Detective McCurley had a phone conversation with Sergeant Yates on the evening of July 27. During the phone conversation Sergeant Yates mentioned a kick and Detective McCurley stated that was the first time he realized he had kicked Soto-Torres. Detective McCurley stated he did not remember if Sergeant Yates suggested he complete a report during the phone conversation. Detective McCurley added Sergeant Dear did tell him to complete a report, and he followed Sergeant Dear's direction.

With regard to his documentation of this incident in the July 26, report, Detective McCurley stated his report was not accurate because he did not document the hardest kick due to the fact he did not recall it at the time. When asked if his articulation about having been involved in an R2R or use of force incident was clear, Detective McCurley replied it was not.

With regard to his documentation of this incident in the July 28, report, Detective McCurley stated his report was accurate because he wrote it after having reviewed the Air One video which revealed a couple of use of force or R2R incidents he initially did not document. IA asked Detective McCurley if the report accurately depicted that he had been involved in an R2R/use of force incident, he replied that it did. IA pointed out to Detective McCurley he did not use the word "kick" anywhere in the report and had the following exchange:

TORRES: *But would you agree that nowhere in this document you use the word kick.*

⁷¹ Tab B2-McCurley-IA Statement Lines 1743-1770

⁷² Tab B2-McCurley-IA Statement Line 1930

MCCURLEY: *Uh, no, I don't, uh, not that I saw.*

TORRES: *Okay and your explanation for that is you were trying to clean it up.*

MCCURLEY: *Not clean it up, just trying to articulate it without using the word kick, I guess. I mean, I...*

TORRES: *And that's the question that we're gonna be asked and that we would like for you to answer for your chain of command. Why did you not use the word kick if you have already described it as a kick when you're articulating talking to us?*

MCCURLEY: *I can't - I mean, I can't tell you - I'm - I don't know why I use these words that day, but that's just how I described it. Um, it makes no sense - it's - it's on video, you know? So, I'm not - I'm not hiding a kick. Do you see what I'm saying? That's just the - the words I chose to - to use that day.*

BENOIT: *Do you think those words are truthful?*

MCCURLEY: *Yes, I wasn't - it's right there. You know? I'm - I'm not gonna lie.⁷³*

When asked, if he agreed that any individual who read his July 28th report would reasonably conclude that he merely placed his boot on Soto-Torres and not that he had been kicked, Detective McCurley replied, *"Yeah, I could of wrote a much better report, yes."⁷⁴*

Detective McCurley stated he asked Sergeant Yates to review the report after he was done with it. Detective McCurley stated Sergeant Yates told him it was *"Good to go."⁷⁵*

When asked if he completed a details page, as required by APD policy, Detective McCurley replied:

MCCURLEY: *No, I did not do any of the R2R stuff. So that's completely on me I dropped the ball, well like I said earlier, I wasn't trying to conceal anything. I just - I didn't document it properly and I forgot about the first ki- or didn't realize the - I had kicked him that first time.⁷⁶*

IA asked Detective McCurley if he observed Officer Richter use force on Soto-Torres at any point. Detective McCurley stated, *"Yeah, just - just, uh, yeah, heel on the ground, toe kinda rested on the - the guy's head."⁷⁷* Detective McCurley said it was something that

⁷³ Tab B2-McCurley-IA Statement Lines 2847-2868

⁷⁴ Tab B2-McCurley-IA Statement Line 2944

⁷⁵ Tab B2-McCurley-IA Statement Line 2959

⁷⁶ Tab B2-McCurley-IA Statement Lines 1731-1734

⁷⁷ Tab B2-McCurley-IA Statement Lines 3171-3172

should have been documented just because there was contact with Soto-Torres' head.

Officer Bryan Richter #6824 was interviewed by IA on December 14, 2017. Officer Richter has been with APD for approximately seven and half years. Officer Richter transferred to OCD in February 2016 and is assigned to the Criminal Conspiracy Team.

Officer Richter stated a detective in the unit asked for assistance, on July 25, 2017, in attempting to locate Abel Soto-Torres who had an outstanding family violence warrant. Officer Richter said he offered to help and that was how he became the case agent. Officer Richter said most of the day was spent doing research and said that eventually he was able to get Soto-Torres' basic information to include his criminal background and involvement. Officer Richter stated Soto-Torres' involvement showed him to be violent, which included violence towards law enforcement. Due to Soto-Torres' involvement Officer Richter stated he thought Soto-Torres was an ideal candidate for a vehicle assault. Officer Richter said on the morning of July 26, 2017, before the operation briefing he approached Sergeant Yates and Sergeant Dear with the vehicle assault plan, but was told a vehicle assault would not be implemented for this operation. Officer Richter said he was told to plan for an open air takedown instead, which he did.

With regards to inserting himself as part of the arrest team, Officer Richter stated:

RICHTER: *...Um, at the time, um, the way we did it on our team is the case agent was almost always directly involved, either on the arrest team or, ah, if we were doin' a narcotics buy and it was their CI doin' the buy, they would end up plannin' the - the raid - being the raid planner and being the team leader on the raid. So the way our team did it, the case agent was almost directly always involved and was right there with it.*⁷⁸

When asked if any OCD supervisor had spoken to him about the expectations of a case agent within the unit, Officer Richter replied:

RICHTER: *...until after this operation it was never - not that I can recall at all that it was ever made clear to me that, as a case agent, I shouldn't be part of a takedown team or actually an active participant in an operation.*⁷⁹

With regard to having followed Soto-Torres to Barton Creek Mall, Officer Richter expressed concern about the confusion of having lost visual contact with Soto-Torres' vehicle. Officer Richter believed a scenario had been created where somebody might have had an opportunity to have gotten into the vehicle during the time visual contact was lost with the vehicle. Officer Richter said the information that two people were in the vehicle when it entered the mall parking lot was "old" and said that although two people had been seen exiting the vehicle, he did not know if anyone else was left inside. He stated he believed due to that unknown factor the vehicle needed to be cleared. Officer

⁷⁸ Tab B2-Richter-IA Statement Lines 868-873

⁷⁹ Tab B2-Richter-IA Statement Lines 932-935

Richter set up near the trunk of the vehicle that was parked next to the passenger side of Soto-Torres' and waited for other officers. Officer Richter said as he waited, he attempted to clear the vehicle, but said the windows had dark tint and would not allow him to see inside. As he held his position, two Hays County deputies approached and formed up behind him. Officer Richter and the deputies did not advance until Detective McCurley also began to approach the vehicle.

Officer Richter stated there was verbal communication between him and Detective McCurley that prompted them to move up and clear the vehicle. Officer Richter could not recall exactly what was said.

Officer Richter said as they moved up to the vehicle he was not able to see inside and said he breached the second rear passenger window with the muzzle of his rifle. He said shortly thereafter, the deputy to his left, next to the third row window, said he could not see inside. Officer Richter said he breached the window to assist the deputy in clearing the inside due to the fact the deputy was only armed with a pistol.

After the vehicle and scene were declared safe, Officer Richter stated:

RICHTER: *Ah, Sergeant, ah, Sergeant - I started noticing Sergeant (Dear). I saw him standing near his vehicle and, ah, went over there and spoke with him. And, ah, he made a motion and mentioned something about the windows on the vehicle. And I - I can't remember what he said, but he drove - he got my attention about the vehicle's, ah, windows being broken. And I said, "Yeah, that car is clear." Then he kind of gave me a look. And I didn't really think of - anything of it at the time, um, walked away.*

Um, and then it wasn't until Sergeant (Yates) approached me and started asking me about where we took him down at. And I - he goes - he just asked me if we took him down in the vehicle. And I said, ah, "No, we took him down over here." And then he said, "Well his vehicle's over there." I said, "Yeah." He goes, "Well why are the windows broken?" I said, 'Cause like we couldn't see in there." And he goes, "But you didn't" - I - I - I don't know if he asked if we took a - he was asking about initially if we took him down by the vehicle. I told him, "No, we took him down here." Asked why the windows were broke. I said, "We - we had to clear the car. We couldn't see in there whatsoever." And I want to say he asked, "But you didn't do a vehicle assault." And I said, "No, we didn't do a vehicle assault." He goes, "Okay."⁸⁰

When asked what constituted a vehicle assault. Officer Richter replied:

RICHTER: *...a vehicle assault is you have - you have a - a front block. You have a*

⁸⁰ Tab B2-Richter-IA Statement Lines 524-549

rear block, which there's two different vehicles. Um, and then you have your, you know, assault team. Ah, so I mean that's a whole different - you - you - you plan that out as well. And, um, to do a vehicle assault, you need those front and rear blocks because you try to do a vehicle assault without them the guy just drives away. There's nothing - it's just not gonna work. Um, so on top of that you need - so you got your - you got your suspect's vehicle that basically is in the middle. You have another vehicle. You have two police vehicles that come in and act as blocks and actually make contact with the suspect vehicle and block that person in from either being able to go forward or backwards. And as that's happening, um, you have at least three officers that go down the predetermined, um, side of the target's vehicle. And then you have a fourth officer that goes to the opposite side, which is your LOD, who is responsible for covering anything that comes out the opposite side of the car. Um, so these are all things that you need in place to do a - a vehicle assault.⁸¹

With regard to any pre-planning for the arrest. Officer Richter indicated there was no real arrest plan and indicated they were planning as the operation unfolded. He stated:

RICHTER: *Yeah. I mean everything kind of evolved and changed, and we just kind of went with it. And, you know, again, one side Steve had responsible for, I had a different side, ah, responsible for the other side. And the - the only reason that came up, Rick was the - the only person that was really designated with a job before we, ah, before we got the cars to be with the - with the less lethal, ah, and we were walking out, I said, "Who wants to drive?" And Vinnie said, "I'll drive." I said, "Okay, cool." And then so then I was in the front passenger side. Steve was on the rear driver's side. That's just kind of how that worked out. It was no thought process. It was no plans. Just kind of everybody sat where they sat.⁸²*

Officer Richter described his actions as he exited the arrest vehicle and made contact with Soto-Torres.

RICHTER: *As we get close enough to approach him, I was going to get out and take him down, take him into custody. Um, as we approached him and I go to get out, ah, I see his right hand go into his pocket. Ah, somebody else in the truck says, "Hey, his hand just went in his pocket." Um, so at that point I got out, exited the vehicle, announced, "Police, you're under arrest. Get on the ground." Grabbed him, spun, and took him to the ground. I went to the ground with him. Ah, when we went to the ground, both his hands went underneath his body. Um, I had gone to the ground. It wasn't my intentions to go to the ground*

⁸¹ Tab B2-Richter-IA Statement Lines 1436-1451

⁸² Tab B2-Richter-IA Statement Lines 2230-2239

with him, ah, so I tried to get up. As I - as I went to the ground with him, I was kind of on - I guess I was on his left side on my knees...

...And at the same time, um, his hands are on his body. I - as I'm gettin' up, I reach and grab one of his arms and pull it out, and start getting up, start givin' commands, "Hey, don't move, um, hands behind your back."...

...as I'm gettin' up, he - I see him liftin' his head, and his - I mean his eyes are just bouncin' everywhere looking...

...Um, and so I see him looking around. I take, ah, as - as I stand up to create distance and get away from him and cover on him as well with my rifle, I took, ah, I want to say my right foot, um, placed it on the side of his head, told him, "Quit moving." Ah, I want to say he communicated like, "Okay, okay, okay." As soon as I got - knew I was getting compliance from him, I moved my foot off.⁸³

Officer Richter was asked if he, at any point, put his entire body weight on Soto-Torres' head. He replied, "*I don't think I - no, I don't think so.*"⁸⁴ IA played a portion of the video beginning at 13:27:20 for Officer Richter and asked him to look at his feet, particularly his left foot and describe what he saw. The following exchange occurred:

TORRES: *Okay. Look at your left leg. Did you see that?*

RICHTER: *I did.*

TORRES: *What did you just see?*

RICHTER: *Ah, my left foot came off the ground.*

TORRES: *Okay. How is it possible that your left leg comes up off the ground, your right leg is on (Soto Torres)'s head, but yet you're not putting your entire body weight on his head?*

RICHTER: *Yeah, I mean when my foot comes off the ground for that very brief moment, then I would - yeah, I would guess that my body weight would be on that right foot.⁸⁵*

Officer Richter told IA he hadn't noticed that before and went on to explain that to him it looked like he was regaining his balance. He added his intentions were not to place his entire body weight on Soto-Torres.

When asked if Soto-Torres was given an opportunity to comply with the commands to

⁸³ Tab B2-Richter-IA Statement Lines 424-463

⁸⁴ Tab B2-Richter-IA Statement Line 3069

⁸⁵ Tab B2-Richter-IA Statement Lines 3123-3137

get on the ground before the takedown was implemented, Officer Richter replied, "No." He was asked if Soto-Torres was given an opportunity to comply with the commands to "quit moving" before a foot was placed on his head. Officer Richter replied:

RICHTER: *Well yeah, he had the opportunity once on the ground to just remain completely still and wasn't doin' that. I mean a guy like this you don't give a whole lot of leeway to.*⁸⁶

When asked if the takedown he performed on Soto-Torres was reasonable, Officer Richter replied that it was. When asked what type of resistance Soto-Torres exhibited when the takedown was implemented, Officer Richter replied, "Um, there was no active resistance. Um, but the information we had on him, um, was - made it highly likely that he - he would. So we just didn't want to give him the opportunity."⁸⁷ Officer Richter agreed the takedown should have been reported to a supervisor at the scene. He likewise agreed there were opportunities available for him to have reported it, but did not. Officer Richter's explanation for not having reported the takedown at the scene was that he believed the supervisors had witnessed the takedown when it happened.

Officer Richter was asked if placing his foot on Soto-Torres' head was reasonable, he replied that it was. When asked what type of resistance Soto-Torres exhibited when the technique was implemented, Officer Richter replied it was passive resistance because Soto-Torres was told not to move but he lifted his head and looked around. Officer Richter's explanation for not having reported this incident at the scene was that he was doing other things.

When asked if he recalled talking about his R2R with his team on the way back to the OCD office, Officer Richter replied:

RICHTER: *Ah, we - we may have talked about the takedown, but I don't - not in detail. I don't specifically remember anything though.*

TORRES: *What do you remember about talking about that incident?*

RICHTER: *I don't remember talking about it at all. I just - I remember being stressed about the window issue. And the u- the - the force wasn't even a issue in my mind at that point. At that point I was thinking about why it was a big deal about the windows.*

TORRES: *So, um, you're saying you don't remember the conversation, but it did take place, or it didn't?*

RICHTER: *No, I'm - I'm saying I don't remember having a conversation about it. If - if we did - I'm not s- I can't say that we didn't have a conversation. I just don't remember or what it was about. I mean we're talking about*

⁸⁶ Tab B2-Richter-IA Statement Lines 3044-3046

⁸⁷ Tab B2-Richter-IA Statement Lines 2603-2605

*something that was almost six months ago, and my mind was elsewhere. I wasn't...*⁸⁸

IA asked Officer Richter to explain the R2R reporting procedure at OCD. Officer Richter explained:

RICHTER: *...my understanding was from hearing other - other folks talk about it was, um, you did a debriefing, you talked about it in a debrief, um, there was a page of part of the after actions report, um, that was filled out, and then you documented in a supplement. But again I never went through that procedure 'cause I - I didn't have to. Um, and then, um, I - I was gone for about six months, came back, and some time either - it was either right before or right after I got back -- it was relatively quickly, um, we were told we don't do after actions reports anymore, um, R2R title code needs to be done. Like okay. And months went by, and I had no reason to use 'em...*

*...Um, this one I just, um, I wasn't real clear. I knew we had to do an R2R title page. But other than that - or that's what my understanding was. Um, other than that it wasn't - it wasn't real clear.*⁸⁹

Officer Richter further explained:

RICHTER: *Ah, I just - I thought the only change that they made to our - the way we did it before was just doin' the R2R title page. You know, again before we would just - we'd have a debrief after the operation back at the office sometimes the next day, and that's when I would hear it brought up. If it was done prior to that, I don't know. I - I - it could have been. I don't know. But I just know from my - my personal knowledge if there's something happened, it would be brought up in a debrief.*⁹⁰

With regard to the force details page he filled out for this incident, Officer Richter indicated it was accurate and complete. When asked which use of force incident he documented on the details page, initially he stated he knew it was for the takedown. However, as the interview continued he later stated the details page actually covered both the takedown and the foot to the head. IA showed Officer Richter some of the fields in the "force used" tab, specifically "subject's resistance" and "subject's conduct", were missing and questioned him about it. Officer Richter told IA those fields are usually filled out and added, he might have just missed or overlooked them when he filled out the page.

IA also showed Officer Richter where he had marked that Sergeant Dear responded to the scene of the R2R/use of force incident and asked him to explain his entry. Officer Richter stated he put yes to make it clear that Sergeant Dear was at the scene. When asked, for

⁸⁸ Tab B2-Richter-IA Statement Lines 3799-3815

⁸⁹ Tab B2-Richter-IA Statement Lines 1466-1481

⁹⁰ Tab B2-Richter-IA Statement Lines 1534-1540

clarification, if Sergeant Dear was made aware of an R2R/use of force incident at the scene, Officer Richter stated he did not notify Sergeant Dear at the scene.

Officer Richter stated when he returned to the OCD office, after the operation, he began to write the "cancel" supplement for the Department warrant that had just been served. He added that as he wrote that supplement he began to think about the other report he needed to complete detailing his actions during the operation. He cited due to the fact that he had not been involved in an R2R at OCD, since the new reporting procedures had been implemented, he was not sure if an R2R title page needed to be completed. He stated:

RICHTER: *Well I just wanted to be sure that that was what I needed to do. And if- at that point I went to (Randy) and said, "Hey, do I need to do an R2R title code?" Um, when I asked him that, he kind of gave me a confused look. And, ah, he goes, "What R2R?" And immediately I kind of thought to the takedown we did. And I said, "Well we took the guy down." And he goes, "Why haven't - why didn't you bring this up sooner?" And I was just kind of - at that point I was just kind of dumbfounded 'cause that was - the whole plan was to do an open air takedown on this guy. Um, so I said, "Well yeah, we took the guy to the ground." And he said, "Well why didn't you tell me about it sooner?" I said, "I didn't - you know, I didn't think of it. You guys brought up the windows. I started worrying about the windows and what the issue was with that."⁹¹*

Because of Sergeant Dear's reaction to the inquiry, Officer Richter said it was then he first realized Sergeant Dear had no idea a takedown had been performed. Officer Richter added:

RICHTER: *I mean, honestly I was - it was the plan. It was a plan they approved. Um, it was the - what they told me to do. You know, that doesn't alleviate me from sh- I should have said something on scene. But I was kinda drawn aback that he would act shocked that there was an R2R that occurred. And - but, you know, maybe that's because I didn't say anything to him on scene and he just assumed it went a different way."⁹²*

When asked if he had made it clear to Sergeant Dear that an R2R or use of force incident had taken place during the arrest of Soto-Torres, Officer Richter replied, "Yes." Officer Richter stated Sergeant Dear told him they would talk about it further the next day.

Officer Richter stated when he got to the office the next morning, July 27, he saw Sergeant Dear in the office by himself. Officer Richter said he went into Sergeant Dear's office, closed the door and said:

⁹¹ Tab B2-Richter-IA Statement Lines 589-600

⁹² Tab B2-Richter-IA Statement Lines 3974-3980

RICHTER: ... "Hey, I want - about to do - finish my supp from yesterday, but I want to make sure you know everything before you just read it in my supplement." And he's just, "Okay." So I tell him, you know, "I took him to the ground." And I said, ah, "I didn't mention yesterday though I also put my foot on his head." And soon as I said that, it was just like, "Well you - you know, at first you didn't tell me - first you break the windows, and then you don't tell me about the force on scene, and now - now you put your foot on his head." I said, "Yeah, but, ah, yes, I put my foot on his head, but it wasn't a stomp, it wasn't a strike, it wasn't a kick. Ah, I put it there. He was movin' his head. I wanted him not to be looking or be able to see anything, so yeah, I put my foot on his head." I said, ah, "It wasn't - again, it wasn't a kick, or a stomp, or anything, but yeah, I put it on the side near his ear." And he calls in Sergeant (Yates). Um, actually I think Sergeant (Yates) was already in there as well 'cause when I told him I want to talk about the R2R, I think he brought in Sergeant (Yates) at that point too, so they both could be in there. I believe that's what happened. I'm - I'm not 100% on that. But I know at some point they were both in there. Um, started talkin' about this, and they're like, "Okay, is there anything else you could tell us that you're not tellin'?" "No," you know, I'm trying to tell you everything right now. I'm gonna go do my supplements. It's gonna be in there. I just wanted to tell you all before, um, you read it in a supplement." They're like, "Okay, great."⁹³

Officer Richter stated he was told to contact Air One and inquire if they had taken video. Officer Richter contacted Air One and eventually got confirmation when he received an email with a link to the video. Officer Richter said he notified Sergeant Dear of the video and said they both saw the video for the first time at the OCD office. Officer Richter stated after they watched the video Sergeant Dear went into his office and a short time later asked the video be emailed to him. Officer Richter stated he was called into Sergeant Dear's office shortly after that. Officer Richter stated:

RICHTER: *We kind of step by step go over what happens in the video. And, um, he - he took issue with, um, I - I want to say he told me I minimized when I told him about me putting my foot on this side of his head, that I minimized what I did. And I said, "Well I just want to make sure you're clear that it wasn't a stomp or a kick because, you know, you go from doing this or just, you know, stepping on somebody to kicking or stomping 'em, I mean that changes the force level. I just want to make - make you aware, yeah, it happened, but it wasn't a strike. Ah, from there it just went and, you know, it started, "You minimized it." And then Sergeant (Yates) said, "Well I don't think you were lying. I just don't think you remember because you're new some of this tactical operations stuff. Um, I think you maybe just didn't remember how it happened right away." "Okay, so, ah, yeah, I mean I went*

⁹³ Tab B2-Richter-IA Statement Lines 623-643

home, thought about it, remembered everything, came in, and in my mind I was telling you exactly how it happened." Um, and at one point they said, "Well if makes it seem like you were still on the ground and that you had one foot over here and then you did one foot over there." And in my head I'm thinkin' that makes no sense. Like it basically had - I'd be doin' the splits, if I did it that way. But at this point I - with the - the way the conversation's going I'm not gonna argue with them. I'm not gonna try to make excuses or - I just don't want it to be in a position where I make things worse for myself. So I'm like, "You know, I wasn't lying to you. Um, this is what happened. This is the way I believe it happened. Um, and that's what I told you." Um, and they said, "You know, go write your report, make sure it's accurate." "Absolutely."⁹⁴

IA had the following exchange with Officer Richter regarding what Sergeant Dear and Sergeant Yates stated Officer Richter told them about his actions during the arrest:

TORRES: *...did you tell them that there was distance between you and (Soto Torres) to where there - he would have had - he would have had time to react to your commands?*

RICHTER: *Uh, I - I don't know. I don't think - no. Uh, I mean, I don't know for sure. Uh, I don't know. I don't remember that.*

TORRES: *You don't remember telling them that - that there was distance?*

RICHTER: *No. I mean, I honestly can't remember...*

TORRES: *...Do you remember saying anything to them that would have made them believe that there was distance between you and (Soto Torres) before you actually made physical contact with him?*

RICHTER: *I mean, yeah, I mean, in a - a conversation that I can't review five months ago, yeah, I mean, I - I can't - I don't know what I may have said or may not have said. I just - I - I don't remember the exact details of that conversation.*

TORRES: *Did you - do you remember telling them that you threw him or hip tossed him when you did the take-down?*

RICHTER: *Uh, hip tossed sounds like something I would say, yes...*

TORRES: *...Did you tell them that you did a take-down?*

RICHTER: *Yeah, absolutely.*

⁹⁴ Tab B2-Richter-IA Statement Lines 673-696

TORRES: *Did you tell them that you put your knee on his back to hold him down?*

RICHTER: *Mmm, not that I recall, no.*

TORRES: *So if there's information that you had given that in- that you had said that, um, you're saying you - you don't recall saying that? It's not - does that sound like something you would have said?*

RICHTER: *I don't remember puttin' my knee on the guy, so I don't know why I would say that.*

TORRES: *Okay. Did you tell them that you gently and lightly used your foot to hold his head down?*

RICHTER: *Mmm, I know that they - that's how they interpreted it. I don't know if I ever specifically said gently or lightly. I wa- you know, I did make it a point to be clear that it wasn't, again, like, a s- a stomp or a kick. Um, and I made it clear that I put my foot on the guy. But, um, I - I don't ever remember trying to make it a point to them that it was gently or anything like that.⁹⁵*

Several days after having given his statement to IA, Officer Richter reviewed the transcript of his interview. After the review, Officer Richter submitted a memorandum⁹⁶ to IA as an addendum to his transcript.

Discrepancies

- Detective McCurley stated Sergeant Yates read his July 28 report and told him it was “good to go”. Detective McCurley did not recall if Sergeant Dear looked it over. Sergeant Yates and Sergeant Dear stated it was Sergeant Dear that helped Detective McCurley write the July 28 report.
- Detective McCurley stated he did not recall Sergeant Yates telling him to write a supplement to address the issues on the Air One video during their phone conversation. Sergeant Yates stated the main purpose for having called Detective McCurley was to make sure he watched the video and wrote a supplement.
- Detective McCurley did not recall any supervisor having mentioned anything during the briefing about not employing a vehicle assault. Several officers noted in their reports that a supervisor told the group no vehicle assault was to be implemented during the operation.
- Officer Richter stated the topic of a vehicle assault was not brought up during the briefing. Several officers noted in their reports that a supervisor told the group no vehicle assault was to be implemented during the operation.

⁹⁵ Tab B2-Richter-IA Statement Lines 4236-4316

⁹⁶ Tab B2-Richter-IA Statement Page 107

- Officer Richter stated when he approached Sergeant Dear on July 26, at the OCD office he made it clear to Sergeant Dear that an R2R/use of force incident had taken place during the arrest. Sergeant Dear stated he did not believe an R2R or use of force incident had occurred after his conversation with Officer Richter.

Summary of Facts

- The operation on July 26, 2017, involved multiple units and officers within OCD.
- During the briefing a supervisor stated no vehicle assault would be conducted.
- Abel Soto-Torres had an active felony assault warrant and conducted a drug transaction with an APD confidential informant (CI).
- The arrest team had a fluid plan for executing the arrest of Soto-Torres.
- All members of the arrest team were equipped with long guns, except the driver.
- Officer Richter performed a takedown maneuver on Soto-Torres and did not report the incident to a supervisor at the scene.
- Officer Richter placed his entire body weight on Soto-Torres' head and did not report the incident to a supervisor at the scene.
- Detective McCurley kicked Soto-Torres, with varying degrees of force, on more than one occasion and did not report the incident to a supervisor at the scene.
- Soto-Torres stated he received injuries from the takedown and later complained of head pain from having Officer Richter put his foot on Soto-Torres' head.
- During the breaching of Soto-Torres' vehicle, terms commonly associated with a vehicle assault were used, but the vehicle was not pinned.
- Detective McCurley's documentation of his involvement and actions in the July 26 report was not indicative that he had been involved in an R2R/use of force incident.
- Detective McCurley's documentation of his involvement and actions in the July 28 report was indicative that he placed his foot on Soto-Torres multiple times and not that he had kicked Soto-Torres.
- Officer Richter stated Sergeant Dear responded to the scene of the R2R. Sergeant Dear stated he was not notified an R2R had occurred while he was at the scene.
- Detective McCurley did not use the word "kick" in either of his reports even though he referred to his contacts as kicks when speaking to supervisors.
- Detective McCurley did not fill out a force details page.
- According to Sergeants Dear and Yates, Officer Richter's verbal account of his actions during the arrest of Soto-Torres was misleading.

S. Torres #4407
Sergeant Santiago Torres #4407

1-4-18
Date

LT. MEB 3531
Lieutenant Michael Earley #3531

1/4/2018
Date

[Signature]
Commander Pat Connor #4259

1-4-18
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	Plaintiffs,	§
		§
v.		§ CIVIL ACTION No. 1:20-cv-01068-LY
		§ JURY DEMANDED
MICHAEL NISSEN AND CITY OF		§
AUSTIN,		§
	Defendants.	§

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 95
Figueroa Use of Force IA File**

(COA 175864)

FILED UNDER SEAL

IA Liaison: Sgt. Matthew Wright #4418

**Internal Affairs
Personnel Complaint Control Sheet**

Class A Internal IA Case #2018-0399

Assigned Investigator: Sgt. Matthew Wright #4418

Date Occurred 04/17/2018	Date Investigation Received 05/01/2018	Date Investigation Completed 09/17/2018	180-Day Deadline 10/14/2018
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Complaint Information

Complainant's Name Commander Jennifer Stephenson #3019	Incident Location 400 Blk. E. 6 th St. Austin TX
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Employee's Information

Officer Mario Aquino	Employee No. 7402	Rank Officer	Current Assignment DTAC Patrol/George 500s
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Employee's Chain of Command

Sergeant Michael Monroe #4055	Lieutenant Ryan Adam #4624	Ops Lieutenant Dustin Lee #3267	Commander Jennifer Stephenson #3019	Assistant Chief Justin Newsom #3365
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Allegations Investigated

Policies Associated with Allegations	Final Classification	Signature of Person Determining Classification	Date Signed
301.2 Impartial Attitude and Courtesy	Sustained	<i>[Signature]</i>	10-10-18
900.3.1 Honesty	Unfounded	<i>[Signature]</i>	10-10-18
200.2 De-escalation of Potential Force Encounters	Sustained	<i>[Signature]</i>	10-10-18

Discipline Administered by Chain of Command

Oral Reprimand <input type="checkbox"/>	Written Reprimand <input type="checkbox"/>
Temp Suspension - No. of Days <u>20</u> <input checked="" type="checkbox"/>	Demotion <input type="checkbox"/> Indefinite Suspension <input type="checkbox"/>

Required Signatures

Required Signatures	Employee No.	Date
Investigator's Signature <i>[Signature]</i>	4418	10/10/18
City Legal Review <i>(Required on DRH)</i> <i>[Signature]</i>		10-10-18
Assistant Chief of Police <i>(Required on Critical Incidents)</i> <i>[Signature]</i>		
Chief of Police <i>[Signature]</i>	0184	10-10-18

(All Control Sheets must be signed by the COP or an Assistant Chief before returning to IA)

IA Commander Signature *[Signature]*

Date 10-10-18

Control Sheet IA 2018-0399

Page 2 of 2 (Attach if Applicable)

Other Factors Addressed By the Chain-of-Command			
Issue	Action Taken	Supervisor's Name	Date

Confidential

AUSTIN POLICE DEPARTMENT
INTERNAL AFFAIRS DIVISION
INVESTIGATIVE SUMMARY¹

To Brian Manley
Chief of Police

Via Pat Connor
Commander, Professional Standards

Jason Bryant
Lieutenant, Internal Affairs

From Matthew Wright
Sergeant, Internal Affairs

Date September 17, 2018

Subject **IA Case #2018-0399 – Officer Mario Aquino #7402**
(180 Deadline 10/14/18)

Introduction

On April 17, 2018, at approximately 23:52, Officers Mario Aquino #7402 (Aquino) and Daniel McLeish #7615 (McLeish) initiated a subject stop on Christopher Adrian Martinez W/M 01/01/1997 (Martinez) in the 400 Blk. of W. 6th St. (18-1071866). Martinez walked against a pedestrian signal and lifted his shirt at a passing motorist he walked in front of that honked at him. Martinez's gesture is a threat commonly made by someone carrying a weapon in the appendix area. Officers Aquino and McLeish detained Martinez, who admitted to the officers he was carrying a knife. Officer Aquino began directing Martinez to a nearby wall where Joseph Adrian Figueroa W/M 01/24/1992 (Figueroa) was standing. In the process, Officer Aquino spoke to Figueroa saying "Hey, give us some room man. Watch out. Can you move man?" At the same time he was saying "Can you move man?" Aquino placed his hand on Figueroa, in order to move him (Figueroa) from the area of the wall Aquino wanted to place Martinez. Figueroa immediately became verbally confrontational with Officer Aquino. The two (Aquino and Figueroa) engaged in a confrontational verbal exchange. A Response to Resistance (R2R) incident ensued.

¹ This summary should be used as a guide to the relevant documents located within the investigative case file. This summary is not intended to replace a comprehensive review of each of those items. The inclusion or omission of a certain fact or detail from within this summary should not be the prevailing consideration when determining its relevance or importance.

Note: Minor edits and formatting changes were made to transcript quotes throughout this document for the sake of clarity if/when necessary & appropriate (e.g. superfluous "ums/ahs" omitted)

PD 0093 Rev July 2012

Allegation and Associated Policies

On April 27, 2018, Commander Jennifer Stephenson filed an *Internal Complaint Memorandum*² alleging Officer Aquino may have violated departmental policy. In relation to the above complaint, the associated Austin Police Department General Order is:

- 301.2 Impartial Attitude and Courtesy

Internal Affairs (IA) reviewed the following evidence in relation to the allegations:

- 18-1071866 Versadex Report
- 18-1071866 Sharepoint Log (R2R review)
- 18-1071866 HALO video
- Body Worn Camera video (BWC) for Officers Aquino and McLeish and Corporal Jared Jordan #5927 (Jordan)
- Digital Mobile Audio Video (DMAV) for Officers Aquino and McLeish
- Officer Aquino's Civil Service Records

IA interviewed the following individuals in relation to this investigation:

- Officer Mario Aquino #7402
- Officer Daniel McLeish #7615

Investigation

In reviewing Officer Aquino's BWC³, the following is a timeline/transcription completed by IA concerning the verbal exchange between Aquino and Figueroa, just as Aquino moved Figueroa from where he was standing against the wall.

- 4:53:02 **AQUINO:** *Hey, give us some room man. Watch out. Can you move man? (Aquino pushes Figueroa on left arm.)*
- 4:53:07 **FIGUEROA:** *Hey don't fuckin' touch me nigga.*
- 4:53:09 **AQUINO:** *You wanna get involved bro? Come closer. Otherwise, just keep running your mouth the way you are.*
- 4:53:18 **AQUINO:** *That's right. Right?*
- 4:53:19 **FIGUEROA:** *I don't know, we'll see.*
- 4:53:22 **AQUINO:** *Talk the way you talk, right? Till I pull your card and see what you're about.*
- 4:53:30 **FIGUEROA:** *We'll find out right now. (Figueroa scrolls through his phone.)*
- 4:53:35 **AQUINO:** *Otherwise you're just talk, keep talking.*

² IA Case #2018-0399 – Tab A-Complaint Information

³ Evidence.com 18-1071866 – Officer Mario Aquino #7402

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- 4:53:48 **AQUINO:** *Yeah, now say what you said before. Say what you said before now that the camera's on. (Figueroa is recording officers with his cell phone).*
- 4:53:53 **FIGUEROA:** *What did I say?*
- 4:53:54 **AQUINO:** *Yeah, you forgot already?*
- 4:53:57 **FIGUEROA:** *Nigga, fuck you homie! (McLeish tells Figueroa to "get out of here.") (Figueroa does not look at Officer McLeish and keeps staring at Officer Aquino, as captured by Officer McLeish's BWC.⁴)*
- 4:54:06 **FIGUEROA:** *Bro, I was fucking LAPD nigga! Fuck you (unintelligible).*
- 4:54:10 **FIGUEROA MOVES TOWARD AND MAKES CONTACT WITH OFFICER MCLEISH. OFFICER AQUINO RESPONDS BY PERFORMING A TAKEDOWN OF FIGUEROA**
- 4:54:31 **AQUINO:** *What does that mean now? What does that mean now, huh?*
- 4:54:35 **FIGUEROA:** *You lost your job homie.*

RESPONSE TO RESISTANCE REVIEW

Corporal Jared Jordan #5927 conducted the R2R review for this incident on April 19, 2018. In the Sharepoint Log of the review Cpl. Jordan noted, under the Policy Violations section, that Officer Aquino:

"...made numerous antagonistic and confrontational statements toward (Figueroa), which then provoked Figueroa to reciprocate in similar statements. Figueroa's attitude and behavior were enlivened as a result and this led to Figueroa then making the wrong decision to become aggressive with preparatory resistance and force Officer Aquino and McLeish to respond to said resistance."⁵

Additionally, Sergeant Michael Monroe #4055 and Cpl. Jordan counseled Officer Aquino, where he admitted he "*went too far*"⁶ in his responses to Figueroa and apologized for his behavior. Officer Aquino requested the opportunity to attend Tactical Communication and De-Escalation training put on April 25 and 26, 2018. Sgt. Monroe and Cpl. Jordan agreed. Sgt. Monroe and Cpl. Jordan handled this issue at the shift level and noted any future occurrences would result in a Conduct Counseling Memorandum for Officer Aquino.

Lt. Ryan Adam reviewed the R2R on April 30, 2018. In the Lieutenant Review portion he noted:

"However, actions by Ofc. Aquino in my opinion led up to the r2r, may have violated policy. These actions have been forward onto IA for further review."⁷

⁴ Evidence.com – 18-1071866 – Officer Daniel McLeish #7615

⁵ IA Case #2018-0496 – Tab E-Physical Evidence – 18-1071866 Sharepoint Page.pdf

⁶ IA Case #2018-0496 – Tab E-Physical Evidence – 18-1071866 Sharepoint Page.pdf

⁷ IA Case #2018-0496 – Tab E-Physical Evidence – 18-1071866 Sharepoint Page.pdf

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OFFICER INTERVIEWS

Officer Daniel McLeish #7615

IA identified Officer McLeish as a witness officer and interviewed him on August 16, 2018 in relation to this incident.

Through review and investigation, it was determined that Officer McLeish was not a witness to the initial verbal interaction that occurred between Figueroa and Officer Aquino. During the detention/arrest of Martinez, Officer McLeish's BWC was knocked off its chest mount and fell to the ground. Officer McLeish spent approximately 46 seconds retrieving and re-mounting his BWC prior to re-engaging with Officer Aquino and Martinez. It was at that time Officer McLeish became aware of Figueroa. Officer McLeish did not recall, specifically, what was said between Officer Aquino and Figueroa. Officer McLeish stated:

"So, as I come up, I can hear Mario talking, like, not to me, obviously, but to the left of my position. But, I kinda almost don't pay any mind to it. As I stated here, we - we worked in DTAC for years...so I mean, we - we are so used to people just yellin' and screamin' at us for whatever reason. You know, right, wrong, or indifferent. For the most part, it's casually brushed off as people generally don't know what's happening...Okay. So I'm standing there, I hear Figueroa, pardon my language in a formal environment, he said, "Nigga. Fuck you, homie." So but the way he said it, his, his harsh tone, his close proximity kinda put me in the alert. So he was only a few feet behind me, so I turned around, and I told him to leave the area. He didn't...So I repeated my commands for him to leave. He didn't leave. There were a few people standing around, trying to get him to leave. He still wouldn't leave. So then he started lookin' at me and talkin' to me. And what I wrote in my report was he said, "Bro, I was fuckin' LAPD, nigger." this makes me feel funny even sayin' it out loud...So as he made that statement though, he rapidly approached me. But, the way he approached me, he kinda had a bowed-out chest. He rolled his shoulders back. So it appeared to me he was posturing for a physical fight. So lets see. So as - as he came within very close proximity to me, I used two open hands and I shoved him in his chest to create some space. So he stumbled backwards, and I probably did a really bad job of describing this, but he began to bounce in place, like he was kinda loosening up to do some vigorous physical activity."⁸

It was at that moment the R2R occurred with Officer Aquino performing a takedown of Figueroa. Officer McLeish stated it was common for them to divide their attention when interacting with people. IA had the following exchange with Officer McLeish:

MCLEISH: *...as I said, you know, people scream and yell at us all the time, usually we just kinda brush it off, slide it off, whatever. Some people just want to get their two cents in and walk away. So...I - at the time, I didn't think it was going to elevate to anything else, no.*

⁸ IA Case #2018-0399 - Tab E-Police Witness - McLeish - McLeish IA Interview-Transcript lines 211-245
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WRIGHT: So at what point did Figueroa began to draw your attention?
MCLEISH: I guess when he said N word, "Fuck you homie." But, I mean, he was so close to me already that when he screamed it like that, it was kinda right there...so I had to turn around to assess what - well, what he was doing, basically.
WRIGHT: So how did you perceive that, basically?
MCLEISH: I perceived it as a threat. you know, whether or not it would ultimately end that way, who knows at the time, but, we're tryin' to take someone into custody, so obviously our attention is divided here...And I've got someone standing behind me, that I don't know who he is or what he's about, screaming, you know, racial slurs and all kinds of stuff at me.⁹

Officer McLeish stated he had no idea why Figueroa was so "amped" up. Upon reviewing BWC with him, IA had the following exchange with Officer McLeish:

WRIGHT: Did he chest bump you?
MCLEISH: No. He was pretty close.
WRIGHT: It looked like he did from the body camera. I was just curious if he actually made contact with you.
MCLEISH: No. He was very, very close.
WRIGHT: Okay. Do you know if...
MCLEISH: But, like, I mean, it's possible I couldn't feel it right there, but...
WRIGHT: Okay. Is - do you know if from Officer Aquino's vantage point, if he was able to see whether or not he made contact with you or not?
MCLEISH: Oh, I have no idea.¹⁰

Officer McLeish stated he and Officer Aquino reviewed BWC video of the incident prior to describing the R2R for Corporal Jordan and assist with writing their reports. Officer McLeish recalled reviewing parts of Officer Aquino's BWC, but not specifically which parts. Officer McLeish stated:

"Not specifically. I mean - so we're talkin' four months ago about a - a piece of a video, and I may have seen - so I can't remember exactly. I know it was playing and I know I could see it...So, I'm sure I got some of it. I can't remember exactly which parts...I guess, we always, you know, sit around and we talk about incidents. 'Cause alw- you always wanna analyze everything...and figure out what you can do better. But, so, I mean, I - I couldn't say exactly what part of it - maybe Mario felt that he did wrong. But I think that was Mario's general attitude after the incident. It's, like, you know, I - I messed some stuff up."¹¹

IA had the following exchange with Officer McLeish:

⁹ IA Case #2018-0399 - Tab E-Police Witness - McLeish - McLeish IA Interview-Transcript lines 548-575

¹⁰ IA Case #2018-0399 - Tab E-Police Witness - McLeish - McLeish IA Interview-Transcript lines 776-792

¹¹ IA Case #2018-0399 - Tab E-Police Witness - McLeish - McLeish IA Interview-Transcript lines 819-837

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TORRES: *And, or - wh- wh- who kinda had that collective feeling I guess. Was it just office Aquino or...*

MCLEISH: *I can only speak for me and Mario.*

WRIGHT: *Mm-hm.*

MCLEISH: *I mean, this is based on - kind of what he's telling me.*

WRIGHT: *Yeah. What's he tellin' ya?*

MCLEISH: *The dude got under his skin.*¹²

Officer McLeish stated Officer Aquino was remorseful after the incident. IA asked Officer McLeish if he ever witnessed Officer Aquino have a similar demeanor while interacting with a subject in the entertainment district. Officer McLeish stated:

*"Not that I can recall. He's usually the guy that actually tones it down, which does make it more surprising. But, when I say things like he's more veteran than me, just his experience in talkin' to people, like - I sound like, you know, I - I'm so scared of policy sometimes I sound like a robot out there. Like, "Hi, my name's Officer McLeish. I am (unintelligible)" you know...he kinda, I guess depending on where you come from, where you grow up would have an effect on it too, so your own personal experiences in life, but he has a way of talkin' to people generally, like, whether he's using their own lingo or whatever it is that kinda usually chills everything out."*¹³

Officer Mario Aquino #7402

Officer Aquino has approximately 11 years of law enforcement experience. Officer Aquino worked 7 years in Hammond, IN, prior to joining APD. Officer Aquino worked David Patrol for about a year, prior to volunteering for a transfer to DTAC. Officer Aquino has worked in DTAC for approximately 4 years on the George 500s. IA interviewed Officer Aquino on August 23, 2018 in relation to this incident.

Officer Aquino recounted the events that led to Martinez being detained. Officer Aquino expressed, that immediately after placing handcuffs on Martinez he felt Officer McLeish break-off and he was unsure as to why. Officer Aquino stated:

*"...he turned off and he walked away, and, at the time it felt like a long time. You know after reviewing my videos and reports and all that I realize that it's just seconds, but there in the moment, you know, we - we stop this guy to take enforcement action and then I'm kinda alone by myself where there's people gathering around. There's people turned around facing us watching us making me think maybe they're with him."*¹⁴

Officer Aquino stated he decided to move Martinez toward the closest wall he could see, because he did not want anyone standing behind him as they handled Martinez. IA had the following exchange with Aquino:

¹² IA Case #2018-0399 - Tab E-Police Witness - McLeish - McLeish IA Interview-Transcript lines 855-866

¹³ IA Case #2018-0399 - Tab E-Police Witness - McLeish - McLeish IA Interview-Transcript lines 1496-1508

¹⁴ IA Case #2018-0399 - Tab B2-Accused Employee Information - Aquino IA Interview-Transcript lines 436-442

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WRIGHT: *So the question is, why that particular portion? You kind of explained it for me, but I wanna get an idea again why - why did you need to place him on that portion of the wall?*

AQUINO: *Put myself back in my shoes or my perspective that night, we had already gotten a little bit of contention from Martinez when we went to handcuff him so I knew that the - the potential for him to try to struggle was - was - was there again...Because, again with my - my instincts, my intuition is, I like to - some, you know, if - if I'm thinking he's gonna fight again then at least I'm mentally prepared for that type of resistance and I - I don't overreact or I don't - I'm not surprised by it because it - I can - I can say well, I - I figured he was gonna try to run away or fight again...So when I went to move him to the brick wall, it's level, it's a wall. There's no step because I - it would be a tactical disadvantage for me to try to put him up on a step and up against the wall or for me to have uneven ground where I have to put one foot up or have one foot down or have my back because there was other people standing just outside of that - I hate to point (unintelligible), but - but just outside of there...On my body camera it makes it look like it's just this guy getting out of the way, Figueroa on the wall, another subject who was talking to us who moved after I - I started walking that way and then, Martinez, but there - there were more people around which is why I - I ma- I look to the right and I went straight to the right because I was already - I was already there. I didn't wanna pull him or start manipulating him any more than I had to, to try - well, let's - let's walk 15' this way because I just wanna get my back to the wall to figure out exactly where my partner had gone.*

WRIGHT: *Do you know how far away your car was at this point?*

AQUINO: *I know - I know from re- from recollection now that we stop just after the crosswalk because I've had plenty of time to - to think about the incident and think about my mistakes - my tactical mistakes that I know that we were - again, this is a rough estimation just being familiar with that block of 6th Street, at least like a good 20' or 25' away maybe.*

WRIGHT: *Okay.*

AQUINO: *A good distance.*

WRIGHT: *So, would you say that this was the most tactically advantageous place to place Martinez at the time?*

AQUINO: *Having thought about it plenty of times after the incident, I'll say no. Right then and there without knowing where my backup was or - or having time to look around and know exactly who was involved, I would say yes that solid wall was the best place that I could put him up against instead of putting him up against that - that rail or going inside of that little cutout that's there 'cause it's a good foot, foot and a half between the end of that brick wall and the iron gate, and*

the iron gate is not solid. I'm just trying to place him up against the wall so that I can have positive control with him by using one hand...and now I've given him a place where he can slip his hands or grab onto a bar or bang his head or do - do - I - sometimes subjects can be kind of unpredictable and I feel like that solid wall was - I was there. I could see it. It was under a light and my - my eyes went to it, so, I - I just went to it.¹⁵

Officer Aquino BWC Review

Officer Aquino recounted the moment when he moved Martinez to the wall and encountered Figueroa, making physical contact with him, in an attempt to place Martinez against a wall.

"So as I move him over toward the quickest wall and I'm still trying to wrap my head around what's going on with Terry, why he walked away, I see the wall and there's a guy kinda standing up against it. He's kinda doing like a light sway. He's looking down on his phone and I decide to move into that spot there so I - I walk over and I - I go to touch the guy on the shoulder...on his - on his left shoulder with my open hand and say, "Hey, man. Like can you give me some room?" Not exactly sure exactly what I told him, but it was something to the effect of, can I get some room or, you know, give me some space or some-to let me hold this guy so that I could turn my back and see what was going on with Officer McLeish and as soon as I went to touch the guy, I don't know if he was already watching me or what, if he was looking down at his phone, but it seem like as my hand made contact with him, he did - I - I was like I was on fire or something."

BWC

4:53:02 AQUINO: Hey, give us some room man. Watch out. Can you move man?
4:53:07 FIGUEROA: Hey don't fuckin' touch me nigga.
4:53:09 AQUINO: You wanna get involved bro? Come closer. Otherwise, just keep running your mouth the way you are.

"Like he - he flinched away from me and was like, he just started cussing at me like, don't - don't F-ing touch me. You F-ing N word, and, for some reason like my - all my attention - most of my attention went to him because just the - what I thought at the time of just that being that - that aggressive, that, vulgar...with me just touching him to say, "Can I have this space," you know, "Can I get this room?" It just seem kinda like disproportionate to what I had done to him, especially with all the people watching and the people who may have been traveling with him, people walking by, just his - the way he reacted to me just caught all this attention from people and in my head at the time it turned into like a posturing thing where he's - he's trying to look tough because he's near - he's by us as we're trying to effect a stop. So he - he kinda steps over and I was just - I was just, I was

¹⁵ IA Case #2018-0399 - Tab B2-Accused Employee Information - Aquino IA Interview-Transcript lines 1118-1184 PD 0093 Rev July 2012

upset with him for - for cussing at me -- for embarrassing me, for - for talking to me like that when it wasn't even my intention to - to talk to hi- or involve him at the time at all."¹⁶

Officer Aquino then recounted the verbal exchange he had with Figueroa.

BWC

4:53:18 **AQUINO:** That's right. Right?

4:53:19 **FIGUEROA:** I don't know, we'll see.

4:53:22 **AQUINO:** Talk the way you talk, right? Till I pull your card and see what you're about.

Officer Aquino stated:

*"So I - I made the mistake of engaging him and focusing on him and just talking - talking street talk to him, which I - I regret, which I - I should have never done. I - that's just - I gave him my personal face and I - I just - I started saying things to him in a challenging way, like, you know, just, you know, I told him - I - I said something like, "Keep running your mouth," you know, "I'm gonna pull your card and see what you're about," which is - which I know is - is, is pretty much like, I'm gonna - I'm gonna dare you. I'm gonna challenge you, you know, because you're - you're saying things and it's not - they're just words, you know, which I should've never done because I could just - it - him - whether he was intoxicated or not, just, I'm the, you know, me and my position, my uniform, it's - it's not for me to challenge him physically especially like with the training that I've received and some of the things that I do as a hobby, like I - there's really no reason to try to feel like I'm being challenged..."*¹⁷

BWC

4:53:30 **FIGUEROA:** We'll find out right now.

4:53:35 **AQUINO:** Otherwise you're just talk, keep talking.

Officer Aquino stated that Officer McLeish re-engaged with them. As he (McLeish) was re-mounting his BWC, which was dislodged during the detention of Martinez, Officer Aquino noticed Figueroa was recording their detention of Martinez on his cell phone, Officer Aquino and Figueroa had the following exchange:

BWC

4:53:48 **AQUINO:** Yeah, now say what you said before. Say what you said before now that the camera's on.

4:53:53 **FIGUEROA:** What did I say?

4:53:54 **AQUINO:** Yeah, you forgot already?

¹⁶ IA Case #2018-0399 - Tab B2-Accused Employee Information - Aquino IA Interview-Transcript lines 477-518

¹⁷ IA Case #2018-0399 - Tab B2-Accused Employee Information - Aquino IA Interview-Transcript lines 528-541

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Officer Aquino stated:

“...because he’s gonna record a perspective that is gonna be just his phone and it’s gonna be on You Tube or it’s just like it’s happened to - to us before where it’s a fraction of something that’s a - a bigger story. So I - I - I wanted to make sure wh- it was just stupid ‘cause I should’ve just not said anything, is okay, you said to me - you said those things to me before – call me the N word and just cussing at me for what I thought - what I felt like was no reason. ‘Say it again now that you’re recording. Go ahead and say it again.’”¹⁸

BWC

4:53:57 FIGUEROA: Nigga, fuck you homie!

Aquino stated at that point during the interaction with Figueroa, Officer McLeish then began to engage and told Figueroa to leave. Officer Aquino told IA, it was during that portion of the interaction that he began thinking about just withdrawing to remove himself and Officer McLeish from the situation altogether. Officer Aquino stated:

“At that point - at that point I feel like it’s important to point out, I was, again, I was just - my brain was in his constant battle between my personal face and my professional face that I knew - I knew I had already engaged him in that challenging type of dialogue that I just wanted to get out of there. I just wanted - I wanted to leave and rather than draw or pull Terry down to my level where I was acting like, unprofessional when I was - while I was comporting myself in an unprofessional manner rather than drag him down into it, I wanted to break off and go because he was back now.”¹⁹

Officer Aquino stated he believed Officer McLeish told Figueroa to leave approximately three times. Officer Aquino then heard Figueroa say that he was a police officer.

BWC

4:54:06 FIGUEROA: Bro, I was fucking LAPD nigga! Fuck you (unintelligible)

Officer Aquino stated:

“...he lunges forward. I could see over Terry’s shoulder and they make physical contact with each other from what I thought was like, just the chest ‘cause I can hear that signature sound of a windbreaker rustling again and that was when I made the decision to - to put Figueroa in handcuffs. As soon as I saw them touch each other, I let go of Martinez, which was tactically unsound. I let go of Martinez. I came around Terry and instead of letting him deal with that situation and - and respond with whatever type of support he needs, I went and I - I created that space between fi- Figueroa and Officer McLeish by - by rushing in on him with my chest

¹⁸ IA Case #2018-0399 – Tab B2-Accused Employee Information – Aquino IA Interview-Transcript lines 1418-1425

¹⁹ IA Case #2018-0399 – Tab B2-Accused Employee Information – Aquino IA Interview-Transcript lines 1460-1467
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and my shoulder in a tackle."²⁰

After Officer Aquino's Response to Figueroa's Resistance, after having him handcuffed, Officer Aquino and Figueroa have the following exchange:

BWC

4:54:31 AQUINO: What does that mean now? What does that mean now, huh?

4:54:35 FIGUEROA: You lost your job homie.

IA had the following exchange with Officer Aquino:

WRIGHT: So you tell Figueroa, "What does that mean? What does that mean now?"

AQUINO: He said that he - he said, "I'm gonna kill you. You're fucking dead," and...

WRIGHT: So is that something that we just couldn't hear on the body cam?

AQUINO: Possibly. He says it multiple times after that, but rather than - again, I'm - it's just constant professional and personal face trying to surface where even after he says it a few more times. He's like, "You're - you're fucking dead," I'm - I just - by that point I had, you know, I knew I had already engaged him verbally in a unprofessional manner and I didn't - I didn't wanna give him anymore.

WRIGHT: Okay.

AQUINO: So I just dismissed him saying, "You're fucking dead."²¹

Officer Aquino stated that as the situation was calming down, he was trying to separate himself from Figueroa but was unable due to Martinez also being in custody. Officer Aquino and Officer McLeish were the only officers on scene. He stated when Cpl. Jordan arrived on scene, Cpl. Jordan began speaking with Officer McLeish about what had occurred. Officer Aquino stated there was a long, uncomfortable delay where he was stuck with Figueroa longer than he wanted to be. Officer Aquino stated, "I knew I messed up already by that point...I knew that I showed him my - he had won by me showing him my personal face and - and saying things that I normally wouldn't say."²³

IA had the following exchange with Officer Aquino:

WRIGHT: The question that I'm gonna ask you again and I think if you can just think about it, it's gonna be either a yes or no answer on this one, okay?

AQUINO: Yes, sir.

WRIGHT: Do you believe that your verbal exchange with Figueroa provoked him and causing the incident to escalate to the point of the R2R occurring?

²⁰ IA Case #2018-0399 - Tab B2-Accused Employee Information - Aquino IA Interview-Transcript lines 1566-1574

²¹ IA Case #2018-0399 - Tab B2-Accused Employee Information - Aquino IA Interview-Transcript lines 1684-1699

²³ IA Case #2018-0399 - Tab B2-Accused Employee Information - Aquino IA Interview-Transcript lines 704-707

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AQUINO: Yes.²⁴

Austin Travis County Emergency Medical Services (ATCEMS) transported Figueroa to the hospital for an elevated heart rate. After being released from the hospital, Officers McLeish and Aquino transported Figueroa to the jail, where he was booked in for Public Intoxication. After being counseled about the incident, Officer Aquino spoke with his supervisors and requested the opportunity to attend the APD's Tactical Communication and De-Escalation course, which he attended on April 25 and 26, 2018

Officer Aquino made the following statement during his IA interview:

*"I've had a lot of time out of uniform and - and, sitting at home on restricted duty to reflect on it to try to put some sort of a, understanding to it, and I've - I've - I've kind of - I've come to realize that the little bit of vulgarity that that guy kinda showed me was just kinda my - my breaking point - my - the overflowing of just like this, you know, the breaking the straw that broke, you know, it was just the - it was that last marble, it was that last brick of - of this load that I had been carrying working downtown from, just receiving all this - just being berated just for being a police officer, just for - just for showing up to work and - and doing my job...I made the mistake of kinda assigning that - my frustration with being cursed at and berated to - to that guy there. So he kinda took a lot of my attention away and rather than deal with the subject that I had in handcuffs and - and doing my job effectively in getting him out of there or just moving to the patrol car or just being smart enough to just ignore that and - and get myself for the sake of my career and my - my dignity, you know, my position out of there, I sat there and I was just - my mind was just kinda like, I was angry at the guy. I was upset that he was cussing at me...I disappointed myself and I think I let a lot of people down by talking like that because I - I just - I gave that guy way too much and, again, I've - I've had a lot of time to think about it"*²⁵

IA had the following exchange with Officer Aquino:

WRIGHT: *So Officer Aquino, I have provided you with a copy of APD General Orders 301.2 Impartial attitude and courtesy. Have you had an opportunity to review, that particular policy?*

AQUINO: *Yes, sir.*

WRIGHT: *Do you believe you violated this policy?*

AQUINO: *Yes, sir.*

WRIGHT: *If so, specifically which portions and how.*

AQUINO: *I didn't - I didn't treat Figueroa with respect. I - I spoke outside of what, you know, what's professional conduct. I showed him a - a person face and it's not even my real personality. It's - it's a ugly side, just a derogatory way of talking to somebody.*

²⁴ IA Case #2018-0399 - Tab B2-Accused Employee Information - Aquino IA Interview-Transcript lines 1636-1643

²⁵ IA Case #2018-0399 - Tab B2-Accused Employee Information - Aquino IA Interview-Transcript lines 545-583

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WRIGHT: *So if we look at that policy and if you would just read over B. I think you've already answered C. Do you believe B, also applies in that - in that nature? I guess for lack of a better term, do you believe that you violated 301.2 Section B?*

AQUINO: *I do, yes.*

WRIGHT: *And C as well?*

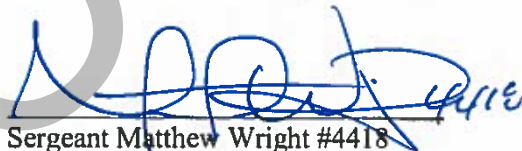
AQUINO: *Yes.*

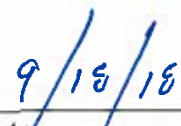
Joseph Figueroa

After several attempts were made to contact him, neither IA, nor SIU, were able to interview Figueroa in relation to this incident.

Summary of Facts

- On April 17, 2018, at approximately 23:52, Officers Aquino and McLeish conducted a subject stop of Martinez in the 400 Blk. Of E. 6th St.
 - Officer McLeish's BWC became dislodged during Martinez's detention and Officer McLeish broke away from Officer Aquino and Martinez to retrieve it.
 - Figueroa was leaning against a portion of brick wall near Officer Aquino and Martinez.
 - Officer Aquino moved Martinez to that portion of the brick wall and places his hand on Figueroa's left shoulder and moved him from the portion of brick wall.
 - Officer Aquino and Figueroa became involved in a confrontational verbal exchange.
 - Officer McLeish engaged with Figueroa and told him to leave the area. Figueroa did not comply.
 - Figueroa physically engaged Officer McLeish and Officer Aquino responded with a takedown of Figueroa (R2R).
 - Figueroa was transported to TCSO Central Booking where he was booked for Public Intoxication.
- Upon review of the R2R, Officer Aquino's supervisors noted potential misconduct by Officer Aquino.
- Officer Aquino was counseled and requests the opportunity to attend APD Tactical Communication and De-Escalation.
- Officer Aquino attended training on April 25 and 26, 2018 at the City of Austin Public Safety Training Center – APD Training Academy.


Sergeant Matthew Wright #4418


Date

LT J-25 3432
Lieutenant Jason Bryant #432

9.18.18
Date

[Signature]
Commander Pat Connor #4259

9-17-18
Date

Confidential

AUSTIN POLICE DEPARTMENT
INTERNAL AFFAIRS DIVISION
ADDENDUM TO INVESTIGATIVE SUMMARY¹

To Brian Manley
Chief of Police

Via Pat Connor
Commander, Professional Standards

Jason Bryant
Lieutenant, Internal Affairs

From Matthew Wright
Sergeant, Internal Affairs

Date October 3, 2018

Subject IA Case #2018-0399 – Officer Mario Aquino #7402
(180 Deadline 10/14/18)

Introduction

This is as an Addendum to the original Investigative Summary, completed on September 17, 2018. On September 24, 2018, during a Pre-Disciplinary Review Hearing, the probable cause affidavit completed by Officer Aquino for Joseph Figueroa (Figueroa) came into question. Chief Newsom was concerned a portion of the PC Affidavit, may not have accurately reflected the events as they occurred. The concerning portion of the PC Affidavit is:

*"The subject even admitted to being armed with a knife as Figueroa became involved in the incident when he stated he was traveling with the subject. Figueroa attempted to intervene in the apprehension of the subject who was indeed found to be carrying a knife in the appendix area of his waistband. Figueroa encroached on officers taking the subject into custody, screaming out profanity and claiming to be a "LAPD". Hand restraints were placed on the subject and during the course of attempting to secure the weapon on the arrested party Figueroa again attempted to intervene."*²

It was determined an additional complaint would be submitted to Internal Affairs

¹ This summary should be used as a guide to the relevant documents located within the investigative case file. This summary is not intended to replace a comprehensive review of each of those items. The inclusion or omission of a certain fact or detail from within this summary should not be the prevailing consideration when determining its relevance or importance.

Note: Minor edits and formatting changes were made to transcript quotes throughout this document for the sake of clarity if/when necessary & appropriate (e.g. superfluous "ums/uhs" omitted)

² IA Case #2018-0399 Tab E-Physical Evidence – SIU Case File – 10-Miscellaneous – Figueroa PI Affidavit
PD 0093 Rev July 2012

requesting the issue be investigated and addressed.

Allegation and Associated Policies

On September 24, 2018, Commander Jennifer Stephenson filed an *Internal Complaint Memorandum*³ alleging Officer Aquino may have violated departmental policy. In relation to the above complaint, the associated Austin Police Department General Order is:

- 900.3.1 Honesty

Internal Affairs (IA) reviewed the following evidence in relation to the allegations:

- Affidavit for Warrant of Arrest and Detention (PC Affidavit) completed by Officer Aquino for Joseph Anthony Figueroa W/M 01/24/1992
- 18-1071866 Versadex Report
- 18-1071866 CAD History
- Body Worn Camera video (BWC) for Officers Aquino and Corporal Jared Jordan #5927 (Jordan)
- Digital Mobile Audio Video (DMAV) for Officers Aquino and McLeish

IA interviewed the following individual in relation to this investigation:

- Officer Mario Aquino #7402

Investigation

IA interviewed Officer Aquino on September 27, 2018 in relation to the most recent complaint filed on September 24, 2018. Officer Aquino agreed to a waiver of the 48-hour notice.

Officer Aquino stated he tried to review his BWC video on his cell phone at Seton Medical Center, however, due to the poor reception inside the hospital he was unable to view his video. Officer Aquino stated:

*“So I do remember trying to access it at the hospital and - and not having a whole lot of success.”*⁴

Officer Aquino stated he completed his PC Affidavit as he reviewed his BWC video, on his cell phone, at Arrest Review. He noted the audio quality was poor. Officer Aquino stated most of his statements from the BWC were clear, however, Figueroa’s statements were not clearly discernable during his review.

³ IA Case #2018-0399 – Tab A-Complaint Information – Honesty Complaint Officer Aquino 2018-0399 (9-24-18)

⁴ IA Case #2018-0399 – Tab B-Accused Employee Information – Aquino 2nd IA Interview-Transcript lines 313-314
PD 0093 Rev July 2012

IA had the following exchange with Officer Aquino:

- WRIGHT:** *So regarding your PC Affidavit...are the statements in your PC Affidavit an accurate factual depiction of your involvement and actions during the arrest?*
- AQUINO:** *The affidavit reflects what I thought happened the night that I was sittin' there after it. And, it's a reflection of the best that I could remember at the time. L- looking at it now, I can see why - I can see there's some - some parts of the affidavit that can be misinterpreted as - as being incorrect.*
- WRIGHT:** *Are your statements in your PC Affidavit an accurate factual depiction of your recollections - of - or recollection of how the events occur the night of the incident?*
- AQUINO:** *Of how I remembered it, yes sir.*
- WRIGHT:** *Okay. So you stated in your PC Affidavit - I'm gonna refer to, - the portion I've highlighted there for you, "The subject even admitted to being armed with a knife as Figueroa became involved in the incident when he stated he was traveling with the subject." From your recollection, when did Figueroa state that he was traveling with Martinez?*
- AQUINO:** *In my affidavit, I made the mistake of jumblin' all my facts together. But I hadn't learned that Figueroa may have been traveling with Martinez until he was already in handcuffs. He said - he mentioned something specifically about his homie...and I put that in my offense report after I had the chance to review it and hear exactly what he was saying...because again - like I - its just verbiage that I'm - I'm using that he said.*
- WRIGHT:** *Yeah.*
- AQUINO:** *You know, implying that they knew each other. That they're traveling together because I - I didn't absolutely know that when I wrote my - my affidavit. I had just kind of - I had heard that he was - officers had talked to Martinez and it kind of just all ran together where I was, like, "Well they are together." And then thinking about how, Figueroa had gotten involved, it made sense that they knew each other because he was - he was hanging in such close proximity to Martinez.⁵*

Officer Aquino acknowledged a reader of the PC Affidavit could have reasonably concluded the events occurred chronologically. Officer Aquino stated he did not write the affidavit in chronological order. Officer Aquino was given the opportunity to review his PC Affidavit prior to his IA interview. IA asked Officer Aquino how he felt after having read the portion of the PC Affidavit in question. Officer Aquino stated:

⁵ IA Case #2018-0399 – Tab B-Accused Employee Information – Aquino 2nd IA Interview-Transcript lines 505-541
PD 0093 Rev July 2012

“...it’s embarrassing...made me feel like I - I should probably take the more necessary time to finish my affidavit before I turn it in instead of tryin’ to hurry up and turn it in the night of...you know, in retrospect I think if I needed to watch my video on the computer, I’m - I’m - I think in the future I’ll - I’ll watch my video on the computer and get all my facts. Especially with something like that that’s so kind of, it’s a little dynamic...get all my facts before I turn in my - my PC Affidavit. Because, it’s just in a wrong chronological order.”⁶

Officer Aquino stated it was not his intent to mislead anyone with his affidavit. IA had the following exchange with Officer Aquino:

WRIGHT: *Okay. Couple of things that we’re just gonna, ver- clarify real quick, in your affidavit...if you’ll follow along with me as I read this on - from that highlighted portion. You wrote in your affidavit Ofc. Aquino: The subject even admitted to being armed with a knife as Figueroa became involved in the incident when he stated he was traveling with the subject. Ofc. Aquino, can you see how the reader of this PC Affidavit - without having the benefit of reviewing the video could see that - or could see that this might be illustrated as - as Martinez is telling you he’s armed with a knife that Figueroa is intervening in your detention of Mr. Martinez?*

AQUINO: *Yes sir. I do see that.*

WRIGHT: *Was it your intent to convey that when writing this PC Affidavit?*

AQUINO: *No sir.*

WRIGHT: *What is it - was it your intent to bolster your probable cause in this affidavit in writing it that way?*

AQUINO: *It was sir.*

The IA investigators interviewing Officer Aquino could see confusion in his body language and facial expressions. It was apparent at this point in the interview, Officer Aquino did not understand the question and/or the meaning of the word “bolster”. For a more accurate version of this exchange, please refer to the audio recording for this interview, from 34:41 through 38:17

TORRES: *Did - did you just say that it was?*

AQUINO: *Oh not for the PI sir, no sir.*

WRIGHT: *So I’m gonna ask again: Was it your intent to bolster your probable cause to - to - in conveying it that way?*

AQUINO: *...w- I’m confused.*

WRIGHT: *Do you understand what I’m askin’? What was it - was it your intent to, embellish the - the - the affidavit...*

AQUINO: *Oh, no sir.*

WRIGHT: *...To - to write it in a fashion that it conveyed something more?*

AQUINO: *No sir.*

⁶ IA Case #2018-0399 – Tab B-Accused Employee Information – Aquino 2nd IA Interview-Transcript lines 782-793
PD 0093 Rev July 2012

WRIGHT: *Okay. And I apologize. I may have asked that question incorrectly...again if you'll go down just a little bit, just past that sentence...it says: Figueroa attempted to intervene in the apprehension of the subject who was indeed found to be carrying a knife in the appendix area of his waistband. So can you see how the reader of this, without having the benefit of the video - would, could view that as Figueroa intervening as your havin' - as you have Martinez or placing Martinez in handcuffs?*

AQUINO: *I do see that sir, yes sir.*

WRIGHT: *Was it your intent to embellish the probable cause affidavit and convey it in that fashion?*

AQUINO: *No sir. These are all facts that I learned throughout the whole incident. No sir.*

WRIGHT: *Okay. So, again you write here: Figueroa encroached on officers taking the subject in to custody screaming out profanity and claiming to be a LAPD...can you see how when you used the term 'encroached' that it sounds like he's approaching you as you're taking Martinez in to custody?*

AQUINO: *I shouldn't have used that word, sir.*

WRIGHT: *Okay.*

AQUINO: *I do see that.*

WRIGHT: *What would have been a better description, you think?*

AQUINO: *...more distracting...verbally engaging, I suppose sir.*

WRIGHT: *...was it your intent to embellish the PC at this point to, in writing it that way?*

AQUINO: *No sir. It's a mistake on my part.*

WRIGHT: *You say hand restraints were placed on the subject and during the course of attempting to secure the weapon on the arrested party, Figueroa again attempted to intervene...can you see how someone reading that would see how that - that - as your placing the handcuffs on Martinez that Figueroa int- is trying to intervene in your taking custody of him?*

AQUINO: *I do sir. It - it makes it seem like it's some sort of physical intervention. When it's just all- dialogue and distraction.*

WRIGHT: *Okay.*

AQUINO: *Yes sir.*

WRIGHT: *Was it your intent to embellish the affidavit to, I guess to kind of try to make your PC a little bit stronger?*

AQUINO: *No sir.⁷*

IA went over APD General Orders 900.3.1 Honesty, section (a)⁸ with Officer Aquino. IA asked Officer Aquino if he intended to omit pertinent material, misrepresent the facts, or mislead others through his statements in the PC Affidavit for arrest he completed on

⁷ IA Case #2018-0399 – Tab B-Accused Employee Information – Aquino 2nd IA Interview-Transcript lines 868-958

⁸ IA Case #2018-0399 Tab F-Documentation – Policies – APD General Orders 900.3

PD 0093 Rev July 2012

Joseph Figueroa. Officer Aquino responded:

"No sir."

Summary of Facts

- APD CAD History for 18-1071866 shows Officers Aquino and McLeish arriving at Seton Medical Center on Red River St. at approximately 00:48 on April 18, 2018.
- The BWC Audit Trail shows Officer Aquino accessed and streamed his BWC video, through the Axon application, within a 16 minute timeframe (02:28:36 – 02:44:50) while at Seton Medical Center.
- Officer Aquino stated, during his IA interview, he was not successful in reviewing his BWC while at the hospital due to poor reception.
- APD CAD History for 18-1071866 shows Officers Aquino and McLeish arriving at TCSO Central Booking at approximately 03:11 on April 18, 2018.
- The BWC Audit Trail shows Officer Aquino accessed, streamed, and successfully uploaded his BWC video, through the Axon application, within a 1 hour and 53 minute timeframe (03:15:13 – 05:08:20) after arriving at TCSO Central Booking. Officer Aquino stated, during his IA interview, the BWC video is difficult to view on a cell phone and the audio quality is poor.
- Officer Aquino completed and submitted the PC Affidavit for Figueroa, which APD Arrest Review accepted.
- Officer Aquino stated in his IA interview that his PC Affidavit was not in chronological order. Officer Aquino also stated there was no intent on his part to embellish the PC Affidavit, nor mislead the reader in any way.


 Sergeant Matthew Wright #4418

10/3/18
 Date


 Lieutenant Jason Bryant #3432

10.3.18
 Date


 Commander Pat Connor #4259

10-3-18
 Date

⁹ IA Case #2018-0399 – Tab B-Accused Employee Information – Aquino 2nd IA Interview-Transcript lines 985-1000
 PD 0093 Rev July 2012

Addendum to Investigative Summary - IA Case 2018-0399 Officer Mario Aquino #7402
 180 Deadline 10 14 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	§	Plaintiffs,
	§	
v.	§	CIVIL ACTION No. 1:20-cv-01068-LY
	§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 106
APD Conduct Counseling Memo**

(COA 174151)

FILED UNDER SEAL



APD Conduct Counseling Memo

Employee Name	Jester, Dusty	Supervisor's Name	Ingram, Derick
Employee Number	AP8238	Employee Number	AP4646
Time in Position	From 10/28/2016 To Present	Observation Period by Supervisor 11/18/2018	
Time in Grade	From 10/28/2016 To Present	From 1/21/2018	To Present

LIST THE CONDUCT WHERE THE EMPLOYEE MAY BE IN VIOLATION OF POLICY (POLICY REFERENCE)

Officer Jester, on November 18, 2018, you were transporting a prisoner to the Travis County Sheriff's Office jail when you pre-empted that transport to assist Officers Brad Hoover and Timothy Skeen on an active fight involving multiple subjects at the intersection of 11th St and IH-35 Svrd SB. (APD Case 183220299) Your initial decision to stop and assist Hoover with his subject was understandable. From that location you were able to assist Hoover while keeping your patrol vehicle containing your prisoner in sight and at a safe distance. But after Hoover moved from that area to engage with the reported suspect in this incident, your decision to leave your prisoner completely unattended can not be justified. Your prisoner was left unattended in the rear seat of the patrol vehicle with multiple unknown subjects close enough to the vehicle for him to speak with from the window. This is could have possibly turned in to an escape situation. Also, it could be seen from the numerous video recordings that there was civilian motor vehicles passing your patrol vehicle. This incident occurred on a Sunday morning at 2:41 am. The bars in the downtown area had just closed less than forty-five minutes prior. The entire downtown area is rife with intoxicated drivers on a Saturday night going into a Sunday morning. The chances of our overhead lights drawing intoxicated drivers in to crash into our patrol vehicles is well documented. If your patrol vehicle had been involved in a collision during this incident you would have surely faced administrative discipline, if not criminal charges. The safety and well being of the prisoner is the transporting officer's first priority.

Your decision to bypass Hoover as he engaged the suspect by holding him at taser point escalated the incident. Before your approach, the suspect and Hoover were standing and facing each other with about five feet between them. There was no active fight between Hoover and the suspect at the moment you charged by Hoover, throwing your body towards the suspect in an attempt to knock him off balance. You gave no warning to Hoover before taking this action and no commands to the suspect. You took no time to assess the situation or stop to formulate a plan of action with Hoover. It's true that the situation may still have resulted in a physical altercation with the suspect and officers but it could have also been resolved with further communication or by the use of the taser, as Hoover had at the ready.

Furthermore, there was still a potential investigation for an assault that needed to be conducted but the key witnesses to the offense were able to leave the scene after you left them unattended.

The following policy violations may have been violated in this incident:

321.3 TRANSPORTING ARRESTED PERSONS : (h) While transporting prisoners, officers shall not respond to any calls for service or initiate any enforcement action unless it is a situation where risk of serious bodily injury or death to a third party is imminent and the risk to the prisoner is minimal. Officers shall notify the dispatcher of any incident that may require a police response.

200.2.1 ASSESSMENT AND DE-ESCALATION : As officers arrive on the scene, observe conditions, and interact with the persons there, they should continue to gather additional relevant information and facts. These assessments, along with reasonable inferences help to develop an understanding of the totality of the circumstances of the incident.

(a) Assessing Risks and Benefits – After an officer has gathered sufficient information to ascertain anticipated threats at the scene, they shall consider whether de-escalation is appropriate.

900.4.3 NEGLECT OF DUTY: (h) Failure to follow department standardized training and tactics when it was objectively reasonable to do so.



APD Conduct Counseling Memo

PREVIOUS CORRECTIVE MEASURES TAKEN

- There were no previous or related incidents involving the above listed policies.

ACKNOWLEDGMENT OF CONDUCT TO BE CHANGED

- "I Officer Dusty Jester #8238 agree that my conduct on the above listed dates may be a violation of policy and that I have been informed of both the policy and the potential consequences for noncompliance. Policy 321.3 Transporting Arrested Persons, Policy 200.2.1 Assessment and De-Escalation and Policy 900.4.3 Neglect of Duty. I understand that any future violations may result in an Internal Affairs complaint and possible further disciplinary actions. I understand that this is a voluntary agreement between Sergeant Derick Ingram #4646 and I in order to avoid more severe disciplinary action."

Dusty Jester #8238	12/20/2018
EMPLOYEE SIGNATURE	DATE
#4646	12/20/2018
SUPERVISORS SIGNATURE	DATE
9648	12/20/2018
C.O.C. SIGNATURE	DATE

Confidential

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	§	Plaintiffs,
	§	
v.	§	CIVIL ACTION No. 1:20-cv-01068-LY
	§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

**Exhibit 112
Halo View of Evans and Howell Shooting**

(COA-EVANS 001034)

FILED TRADITIONALLY

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	§	Plaintiffs,
	§	
v.	§	CIVIL ACTION No. 1:20-cv-01068-LY
	§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF AUSTIN'S MOTION FOR
SUMMARY JUDGMENT**

Exhibit 114
Rickard Body Worn Camera of Underwood Shooting

(COA-GENERAL PROTEST 017757)

FILED TRADITIONALLY

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.		§	
	Plaintiffs,	§	
		§	
v.		§	CIVIL ACTION No. 1:20-cv-01068-LY
		§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF AUSTIN,		§	
	Defendants.	§	

**PLAINTIFFS’ FILING OF PUBLIC EXHIBIT IN SUPPORT OF RESPONSE TO
DEFENDANT CITY OF AUSTIN’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to the Court’s order, Doc. 201, Plaintiffs respectfully file a public, redacted version of Exhibit 50 in support of their response to the City of Austin’s motion for summary judgment, Doc. 186, which is attached hereto.

Dated: July 14, 2023.

Respectfully submitted,

EDWARDS LAW
603 West 17th St.
Austin, TX 78701
Tel. (512) 623-7727
Fax. (512) 623-7729

By /s/ Jeff Edwards
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/s/ Bhavani Raveendran (with permission JSE)

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**ATTORNEYS FOR PLAINTIFF
MICHELLE BEITIA AS NEXT FRIEND OF
J.A.A., A MINOR**

CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing and the exhibits thereto has been served on all counsel of record by electronic mail.

By /s/ Jeff Edwards
JEFF EDWARDS

FILED

July 31, 2023

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BY: PG
DEPUTY

JAVIER AMBLER, Sr., et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 1:20-cv-01068-LY
	§	JURY DEMANDED
	§	
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	
Defendants.	§	

PLAINTIFFS’ SUR-REPLY IN OPPOSITION TO THE CITY’S MOTION FOR SUMMARY JUDGMENT

The City of Austin’s motion for summary judgment should be denied for the reasons stated in Plaintiffs’ response, Doc. 186, and the following four reasons.

I. ARGUMENT

A. The City of Austin is vicariously liable for Nissen’s disability discrimination.

The City’s reply argues for the first time that in the Sixth Circuit, the ADA and RA cannot be used to impose vicarious liability. Doc. 196, p. 21. As this argument was not present anywhere in the City’s motion, it should be denied as waived¹—but it is also wholly meritless in this Circuit.

The City of Austin's untimely argument neglects to mention that the Fifth Circuit has specifically rejected the Sixth Circuit’s (incorrect) view in multiple binding decisions, including a binding decision cited by Plaintiffs' response and cited *by the City* elsewhere in its reply. The Fifth

¹ See, e.g., *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010) (“Arguments raised for the first time in a reply brief are generally waived.”); *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 394 n.5 (5th Cir. 2018) (“Ordinarily, we do not consider arguments raised for the first time in a reply brief.”); *Parsons v. Sager*, No. 1:18-CV-1014-RP, 2019 WL 5243190, at *2, n.2 (W.D. Tex. Apr. 30, 2019) (Pitman, J.) (“By raising her ... argument for the first time in her reply brief, [defendant] waived that argument for purposes of this motion to dismiss.”).

Circuit settled this exact question in *Delano-Pyle*, holding that the governmental employer is vicariously liable for the conduct of *any* employee:

The ADA and RA impose liability upon certain employers for disability discrimination. The definition of “employer” under the ADA specifically encompasses any agent of an employer covered by the statute. 42 U.S.C. § 12111 (1995). ... The Fourth, Seventh, Ninth, and Eleventh circuits have all agreed that when a plaintiff asserts a cause of action against an employer-municipality, under either the ADA or the RA, the public entity is liable for the vicarious acts of *any* of its employees as specifically provided by the ADA.

Delano-Pyle v. Victoria Cty., Tex., 302 F.3d 567, 574–75 (5th Cir. 2002) (citations omitted) (emphasis in original). The Fifth Circuit’s conclusion rests on the unambiguous text of the statutes, so the Sixth Circuit is simply incorrect.² “The ADA and Rehabilitation Act are vicarious liability statutes.” *Phillips v. Prator*, No. 20-30110, 2021 WL 3376524, at *4 (5th Cir. Aug. 3, 2021) (unpublished); *see also T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 417 (5th Cir. 2021) (“a public entity may be held vicariously liable for the acts of its employees under either statute”); *Wilson v. Baucom*, No. A-20-CV-311-RP, 2021 WL 7081523, at *8 (W.D. Tex. Jan. 25, 2021), *report and recommendation adopted as modified*, No. 1:20-CV-311-RP, 2021 WL 7081438 (W.D.

² As *Delano-Pyle* explains, the dispositive text is 42 U.S.C. § 12111(4): “The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees ... *and any agent of such person.*” Although *Jones v. City of Detroit, Michigan* suggests that *Delano-Pyle* is incorrect because it does not expressly consider *Gebser v. Lago Vista Indep. Sch. Dist.*, which was a Title IX case, it is the Sixth Circuit which overlooks that in *Gebser*, the Supreme Court found the *absence* of identical “agent” language in Title IX to be dispositive. Compare 20 F.4th 1117, 1122 (6th Cir. 2021) with 524 U.S. 274, 283 (1998):

Title VII, in which the prohibition against employment discrimination runs against “an employer,” 42 U.S.C. § 2000e–2(a), explicitly defines “employer” to include “any agent,” § 2000e(b). *See Meritor, supra*, at 72, 106 S.Ct., at 2408. Title IX contains no comparable reference to an educational institution’s “agents,” and so does not expressly call for application of agency principles.

Thus, *Gebser* makes it crystal clear that the Fifth Circuit is correct: 42 U.S.C. § 12111(4), which similarly “explicitly defines ‘employer’ to include ‘any agent,’” just like Title VII but unlike Title IX, is dispositive of the vicarious liability question.

Tex. Mar. 23, 2021) (Lane, Mag. J.) (“a public entity is liable for the vicarious acts of any of its employees as specifically provided by the ADA”).

Thus, not only did the City waive this argument by failing to raise it in its motion, this argument is also foreclosed by binding precedent (and the plain text of the ADA and RA).

B. Nissen intentionally discriminated against Ambler because of his disabilities.

The City also argues for the first time that Nissen did not intentionally discriminate, but it ignores the discussion in Plaintiffs’ response establishing that he most certainly did. *See* Doc. 186, pp. 55–57. The City’s new argument to the contrary is fundamentally flawed for two reasons.

First, Nissen’s conduct in continuing to use force that he knew would be deadly due to Ambler’s obvious obesity³ and medical distress,⁴ combined with his pleas that “I can’t breathe”⁵ and “I have congestive heart failure,”⁶ is analogous to continuing to only communicate verbally despite evident deafness, which the Fifth Circuit found to be intentional discrimination in both *Delano-Pyle v. Victoria Co.*, 302 F.3d 567, 575–576 (5th Cir. 2002) and *Perez v. Doctors Hosp. at Renaissance, Ltd.*, 624 Fed. Appx. 180, 185 (5th Cir. 2015). This reflects an analogous culpable mental state because, just like the officer in *Delano-Pyle* and the doctor *Perez* knew they needed to provide a different form of communication to a deaf person, Nissen knew that he needed to

³ Doc. 186-3, Body-Worn Camera, 1:43–44 (T06:46:33–34Z), 3:35–40 (T06:48:25–30) (Nissen acknowledging Ambler as “big man” and “heavy set”); Doc. 186-2, Nissen Deposition, 70:18-21, 171:21-25, 286:5-14 (agreeing he knew Ambler was overweight); Doc. 186-6, Autopsy Report, p. 5 [COA 052264] (Ambler was over 400 pounds).

⁴ Doc. 186-10, Kadar Declaration, p. 3; Doc. 186-15, Baden Report, p. 2; Doc. 186-1, Clark Report, p. 29; *see* Doc. 186-3, Body-Worn Camera, 1:30–2:40 (T06:46:20–47:29).

⁵ Doc. 186-2, Nissen Deposition, 146:3–5 (admitting he heard Ambler say he could not breathe); Doc. 186-3, Body-Worn Camera, 1:41–1:42 (T06:46:31–32), 1:54–55 (T06:46:43–44), 1:56 (T06:46:46), 2:03–04 (T06:46:52–53), 2:15–16 (T06:47:05–06). (“please” and “I can’t breathe”).

⁶ Doc. 186-3, Body-Worn Camera, 1:30–1:31 (T06:46:20–21), 1:37–1:38 (T06:46:28–29), 1:40–1:41 (T06:46:29–30); Doc. 186-5, Dash Camera Footage, 01:46:23–24, 01:46:30–31, 01:46:32–33 (“I have congestive heart failure”).

restrain an obese person with congestive heart failure differently than an able-bodied person to avoid the risk of killing them, particularly in light of Ambler’s specific complaints that he could not breathe.⁷ Thus, Plaintiffs’ evidence satisfies this prong “with evidence that the defendant failed to make reasonable accommodations for a plaintiff’s disability.” *Epley v. Gonzalez*, 860 F. App’x 310, 314 (5th Cir. 2021); *see also Tennessee v. Lane*, 541 U.S. 509, 531–3 (2004) (ADA and RA affirmatively require public entities to accommodate disabilities, rather than treat them the same as an able-bodied person).

Second, the City and Nissen argue that in fact Nissen was using force because of Ambler’s arm movements, but this means Nissen was intentionally using force because of Ambler’s impairments due to his disability. Ambler was only putting his elbows and hands on the ground as an instinctive response to his impaired breathing—which, in turn, was a consequence of his disabilities (and Nissen’s failure to accommodate them).⁸ The City and Nissen now characterize this as resistance, but, in the light most favorable to Plaintiffs, Nissen should have seen what is apparent from the video: Ambler’s arm movement was an involuntary consequence of Ambler’s

⁷ Doc. 186-2, Nissen Deposition, 61:6-23, 63:3-25 (trained prone position risks positional asphyxia), 64:17-23 (knew medical conditions increase the risk of prone restraint), 70:9-17 (knew overweight person affects how to restrain them), 103:14-20 (trained positional asphyxia can be fatal), 106:17-23 (agreeing he had to consider the risk of injury from a person’s physical condition in restraints), 113:6-10 (understands “I can’t breathe” to mean difficulty catching breath), 123:3-6 (agreeing mere fact a person can speak down not mean they can breathe), 169:7–11 (agreeing congestive heart failure would have made a difference in his response to Ambler), 218:25-219:7 (agreeing has to consider a subject’s medical distress during restraint); Doc. 186-11, Staniszewski Deposition, 125:23–126:1, 126:22–127:4, 127:15–128:17 (trained congestive heart failure makes an arrestee more likely to be injured or killed from this type of restraint), 129:11–16 (trained to consider when a person says “I can’t breathe”), 131:20–134:22 (trained that a prone position risks death from positional asphyxia and pushing a person’s head face down into the ground would limit their ability to breathe).

⁸ Doc. 186-5, Dash Camera Footage, 1:45:58–1:47:22; Doc. 186-3, Body-Worn Camera, 2:00–39 (T06:46:49–47:28); Doc. 186-1, Clark Report, 27; Doc. 186-10, Kadar Declaration, 2.

disabilities. So Nissen using force *based on* that action was necessarily intentional conduct *because of* Ambler’s disabilities.

These facts stand in sharp contrast to the City’s new argument, which hinges upon *Windham v. Harris Cnty., Tex.*, 875 F.3d 229 (5th Cir. 2017). But in that case, where officers told a person with a neck injury to perform the horizontal gaze nystagmus sobriety test, the detainee “made no requests of the officers whatsoever” to alert them to his disability or need for any accommodation. *Id.* at 237. Ambler’s case presents the exact opposite scenario: Nissen was aware of Ambler’s disabilities, Ambler’s need for accommodations, and the fact that his ongoing use of force risked killing Ambler if he refused to accommodate. *See supra* nn.3–7 and accompanying text. Indeed, Ambler’s last words were begging for Nissen for help—as well as trying to make Nissen to recognize that he had congestive heart failure, could not breathe, and was not resisting.

Thus, the City’s new argument is meritless, as Nissen intentionally discriminated against Ambler because of his disabilities.

C. The area was secure, unlike *Munroe* and *Betts*.

In an effort to salvage its *Hainze* argument, the City cites two new cases: *Munroe v. City of Austin*, 300 F.Supp.3d 915 (W.D. Tex. Mar. 12, 2018) and *Betts v. Brennan*, 22 F.4th 577, 584 (5th Cir. 2022), but the exigencies in those cases do not transform Ambler into a threat that permitted Nissen to discriminate against him. *Contra* Doc. 196, pp. 16–17.

In *Munroe*, when the officers used force, the decedent had a gun in his lap, which officers did not know was a BB gun, and he was not within reach of the officers, much less restrained under them. 300 F.Supp. at 921. Of course, a distraught, unrestrained person with what is reasonably believed to be a loaded firearm is not yet “secure.” Ambler was restrained, did not have a firearm or any weapon, and there was no reason to believe he was armed.

In *Betts*, the arrestee had force used against him twice. During the first use of force, the arrestee was sitting behind the wheel of his pickup truck and refusing to exit. 22 F.4th at 580. During the second, the arrestee was standing immediately next to the driver’s seat and refusing to face the officer. *Id.* at 580–581. Ambler, in contrast, was not in the driver’s seat or even standing within arms-reach—instead, he was face down, on the ground, and beneath three officers. Moreover, in the light most favorable to Plaintiffs, Ambler was not resisting.

Thus, neither of those cases bears any factual resemblance on the *Hainze* question of whether the “area was secure” or there was an imminent “threat to human safety.” Tellingly, the City does not attempt to distinguish Plaintiffs’ cited decisions where there was an ongoing threat, but it was too minimal to trigger the *Hainze* exception. *See Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 742 (S.D. Tex. 2011); *Wilson v. City of Southlake*, 936 F.3d 326, 331 (5th Cir. 2019).

D. Nissen’s use of force was unreasonable.

Finally, the City’s reply asks the Court to apply the reasoning of *Bates ex rel. Johns v. Chesterfield Cnty., Va.*, 216 F.3d 367, 373 (4th Cir. 2000), which is essentially to apply the *Graham* factors to a use of force case arising under the ADA and RA. This new argument is also untimely and thus waived, but in any event the reasonableness test still requires the City’s motion to be denied because Nissen’s conduct was unreasonable, as explained in Plaintiffs’ response to Nissen’s motion for summary judgment, which is incorporated in Plaintiffs’ response to the City, but ignored in the City’s reply. *See generally* Doc. 183.⁹

⁹ Notably, rather than discussing the underlying constitutional violation at all, the City’s motion incorporated by reference Nissen’s entire motion. *See* Doc. 165, p. 2. Although Plaintiffs likewise incorporated their response to Nissen’s motion in their response to the City, Doc. 186, p. 3, n.1, the City incorrectly claims Plaintiffs “ignore[d] the most important fact regarding this incident” by not addressing the degree of Nissen’s force. Doc. 196, p. 1. This is mistaken, as Plaintiffs’ response to Nissen’s motion directly disputes the facts surrounding Nissen’s assertions about how much force he used. *See* Doc. 183, pp. 2, 7–8, 19–21.

The most glaring problem with the City’s argument to the contrary is the same problem at the core of Nissen’s argument: For summary judgment purposes, Nissen *did* use deadly force, because he *knew* the type of restraint he was using was killing Ambler. *See supra* p. 4, n.7. This is not a “soft hands” case because Ambler could not breathe due to the use of force—and Nissen knew it. Nissen knew Ambler was obese, had congestive heart failure, could not breathe, was not resisting, and was begging him for help. *See supra* p. 3, nn.3–6. Nissen was specifically trained that these facts meant the prone restraint risked asphyxiating Ambler. *See supra* p. 4, n.7. Ambler’s death is instead comparable to the likes of *Darden v. City of Fort Worth, Tex.*, where the officers similarly had been trained “to exercise ‘[e]xtreme caution’ when arresting ‘a prisoner that is obese ... since cuffing behind the back and laying the prisoner in a prone position could lead to positional asphyxia.” 880 F.3d 722, 732, n.8 (5th Cir. 2018). There, the Fifth Circuit emphasized that the officers’ knowledge of “potential dangers” informed the analysis of the degree of force used, and ultimately vacated the dismissal of a similar use of force claim for a positional asphyxia death of an obese arrestee. *Id.* at 732, 734.¹⁰ Not only does Nissen’s analogous training and the near-identical scenario meet the same threshold of unreasonableness as in *Darden*, but also the City itself conceded that if Nissen believed Ambler’s words, then his conduct was unreasonable.¹¹

Accordingly, even under the Fourth Circuit’s reasonableness standard, rather than the *Hainze* standard, Plaintiffs’ evidence shows summary judgment on the ADA and RA claims should be denied.

¹⁰ Moreover, unlike Nissen, the officers in *Darden* knew they were deployed with tactical gear and heavy armament to conduct a high-risk, no-knock sting of a suspected drug den, surrounded by belligerent suspects in their (alleged) drug dealer’s home, whereas in this case Ambler was alone, on the street, and had been pursued only for his flight and a head light violation. *Id.* at 725.

¹¹ Doc. 186-11, Staniszewski Deposition, 138:14–24.

II. CONCLUSION

Accordingly, the Court should deny the City's motion for summary judgment.

Dated: June 2, 2023.

Respectfully submitted,

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AS NEXT FRIEND OF J.A.A., A MINOR**

CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing has been served on all counsel of record via the Court's electronic case filing system.

/s/ Jeff Edwards
Jeff Edwards

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, SR., and MARITZA	§	
AMBLER, individually, on behalf of all	§	
wrongful death beneficiaries of JAVIER	§	
AMBLER, II, on behalf of the ESTATE OF	§	
JAVIER AMBLER, II, and as next friends of	§	
J.R.A., a minor child; and MICHELE BEITIA,	§	
as next friend of J.A.A., a minor child	§	
<i>Plaintiffs,</i>	§	
	§	
vs.	§	No. 1:20-cv-1068-DII
	§	
MICHAEL NISSEN and	§	
CITY OF AUSTIN,	§	
<i>Defendants.</i>	§	

**MICHAEL NISSEN’S NOTICE
OF IMMEDIATE INTERLOCUTORY APPEAL**

1. NOTICE is hereby given that Defendant, Officer Michael Nissen (“Nissen”), respectfully appeals to the United States Court of Appeals for the Fifth Circuit this District Court’s Order denying Nissen’s motion for summary judgment on the grounds that he is entitled to Qualified Immunity on all claims. Pending this Appeal, Nissen respectfully submits that this Court should also stay the trial against the City of Austin for reasons articulated *infra*.

2. This Court denied Nissen’s motion for summary judgment in its Order entered September 21, 2023, when it adopted the Magistrate Judge’s Report and Recommendation as its own order¹—overruling Nissen’s objections to the Magistrate’s findings.² Under 28 U.S.C.A. § 1291, a district court’s denial of a motion for summary judgment is not generally a final decision that is

¹ Order, Dkt. # 219.

² Nissen Obj. to Report & Recommendation, Dkt. # 212.

immediately appealable.³ However, when a district court issues a pretrial order denying Qualified Immunity to a defendant who enjoys that defense, such an order is immediately appealable under the collateral order doctrine.⁴ As the Supreme Court has explained, this is “because such orders conclusively determine whether the defendant is entitled to immunity from suit; this immunity issue is both important and completely separate from the merits of the action, and this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost.”⁵

3. This appeal complies with the collateral order doctrine as Nissen challenges this Court’s application of controlling law and challenges the materiality of factual issues guiding this Court’s decision to deny Nissen’s motion for summary judgment on the first prong of the Qualified Immunity test. The appeal will also involve challenges to this Court’s decision on the second prong of the Qualified Immunity test, namely this Court’s holding that *Darden*⁶ provided Nissen with notice that his conduct in these factual circumstances was contrary to clearly established law. Finally, the appeal will involve challenges to triable issues of disputed facts bound by this Court to the extent the Fifth Circuit, if at all, finds them “clearly contradicted” by the body-worn camera evidence.⁷

4. This Notice of Appeal divests this Court of jurisdiction regarding Officer Michael Nissen. “[N]otice of interlocutory appeal following a district court’s denial of a defendant’s immunity defense divests the district court of jurisdiction to proceed against that defendant.”⁸

³ 28 U.S.C.A. § 1291 (West).

⁴ See *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014); see also *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); see also *Brown v. Strain*, 663 F.3d 245, 248 (5th Cir. 2011).

⁵ *Plumhoff*, 572 U.S. at 772.

⁶ *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 725 (5th Cir. 2018).

⁷ *Scott v. Harris*, 550 U.S. 372 (2007).

⁸ *Williams v. Brooks*, 996 F.2d 728, 729 – 30 (5th Cir. 1993).

Accordingly, a trial court “may not try” the defendant asserting the interlocutory appeal, “and will usually stay proceedings involving other defendants or entities whose liability may critically depend on facts found as to the potentially immune defendants.”⁹ This is because “[i]t stands to reason that defendants who may legitimately claim qualified immunity should not be forced to participate in a trial on, for example, municipal liability, where that theory becomes moot if they succeed on the qualified immunity defense.”¹⁰

5. Accordingly, Nissen respectfully submits that proceedings in this District Court on Plaintiffs’ claims against Nissen are suspended pending resolution of this interlocutory appeal, and respectfully submits that the trial of this matter against the City of Austin should also be stayed—because the City cannot be liable under a *Monell* theory of liability if the Fifth Circuit determines that Officer Nissen is entitled to Qualified Immunity under the first prong of the test.¹¹

Respectfully submitted,

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⁹ *Bevill v. Wheeler*, No. 23-40321, at *4 (5th Cir. July 26, 2023) (Order Granting stay of trial pending appeal, overruling the district court) (**Only available on Pacer**) (citing *Carswell v. Camp*, 54 F.4th 307, 313 (5th Cir. 2022)).

¹⁰ *Id.*

¹¹ *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (“If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the [constitutional injury] is quite beside the point.”).

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MICHAEL NISSEN**

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September 2023, a true and correct copy of the foregoing document was caused to be served upon all counsel of record via E-File/E-Service and/or E-Mail, in accordance with the Federal Rules of Civil Procedure, as follows:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

JAVIER AMBLER, SR., and MARITZA	§	
AMBLER, individually, on behalf of all	§	
wrongful death beneficiaries of JAVIER	§	
AMBLER, II, on behalf of the ESTATE OF	§	
JAVIER AMBLER, II, and as next friends of	§	
J.R.A., a minor child; and MICHELLE	§	
BEITIA,	§	
as next friend of J.A.A., a minor child	§	Civil Action No. 1:20-cv-01068-LY
	§	
<i>Plaintiffs</i>	§	
	§	
v.	§	
	§	
MICHAEL NISSEN and CITY OF AUSTIN,	§	
	§	
<i>Defendants</i>		

**DEFENDANT CITY OF AUSTIN’S OPPOSED MOTION TO STAY PROCEEDINGS
PENDING INTERLOCUTORY APPEAL**

Defendant City of Austin files this Opposed Motion to Stay Proceedings Pending Interlocutory Appeal as follows:

I. Factual Background

This case is currently set for trial on October 30, 2023. On September 21, 2023, the District Court entered its order adopting the Report and Recommendation of the United States Magistrate Judge (Doc. 206) which granted in part and denied in part Defendant Michael Nissen’s Motion for Summary Judgment and which granted in part and denied in part Defendant City of Austin’s Motion for Summary Judgment. (Doc. 219) On September 25, 2023, Defendant Nissen filed a Notice of Immediate Interlocutory Appeal to the United States Court of Appeals for the Fifth Circuit on the grounds that he is entitled to qualified immunity on all claims. (Doc. 220)

II. Legal Standards and Argument

An order denying a motion for summary judgment based on qualified immunity is a collateral order capable of immediate review. *Brown v. Strain*, 663 F.3d 245, 248 (5th Cir. 2011); *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996). In *Williams v. Brooks*, the Fifth Circuit held that the filing of an interlocutory appeal following a district court’s denial of a defendant’s immunity defense divests the district court of jurisdiction to proceed against that defendant. *Williams v. Brooks*, 996 F.2d 728, 729-30 (5th Cir. 1993). The traditional rule that the filing of a notice of appeal divests a district court of jurisdiction applies with particular force in the immunity context.” *Id.* at 730 n.2 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Thus, Nissen’s interlocutory appeal divests the District Court of jurisdiction to proceed with litigation of the claims asserted against Nissen.

The Court should stay the proceedings, including the October 30, 2023 trial, of the remaining claims against the City pending resolution of Nissen’s interlocutory appeal. Courts “will usually stay proceedings involving other defendants or entities whose liability may critically depend on facts found as to the potentially immune defendants.” *Bevill v. Wheeler*, No. 23-40321, at *4 (5th Cir. July 26, 2023)(order granting stay of trial pending appeal, overruling the district court)(only available on Pacer)(citing *Carswell v. Camp*, 54 F.4th 307, 313 (5th Cir. 2022)). This is because “[i]t stands to reason that defendants who may legitimately claim qualified immunity should not be forced to participate in a trial on, for example, municipal liability, where that theory becomes moot if they succeed on the qualified immunity defense.” *Id.*

Here, the City cannot be liable under a *Monell* theory of liability if the Fifth Circuit determines that Nissen is entitled to qualified immunity under the first prong of the qualified immunity test. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)(“If a person has suffered

no constitutional injury at the hands of the individual police officer, the fact that departmental regulations might have authorized the [constitutional injury] is quite beside the point.”). The remaining *Monell* claim asserted against the City is that the City failed to enforce its intervention policy. (Doc. 219) The remaining claims asserted against Nissen include §1983 claims that he used excessive force on Ambler and failed to intervene to stop the excessive force of other law enforcement officials. The *Monell* claim and §1983 claims against Nissen are substantially intertwined both factually and legally and involve immunity issues subject to the interlocutory appeal. Plaintiffs’ *Monell* claim against the City is predicated on constitutional violations allegedly committed by Nissen. To defend against Plaintiffs’ allegations that the City’s policies and procedures were the moving force behind Nissen’s constitutional violations, the City would require Nissen’s trial testimony. Nissen would necessarily be a witness at the trial of the *Monell* claim since the City’s liability would critically depend on facts found as to the actions of Nissen, who is potentially immune. *See Bevill v. Wheeler*, No. 23-40321, at *4 (5th Cir. July 26, 2023). Moreover, the other remaining claim against the City, Plaintiff’s ADA claim, likewise is substantially intertwined with the claims against Nissen since a determination of the ADA claim would rely heavily on the testimony of Nissen regarding his knowledge and understanding of Ambler’s disability and medical condition and his actions or inactions taken in response to the disability.

Other courts in the Western District and Fifth Circuit have found that stays of trials and discovery against *Monell* claim defendants are appropriate while law enforcement defendants appeal qualified immunity issues to the Fifth Circuit. In *Ramirez v. Escajeda*, 2022 WL 1744454 at *3 (W.D. Texas, May 31, 2022), the Court stated that it was leery of allowing the plaintiffs’ *Monell* claims to proceed separately to trial from their excessive force claim against the officer

since it would be more efficient to try the claims together. Moreover, the Court noted that the Fifth Circuit's determination of whether a constitutional violation occurred would affect the viability of plaintiffs' *Monell* claim. *Id.* The Court ultimately concluded that the cautionary approach of staying the trial of the claims against the City of El Paso pending resolution of the officer's appeal to the Fifth Circuit was the best approach. *Id. See also Nevarez v. Coleman*, 2023 WL 5034645 at *4 (E.D. Louisiana, August 8, 2023)(stay of case and discovery against remaining defendants appropriate while qualified immunity issues were pending in Fifth Circuit).

Likewise, there is no reason to try the claims against the City and Nissen separately when the claims are so intertwined and involve nearly identical witnesses and demonstrative evidence. It is much more efficient both from a time standpoint and economic standpoint for the parties and the Court to try the claims together if Nissen's appeal is unsuccessful.

III. Prayer for Relief

Based on the foregoing, Defendant City of Austin respectfully requests that the Court grant this Motion to Stay Proceedings Pending Interlocutory Appeal and stay this matter in its entirety pending resolution by the Fifth Circuit of Defendant Nissen's interlocutory appeal. Defendant City of Austin requests such additional relief to which it is entitled.

RESPECTFULLY SUBMITTED,

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**Counsel for Defendant
City of Austin**

CERTIFICATE OF CONFERENCE

This is to certify that I have conferred with Plaintiffs' counsel regarding this motion, and Plaintiffs' counsel is opposed to the motion.

/s/ H. Gray Laird III

H. Gray Laird III

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Rules of Federal Procedure, this 29th day of September, 2023.

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s/ Monte L. Barton Jr. _____
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	Plaintiffs,	§
		§
v.		§ CIVIL ACTION NO. 1:20-cv-01068-LY
		§ JURY DEMANDED
		§
MICHAEL NISSEN AND CITY OF AUSTIN,		§
	Defendants.	§

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO MOTIONS¹ TO STAY PENDING
APPEAL AND MOTION TO CERTIFY APPEAL AS FRIVOLOUS**

The Court should certify Defendant Nissen’s appeal as frivolous and deny Defendants’ motions to stay. Doc. 220; Doc. 221.

I. SUMMARY OF THE ARGUMENT

The Court should certify Nissen’s appeal as frivolous and deny the motions to stay for three reasons:

First, the appeal does not satisfy the exception to the collateral order doctrine for qualified immunity, as qualified immunity was denied due to disputes regarding material facts.

Second, the appeal is frivolous due to the lack of interlocutory appellate jurisdiction.

Finally, because Nissen’s appeal is frivolous and should be certified as frivolous, there is no basis for the motions to stay, so they should be denied.

Accordingly, the Court should certify the appeal as frivolous and set this case for trial.

II. BACKGROUND

This is a 42 U.S.C. § 1983 excessive deadly force case brought by the plaintiff survivors

¹ Although Nissen has not filed a “motion,” his notice of appeal “submits that this Court should stay the trial.” Doc. 220, p. 1.

of Javier Ambler II against Defendants APD Officer Michael Nissen and the City of Austin for Nissen's use of force, and failure to intervene in two Williamson County deputies' use of force, against Ambler. Doc. 44 (all remaining defendants have been voluntarily dismissed).

On February 28, 2023, Defendants moved for summary judgment. Doc. 165; Doc. 167.

On July 31, 2023, Magistrate Judge Hightower recommended that the Court deny the motions in part and grant them in part. Doc. 206, p. 30.

As pertinent to this motion, the Report and Recommendation identified genuine issues of material fact that precluded summary judgment and qualified immunity for Nissen, including:

- “Whether a reasonable officer would believe that Ambler, who was surrounded by multiple officers with a Taser to his neck, was subdued and posed no threat to safety when Nissen began helping handcuff him.” Doc. 206, p. 10.
- “Whether Ambler was actively resisting arrest when Nissen used force.” *Id.* at 10–11.
- “[W]hether Ambler posed a threat at the time force was used.” *Id.* at 11.
- Whether “the use of prone restraint on an individual with obesity and congestive heart failure created a substantial risk of death or serious bodily injury.” *Id.* at 14.
- Whether “Nissen had a reasonable opportunity to intervene” to stop the Williamson County deputies' use of force against Ambler. *Id.* at 17–18.

The Report and Recommendation also concluded that binding decisions gave fair notice to Nissen that “the continued use of force against a person who is on the ground, not resisting, and possibly unable to breathe violates the Fourth Amendment.” Doc. 206, pp. 15–16; *Darden v. City of Fort Worth*, 880 F.3d 722, 727 (5th Cir. 2018); *Timpa v. Dillard*, 20 F.4th 1020, 1032 (5th Cir. 2021).

Both Defendants objected. Doc. 210; Doc. 212.

On September 21, 2023, the Court overruled the objections and adopted the Magistrate Judge's Report and Recommendation in its entirety. Doc. 219.

Nissen appealed on September 25, 2023, arguing the Court should stay trial. Doc. 220, pp.

2–3. The City moved to stay pending the appeal on October 2, 2023. Doc. 221.

The Court vacated the current deadlines while the motion to stay was pending.

III. STANDARD OF REVIEW

“[A] district court's order, entered in a qualified immunity case, is not appealable if it simply determines a question of evidence sufficiency.” *Naylor v. State of La., Dep't of Corr.*, 123 F.3d 855, 857 (5th Cir. 1997); *Johnson v. James*, 515 U.S. 304, 309 (1995). The Fifth Circuit only “ha[s] jurisdiction for the interlocutory appeal *if* it challenges the *materiality* of factual issues, but lacks jurisdiction *if* it challenges the district court’s *genuineness* ruling—that *genuine issues* exist concerning *material facts*.” *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 490 (5th Cir. 2001) (emphasis in original).² “[A]n appeal would be frivolous if it were of the type that the Fifth Circuit lacks jurisdiction to hear.” *Juarez v. Brownsville Indep. Sch. Dist.*, No. CIV. B-09-14, 2010 WL 2817073, at *2, n.4 (S.D. Tex. July 16, 2010); *see also Canada Hockey LLC v. Tex. A&M Univ. Athletic Dep't*, No. 4:17-CV-181, 2021 WL 8919082, at *6 (S.D. Tex. Jan. 22, 2021) (certifying appeal as frivolous). The divestment of jurisdiction while an interlocutory appeal of immunity is pending “is neither automatic nor absolute” and is contingent upon that appeal being *non-frivolous*. *Saenz v. Flores*, No. EP-14-CV-244-PRM, 2018 WL 3603111, at *1 (W.D. Tex. June 5, 2018); *see Williams v. Brooks*, 996 F.2d 728, 230 (5th Cir. 1993). To retain jurisdiction, the Court must “make written findings determining whether the [appeal] is frivolous or nonfrivolous.” *United States v. Dunbar*, 611 F.2d 985, 988 (5th Cir. 1980).

Accordingly, if the notice of appeal fails to identify a question of law, as opposed to a

² *See also, e.g., Bisetti v. McMorrow*, No. 22-50948, 2023 WL 4421383, at *1 (5th Cir. July 10, 2023); *Amador v. Vasquez*, 961 F.3d 721, 726 (5th Cir. 2020); *Cole v. Carson*, 935 F.3d 444, 452 (5th Cir. 2019) (en banc); *Connelly v. Tex. Dep't of Criminal Justice*, 484 F.3d 343, 346 (5th Cir. 2007).

question of fact, the Court should decline to stay proceedings and instead certify the appeal as frivolous. *See Salcido v. Harris Cnty., Tex.*, No. CV H-15-2155, 2018 WL 6618407, at *11 (S.D. Tex. Dec. 18, 2018); *Baker v. Castro*, No. CV H-15-3495, 2018 WL 11354849, at *2 (S.D. Tex. Nov. 27, 2018); *Saenz*, No. EP-14-CV-244, 2018 WL 360311, at *1; *Juarez*, No. CIV. B-09-14, 2010 WL 2817073, at *3; *Ramirez v. Abreo*, No. 5:09-CV-189-C, 2011 WL 13233420, at *5 (N.D. Tex. June 15, 2011).

IV. ARGUMENT

A stay is improper and the Court should certify Nissen's appeal as frivolous.

A. The Court should certify the appeal as frivolous, as it rests upon disputed material facts that divest the Fifth Circuit of jurisdiction.

The Court should certify Nissen's appeal as frivolous because he is attempting to appeal the genuineness of fact disputes, rather than their materiality, on each of his three issues.

In an interlocutory appeal, there is "no appellate jurisdiction to consider the correctness of the plaintiff's version of facts." *Winfrey v. Pikett*, 872 F.3d 640, 643 (5th Cir. 2017) (internal quotation marks omitted). The universe of cases where the appellate court has jurisdiction on an interlocutory appeal of qualified immunity is thus limited to determining whether, "taking [Plaintiff's] allegations and summary judgment evidence as true...[the officer's] course of conduct would be objectively unreasonable in light of clearly established law." *Blake v. Lambert*, 921 F.3d 215, 219. This universe is, accordingly, narrow. *Id.*

Nissen identifies three bases for his interlocutory appeal, none of which fit within this narrow universe: (1) challenges to the Court's decision "on the first prong on the Qualified Immunity test," (2) the "Court's holding that *Darden* provided Nissen with notice that his conduct in these factual circumstances was contrary to clearly established law," and (3) challenges to disputed facts "to the extent the Fifth Circuit, if at all, finds them 'clearly contradicted' by the

body-worn camera evidence.” Doc. 220 at p. 2, ¶ 3. Nissen’s clever wording notwithstanding, each and every one of these challenges is to the *genuineness* of the factual dispute, not the *materiality* of the disputed facts, so there is no appellate jurisdiction over Nissen’s interlocutory appeal.

For starters, Nissen’s first issue is simply whether he violated the Constitution, which this Court already held depends upon genuine issues of material fact. The Court evaluated the reasonableness of Nissen’s force under the *Graham v. Connor*, 490 U.S. 386 (1989) factors, concluding that the first prong (severity of the crime) cut in Nissen’s favor and that the genuine issues of material fact precluded a determination of the second (immediate safety threat) and third (resisting or evading arrest) prongs. Doc. 219; Doc. 206 at pp. 9-11. It is axiomatic that these fact issues—whether Ambler was an immediate safety threat or resisting or evading arrest—are material, as they affected both the Court’s evaluation of whether Nissen’s use of force was reasonable and whether his force violated clearly established law. *See also e.g., Edwards v. Oliver*, 32 F.4th 925, 930, 930 (5th Cir. 2022) (factual dispute regarding whether car driver posed threat was material in that it affected reasonableness and clearly established law inquiries). Nissen are thus confined to why he disagreements with the Court’s assessment of whether there is a genuine dispute about whether Ambler posed an immediate threat and whether he was resisting arrest. Such inquiries are squarely not appealable before trial and are therefore frivolous. *See, e.g., Cameron v. Christian*, No. SA-06-CA-325-H, 2008 WL 11408756, at *2 (W.D. Tex. July 23, 2008) (denying stay pending interlocutory appeal, and concluding appeal is frivolous, where officer disputed whether use of force was objectively reasonable); *Juarez v. Brownsville Indep. Sch. Dist.*, No. CIV. B-09-14, 2010 WL 2817073, at *3 (S.D. Tex. July 16, 2010) (same for official who failed to identify a legal issue for appeal).

Second, Nissen’s challenge to *Darden* likewise turns on genuine issues of material fact and

thus fails. The Court specifically noted that “[i]f a jury finds that Ambler was compliant and not resisting arrest, then the continued use of force, particularly after Ambler said he could not breathe, necessarily would be excessive.” Doc. 206, p. 15; Doc. 219. In other words, “taking [Plaintiffs’] allegations and summary judgment evidence as true,” the force used on Ambler was excessive. *Blake*, 921 F.3d at 219. Thus, Nissen’s appeal would be outside the Fifth Circuit’s interlocutory jurisdiction unless he argues that, even under Plaintiffs’ versions of the facts, it was not clearly established that his force was excessive. *Id.* But Nissen has never made that argument; instead, in his objections to the Magistrate’s Report and Recommendation, Nissen challenged that *Darden* could have provided him notice by arguing *his* version of the disputed facts: He argued that the Court should conclude Ambler “possessed an adject despotism to escape at all costs” so that he continued to be a threat, unlike the *Darden* plaintiff. Doc. 212, pp. 22, ¶ 51. Nissen further relied on the argument that the Court should have discounted “Ambler’s statements of medical distress” and instead find that Nissen reasonably believed “Ambler was continuing to resist arrest.” *Id.* at 23, ¶ 53. Thus, Nissen’s arguments rest upon the genuineness of those disputes of material fact as to the second and third *Graham* factors—which are outside interlocutory appellate jurisdiction.

Finally, as to Nissen’s half-hearted challenge based on body-worn camera evidence, here too the appellate court lacks interlocutory jurisdiction. The Court explicitly considered the video evidence submitted by the parties during summary judgment briefing. Doc. 206 at pp. 2-3 (background summary), pp. 5-6 (generally), p. 8 (severity of the crime), p. 11 (whether Ambler was resisting or evading arrest), pp. 12-13 (whether force used was deadly), p. 17 (whether Nissen had a reasonable opportunity to intervene); Doc. 219. With the exception of the severity of the crime analysis, the Court concluded that the video was not sufficiently clear to resolve the factual dispute, requiring the Court to consider the evidence in the light most favorable to Plaintiffs. Doc.

206 at p.11 quoting *Darden*, 880 F.3d at 730, citing *Scott v. White*, No. 1:16-CV-1287-RP, 2019 WL 122055, at * 12 (W.D. Tex. Jan. 7, 2019) (requiring video to “blatantly contradict” plaintiff’s position). Any challenge Nissen has to the Court’s order concerning the video would thus go to the genuineness of the disputed facts, depriving the appellate court of jurisdiction to hear the challenge. *See, e.g., Bisetti v. McMorrow*, No. 22-50948, 2023 WL 4421383, at *1, n.1 (5th Cir. July 10, 2023) (dismissing interlocutory appeal from denial of qualified immunity for lack of jurisdiction despite video evidence because “video evidence would not resolve, or speak to, that factual dispute”).

Accordingly, there is no automatic stay from Nissen’s appeal.

B. Because the appellate court lacks jurisdiction to hear Nissen’s appeal, this Court should certify his appeal as frivolous and deny the City’s Motion to Stay.

The lack of interlocutory appellate jurisdiction is grounds to certify Nissen’s appeal as frivolous. *See, e.g., Saenz*, No. EP-14-CV-244-PRM, 2018 WL 3603111, at *1; *Salcido*, No. CV H-15-2155, 2018 WL 6618407; *Juarez*, No. CIV. B-09-14, 2010 WL 2817073, at *3; *Ramirez v. Abreo*, No. 5:09-CV-189-C, 2011 WL 13233420, at *5; *Williams v. Brooks*, 996 F.2d 728, 230 (5th Cir. 1993).

“[A] number of circuits have recognized that a court may exercise its discretion to proceed to trial despite an interlocutory appeal in certain cases, including where an appeal is frivolous or used to manipulate proceedings.” *Saenz*, No. EP-14-CV-244-PRM, 2018 WL 3603111, at *1 (collecting cases). Where this is the case, a district court may certify to the court of appeals that an interlocutory appeal of the denial of a . . . motion is frivolous and then proceed with trial rather than relinquish jurisdiction.” *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391 (5th Cir. 2017) citing *United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir. 1980)).

District courts in Texas have certified appeals in excessive force cases as frivolous where,

as here, the appeal relies solely on disputes concerning the genuineness of material facts over which the appellate court has no jurisdiction. For example, in *Saenz*, the Western District of Texas denied qualified immunity to a law enforcement officer at the summary judgment stage, finding that plaintiff's allegations taken as true and in light of available video evidence constituted a violation of a clearly established constitutional right, even if the officer might ultimately be able to convince a jury his actions were justified. 2018 WL 3603111 at *3. In deciding to declare the appeal frivolous, the Court additionally noted that the case had been pending for years and trial was close at hand. *Id.* at *4. Though the “[d]efendant...certainly has a right to assert his immunity as a defense (which he has), [p]laintiff also has a right to have her due process claim adjudicated, and the Court cannot justify any further extension of this case.” *Id.* The Court went on to note that dual jurisdiction of the district court and the Fifth Circuit over the case struck the right balance and ordered the case to proceed to trial. *Id.*

Likewise, the Southern District of Texas declared the appeal of several Harris County deputies and Harris County frivolous in *Salcido v. Harris County, Texas*. No. H-15-2155, 2018 WL 6618407 (S.D. Tex. Dec. 18, 2018). There, as here, the Court determined genuine issues of material fact precluded it from determining whether the officers' use of force was objectively reasonable and from granting qualified immunity to the officers. *Id.* at * 12. Like Nissen, the officers appealed, arguing that they are entitled to qualified immunity premising their construction of facts not on those plaintiffs' version of the facts but on facts the Court explicitly found were in dispute. *Id.* Upon review, the Court denied the officers' motion to stay and declared their appeal frivolous. *Id. see also Baker*, No. CV H-15-3495, 2018 WL 11354849, at *2; *Ramirez v. Abreo*, No. 5:09-CV-189-C, 2011 WL 13233420, at *5; *Cameron*, No. SA-06-CA-325-H, 2008 WL 11408756, at *2.

As with the courts in *Saenz*, *Salcido*, *Baker*, *Ramirez*, and *Cameron*, this Court should certify that Nissen’s interlocutory appeal is frivolous as it seeks review solely of issues over which the appellate court lacks jurisdiction.

C. The Court should deny the motions to stay.

The motions to stay are entirely dependent upon Nissen’s interlocutory appeal and so should be denied.

“A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). “It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.” *Id.* at 433–34 (quotation marks, citations, and brackets omitted). In determining a motion to stay pending appeal, the court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (citing *Nken*, 556 U.S. at 429). “The first two factors of the traditional standard are the most critical.” *Id.* (quoting *Nken*, 556 U.S. at 434).

As to the first factor, Nissen’s appeal is frivolous as discussed above, so he is not likely to succeed on the merits.

Second, Defendants cannot show they will be irreparably injured, as they will retain the right to appeal if they do not succeed at trial.

Third, conversely, staying this case would unfairly injure Plaintiffs. The aphorism “justice delayed is justice denied” is grounded in reality. *See Stelly v. C.I.R.*, 761 F.2d 1113, 1116 (5th Cir. 1985). “Delay alone can infuse an adverse element into the proper flow of litigation: evidence deteriorates or disappears, memories fade, and witnesses die or move away.” *Veazey v. Young’s Yacht Sale and Service, Inc.*, 644 F.2d 475, 477 (5th Cir. 1981). Javier Ambler II died over four and a half years ago. This case was already stayed for five months. *See* Doc. 89; Doc. 99. Plaintiffs have endured enough delays.

Finally, this is a civil rights and disability rights case where the public will benefit from the resolution of the legal questions at issue.

Because the motions to stay rest solely on the premise that the case should be stayed pending appeal, this Court should likewise deny the motions to stay. Defendants cite an unpublished Fifth Circuit order staying trial in *Bevill v. Fletcher*, No. 23-40321, but in that case, one of the officers’ qualified immunity appeals was non-frivolous—unlike this case. *See Bevill v. City of Quitman, Tex.*, No. 4:19-CV-00406, 2023 WL 3805827, at *4 (E.D. Tex. June 2, 2023) (noting that one of the co-defendants’ appeals was not frivolous). Instead, the usual result is that appeals certified as frivolous are abandoned. Indeed, in one case, the Fifth Circuit also declined to stay trial. *See Ex. 1, Salcido v. Leveston*, No. 18-20730 (Jan. 25, 2019) (per curiam).

V. CONCLUSION

For the foregoing reasons, this Court should certify Nissen’s appeal as frivolous, deny the motions to stay based on Nissen’s appeal, and set the case for trial.

Dated: October 6, 2023.

Respectfully submitted,

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MICHELLE BEITIA AS NEXT FRIEND OF
J.A.A., A MINOR**

CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing has been served on all counsel of record via the Court's electronic case filing system on October 6, 2023.

 /s/ Jeff Edwards
Jeff Edwards

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	§	Plaintiffs,
	§	
v.	§	CIVIL ACTION No. 1:20-cv-01068-LY
	§	JURY DEMANDED
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	Defendants.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTIONS TO STAY PENDING
APPEAL AND MOTION TO CERTIFY APPEAL AS FRIVOLOUS**

Exhibit 1

***Salcido v. Leveston*, No. 18-20730, Doc. 36-2 (5th Cir.
Jan. 25, 2019) (per curiam)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-20730

CASANDRA SALCIDO, As Next Friend of Minor Children K.L. and T.L.;
DENISE COLLINS, Individually and as Representative of the Estate of
Kenneth Christopher Lucas, Deceased; KENNETH LUCAS, Individually and
as Representative of the Estate of Kenneth Christopher Lucas, Deceased;
AMBER LUCAS, Individually and as Representative of the Estate of
Kenneth Christopher Lucas, Deceased; DIEDRE MCCARTY, As Next Friend
of Minor Children K.J.L. and T.J.L.,

Plaintiffs - Appellees

v.

DEPUTY XAVIER LEVESTON; OFFICER BRODERICK GREEN; OFFICER
ALICIA SCOTT, also known as Riley Scott; OFFICER JESSE BELL;
OFFICER MORRIS THOMAS; OFFICER ADAM KNEITZ; DEPUTY DAVID
GORDON,

Defendants - Appellants

Appeals from the United States District Court
for the Southern District of Texas

Before CLEMENT, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellants' opposed motion to stay district court
proceeding pending appeal is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, Sr., et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION No. 1:20-cv-01068-LY
	§	JURY DEMANDED
	§	
MICHAEL NISSEN AND CITY OF	§	
AUSTIN,	§	
	§	
Defendants.	§	

ORDER DENYING MOTIONS TO STAY

After considering the City of Austin’s motion to stay, Nissen’s notice of appeal, Plaintiffs’ response, any reply, any evidence presented, the Court’s prior orders, the parties’ prior filings, all other applicable pleadings on file, any argument presented, and all applicable law, the Court hereby ORDERS the following:

For the reasons stated in Plaintiffs’ response and the Court’s order denying summary judgment, the Court hereby certifies that Defendant Nissen’s notice of interlocutory appeal is frivolous, as there is no issue presented within the interlocutory appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit.

Accordingly, the Defendants’ requests to stay the case pending appeal are hereby DENIED in their entirety.

The parties are hereby ORDERED to confer regarding their mutual availability for trial and appear at a status conference to schedule the same on _____.

IT IS SO ORDERED.

SIGNED this _____ day of _____, 2023.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAVIER AMBLER, SR, *individually, on behalf of all* §
wrongful death beneficiaries of Javier Ambler, II, on §
behalf of the Estate of Javier Ambler, II, and as next §
friends of J.R.A., a minor child, et al., §

Plaintiffs, §

v. §

1:20-CV-1068-DII

MICHAEL NISSEN and CITY OF AUSTIN, §

Defendants. §

ORDER

Before the Court is Defendant City of Austin’s (“the City”) motion to stay proceedings pending Defendant Michael Nissen’s (“Nissen”) interlocutory appeal. (Dkt. 221). Plaintiff Javier Ambler, Sr. (“Plaintiff”) opposes the motion. (Dkt. 223). After reviewing the motion, responses and applicable law, the Court will grant the motion to stay.

I. BACKGROUND

This case concerns the death of Javier Ambler, Jr. (“Ambler”) while being detained by Williamson County Police and Austin Police Officer Michael Nissen after a high-speed car chase. (R. & R., Dkt. 206, at 2). Plaintiff brings claims under 42 U.S.C. § 1983 against both Defendants, arguing that Nissen was deliberately indifferent to Ambler’s serious medical needs and violated Ambler’s Fourth Amendment rights through excessive force. (Am. Compl., Dkt. 44). He alleges that the City of Austin failed to train its officers and failed to enforce its intervention policy. (*Id.*). He also brings claims under Title II of the Americans with Disabilities Act (“ADA”). (*Id.*).

On February 28, 2023, the City and Nissen filed separate motions for summary judgment. (Dkts. 165, 167). On July 31, 2023, United States Magistrate Judge Susan Hightower issued her report and recommendations on the motions for summary judgment, finding that the Court should

grant Nissen’s motion as to deliberate indifference but deny it in all other respects. (R. & R., Dkt. 206, at 30). In particular, the magistrate judge found that a genuine question of fact existed as to whether Nissen was entitled to qualified immunity for the claims of excessive force and failure to intervene. (*Id.* at 15–17). The magistrate judge also found that questions of fact existed on whether the City failed to enforce its intervention policy and whether it could be liable for violating the ADA. The Court adopted the report and recommendation in full on September 21, 2023. (Order, Dkt. 219).

Nissen appealed the Court’s order on September 25, 2023, in which he “submit[ted] that this Court should stay the trial[.]” (Notice of Appeal, Dkt. 220, at 1). On October 2, the City filed the instant motion to stay proceedings pending Nissen’s interlocutory appeal. (Dkt. 221). Although the City has not appealed this Court’s order, it asks the Court to stay trial until after the Fifth Circuit has decided Nissen’s appeal, as the City’s liability is intertwined with Nissen’s conduct. (*Id.*). Plaintiff opposes the motion, arguing that Nissen’s appeal is frivolous because it deals only with questions of facts, and other district courts have held similar appeals in the context of qualified immunity to be frivolous. (Resp., Dkt. 223).

II. LEGAL STANDARD

An order denying a motion for summary judgment based on qualified immunity is a collateral order capable of immediate review. *Brown v. Strain*, 663 F.3d 245, 248 (5th Cir. 2011); *Bebrens v. Pelletier*, 516 U.S. 299, 311 (1996). However, “a district court’s order, entered in a qualified immunity case, is not appealable if it simply determines a question of evidence sufficiency.” *Naylor v. State of La., Dep’t of Corr.*, 123 F.3d 855, 857 (5th Cir. 1997). The divestment of jurisdiction while an interlocutory appeal of immunity is pending “is neither automatic nor absolute” and is contingent upon that appeal being non-frivolous. *Saenz v. Flores*, No. EP-14-CV-244-PRM, 2018 WL 3603111, at *1 (W.D. Tex. June 5, 2018).

Still, the traditional rule that the filing of a notice of appeal divests a district court of jurisdiction “applies with particular force in the immunity context.” *Williams v. Brooks*, 996 F.2d 728, 730 n.2 (5th Cir. 1993) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). “Immunity, whether qualified or absolute, is an entitlement to be free from the burdens of time-consuming pre-trial matters and the trial process itself.” *Id.* “[I]t is effectively lost if a case is erroneously permitted to proceed at the district court level while an interlocutory appeal of a denial of immunity is pending.” *Id.*

III. DISCUSSION

The threshold question is whether Nissen’s appeal is frivolous. If the appeal is non-frivolous, then the case must be stayed against him, and should accordingly be stayed against the City. *See Beville v. Wheeler*, No. 23-40321, slip op. at 4 (5th Cir. July 26, 2023) (noting that a district court “will usually stay proceedings involving other defendants or entities whose liability may critically depend on facts found as to the potentially immune defendants.”).

Instead of arguing that a stay against the City is not warranted pending appeal, Plaintiff contends that the City’s motion should be mooted because Nissen’s appeal is frivolous. (Resp., Dkt. 223). In general, an order denying the defense of qualified immunity at summary judgment is “a collateral order capable of immediate review.” *Brown*, 663 F.3d at 248. If the appeal is frivolous, however, the district court “may certify to the court of appeals that an interlocutory appeal of the denial of a . . . motion is frivolous and then proceed with trial rather than relinquish jurisdiction.” *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391, 398 (5th Cir. 2017). Even then, the “rule is a permissive one: the district court *may* keep jurisdiction, but is not required to do so. . . . [S]uch a power must be used with restraint.” *Id.* at 400 (emphasis in original) (citing *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989)).

The basis for Plaintiff's argument is that Nissen's appeal deals exclusively with questions of fact, but only questions of law are appealable. (Resp., Dkt. 223, at 3 (citing *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 490 (5th Cir. 2001)). The Court is skeptical of this argument. Plainly, the report and recommendation did deal with contested factual issues, such as whether Ambler posed a safety threat and whether Nissen should have been aware that Ambler needed medical assistance. (R. & R., Dkt. 206, at 6–18). But the report and recommendation also discusses several legal issues, including the impact of the high-speed car chase on excessive force claims, the requisite notice for Nissen to intervene to stop the use of the second taser, and whether Nissen's restraint violated clearly established law. (*See* Reply, Dkt. 229, at 3–4). The report and recommendation rested on mixed questions of law and fact, and those legal questions are available for Nissen to appeal. (Notice of Appeal, Dkt. 220, at 1–2 (discussing issues to appeal)).

Plaintiff next points to other district court decisions which have certified appeals of qualified immunity as frivolous. (Resp., Dkt. 223, at 4 (citing *Saenz v. Flores*, No. EP-14-CV-244-PRM, 2018 WL 3603111, at *1 (W.D. Tex. June 5, 2018); *Salcido v. Harris Cnty., Tex.*, No. CV H-15-2155, 2018 WL 6618407, at *11 (S.D. Tex. Dec. 18, 2018); *Baker v. Castro*, No. CV H-15-3495, 2018 WL 11354849, at *2 (S.D. Tex. Nov. 27, 2018); *Ramirez v. Abreo*, No. 5:09-CV-189-C, 2011 WL 13233420, at *5 (N.D. Tex. June 15, 2011)).

In *Saenz*, this Court certified an appeal as frivolous where the defendant officer “fired his service weapon at a handcuffed man, nearly naked, bleeding from his head, and lying prostrate in a loading dock,” and that such allegations are “supported by video evidence.” *Saenz*, 2018 WL 3603111, at *3. It noted that it “borders on absurdity to suggest that, as a matter of law, these facts could not support a finding of liability” for a constitutional violation. *Id.* Here, while the Court found that a question of fact existed as to Nissen's potential excessive force, it is far from “absurd” for him to claim that his actions did not amount to a constitutional violation. Moreover, in *Saenz* the

defendant “offered no cases suggesting” that his actions were constitutional. *Id.* Here, Nissen offered extensive briefing on the issue, and cited several cases where courts had affirmed qualified immunity under related circumstances. (Mot. Summ. J., Dkt. 167; Obj., Dkt. 212).

Similarly, the district court in *Salvado* dealt with conduct that was plainly egregious. 2018 WL 6618407, at *11. There the district court detailed extensively why several Fifth Circuit cases had shown that the officers’ conduct was excessive, and found that “their argument to the contrary has no merit.” *Id.* at *14. Here, several issues raised by Nissen—such as his *Darden*¹ defense and the legal impact of a high-speed car chase on the officers’ perceived danger—have some merit, even if this Court disagrees that they warrant summary judgment.

Next, in *Ramirez*, the district court dealt with “an untimely and frivolous appeal in an effort to delay the inevitable” that was also related to a motion for summary judgment that had been filed “in contravention of the Court’s” order. *Ramirez*, 2011 WL 13233420, at *1–3. Those circumstances are not present here. Finally, Plaintiff cites *Baker*—a cursory opinion where the district court briefly provided caselaw quotations before concluding that the appeal was frivolous because “of the existence of genuine issues of material fact that must be resolved by a jury.” 2018 WL 11354849, at *2. To the extent *Baker* discussed the issue at all, the Court finds it unconvincing as applied to Nissen’s appeal. Indeed, Nissen’s appeal does not turn on the “genuineness of a fact issue” as the *Baker* court held, but rather on the application of qualified immunity caselaw to Nissen’s actions. *Id.* (citing *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017)). Nissen has identified non-frivolous legal conclusions that he intends to appeal to the Fifth Circuit. As such, it would be erroneous to maintain jurisdiction over Nissen’s case pending appeal. *BancPass*, 863 F.3d at 398.

¹ *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 725 (5th Cir. 2018).

IV. CONCLUSION

For the reasons set forth above, the Court declines to certify Nissen's appeal as frivolous. Accordingly, it will **GRANT** the City's motion to stay, (Dkt. 223).

IT IS THEREFORE ORDERED that this case is **STAYED** pending the Fifth Circuit's decision in Nissen's interlocutory appeal.

SIGNED on October 24, 2023.

A handwritten signature in blue ink, appearing to read "R. Pitman", written over a horizontal line.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Case No. 23-50696

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

MICHAEL NISSEN,

Defendant – Appellant,

v.

JAVIER AMBLER, SR. and MARITZA AMBLER, individually, on behalf of all wrongful death beneficiaries of JAVIER AMBLER, II, on behalf of the ESTATE OF JAVIER AMBLER, II, and as next friend of J.R.A., a minor child; and MICHELE BEITIA, as next friend of J.A.A., a minor,

Plaintiffs – Appellees.

On Appeal from the United States District Court
For the Western District of Texas, Case No. 1:20-cv-1068
Hon. Robert Pitman, District Judge

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Interested Party	Interest
Javier Ambler, Sr. Maritza Ambler, J.R.A., a minor child, Michele Beitia, J.A.A., a minor child.	Plaintiffs-Appellees
Jeff Edwards David James Paul Samuel Lisa Snead EDWARDS LAW 603 W 17th St. Austin, TX 78701	Counsel for Plaintiffs-Appellees Javier Ambler SR., Maritza Ambler, and JRA
Antonio M. Romanucci Bhavani Raveendran Javier Rodriguez ROMANUCCI & BLANDIN, LLC 321 N. Clark Street, Suite 900 Chicago, Illinois 60654	Counsel for Plaintiffs-Appellees Michele Beitia and J.A.A.

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Michael Nissen (hereinafter “Officer Nissen”) requests the opportunity to present oral argument to assist in the presentation of the issues, and because this Court’s decisional process would be aided by oral argument. This is a complex case involving the denial of qualified immunity for an excessive force claim and failure to intervene claim. This is an area of the law that this Court has held requires “careful attention to the facts and circumstances of each particular case...”¹

¹ *Salazar v. Molina*, 37 F.4th 278, 281 (5th Cir. 2022), cert. denied, 143 S. Ct. 1781 (2023).

STATEMENT OF THE RECORD

In compliance with Fifth Circuit Rule 28.2.2 and Fifth Circuit Court of Appeals Form 1, Guidance for Record References as directed by the Clerk of the Court, the Record on Appeal will be referenced following the short form “ROA” followed by a period, followed by the page number.

JURISDICTIONAL STATEMENT

This appeal arises from the denial of Officer Nissen’s motion for summary judgment based on his assertion that he is entitled to the defense of qualified immunity. On August 31, 2023, the Honorable Magistrate Judge Susan Hightower issued a Report and Recommendation that recommended denying, in part, Officer Nissen’s Motion for Summary Judgment based on qualified immunity.² Officer Nissen timely objected. On September 21, 2023, the district court issued an order adopting the Report and Recommendation.³ On September 25, 2023, Officer Nissen filed his Notice of Immediate Interlocutory Appeal.⁴

Under 28 U.S.C.A. § 1291, a district court’s denial of a motion for summary judgment is not generally a final decision that is immediately appealable. However, the denial of qualified immunity is immediately appealable under the collateral order doctrine when based on an issue of law.⁵ Accordingly, this Court does not have jurisdiction to review the genuineness of a fact issue identified by the district court precluding qualified immunity, but it may review the legal *materiality* of the district court’s identified fact issue precluding qualified immunity.⁶

² **ROA.7838 – 7986** (Report and Recommendation).

³ **ROA.8119 – 8120** (Order adopting Report & Recommendation).

⁴ **ROA.8121 – 8123**. (Notice of Appeal).

⁵ *Garcia v. Orta*, 47 F.4th 343, 349 (5th Cir. 2022); *see also Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

⁶ *Id.* at 350 – 51 (The one exception to this rule restricting this Court’s review is that “a court of appeals may consider, on interlocutory appeal, still photographs and video evidence to evaluate whether the district court erred by relying on the plaintiff’s version of the facts.”).

STATEMENT OF ISSUES PRESENTED

- (1) Did the lower court err in holding that a genuine issue of *material* fact—in light of the clear video evidence—precludes summary judgement on Appellees’ excessive force claim against Officer Nissen under *Graham* factors 2 and 3? Specifically, the court held that Officer Nissen could not reasonably view Ambler as an ongoing immediate threat until he was in handcuffs—despite the fact that Ambler previously led law enforcement on an extremely dangerous 22-minute high speed chase at speeds exceeding 100 MPH. Did the lower court further err in holding that the degree of Officer Nissen’s force was “deadly force”?
- (2) Did the lower court err in holding that *Darden v. City of Fort Worth, Texas* provided clearly established law that placed Officer Nissen on notice that the force he used on Ambler was unconstitutional—despite the fact that *Darden* never involved a suspect who had just committed the violent felony of evading in a motor vehicle?
- (3) Did the lower court err in holding that there was a genuine issue of *material* fact that Officer Nissen should have known that he needed to intervene to stop the first responding Williamson County Deputies from using a Taser on Ambler, and that Officer Nissen had a reasonable opportunity to stop the Taser from being used on Ambler?
- (4) Did the lower court err in holding that *Carroll v. Ellington* provided clearly established law that placed Officer Nissen on notice that his failure to intervene to stop the Taser was unconstitutional?

STATEMENT OF THE CASE

A. CAUSES OF ACTION ON APPEAL

1. The only relevant causes of action in this interlocutory appeal, as asserted by Plaintiffs—Appellees (hereinafter “Appellees”), originate from their live First Amended Complaint.⁷ Therein, they bring a 42 U.S.C. §1983 claim alleging that Austin Police Officer Michael Nissen used excessive force under the Fourth Amendment and failed to intervene to stop excessive force used by Williamson County Deputies James Johnson and Zachary Camden. Appellees also brought a deliberate indifference claim against Officer Nissen, but they failed to defend it on summary judgment, and it was dismissed.⁸

B. ASSERTED FACTS RELEVANT TO APPEAL.⁹

a. In the dark morning hours of March 28, 2019, Javier Ambler II acted on his pre-meditated decision to flee from police if he was ever hailed to pull over. He fled for over 20 minutes, at speeds over 100 MPH and crashed 3 times.

2. At 1:23 a.m. on March 28, 2019, decedent Javier Ambler II (hereinafter “Ambler”) was hailed to pull over for a routine traffic stop initiated by Williamson County Sheriff’s Deputy James Johnson.¹⁰ Unbeknownst to officers at the time,

⁷ **ROA.349 – 350.**

⁸ **ROA.7942** (Recommending dismissal of this claim as abandoned).

⁹ Officer Nissen acknowledges that Appellees dispute some of the statements in this Section, but Nissen asserts that all of these facts are either uncontroverted or clearly depicted by the video evidence.

¹⁰ **ROA.3608** (Williamson County’s written investigation).

Ambler weighed 410 pounds, had a “markedly enlarged heart,”¹¹ had poorly treated congestive heart failure and a plethora of other medical problems.¹² Ambler was in such poor health that his ability to breathe merely at rest was compromised, and he needed numerous medications to survive his heart problems. Generally, Ambler was so ill that Appellees expert concedes that he was impaired in his ability merely to “survive in high intensity situations...”.¹³

3. Nevertheless, Ambler thrust himself into such a high-intensity situation when he committed to a premeditated decision to flee from law enforcement—in this case Deputy Johnson’s traffic stop. Also, unknown to officers at the time, Ambler was an illegal narcotics dealer well known for selling large amounts of cocaine, pills and weed at various gambling establishments in the area, and Ambler had told his friend just two nights previously that it was his premeditated plan to flee from police if he ever encountered law enforcement.¹⁴

4. That was just what happened here. At the beginning, Deputy Johnson simply called out over the radio that he was conducting a traffic stop on an individual later known to be Ambler.¹⁵ Then, Ambler failed to stop, and began fleeing in his car.

¹¹ **ROA.5023** (Travis County Medical Examiner’s characterization of Ambler’s heart).

¹² **ROA.3937** (Defense Expert Dr. Bux noting uncontroverted that Ambler had numerous medical problems that he did not seek treatment for, in addition to using marijuana and methamphetamine).

¹³ **ROA.5060** (Plaintiffs’ cardiac expert’s characterization of Ambler’s poor health).

¹⁴ **ROA.3482 – 3483**; *see also* **ROA 3519** (Defendant’s Exhibit 2, 34:48 – 37:25) (Informant telling police that Ambler had previously told him he would run if confronted by police).

¹⁵ **ROA.3608**; *United States v. Harrimon*, 568 F.3d 531, 532 (5th Cir. 2009).

What followed was a frantic flight from police for approximately 22 minutes—a violent felony under the law.¹⁶ The pursuit was captured on Deputy Johnson’s dash camera.¹⁷ Ambler then led police on an outrageous and life-threateningly dangerous pursuit as he fled at speeds exceeding 100 MPH¹⁸ while running red lights and weaving in and around traffic.¹⁹ During the chase, Deputy Johnson radioed that “this guy is determined to get away from us,” and “I don’t know what we are chasing—a murder suspect or it could be a drunk driver.” Finally, Deputy Johnson stated, while in pursuit, “I’m fully expecting that if this comes to a stop this guy is going to run or fight...because he hasn’t shown any signs he is ready to submit [to arrest].”²⁰

5. Ambler crashed his car two times during his continued attempt to escape, leaving debris from his car on the road.²¹ After 20 minutes, Ambler re-entered Interstate Highway 35, still fleeing at a high rate of speed.²² He continued to weave through traffic and attempted to lose law enforcement by driving on the shoulder. This portion of the chase was partially captured by the police helicopter that the

¹⁶ **ROA.3628 – 3631** (Mapped route of Ambler’s flight in his motor-vehicle); *see* TEX. PENAL CODE § 38.04.

¹⁷ **ROA.3642** (Defendants’ Exhibit 11, 00:00 –22:37) (Ambler’s flight from arrest as captured on Deputy Johnson’s Dash Camera).

¹⁸ **ROA.3645** (APD investigative summary).

¹⁹ **ROA.3642** (Defendants’ Exhibit 11, 20:30 – 22:15).

²⁰ **ROA.3642** (Defendants’ Exhibit 11, 15:15 – 15:25 (get away), 16:30 – 16:50 (murder suspect), 17:16 – 17:32 (expecting a fight)).

²¹ **ROA.3633 – 3639** (crash reports); **ROA.3640 – 3641** (concrete wall report).

²² **ROA.3642** (Defendants’ Exhibit 11, 19:56).

Austin Police Department deployed to monitor Ambler. Ambler eventually exited the highway, still fleeing.²³

b. Meanwhile, Austin Police Officer Michael Nissen was monitoring the chase on the radio, and attempted to deploy stop sticks before Ambler sped by his location.

6. At the time, Austin Police Officer Michael Nissen was on patrol in his marked police vehicle when he learned from listening to his radio that a suspect was fleeing from Williamson County Deputies in a motor vehicle.²⁴ Officer Nissen received clearance from his chain of command to trail the pursuit, which meant he had clearance to get in an area where the chase was anticipated to go, set up stop sticks, and then potentially assist with the felony car stop. The chase then left Officer Nissen's location, but Nissen remained in the area in case Ambler doubled back.²⁵

7. Officer Nissen continued to listen to Dispatch and heard over the radio that Ambler had "wrecked out at least once" and was now doubling back toward Nissen's location near the IH-35 northbound service road.²⁶ Officer Nissen's body-camera was activated at this time, and it began to capture the incident. Officer Nissen accordingly positioned his vehicle back on the service road in Ambler's anticipated

²³ **ROA.3624** (Defendants' Exhibit 6, 00:00, (footage begins with Ambler on I35), 01:30 (exits IH-35)).

²⁴ **ROA.3821** (Noting that a Dispatch had announced over the radio that a significant chase was going on).

²⁵ **ROA.3821.**

²⁶ **ROA.3821 – 3822.**

flight path, and he notified Dispatch he would attempt to deploy stop sticks.²⁷ With his lights activated, Officer Nissen stopped and exited his vehicle. Almost immediately, Ambler's wrecked out car sped right past Nissen. Officer Nissen then observed Ambler spinout sideways, almost hit cars stopped at the traffic light up ahead, and then go over the sidewalk before hitting some poles.²⁸ This spinout was captured by the helicopter footage.²⁹ The sound of the crash was so loud that Officer Nissen assumed Ambler's vehicle would be disabled—but Ambler managed to continue fleeing and Nissen announced on the radio that he thought Ambler was “gone.”³⁰

8. Shortly thereafter Officer Nissen heard over the radio that Ambler's vehicle had crashed yet again and was now stopped, with “only two deputies” there to engage Ambler. Officer Nissen then informed Dispatch that he would assist with the felony car stop.³¹

c. After Ambler crashed for a third and final time, Deputies Johnson and Camden arrived on scene and exited their vehicles to make a felony car stop arrest and tased Ambler when he failed to obey an order to get on the ground. Officer Nissen was not yet on scene at these times.

²⁷ **ROA.3643** (Defendant's Exhibit 12, 1:15 – 1:30 (Nissen stating he could deploy stop sticks on the northbound service road), 2:30 (stating he would deploy the spikes)).

²⁸ **ROA.3643** (Defendant's Exhibit 12, 02:50 – 02:57 (Ambler's car driving past Nissen)); **ROA 3821 – 3822** (Nissen's description of Ambler's car and the crash he observed).

²⁹ **ROA.3624** (Defendant's Exhibit 6, 2:25 – 2:37).

³⁰ **ROA.3643** (Defendant's Exhibit 12, 03:40 – 03:45).

³¹ **ROA 3822; ROA.3643** (Defendant's Exhibit 12, 17:53 – 20:05 (capturing Officer Nissen recounting what occurred during the pursuit and his observation that only two deputies were at the scene)).

9. Deputy Johnson was still in pursuit when Ambler passed Officer Nissen on the side of the road.³² After the spinout, Ambler managed to flee for two more turns before he crashed his car—for a final time—into a tree or shrub on the side of the road. This can be seen on Deputy Johnson’s dash camera.³³

10. At **Dash 22:35**, Deputy Johnson exited his police cruiser and began giving commands for Ambler to exit his vehicle and get on the ground. At **Dash 22:40**, Deputy Johnson can be seen on the left side of the video pointing his Taser at Ambler while he continued to order Ambler to get on the ground. Ambler does not comply, and at **Dash 22:45** Deputy Johnson deployed his taser device, and Ambler dropped to the ground. The wires connecting the taser to Ambler can be seen clearly between **Dash 22:48 – 22:50**.³⁴

11. At **Dash 22:49**, Deputy Camden arrived and rushed to help Deputy Johnson. The two deputies gave Ambler more commands to get on the ground and roll over. The deputies then attempted to get Ambler to lay completely flat on the ground in the prone position so that his hands could be placed behind his back so that Ambler could be safely handcuffed. Officers are trained that it is safest to place a high-risk and resisting suspect face down for handcuffing to limit their ability to attack with

³² **ROA.3642** (Defendants’ Exhibit 11, 22:00 – 22:10).

³³ **ROA.3642** (Defendants’ Exhibit 11, 22:30).

³⁴ **ROA.3642** (Defendants’ Exhibit 11).

their limbs and to prevent them from deploying a weapon that might be hidden on their person.³⁵ Ambler continuously refused to comply with this instruction. Instead, Ambler held his upper body up in the air as the deputies yelled at him to get on the ground “all the way!” At **Dash 22:57**, the deputies used knee strikes on Ambler in an attempt to gain compliance. Simultaneously, one of the deputies asked, “where is APD?”³⁶

d. Officer Nissen arrived on scene to assist with Ambler’s felony arrest. Based on the totality of the circumstances, Officer Nissen decide he would use minimal force to handcuff Ambler.

12. Thirty-one seconds after Deputy Johnson made contact with Ambler, and fourteen seconds after the deputies asked where APD back-up was—Officer Nissen arrived on scene at **Dash 23:11**. He entered the dash-camera’s frame from the left-hand side.³⁷ Officer Nissen’s body-worn camera (BWC) recorded him arriving at media timestamp **BWC 04:15**.³⁸ Due to his late arrival, Nissen never saw Ambler in the moments after the chase ended or if Ambler purported to surrender in those moments. Officer Nissen accordingly never saw Ambler exit his vehicle with his hands raised, nor did he see Ambler get tased for the first time—which was the only

³⁵ **ROA.3886** (Defendant’s Expert discussing why the prone position is used on high-risk suspects at ¶74).

³⁶ **ROA.3642** (Defendant’s Exhibit 11, 22:50 – 23:57).

³⁷ **ROA.3642** (Defendant’s Exhibit 11, 22:40 (Deputy Johnson makes contact), 22:57 (deputies ask where APD is), 23:11 (Nissen arrives)).

³⁸ **ROA.3643** (Defendant’s Exhibit 12, 04:15).

traditional Taser deployment that occurred.³⁹ Nor did Officer Nissen ever allegedly observe Ambler obeying a command to rollover.⁴⁰

13. The video evidence thus reveals that Officer Nissen was not present to see if Ambler attempted to violently resist arrest when he exited his car—which necessarily would have affected the level of force the deputies were using to place Ambler in handcuffs. Accordingly, when Officer Nissen pulled up to the scene he had only the following knowledge: “that [the suspect] was just involved in a vehicle pursuit where he was driving very recklessly, crashing, [and] fleeing the scene of collisions; that [the suspect] almost hit [him] when he sped past [Nissen] and lost control and then almost hit vehicles at the intersection;” and that Ambler was “a pretty obvious threat to the public at that point.”⁴¹

14. Officer Nissen also believed that because of Ambler’s prior behavior, he was a continuing threat until he was handcuffed. As Officer Nissen attested in his declaration:

Based on my perspective at the time, I determined that the totality of the circumstances warranted placing Mr. Ambler in handcuffs as soon as possible due to his prior dangerous behavior, and the fact that it did not appear to me that Ambler’s vehicle had been searched for weapons, nor had Mr. Ambler’s person been searched for weapons.⁴²

³⁹ **ROA.3676 – 3677** (Defendant’s expert’s analysis of the Taser usage).

⁴⁰ *Contra* **ROA.4863** (Plaintiffs’ Response in Opposition to Summary Judgment).

⁴¹ **ROA.3762; ROA.3804.**

⁴² **ROA.3846** (Nissen declaration at paragraph 5).

Officer Nissen gave identical testimony in his deposition:

There's still a threat that this individual is able to get back to the car and flee again. It's an obvious danger to the community and the officers. If he has a weapon on him, is he able to access that or stand up? He is a very large individual. That can be a threat. If he flees and tries to run into someone's, backyard or into their home, that could potentially be a threat. So the situation was still unsafe at that point....⁴³

...Mr. Ambler, as far as my knowledge what I understood, had not been frisked and the vehicle also had not been frisked or searched. So it is unknown if there's a weapon on the scene. And I can also tell you from my training and experience that, generally speaking, people don't just flee from the police in the manner that Mr. Ambler did for no reason. So that was also a red flag in his behavior.⁴⁴

15. With all this in mind, the first thing Officer Nissen did was perform a cursory look inside of Ambler's vehicle to determine if there were other suspects inside. Afterwards, Officer Nissen turned his attention toward the two deputies who were "still struggling with the suspect."⁴⁵ Officer Nissen then decided he would assist by using to minimal force to place Ambler into handcuffs. *In total, Nissen used force for about 90 seconds.*⁴⁶ While using this force, Officer Nissen testified that he heard Ambler state he could not breathe. However, in weighing the totality of the circumstances, Officer Nissen testified that Ambler did not appear to be "having a medical emergency" because he could hear Ambler breathing. Officer Nissen also

⁴³ **ROA.3762; ROA.3804.**

⁴⁴ **ROA.3804** (Nissen deposition testimony).

⁴⁵ **ROA.3822; ROA.3643** (Defendant's Exhibit 12, 04:18 – 04:32); **ROA.3642** (Defendant's Exhibit 11, 23:20 – 23:22).

⁴⁶ **ROA.3643** (Defendant's Exhibit 12, 04:40 – 06:10).

determined that Ambler’s prior behavior made him such a threat that the situation warranted getting “Mr. Ambler into [handcuffs] as quickly as possible”⁴⁷

e. The full extent of Officer Nissen’s force is clearly depicted by Deputy Johnson’s dash camera (Dash) and Nissen’s body-worn camera (BWC).

16. The video evidence clearly shows all force used by Officer Nissen. First, at Nissen’s **BWC 4:40** and on Johnson’s **Dash 23:32**, Officer Nissen tells Ambler “alright big man, other hand now” as he attempts to handcuff Ambler. Officer Nissen then walks around and positions himself close to Ambler’s head. From **BWC 4:44 – 5:17** and **Dash 23:38 – 24:11**, Nissen can be seen using both his hands to control Ambler’s right arm so that he would be “flat on his stomach” to be handcuffed in the prone position. Next, Officer Nissen used both his hands to grab Ambler’s left hand, which was braced on the ground. However, by **BWC 05:25** and **Dash 24:19**, Ambler’s resistance was so effective that—despite three officers attempting to handcuff him while he was on his stomach—Ambler had managed to roll over onto his left elbow, off of his stomach, while remaining unhandcuffed.⁴⁸

17. At **Dash 24:22** and **BWC 5:28**, Officer Nissen placed his right hand on the back of Ambler’s head and attempted to push Ambler back over onto his stomach, while saying “get on your stomach.” Simultaneously, by **BWC 05:30** and **Dash**

⁴⁷ **ROA. 3809 – 3810.**

⁴⁸ **ROA.3643** (Defendant’s Exhibit 12, 05:25) (BWC); **ROA.3642** (Defendant’s Exhibit 11, 24:19)(Dash).

24:24, one of the deputies tased Ambler for the first and only time in Officer Nissen's presence.⁴⁹ Ambler was then rolled back onto his stomach and one of the deputies took hold of Ambler's right arm and placed it behind his back.⁵⁰ Meantime, until **BWC 5:50** and **Dash 24:44**, Officer Nissen simultaneously used his left hand to hold Ambler's head down, while using his knee on Ambler's left hand to keep him in the prone position.⁵¹ Nissen attested he only used enough force on Ambler's head to keep Ambler from pushing upwards again.⁵²

18. Then, a deputy stated that they needed one more set of cuffs to make a long enough chain to handcuff Ambler. At **BWC 5:52** and **Dash 24:46**, Officer Nissen handed the deputy his own set of handcuffs. Finally, between **Dash 25:00 – 25:05** and **BWC 06:04 – 06:09**, Officer Nissen placed his left knee on Ambler's left shoulder to hold it in place so that the handcuffs could finally be put on Ambler's wrists. Officer Nissen then immediately removed his knee and stepped back and away from Ambler. Once the handcuffs were secured, all officers on the scene stopped using force on Ambler.⁵³

⁴⁹ As revealed by the audible clicking sound on both media exhibits.

⁵⁰ The deputy stated that he might have broken one of Mr. Ambler's fingers during this moment.

⁵¹ **ROA.3643** (Defendant's Exhibit 12, 05:45) (BWC); **ROA.3642** (Defendant's Exhibit 11, 24:39)(Dash).

⁵² **ROA.3846**.

⁵³ **ROA.3643** (Defendant's Exhibit 12, 06:10) (BWC); **ROA.3642** (Defendant's Exhibit 11, 25:05)(Dash).

f. Once the handcuffs were on, officers on scene immediately sat Ambler up, then began to render aid when they realized Ambler was nonresponsive.

19. After the handcuffs were on, the deputies rolled Ambler onto his side and out of the prone position.⁵⁴ Moments later, one of the deputies noticed and announced that Ambler was unresponsive.⁵⁵ Officer Nissen instantly radioed in a request for EMS to come to the scene.⁵⁶ Officer Nissen returned to Ambler's side to render aid and asked him to "sit up, bud", while simultaneously bracing Ambler upright against his knee.⁵⁷ Deputy Camden then began rubbing Ambler's sternum in an attempt to determine if Ambler was just unconscious or was completely unresponsive. The officers—including Officer Nissen—then began to collectively check Ambler's vitals.⁵⁸ A deputy thought he could tell that Ambler was breathing, but then Officer Nissen checked and stated that he could not find a pulse. Officer Nissen then radioed that EMS needed to come "10-18", which is code that means using full lights and sirens to expedite medical assistance.⁵⁹

20. Officer Nissen then stated that Ambler's handcuffs needed to be removed so that he could be laid flat and begin CPR. Officer Nissen assisted in laying Ambler flat. He then stepped away from Ambler and moved to his police car to allow the

⁵⁴ **ROA.3642** (Defendant's Exhibit 11, 25:30)(Dash).

⁵⁵ **ROA.3642** (Defendant's Exhibit 11, 25:25 – 25:28)(Dash).

⁵⁶ **ROA.3643** (Defendant's Exhibit 12, 06:25 – 06:33).

⁵⁷ **ROA.3643** (Defendant's Exhibit 12, 06:38 – 06:40).

⁵⁸ **ROA.3643** (Defendant's Exhibit 12, 06:45 – 7:00).

⁵⁹ **ROA.3643** (Defendant's Exhibit 12, 07:00 – 07:55).

ambulance better access to the scene once it arrived.⁶⁰ Ambler was later declared deceased after being taken to the hospital. The Travis County Medical Examiner determined that Ambler died of congestive heart failure in combination with police restraint.⁶¹ The defense expert determined that “Mr. Ambler’s death by cardiac arrest [was] caused by a massive release of epinephrine and norepinephrine on an already failing heart.”⁶² Plaintiffs’ expert opined that Ambler died due to a “vicious cycle of worsening distress as a result of reduced cardiac function...” and claims that Ambler would not have died if officers had stopped attempting to restrain him.⁶³

C. COURSE OF PROCEEDINGS

21. Appellees filed their Original Complaint on October 25, 2020 solely against Williamson County, wherein they asserted a *Monell* claim arising out of Ambler’s death, and included numerous complaints about Williamson County Sheriff Chody’s decision to allow Live PD to film his deputies—including at this incident.⁶⁴

22. By March 26, 2021—Appellees filed their Live First Amended Complaint. This pleading added as new defendants: (1) Sherriff Chody; (2) Deputy Johnson; (3) Deputy Camden; (4) Officer Nissen, and (5) the City of Austin.⁶⁵ By November 23, 2021, Appellees and the Williamson County Defendants informed the district court

⁶⁰ **ROA.3643** (Defendant’s Exhibit 12, 07:00 – 10:55).

⁶¹ **ROA.5022.**

⁶² **ROA.3941.**

⁶³ **ROA.5061 – 5062.**

⁶⁴ **ROA.33 – 60.**

⁶⁵ **ROA.311.**

that they had reached a settlement.⁶⁶ On January 5, 2022, Appellees filed a partial motion to dismiss those defendants, noting that “Defendants City of Austin and Michael Nissen will remain in the case as defendants.”⁶⁷

23. On February 28, 2023, both the City of Austin and Officer Michael Nissen moved for Summary Judgment.⁶⁸ Plaintiffs filed a response, and Officer Nissen filed a reply in support.⁶⁹

D. DISPOSITION

24. On June 31, 2023, the Honorable Magistrate Judge Susan Hightower entered a Report and Recommendation (hereinafter the “R&R”).⁷⁰ Specifically, the R&R recommended that Officer Nissen’s motion for summary judgment be denied as it related to Appellees’ claims that Nissen (1) used excessive force and (2) failed to intervene as a bystander in violation of the Fourth Amendment.⁷¹

25. On August 22, 2023, Officer Nissen filed comprehensive objections to the R&R, to which Plaintiffs responded on September 15, 2023.⁷² On September 21, 2023, the district court entered a two-page order adopting the R&R without articulating an analysis on the merits of Officer Nissen’s objections.⁷³

⁶⁶ **ROA.915.**

⁶⁷ **ROA.930.**

⁶⁸ **ROA.2463** (City of Austin); **ROA.3388** (Officer Nissen).

⁶⁹ **ROA.4861** (Plaintiff response); **ROA.7455** (Nissen reply in support).

⁷⁰ **ROA.7938.**

⁷¹ **ROA.7967.**

⁷² **ROA.8038** (objections); **ROA.8075** (response).

⁷³ **ROA.8119 – 8120.**

E. APPEAL

26. On September 25, 2023, Officer Nissen filed his Notice of Interlocutory Appeal concerning the district court's order denying, in part, Officer Nissen's Motion for Summary Judgment based on qualified immunity.⁷⁴

SUMMARY OF THE ARGUMENT

27. Javier Ambler thrust himself into a high-intensity situation by choosing to flee from police for 22 minutes in a manner that was outrageous, offensive, and life-threateningly dangerous to every Texan who was unlucky enough to cross his path on the night of March 28, 2019. He crashed three times, and his actions amounted to a *violent* felony as a matter of law—a fact which the lower court overlooked. Ambler's flight at speeds exceeding 100 MPH demonstrated to all reasonable law enforcement involved that Ambler was capable of violence and had an escape at all cost mindset. Ambler died because, as his expert attests, he was in such poor health he could not survive a high intensity situation. Well, here Ambler himself created this high intensity situation, the consequence of which was 90 seconds of force so that he could be restrained in handcuffs.

28. Under this Court's precedent in *Salazar v. Molina*, it was reasonable as a matter of law under these facts for Officer Michael Nissen to perceive Ambler as an immediate threat due to his prior behavior, and reasonable for him to use force to

⁷⁴ ROA.8122 – 8123.

place Ambler in handcuffs as quickly as possible. It was also reasonable under these facts as a matter of law for Officer Nissen to suspect Ambler was resisting arrest and potentially engaging in “ploys” due to his highly dangerous flight from law enforcement, which revealed Ambler was potentially willing to kill to make good his escape.

29. Thus, when Officer Nissen arrived at the scene of Ambler’s third and final crash—after Ambler had already been tased—Officer Nissen had an abundance of cause to reasonably assume that Ambler was an enormous threat to (1) himself, (2) the Williamson County Deputies, and (3) the Texas public. Officer Nissen’s split-second decision to use force to help the Williamson County deputies place Ambler in handcuffs was eminently appropriate from the standpoint of an objectively reasonable officer. Due to Officer Nissen’s late arrival, it was also eminently reasonable for Nissen to presume that the deputies were using appropriate force and that he did not need to intervene.

30. Finally, no clearly established law in March of 2019 existed that placed it “beyond debate” that using this force, and failing to intervene to stop the deputies’ force, was unconstitutional *after* a suspect engaged in the violent felony of prolonged fleeing in a motor vehicle. Accordingly, Officer Nissen is entitled to qualified immunity for both of Appellees’ claims under both prongs of the defense.

ARGUMENTS & AUTHORITIES

A. Standard of Review: Qualified Immunity & Interlocutory Appeal.

31. This Court stated in *Morrow*, that “Qualified immunity includes two inquiries. The first question is whether the officer violated a constitutional right. The second question is whether the ‘right at issue was clearly established at the time of the alleged misconduct.’”⁷⁵ On Appeal, this Court can “decide one question or both.”⁷⁶

In *Mullenix*, the Supreme Court mandated, “[p]ut simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.”⁷⁷

32. This Court reviews the denial of a motion for summary judgment *de novo*.⁷⁸ As this Court stated best in *Garcia*, “[s]ince this is an interlocutory appeal of the district court’s denial of qualified immunity on summary judgment, [the Court’s] review is generally limited to the extent that it turns on an issue of law.”⁷⁹ Generally, “[w]hen the district court identifies a factual dispute, as it did here, we consider only whether the district court correctly assessed ‘the legal significance’ of the facts it ‘deemed sufficiently supported for purposes of summary judgment.’”⁸⁰

⁷⁵ *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019) (cleaned up).

⁷⁶ *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

⁷⁷ *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

⁷⁸ *Garcia v. Orta*, 47 F.4th 343, 348 (5th Cir. 2022) (citing *Joseph ex rel. Est. of Joseph v. Bartlett*, 981 F.3d 319, 331 (5th Cir. 2020)).

⁷⁹ *Id.*

⁸⁰ *Id.* (citing *Cole v. Carson*, 935 F.3d 444, 452 (5th Cir. 2019) (en banc)).

33. There is an exception. Since the Supreme Court’s decision in *Scott*, this Court has held that “a court of appeals may consider, on interlocutory appeal, still photographs and video evidence to evaluate whether the district court erred by relying on the plaintiff’s version of the facts.”⁸¹ This is done when the video blatantly contradicts the plaintiff’s version of the facts. This includes what can be heard, and not just seen, on the video record.⁸²

B. Qualified Immunity Prong 1: As a matter of law, the facts conclusively established by the video evidence reveal that Officer Nissen did not violate Ambler’s constitutional right to be free from excessive force under the *Graham* factors.

a. Legal Standard.

34. In *Deshotels* this Court noted that, “[a]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard.”⁸³ Pursuant to the Supreme Court’s seminal decision in *Graham*, “[d]etermining whether an officer’s use of force was objectively reasonable requires careful attention to the facts and circumstances of

⁸¹ *Id.* (citing *Curran v. Aleshire*, 800 F.3d 656, 663 – 64 (5th Cir. 2015)).

⁸² *d.* (citing *Rich v. Palko*, 920 F.3d 288, 295 (5th Cir. 2019)).

⁸³ *Deshotels v. Marshall*, 454 Fed. Appx. 262, 267 (5th Cir. 2011) (citing *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 487 (5th Cir. 2001)).

each particular case, including (1) the severity of the crime at issue, and (2) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”⁸⁴

35. These elements are referred to as the *Graham* factors. Additionally, the Court “must also account for the degree of force the officer used, because the permissible degree of force depends on the *Graham factors*.”⁸⁵ *Graham* also teaches that the

reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight....The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.⁸⁶

Finally, in cases where different officers used differing levels of force, the qualified immunity analysis requires that each officer’s use of force be analyzed separately.⁸⁷

36. Here, as Officer Nissen testified, and as can be clearly seen from the video evidence laid out *supra*, Nissen’s force was “minimal, it was brief, and it stopped immediately after Mr. Ambler was placed in handcuffs...”.⁸⁸ Accordingly, “the degree of force” that Officer Nissen individually used overwhelmingly passes the *Graham* factors on this record.⁸⁹ But Appellees argued in the lower court that Officer

⁸⁴ *Id.* (numerals added) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

⁸⁵ *Salazar v. Molina*, 37 F.4th 278, 281 (5th Cir. 2022).

⁸⁶ *Graham*, 490 U.S. at 396 – 97.

⁸⁷ *Kitchen v. Dall. Cty.*, 759 F.3d 468, 480 (5th Cir. 2014) (quoting *Atteberry v. Nocona Gen Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005)), *abrogated on other grounds by Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015).

⁸⁸ **ROA.3804.**

⁸⁹ *Salazar v. Molina*, 37 F.4th 278, 281 (5th Cir. 2022).

Nissen’s degree of force was the equivalent to *deadly* force “due to Ambler’s visible morbid obesity, his congestive heart failure” and statements he could not breath.⁹⁰ The R&R found that there were “genuine issues of material fact [] as to Plaintiffs’ deadly force claim.”⁹¹ The Magistrate erred in so holding.

b. Officer Nissen’s degree of force was not and cannot have been deadly force. If the R&R’s holding is not reversed, the *Graham* analysis for all Officers in the Fifth Circuit will be short circuited for cases involving an accidental death during arrest arising out of the most miniscule amount of force.

37. The video evidence conclusively shows that no officer was using deadly force to try and kill Ambler—and Officer Nissen extensively argued that point in the lower court.⁹² Appellees agreed in their briefing that Ambler essentially would not have died but for his expansive comorbidities.⁹³ The videos reveal that the deputies were using what this Court has called “intermediate force” and Officer Nissen was using what district courts across the Circuit have called “minimal force” or soft-hand force solely to effectuate placing Ambler into handcuffs.⁹⁴ For example, in *Ramirez v.*

⁹⁰ **ROA.4861.**

⁹¹ **ROA.7951.**

⁹² When the videos show the full interaction, a Court views the facts “in the light depicted by the videotape”. *Scott v. Harris*, 550 U.S. 372, 381 (2007); *see also Betts v. Brennan*, 22 F.4th 577, 582 (5th Cir. 2022); **ROA.7460**; **ROA.8053** (Nissen arguing the force used was not deadly force).

⁹³ *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 728 (5th Cir. 2018) (describing the suspect who also died of a heart attack during arrest as falling under the “eggshell skull” rule).

⁹⁴ *Ramirez v. Martin*, No. 22-10011, 2022 WL 16548053, at *3 (5th Cir. Oct. 31, 2022), cert. denied, 143 S. Ct. 2641 (2023); *see also Kalma v. City of Socorro, Tex.*, No. EP-06-CA-418-DB, 2008 WL 954165, at *7 (W.D. Tex. Mar. 17, 2008) (describing the use of force

Martin, an unpublished case, this Court described using a taser as “intermediate force” and pushing a suspect to the ground—as Officer Nissen did here—as less than intermediate force.⁹⁵

38. In 2016 in *Brothers v. Zoss*, this Court rejected a plaintiff’s characterization of force as “tantamount to deadly force” just because it resulted in a suspect’s death.⁹⁶ Instead, this Court recognized, in accord with the Supreme Court’s holding in *Mullenix v. Luna*, that “[f]orce is not necessarily deadly *even where it results in death*.”⁹⁷ In *Brothers*, officers confronted a man suspected of being drunk in his car with the engine running in a parking lot. Similar to Ambler, this suspect was of a “great weight”, weighing 350 pounds despite being 5 feet 10 inches tall.⁹⁸ The suspect refused to get out of his car after two minutes of negotiating, officers eventually grabbed the suspect’s arm and attempted to pull him out of the pick-up truck so that he could be taken into custody.⁹⁹

continuum); *Johnson v. Byrd*, No. 2:12-CV-77-KS-MTP, 2013 WL 3884126, at *5 (S.D. Miss. July 26, 2013) (“minimal force” as a term used to describe a “flat-handed strike and grab”); *see also Johnson v. Harris Cnty*, No. CV H-21-1558, 2022 WL 4137842, at *4 (S.D. Tex. Sept. 9, 2022) (describing grabbing arms as “minimal force” despite the fact the suspect slipped and injured himself).

⁹⁵ *Ramirez*, No. 22-10011, 2022 WL 16548053, at *3.

⁹⁶ *Brothers v. Zoss*, 837 F.3d 513, 520 (5th Cir. 2016).

⁹⁷ *Id.* (*Mullenix v. Luna*, 577 U.S. 7, 17 (2015) (Scalia, J. concurring) (“It does not assist analysis to refer to all use of force that happens to kill the arrestee as the application of deadly force. The police might, for example, attempt to stop a fleeing felon’s car by felling a large tree across the road; if they drop the tree too late, so that it crushes the car and its occupant, I would not call that the application of deadly force. Though it was force sufficient to kill, it was not applied with the object of harming the body of the felon.”).

⁹⁸ *Id.* at 516, n.1.

⁹⁹ *Id.*

39. Due to his weight, when the *Brothers* suspect was yanked out of the car by two officers, he fell and landed hard on the pavement with such force that it cracked his vertebrae, rendering him a quadriplegic—which allegedly caused his death a few months later.¹⁰⁰ In holding that this was not a use of deadly force, this Court noted that the *Brothers* suspect’s serious injury was not foreseeable to a reasonable officer.¹⁰¹

40. It was just as unforeseeable to Officer Nissen in the case at hand that his mere 90 seconds of force—the majority of which was soft-hand controls on Ambler’s hands, wrists, and head—would result in Ambler’s serious bodily injury or death. As Appellees’ own expert concedes, Ambler was in such poor health that his mere ability to survive in high-intensity situations was “substantially impaired.”¹⁰² Yet Ambler *himself* thrust himself into a high-intensity situation by making his premeditated decision to run from police for 22 minutes at speeds exceeding 100 MPH.

41. It is anathema to common sense to expect every reasonable officer to believe that an individual like Ambler could simultaneously be fit enough to engage in his outrageous, offensive, and life-threateningly dangerous flight from police for nearly half an hour, while also simultaneously expecting every reasonable officer to believe

¹⁰⁰ *Id.* at 515 – 516.

¹⁰¹ *Id.* at 519 – 520.

¹⁰² **ROA.5060.**

that there was a “substantial risk of death or serious bodily injury” to that same individual if they were to subject him to 90-seconds of intermediate or less force to place him in handcuffs.¹⁰³

42. In *Scott v. Harris*, the Supreme Court held that there is no “magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute “deadly force.”¹⁰⁴ Instead, it is not “whether or not [the officer’s] actions constituted application of “deadly force”, all that matters is whether [the officer’s] actions were reasonable”¹⁰⁵. In *Aguirre*—a case that the R&R relied on to hold that Officer Nissen must face a jury on the question of deadly force¹⁰⁶—this Court recognized the Supreme Court’s mandate in *Scott* and noted that all claims for excessive force were broadly analyzed under the same general rubric of “reasonableness as other excessive force claims.”¹⁰⁷ This requires “a balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”¹⁰⁸

43. However, the *Aguirre* Court then constrained its analysis—as the R&R did here—to requiring that those officers show that they perceived “that the suspect

¹⁰³ *Aguirre v. City of San Antonio*, 995 F.3d 395, 413 (5th Cir. 2021).

¹⁰⁴ *Scott v. Harris*, 550 U.S. 372, 382 (2007).

¹⁰⁵ *Id.*

¹⁰⁶ **ROA.7949.**

¹⁰⁷ *Aguirre*, 995 F.3d at 412 (this portion of the *Aguirre* opinion was decided 2 – 1. Section II.B. was not joined by any Judge other than Judge Dennis).

¹⁰⁸ *Timpa v. Dillard*, 20 F.4th 1020, 1028 (5th Cir. 2021), cert. denied, 142 S. Ct. 2755 (2022).

posed a threat of serious physical harm, either to the officer or to others” else their use of force would be unreasonable under the Fourth Amendment.¹⁰⁹ This is a recent line of case law, arising from *Aguirre* and later *Timpa*—wherein this Court analyzed accidental “deadly force”—i.e., the officers were not purposefully trying to use deadly force¹¹⁰—in cases involving maximal or prone restraint. Specifically, this Court noted in *Aguirre* in footnote 10 that its precedents “do not clearly require looking to a law enforcement officer’s subjective awareness of the risks involved when determining whether a technique [like prone restraint] constitutes deadly force.”¹¹¹

44. But neither of these cases held that a fact question regarding deadly force could be sustained for such a miniscule duration and type of force as Officer Nissen used here. In *Timpa*, the suspect had been restrained face down for “over fourteen minutes.”¹¹² In *Aguirre* the suspect was face down “in the maximal-restraint position for over five minutes.”¹¹³ With the video clearly showing such minimal force by Officer Nissen, this Court should view the facts in light of the videotape, instead of the facts as presented by Appellees and their experts.¹¹⁴

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at fn. 10 (acknowledging that the opinion was discounting the officer’s subjective awareness of using deadly force).

¹¹¹ *Id.* at n. 10.

¹¹² *Timpa*, 20 F.4th at 1036.

¹¹³ *Aguirre*, 995 F.3d at 408.

¹¹⁴ *Scott*, 550 U.S. at 380 (stating the court should view the facts in light of the videotape because the plaintiff’s side was discredited by the videotape).

45. When Officers perceive a threat of serious bodily harm or death to themselves or others, the record attests that officers are trained to use their firearms and “all tools” to combat that threat.¹¹⁵ But if a suspect dies *by accident* in the course of an arrest, then officers *were necessarily not attempting to use deadly force* on the suspect—almost assuredly because the officers *did not perceive a threat of serious harm or death from that suspect*. But, if courts in the Fifth Circuit under *Timpa* and *Aguirre* are always mandated to apply the deadly force standard—even in an accidental death case—then the Fourth Amendment’s general reasonableness test will necessary be short-circuited.

46. Essentially, if that’s the case, then officers will *always* lose their qualified immunity in a case involving an accidental death. This would be in contravention to *Scott*, which teaches “[w]hether or not [the officer’s] actions constituted application of “deadly force,” all that matters is whether [the officer’s] actions were reasonable.”¹¹⁶ Accordingly, to the extent that *Aguirre* and *Timpa* have created confusion amongst the district courts, this Court should reaffirm here that there is no requirement in the Fifth Circuit to constrain every accidental death case with the deadly force analysis.

¹¹⁵ **ROA.3881**

¹¹⁶ *Scott*, 550 U.S. at 383.

47. Such a holding would be well within this Court’s past jurisprudence. In *Deshotels*, officers approached a man who had been restrained by a citizen as a burglary suspect. The officers ultimately tackled the suspect after he tried to flee on foot.¹¹⁷ The suspect was forced to the ground face down, and the arresting officer got on his back and tried to pull his left arm behind him, but the suspect continued to keep his arm under his chest away from the officer. The other assisting officer put his legs over the suspect’s back to hold him down in the prone position.

48. The arresting officer warned that if he did not surrender his hands he would be tased. After the suspect failed to comply again, the original officer performed one drive stun and then another. After the second tasing, the officers were able to finally apply the handcuffs.¹¹⁸ The two assisting officers are even noted to have heard beforehand the warnings indicating that the suspect was going to be tased each time.¹¹⁹ The suspect was subsequently found to be unresponsive and ultimately died, with the plaintiffs’ expert claiming the death was caused by to asphyxia and compression of the chest from the weight of the officers.¹²⁰

49. This Court granted the *Deshotels* officers qualified immunity—because no constitutional violation occurred—after undertaking the *normal* Fourth Amendment

¹¹⁷ *Deshotels*, 454 F. App'x at 264.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at n. 7.

¹²⁰ *Id.* at 264.

analysis under the *Graham* factors.¹²¹ Specifically, this Court noted that “in light of the above described circumstances, the officers’ actions were objectively reasonable...”.¹²² At no point in *Deshotels* did this Court require those officers to proffer that they perceived a threat of serious bodily injury or death before using the force that they did—even though the suspect accidentally died as a result.

50. Even *Darden v. City of Fort Worth*—a case that Appellees incorrectly claimed in the lower court was “on all fours”¹²³ with this case and the R&R used to deny Officer Nissen qualified immunity on the second prong¹²⁴—can offer some guidance to rebut the argument that this case must be analyzed as constrained by the deadly force standard. In *Darden*, this Court never held that *Darden*’s death made the degree of force that the Fort Worth officers used *per se* unreasonable as deadly force. Instead, this Court merely held that—since *Darden* had *never* attempted to flee—that there was a fact question about qualified immunity because “when an arrestee is not actively resisting arrest the degree of force an officer can employ is reduced.”¹²⁵

51. Indeed, this Court noted that “[the officer’s] decisions to force Darden to the ground and tase him might have been reasonable...”, despite his death, if Darden

¹²¹ *Id.*

¹²² *Id.*

¹²³ **ROA.4881** (ignoring the fact that Darden never ran).

¹²⁴ **ROA.7952** (R&R holding that *Darden* put Officer Nissen on notice that it was clearly established that his conduct was unconstitutional).

¹²⁵ *Darden v. City of Fort Worth, Tex.*, 880 F.3d 722, 731, 732 (5th Cir. 2018).

was resisting arrest, but that this Court could not tell if that was true due to an unclear video.¹²⁶ At bottom, despite the fact that Darden arguably died of a heart attack due to officer force, this Court analyzed the case under the “intermediate” use of force standard, which generally holds that a “constitutional violation can occur when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest.”¹²⁷

52. For all of these reasons, the R&R erred when it held that this case must be constrained by the deadly force analysis.¹²⁸

c. In the alternative, if this Court determines that *Timpa* and *Aguirre* apply as the R&R held, then this Court should rule that Officer Nissen could reasonably perceive Ambler posed a threat of serious harm until handcuffed.

53. In the alternative, if there was ever a case where an officer could satisfy the difficult standards articulated in *Aguirre* and *Timpa*—that the subject “posed a threat of serious harm” when subjected to restraint¹²⁹—it is this case. As will be explored in the *Graham* factors *infra*, under this Court’s precedent: (1) Ambler had committed the violent crime of evading in a motor vehicle; (2) he was an immediate threat because his desperate flight had subjected the public to the “serious potential risk of

¹²⁶ *Id.* at 731

¹²⁷ *Id.* (the Fifth Circuit noting that it has “previously suggested that a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest.”).

¹²⁸ **ROA.7949.**

¹²⁹ *Timpa*, 20 F.4th at 1032.

injury to another”¹³⁰; and (3) reasonable officers were permitted to be suspicious that Ambler’s actions once cornered were a dangerous ploy due to “the preceding high-speed chase” until he was restrained—meaning *handcuffed*.¹³¹ Under all the facts briefed, a reasonable officer could have believed that Ambler posed a threat of serious bodily harm to the public or the officers if he was allowed to remain unrestrained.¹³²

d. Under the Fourth Amendment’s general reasonableness test pursuant to the *Graham* factors, Officer Nissen’s use of force was objectively reasonable under the totality of the circumstances.

i. First *Graham* factor.

54. The first *Graham* factor is “the severity of the crime at issue.”¹³³ This Court has held that “fleeing by vehicle is a purposeful, violent, and aggressive felony under Texas law.”¹³⁴ In the district court below, the R&R correctly determined that the first *Graham* factor—the severity of the crime—weighed in Officer Nissen’s favor that the force he used was not excessive.¹³⁵ In so finding, the R&R correctly determined

¹³⁰ *Harrimon*, 568 F.3d at 536.

¹³¹ *Salazar*, 37 F.4th at 284 (emphasis added).

¹³² Even though Officer Nissen testified deadly force was unreasonable, the only relevant question to this Court’s inquiry is “that an objectively reasonable officer in [Nissen’s] position [could] believe that [Ambler] posed a threat of serious harm.”). *Guerra v. Bellino*, 703 Fed. Appx 312, 317 (5th Cir 2017).

¹³³ *Id.* at 281.

¹³⁴ *Ramirez*, 2022 WL 16548053 at *2 (citing *U.S. v. Harrimon*, 586 F.3d 531, 534, 547 (5th Cir. 2009)).

¹³⁵ **ROA.7945.**

that the crime at issue was “[e]vading arrest in a motor vehicle” under Texas Penal Code §38.04, which was a serious crime that endangers the public.¹³⁶

55. However, the R&R’s analysis neglected that this is also a *violent crime* under this Court’s precedent. This distinction with a difference is relevant to errors that the R&R made in its analysis of the second and third *Graham* factors. For instance, the R&R erroneously relied on *Cooper v. Brown* in footnote 1 for the proposition that Officer Nissen could not reasonably view Ambler as an immediate threat because Ambler had not been searched for a weapon. But that part of *Cooper’s* holding explicitly did not apply if, “for example a plaintiff is suspected of committing a *violent* crime...”.¹³⁷

56. In *Harrimon*, this Court determined that fleeing by vehicle in violation of Texas Penal Code §38.04, qualified as a “violent felony” under the Armed Career Criminal Act—even though there was no evidence in the record that Harrimon had struck someone with his car while fleeing.¹³⁸ In so holding, this Court explained that:

This disobedience [fleeing in a vehicle] poses the threat of a direct confrontation between the police officer and the occupants of the vehicle, which, in turn, creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders....

¹³⁶ TEX. PENAL CODE § 38.04.

¹³⁷ See **ROA.7946**; *contra Cooper v. Brown*, 844 F.3d 517, 523 (5th Cir. 2016) (“Brown contends that the fact that Cooper was unsearched made Cooper more of a threat. Although this will sometimes be a relevant fact—for example, *where a plaintiff is suspected of committing a violent crime*—it is not enough, standing alone, to permit a reasonable officer to characterize a suspect as an immediate threat”) (emphasis added).

¹³⁸ *Harrimon*, 568 F.3d at 532.

[I]n the typical case, an offender fleeing from an attempted stop or arrest will not hesitate to endanger others to make good his or her escape. Under the stress and urgency which will naturally attend his situation, a person fleeing from law enforcement will likely drive recklessly and turn any pursuit into a high-speed chase with the potential for serious harm to police or innocent bystanders.¹³⁹

In *Ramirez*, this Court explicitly applied *Harrimon* in a qualified immunity case to hold that “fleeing by vehicle is a purposeful, **violent, and aggressive felony** under Texas law” as a matter of law—again when the record did not contain evidence that the fleeing suspect actually struck anyone with their car.¹⁴⁰ Accordingly, this first *Graham* factor weighs heavily in favor of Officer Nissen’s qualified immunity.

ii. Second *Graham* factor.

57. The second *Graham* factor is “whether the suspect poses an immediate threat to the safety of the officers or others.”¹⁴¹ The question before this Court on appeal under this factor is whether a **reasonable officer** could have believed Ambler was an ongoing immediate threat—after committing the violent crime of evading in a motor vehicle—until he was safely secured in handcuffs.

58. Under this Court’s precedent,¹⁴² the answer should unambiguously be “yes.” The R&R erroneously reached the opposite conclusion by deemphasizing key portions of this Court’s seminal analysis on this issue in *Salazar v. Molina*. Instead,

¹³⁹ *Id.* at 536 (cleaned up).

¹⁴⁰ *Ramirez*, 2022 WL 16548053 at *3 (emphasis added).

¹⁴¹ *Salazar*, 37 F.4th at 282.

¹⁴² *Id.*

the R&R deemphasized *Salazar*'s language and logic, and instead relied on *Cooper v. Brown*¹⁴³ and *Austin v. City of Pasadena*¹⁴⁴ for the proposition that force should have stopped once Ambler was merely “subdued.”¹⁴⁵ Those cases were off point for this qualified immunity analysis because neither involved the *violent crime* of evading in a motor vehicle.¹⁴⁶

59. In *Salazar*, a Zapata County sheriff's deputy tried to pull over a suspect for speeding. Instead of surrendering, the suspect took off in his car—leading the police on a high-speed chase of 70 MPH for approximately five minutes. Eventually, two vehicles pulled in front of the *Salazar* suspect—cutting off his escape. The suspect then got out of his car, dropped to his knees, raised his hands, and put his stomach on the ground. Yet when the deputy arrived, he tased the *Salazar* suspect in the back for six seconds before handcuffing him.¹⁴⁷ The *Salazar* suspect sued for excessive force, claiming that no reasonable officer would have seen him as an immediate threat because he was cornered and had surrendered. The district court denied the deputy's motion for summary judgment, holding—just as the R&R held here—that

¹⁴³ *Cooper*, 844 F.3d at 523.

¹⁴⁴ *Austin v. City of Pasadena, Tex.*, 74 F.4th 312, 326 (5th Cir. 2023).

¹⁴⁵ **ROA.7947.**

¹⁴⁶ *Cooper*, 844 F.3d at 523 n.2 (Explicitly “suggesting that an unsearched suspect of a *violent crime* [such as fleeing in a motor vehicle] may pose a credible threat.”) (emphasis added).

¹⁴⁷ *Salazar*, 37 F.4th at 280.

“there were material factual disputes as to whether a reasonable officer would have viewed [the *Salazar* suspect] as an immediate threat...”¹⁴⁸

60. This Court emphatically disagreed on this score, and noted that this holding:

[C]omports with neither common sense nor our precedent. First, as a matter of common sense, *what preceded the surrender matters*. A reasonable officer will have little cause to doubt the apparent surrender of a compliant suspect who has not engaged in dangerous or evasive behavior. But when a suspect has put officers and bystanders in harm’s way to try and evade capture, it is reasonable for officers to question whether the now-cornered suspect’s purported surrender is a ploy. That’s especially true when (1) a suspect is *unrestrained*, (2) in close proximity to the officers, and (3) potentially in possession of a weapon.¹⁴⁹

61. In the lower court, the R&R’s analysis of the above *Salazar* standard was deemphasized into one sentence. The R&R glossed that in *Salazar*, “[t]here was no genuine issue of material fact that the plaintiff posed an immediate threat when the force was used.” Specifically, the R&R held that a fact question existed as to if a “reasonable officer would believe that Ambler” was not an immediate threat because he was “subdued” by the time Nissen arrived.¹⁵⁰

62. But this holding ignores *the reason* that this Court held that the *Salazar* deputy was reasonably permitted to view the suspect as an immediate threat as a matter of law. Specifically, this Court held that a reasonable officer could view the *Salazar*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 282 (emphasis added) (numerals added).

¹⁵⁰ **ROA.7947.**

suspect’s surrender *as a ploy* because he had just committed the dangerous and violent felony of fleeing in a motor vehicle and (1) was still *unrestrained*, (2) was in close proximity to officers, and (3) was potentially in possession of a weapon.¹⁵¹ Ambler fits these criteria hand to glove, and Officer Nissen attested that he knew Ambler had previously behaved violently and feared he was armed.¹⁵² As the *Salazar* panel explained, such a suspect “cannot refuse to surrender and instead lead police on a dangerous hot pursuit—and then turn around, appear to surrender, and receive the same Fourth Amendment protection from intermediate force he would have received had he promptly surrendered in the first place.”¹⁵³

63. Accordingly, under this Court’s precedent, Officer Nissen could reasonably believe that Ambler was an ongoing immediate threat—due to his prior dangerous behavior, and because Ambler’s person and car had not been searched for weapons—until he was handcuffed. In both *Salazar* and *Ramirez*, this Court specifically used the word “unrestrained” or “restrained” instead of the word “subdued” when it analyzed when a suspect was no longer an immediate threat after they had led the police on a high-speed chase in a motor vehicle.¹⁵⁴ The R&R erred as a matter of law when it held otherwise.

¹⁵¹ *Salazar*, 37 F.4th at 282.

¹⁵² **ROA.3846** (attested he witnessed Ambler’s prior dangerous behavior); **ROA.3763** (unknown if armed).

¹⁵³ *Id.*

¹⁵⁴ **ROA.8049 – 8050** (Nissen extensively briefing this issue in the lower court); *see also Salazar*, 37 F.4th at 282, 284, 287; *see also Ramirez*, 2022 WL 16548053 at *1, *3.

iii. Third *Graham* factor.

64. “The third *Graham* factor is whether the suspect is actively resisting arrest or attempting to evade arrest by flight.”¹⁵⁵ This third factor “largely folds into the second. If the suspect may have posed a threat, then he also might have attempted to flee.”¹⁵⁶ In *Salazar*, this Court noted that when the suspect had just been attempting to evade arrest by flight in a highly dangerous manner it was reasonable to assume that the suspect would still be seeking to resist or escape even after the vehicle chase ended.¹⁵⁷ Accordingly, if the second *Graham* factor weighs in Officer Nissen favor, then the third likely follows.

65. On this score, Officer Nissen testified that he perceived that Ambler continued to resist arrest by refusing to place his hands behind his back:

[G]iving his behavior up to that point, he was in approximately 20-minute vehicle pursuit. He crashed three times. There was no reason for me at least to believe from what I know that Mr. Ambler had any intent on surrendering because he certainly had the opportunity to, especially while we were—I was trying to help put him in handcuffs. Had he just simply stopped resisting and surrendered, it would have taken mere seconds to get him handcuffed, get him frisked, and either sit him or stand him up.¹⁵⁸

66. However, the R&R held that the videos “do not provide the clarity necessary to resolve the factual dispute presented by the parties’ conflicting accounts.”

¹⁵⁵ *Salazar*, 37 F.4th at 284. (cleaned up).

¹⁵⁶ *Id.* (citing *Escobar v. Montee*, 895 F.3d 387, 396 (5th Cir. 2018)).

¹⁵⁷ *Salazar*, 37 F.4th at 284.

¹⁵⁸ **ROA.3760.**

Instead, under *Darden*, the R&R held that a fact question existed for a jury if Officer Nissen should have “credited the warnings” that Ambler gave that he was having a medical emergency and not resisting arrest.¹⁵⁹

67. Officer Nissen’s body-camera demonstrably portrays that Ambler was resisting the officers’ attempts to place his hands behind his back so that he could be handcuffed. The camera evidence clearly shows that from **BWC 04:45 – 05:20** Ambler vigorously resisted Officer Nissen’s soft-hand force to try and control Ambler’s hands and place them behind his back.¹⁶⁰ In fact, Ambler’s resistance was so effective that—despite three officers attempting to handcuff him—by **BWC 05:25**, Ambler had managed to rollover onto his left elbow, off of his stomach, while remaining unhandcuffed.¹⁶¹

68. Accordingly, the question for this Court on appeal becomes whether *Darden* mandates as a matter of law that, under these facts, a reasonable officer would have been required to credit Ambler’s statements that he was having a medical emergency—instead of resisting arrest—and cease using force on him *before* placing him in handcuffs.

69. In *Darden*, this Court held that *Darden* could not be perceived as an immediate safety threat—despite being subject to a narcotics warrant—because “*Darden* was

¹⁵⁹ **ROA.7848.**

¹⁶⁰ **ROA.3643** (Defendant’s Exhibit 12, 04:45 – 05:20) (BWC).

¹⁶¹ **ROA.3643** (Defendant’s Exhibit 12, 05:25) (BWC).

not suspected of committing a violent offense.”¹⁶² This is completely contrary to *Ambler*. Here, Ambler was **absolutely** suspected of committing a violent offense as a matter of law for fleeing in a motor vehicle.¹⁶³ For that reason, no jury could reasonably conclude that Ambler *never* resisted arrest as in *Darden*—¹⁶⁴ because the undisputed evidence again shows that Ambler resisted by fleeing.¹⁶⁵

70. In *Salazar*, this Court noted that under the third *Graham* factor that “because of the preceding high-speed chase” an officer could reasonably “be concerned about the **sincerity**” of the suspect’s actions.¹⁶⁶ In *Ramirez*, this Court noted that instead of believing the suspect, it was “just as reasonable for [the officer] to fear that [the suspect] still sought to escape as it was for [the officer] to fear that [the suspect] was a threat to his or others’ safety.”¹⁶⁷

71. Because of Ambler’s preceding high-speed chase, this Court’s precedent since *Darden* establishes that a reasonable officer—like Officer Nissen—could question the sincerity of Ambler’s statements regarding his medical emergency. Officer Nissen could accordingly reasonably suspect that Ambler was resisting arrest until he was successfully placed in handcuffs.

¹⁶² *Id.* (citing *Cooper*, 844 F.3d at 522).

¹⁶³ *Harrimon*, 568 F.3d at 532.

¹⁶⁴ *Darden*, 880 F.3d at 726 (noting that witnesses stated that “Darden never made any threatening gestures and did not resist arrest).

¹⁶⁵ **ROA.3624** (Defendant’s Exhibit 6, 00:00 – 06:24).

¹⁶⁶ *Salazar*, 37 F.4th at 284 (emphasis added).

¹⁶⁷ *Ramirez*, 2022 WL 16548053 at *3.

72. Taken together, all the *Graham* factors weigh in Officer Nissen’s favor. He accordingly did not use excessive force, and he is entitled to qualified immunity under prong one of the defense.

C. Qualified Immunity Prong 2: Assuming *arguendo* a constitutional violation, the R&R erred in holding that *Darden* provided Officer Nissen with clearly established law that his force violated Ambler’s clearly established rights.

73. The second prong of the qualified immunity question, “whether the officer violated clearly established law—is a doozy.”¹⁶⁸ The §1983 plaintiff bears the burden of proof, “[a]nd that burden is heavy: A right is clearly established only if relevant precedent has placed the constitutional questions beyond debate.”¹⁶⁹ In *Morrow*, this Court exhaustively laid out the “four applicable commandments” that a plaintiff must satisfy to establish that the constitutional question is beyond debate in an excessive force case.¹⁷⁰ To deny an officer qualified immunity, (1) the officer must have violated a constitutional right, and (2) “the right at issue was clearly established at the time of the alleged misconduct.”¹⁷¹ To satisfy the second prong, the “§1983 plaintiff bears the burden of proof” to cite case law that “has placed the constitutional question beyond debate.”¹⁷² “The dispositive question is whether the

¹⁶⁸ *Morrow*, 917 F.3d at 874.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

violative nature of *particular* conduct is clearly established.”¹⁷³ Any cases after the date of the incident “cannot show clearly established law at the time of the violation.”¹⁷⁴ In attempting to meet their burden, Appellees cited numerous cases in the lower court.¹⁷⁵

74. However, the R&R only found that *Darden* could act as clearly established precedent that provided Officer “fair notice that his actions were unreasonable.”¹⁷⁶ But the R&R erred in so holding. Specifically, the R&R’s gloss of this Court’s holdings in *Darden* failed to explore the *plethora* of ways that *Darden* is different from *Ambler*. Namely, the entire R&R undertook no analysis as to why *Darden* could apply in this case, when it is undisputed that *Ambler*—unlike *Darden*—engaged in over 21-minutes of fleeing in a motor vehicle and crashed his car thrice.¹⁷⁷

75. Conversely, in *Darden*, officers performed a no-knock raid to execute a narcotics warrant inside a residence.¹⁷⁸ During that arrest, *Darden* was thrown to the ground, tased, choked and punched. He was morbidly obese, and accordingly died

¹⁷³ *Id.* (citing *Mullenix*, 577 U.S. at 12.

¹⁷⁴ *Henderson v. Harris Cnty., Tex.*, 51 F.4th 125, 133 (5th Cir. 2022), cert. denied sub nom. *Henderson v. Harris Cnty.*, 143 S. Ct. 2661 (2023).

¹⁷⁵ **ROA.4888**; see also **ROA.3408** (Officer Nissen preemptively distinguished *Darden*.).

¹⁷⁶ **ROA.7952**.

¹⁷⁷ *Darden*, 880 F.3d at 752.

¹⁷⁸ *Id.* at 725 – 726.

of a heart attack during arrest.¹⁷⁹ The Court held this was excessive force, but for logical reasons that could not be more different from the case at hand.

76. In *Darden*, this Court held that the force used on Darden could not pass the *Graham* factors because that force was used when “Darden was not suspected of committing *a violent offense*” and he was merely sitting in a residence before force was used on him.¹⁸⁰ This is completely contrary to *Ambler*. Here, Ambler absolutely was suspected of committing a violent offense as a matter of law—because he fled in a motor vehicle just moments before force was used on him.¹⁸¹

77. Also—unlike in *Darden*—Ambler’s behavior here when he fled in his motor vehicle revealed that he possessed an abject intention to escape at all costs, and he would “not hesitate to endanger others to make good [his] escape” and was willing to accept the risk of “potential serious harm to police or innocent bystanders.”¹⁸² As explored *supra*, this Court’s case law has stated that such suspects can reasonably be viewed by officers as untrustworthy and can be suspected of “ploys” to further an escape.¹⁸³

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (emphasis added) (citing *Cooper*, 844 F.3d at 522).

¹⁸¹ *Harrimon*, 568 F.3d at 532.

¹⁸² *Id.* at 536.

¹⁸³ *Ramirez*, 2022 WL 16548053, at *3 (citing *Salazar*, 37 F.4th at 284).

78. More tellingly, *Salazar* also explicitly held that *Darden* could not stand as clearly established law for the purposes of qualified immunity in a case that involved fleeing in a motor vehicle. In *Salazar*, the Fifth Circuit wrote:

Moreover, the arrestee in *Darden* was not suspected of a violent offense. Given that [the officer in *Salazar*] encountered a more threatening situation—outside at night, with a suspect who had just committed a dangerous felony—and used far less force, *Darden* cannot clearly establish that [the officer’s] conduct in these specific circumstances was unlawful.¹⁸⁴

79. At bottom the R&R’s holding in *Ambler* suggests that all officers in the Fifth Circuit were apparently put on notice by *Darden* that they must accept and credit the statements and actions of even the most untrustworthy of suspects lest they be stripped of their qualified immunity and face a jury trial on a fact question.¹⁸⁵ Here, the R&R, with the benefit of 20/20 hindsight, denied Officer Nissen qualified immunity because it would have had Officer Nissen credit *Ambler*’s statements of medical distress instead of believing that *Ambler* was continuing to resist arrest.

80. But qualified immunity is explicitly analyzed without 20/20 hindsight, “from the perspective of a reasonable official on the scene...”.¹⁸⁶ *Darden* in no way put Officer Nissen on notice that his particular conduct with *Ambler* would be analyzed

¹⁸⁴ *Salazar*, 37 F.4th at 288.

¹⁸⁵ “Because qualified immunity is an immunity from suit, not merely a defense to liability, it is effectively lost if a case is erroneously permitted to go to trial.” *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021) cert. denied, 142 S. Ct. 2571 (2022)).

¹⁸⁶ *Id.* at 136.

in the same breath as *Darden*—a man who was never suspected a violent crime and never ran, and officers had no reason to otherwise mistrust that his actions would be a “ploy”. For these reasons Officer Nissen is accordingly entitled to qualified immunity as a matter of law. As the Supreme Court has held, qualified immunity is meant to protect officers in just such a “hazy border between excessive and acceptable force.”¹⁸⁷

D. Qualified Immunity Prong 1: As a matter of law, the video evidence establishes that Officer Nissen did not violate Ambler’s constitutional rights by failing to intervene to stop the Williamson County Deputies from using force.

a. Legal Standard.

81. An officer may be “liable for failure to intervene when that officer: (1) *knew* a fellow officer was violating an individual's constitutional rights, (2) was present at the scene of the constitutional violation, (3) had a reasonable opportunity to prevent the harm but nevertheless, (4) chose not to act.”¹⁸⁸ On appeal, Officer Nissen challenges that Appellees cannot meet their burden on the first three elements.¹⁸⁹

82. “Bystander liability requires more than mere presence in the vicinity of the violation; ‘we also consider whether an officer ‘acquiesced in’ the alleged

¹⁸⁷ *Mullenix*, 577 U.S. at 18.

¹⁸⁸ *Joseph ex rel. Est. of Joseph*, 981 F.3d at 343 (emphasis added) (citing *Whitley v. Hanna*, 726 F.3d 631, 646-47 (5th Cir. 2013)).

¹⁸⁹ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

constitutional violation.”¹⁹⁰ Courts must analyze the constitutional merits of a failure to intervene claim apart from any related excessive force claims.¹⁹¹ The plaintiffs “bear the burden to demonstrate that the state of the law in [March 2019] clearly established that ‘any reasonable officer would have known that the Constitution required them to intervene’ in this circumstance.”¹⁹²

b. Officer Nissen was not present for the first thirty seconds; he accordingly had to make split-second assumptions, and he did not know if Ambler took any further violent acts in the moments he was not present that warranted escalating force from the deputies.

83. As established *supra*, the video evidence conclusively shows that Officer Nissen arrived on scene approximately thirty seconds after the deputies made contact with Ambler, and after Ambler had already been tased and was on the ground in front of his car.¹⁹³ Under the second and third elements, the R&R correctly held that Officer Nissen cannot be liable under a bystander theory for this force since he was not present.¹⁹⁴ However, the R&R failed to engage with Officer Nissen’s argument that he had to make assumptions about the amount of force the deputies were using—even in his presence—since he arrived late.¹⁹⁵

¹⁹⁰ *Ibid.*

¹⁹¹ *Joseph ex rel. Est. of Joseph*, 981 F.3d at 343.

¹⁹² *Timpa*, 20 F.4th at 1038–39 (emphasis added) (citing *Joseph ex rel. Est. of Joseph*, 981 F.3d at 343).

¹⁹³ **ROA.3642** (Defendant’s Exhibit 11, 22:40 (Deputy Johnson makes contact), 22:57 (deputies ask where APD is), 23:11 (Nissen arrives)).

¹⁹⁴ **ROA.7953**.

¹⁹⁵ **ROA.7954**.

84. Since Officer Nissen was not present in the crucial moments contact was first made, it would have been *impossible* for Officer Nissen to know how Ambler had acted between the time the crash occurred and when Nissen first arrived on the scene. Accordingly, Officer Nissen could not have known if Ambler had tried to flee on foot, tried to drive in reverse back toward the deputies, physically struck a deputy, reached for his waistband, or otherwise acted aggressively. Any one of these acts would have made a reasonable officer presume that such behavior required an escalating amount of force by the deputies. What Nissen *could* see were (1) the *recently-dangerously-driven* car—which had yet to be checked for threats—next to the unhandcuffed *recently-dangerously-driving* suspect, and (2) the deputies giving commands that were not being obeyed.¹⁹⁶ Thus, the facts that Officer Nissen did know would lead a reasonable officer to believe that the force the deputies were using was reasonable.

85. Courts should give leeway to late-arriving officers because they have to make split-second assumptions based on incomplete information, and assisting officers must be afforded the flexibility to trust that the already-present officers are acting justifiably. Simply put, “[a]n officer may reasonably rely on information provided by other officers.”¹⁹⁷ For example, in *Reynolds*, the Western District of Texas held

¹⁹⁶ **ROA.3643**, (Defendant’s Exhibit 12, **4:09 – 4:27**).

¹⁹⁷ *Duran v. Sirgedas*, 240 Fed. Appx. 104, 114 (7th Cir. 2007), vacated in part on reh'g (July 17, 2007) (citing *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000)).

that an officer need not independently verify the assertions of another officer before acting.¹⁹⁸ Furthermore, courts across the country have held that that information from another officer can come in the form of a non-verbal cue conveying a need for assistance in effectuating arrest.¹⁹⁹

86. Though out of Circuit, Officer Nissen proffers that the *Chivers* case provides a good framework for appropriate analysis of this situation. There, the plaintiff argued that the defendant officer used excessive force by pushing her into the prone position and putting his weight on her back to handcuff her.²⁰⁰ It was later discovered that the plaintiff was not the perpetrator, but she was arrested anyway because the already-present officer on the scene had instructed the defendant officer to secure

¹⁹⁸ *Reynolds v. City of Poteet*, No. 12-CV-1112-DAE, 2014 WL 1355560, at *12 (W.D. Tex. Apr. 4, 2014).

¹⁹⁹ *Id.* at 116 (holding that officer who arrived at scene and witnessed other officers arresting individual had probable cause to assist in effectuating arrest because, “[a]lthough the other officers may not have expressly told Officer Peslak that probable cause existed, their conduct implied as much.”) (emphasis added); *see also* *Greene v. Barber*, 310 F.3d 889, 898 (6th Cir. 2002) (holding that the original officer may be liable, but the late-arriving officers “could reasonably have concluded that the plaintiff was resisting arrest and that they were entitled to assist a fellow officer in making the arrest.”); *see also* *Boyle v. Torres*, 756 F. Supp. 2d 983, 992 (N.D. Ill. 2010) (“It is undisputed that [the assisting officers] came to the scene after hearing a call that an officer was in need of assistance. By the time they arrived, Boyle was engaged in a scuffle with Moore and Torres....based on the circumstances they observed when they arrived [the assisting officers] were entitled to believe that Moore and Torres had probable cause to arrest Boyle.”); *see also* *Rodriguez v. Chavez*, No. 12-CV-01071-PAB-MJW, 2015 WL 5174226, at *9 (D. Colo. Sept. 3, 2015) (“Thus, regardless of whether Corporal Chavez communicated her reasons for attempting to take plaintiff into custody and regardless of whether plaintiff was actually physically resisting Corporal Chavez, Officer Gasca was entitled to come to Corporal Chavez' aid.”).

²⁰⁰ *Chivers v. Reaves*, No. 1:13-CV-00171, 2017 WL 4296726, at *26 (D. Utah Sept. 26, 2017), *aff'd*, 750 F. App'x 769 (10th Cir. 2019).

her as soon as he arrived. The plaintiff argued that she was “kneeling, clearly distraught, and not obviously aggressive or armed,” and that “[t]he defendant officer therefore knew that she did not pose any threat when he encountered her.” The court found such arguments “unavailing.”²⁰¹ “It is plain that a reasonably prudent officer arriving on scene with limited information would be justified in assuming that ... [she was] a potential threat[.]” because the already-present officer indicated as much.²⁰²

87. Persuasively applying *Chivers* here, Nissen’s late arrival to an active arrest—for a felony of evading in a motor vehicle—made it reasonable for him to make the split-second assumption that the deputies were using a proper amount of force to secure the scene. As Nissen attested, he had “[n]o idea if Mr. Ambler had exhibited any additional aggressive behavior toward the Williamson County deputies after he got out of his vehicle that might have further warranted the usage of a Taser.”²⁰³

c. The R&R held that Officer Nissen should have intervened to stop the second taser, but Nissen had no reasonable opportunity to do so even if it had been appropriate.

88. The R&R relied on a plethora of this Court’s tasing jurisprudence to hold that Officer Nissen could be liable under a bystander theory of liability for the deputies’ force because “their Taser use may have been a contributing cause of Ambler’s

²⁰¹ *Id.* at 27.

²⁰² *Id.*

²⁰³ **ROA.3846.**

death.”²⁰⁴ The videos reveal that Ambler was only tased once by the deputies—in Officer Nissen’s presence—and this occurred when they were trying to get Ambler back onto his stomach after Ambler had effectively resisted all three officers and rolled onto his left forearm.²⁰⁵

89. But the R&R erred when it held that Officer Nissen had a reasonable opportunity to intervene to stop this second deployment of the Taser. The Wilco deputies deployed the Taser the second time at **BWC 05:30**. At the time, it is beyond dispute that Officer Nissen is fully occupied with rolling Ambler over, and the videos additionally reveal that within the prior 30 seconds, the deputy gave no clear verbal warning that he was about to use his Taser on Amber.²⁰⁶ Officer Nissen accordingly had no “reasonable opportunity to prevent the harm...”²⁰⁷

d. No clearly established law placed it “beyond debate” that Officer Nissen reasonably should have known to intervene because the tasing conduct of the deputies was unlawful.

90. In denying Officer Nissen qualified immunity, the R&R relied on *Ramirez v. Martinez*, *Carroll v. Ellington*²⁰⁸, and *Newman v. Guedry*²⁰⁹ for the proposition that “using a Taser on someone who is subdued and does not pose a threat can constitute

²⁰⁴ **ROA.7954**.

²⁰⁵ **ROA.3643** (Defendant’s Exhibit 12, 05:30) (BWC); **ROA.3642** (Defendant’s Exhibit 11, 24:24)(Dash).

²⁰⁶ **ROA.3643** (Defendant’s Exhibit 12, 5:00 – 05:30) (BWC).

²⁰⁷ *Whitley*, 726 F.3d at 646.

²⁰⁸ *Carroll v. Ellington*, 800 F.3d 154 (5th Cir. 2015).

²⁰⁹ *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012).

excessive force” and that Nissen had fair notice that “another officer’s use of [this] excessive force” could give rise to bystander liability under these particular circumstances.²¹⁰ But all three of those cases were distinguished by the *Salazar* Court as not providing clearly established law due to the prior crime of fleeing in a motor vehicle.

91. As noted *supra*, this Court in *Salazar* wrote that *Ramirez* did “not show that any reasonable officer would have known tasing [the suspect] under these circumstances [after fleeing in a motor vehicle] was unlawful.”²¹¹ Similarly, *Salazar* distinguished *Carroll* along much the same lines, noting “[a]s with *Ramirez*, *Carroll* does not support [the suspect’s] position because [the suspect] was not subjected to the use of additional force after he was **handcuffed and subdued**.”²¹² *Salazar* also distinguished *Newman*. This Court wrote, “[b]ecause *Newman* involved a plaintiff who committed no crime and obeyed all commands, that case cannot clearly establish that using a taser was unlawful in the circumstances [the officer] confronted here.”²¹³

92. Accordingly, all of the cases that the R&R relied upon for the proposition that Officer Nissen should have **known** to intervene because “a fellow officer [was]

²¹⁰ **ROA.7953.**

²¹¹ *Salazar*, 37 F.4th at 287.

²¹² *Id.* at 287 – 288; *see also Carroll*, 800 F.3d 154 at 177 (explicitly holding that the deputies who were not entitled to qualified immunity for the injuries inflicted “after [the suspect] was **handcuffed and restrained**.”) (emphasis added).

²¹³ *Salazar*, 37 F.4th at 288.

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B), and pursuant to 5th Cir. R. 32.1 and 32.3, the undersigned certifies that this brief complies with the type-face requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6).

1. Exclusive of the exempted portions in 5th Cir. 32.2, this Brief Contains:

a. 12699 words, which is less than the limit of 13,000 words.

2. This Brief was prepared:

a. In proportionally spaced typeface using **Microsoft Word 365** for Macintosh Computers in **Times New Roman font. 14 Point** was utilized for the Body of the Brief. **12.5 Point** was utilized for the Footnotes.

/s/ Stephen B. Barron
Stephen B. Barron

CERTIFICATE OF SERVICE

I certify that on this 18th day of December 2023, a true and correct copy of the foregoing Brief of Appellant was forwarded to the clerk for the Fifth Circuit Court of Appeals and to counsel of record via e-service through the CM/ECF e-filing program in accordance with Federal Rule of Appellate Procedure 25(c)(2).

/s/ Stephen B. Barron
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