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FINAL INVESTIGATIVE REPORT
for
THE TOWN OF NEEDHAM, MASSACHUSETTS

Review of the Needham Police Department's January 25, 2020 Response to Shoplifting Incident at CVS Pharmacy ("The Marvin Henry Incident")

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I. INTRODUCTION

The Town of Needham engaged Saul Ewing Arnstein & Lehr, LLP ("SEA&L") to conduct an independent investigation of the Needham Police Department's ("NPD") response to a January 25, 2020 shoplifting call that resulted in Marvin Henry being seized and handcuffed by NPD officers for approximately 30 minutes. The investigation was conducted by SEA&L attorneys Natashia Tidwell and Allison Burdette (collectively the "SEA&L Investigators").[1] SEA&L investigated the officers' interactions with Mr. Henry, NPD's investigation of the shoplifting call, and NPD's subsequent investigation of the incident conducted by its own internal investigators ("IA Investigation"). Needham asked the SEA&L Investigators to determine whether the officers' conduct was consistent with NPD policies and procedures and, where possible, to determine what role, if any, racial discrimination or implicit bias factored into the officers' response.

This report summarizes the SEA&L investigation and findings. First, the SEA&L Investigators conclude that, under the circumstances, the officers had reasonable suspicion to stop Mr. Henry. Second, the pat frisk conducted almost immediately after Mr. Henry was seized was in contravention of NPD policy and the law. Third, at some point, the investigative stop morphed into an arrest, but it is not clear at what point that happened and whether the officers had probable cause to arrest Mr. Henry at that time. Fourth, although the officers failed to consider several factors that supported Mr. Henry's innocence, the preponderance of the evidence does not support a finding that the officers racially-profiled Mr. Henry. Finally, NPD should address several deficiencies in its internal investigations practices to increase the effectiveness of future investigations and ensure that confidence in the department's ability to foster internal accountability is not eroded.

II. PROCEDURAL TIMELINE

On July 20, 2020, Mr. Henry, through counsel, wrote a letter to NPD Chief John Schlittler summarizing his interaction with several NPD officers on January 25, 2020. Mr. Henry stated that the officers engaged in unlawful search and seizure and racial profiling in violation of both state and federal law. The letter also requested copies of video, audio, and written records related to the January 25, 2020 incident, a copy of NPD's "Use of Force" policy, a copy of policies regarding the magnitude of police response, a copy of data relating to the racial demographic breakdown of individuals stopped by NPD, an apology from Off. Fitzpatrick, an independent investigation of the incident, compensation for Mr. Henry's physical and emotional harm, confirmation of steps taken to prevent future incidents (including enhanced and ongoing training on implicit bias and de-escalation techniques), and attorneys' fees.

In September 2020, the Town of Needham engaged Investigator Tidwell and Saul Ewing Arnstein & Lehr LLP to conduct the investigation of this matter.

Also in September 2020, NPD launched its own internal investigation relating to the incident ("IA Investigation"). The investigators completed their investigation on October 29, 2020. By letter dated January 11, 2021, NPD notified Mr. Henry of the investigation's findings. On January 22, 2021, the internal investigators issued an addendum detailing their interview with a witness who was previously unavailable. The investigation's findings were not changed.

[1] Boston Private Investigation, LLC was also included in the SEA&L investigative team.

III. SCOPE OF INVESTIGATION

In conducting this investigation, the SEA&L Investigators interviewed the following twelve witnesses, some more than once:

- Marvin Henry ("Mr. Henry")
- Officer Nicole McMahon ("Off. McMahon")
- Officer Colin Fitzpatrick ("Off. Fitzpatrick")
- Officer Leo Schlittler ("Off. Schlittler")
- Officer William Kelleher ("Off. Kelleher")
- Sergeant Andrew Cray ("Sgt. Cray")
- CVS Operations Manager ("Witness #1")
- CVS Store Manager ("Witness #2")
- Local Business Owner ("Witness #3")
- Town House of Pizza Owner ("Witness #4")
- Starbucks Employee ("Witness #5")

The SEA&L Investigators also reviewed the following materials:

- Closed-circuit surveillance video from CVS ;
- Audio recordings of Witness #1's call to NPD;
- Audio recordings of NPD radio communications ;
- Mr. Henry's July 2020 letter and other documents furnished by Mr. Henry;
- Off. McMahon's January 25, 2020 Report of NPD's Response to Shoplifting Call at CVS ("Incident Report") and supplemental reports;
- NPD policies and procedures;
- Interview Notes of NPD Internal Investigator Interviews ("IA Notes");
- Report of NPD Internal Investigation of Marvin Henry's Complaint ("IA Report") and related notification letters to officers and Mr. Henry; and
- NPD reports of historical shoplifting arrests and other official records and reports.

IV. FACTUAL SUMMARIES

The following section details Mr. Henry's account of the events of January 25, 2020 as he recounted it to SEA&L investigators over the course of two interviews.

A. Mr. Henry's Account of his Seizure by Needham Police

On Saturday January 25, 2020, Marvin Henry was heading to work at Elements Massage, 855 Highland Avenue, in Needham Heights. His shift was scheduled to begin at 3:30 p.m. Following his typical routine, he drove his minivan into Needham, parked on Highland Avenue (this time in front of the Starbucks at 910 Highland Avenue) and placed his lunch order at neighboring Town House of Pizza. While it was being prepared, he walked further up the block to CVS, 936 Highland Avenue.

Mr. Henry did not notice anything unusual while he was in CVS. He picked up a drink and cough drops, stood in line for the register, and paid for his items. When he exited back on to Highland Avenue, he turned right and headed back to Town House of Pizza. Mr. Henry picked up his lunch order and returned to the car so that he could move it to a space at his work. He put his lunch and CVS bag on the front passenger seat and walked around the minivan to the driver's side (closest to the street).

As Mr. Henry put his hands on the driver's door handle, he heard someone say "Hey, you! Come here!" He was unaware of any officers in the area before this moment. As Mr. Henry turned to see who the voice was talking to, an officer grabbed Mr. Henry's right arm, put it behind him, and pushed him against the van. The officer put a handcuff on Mr. Henry's right hand, then brought his left hand back and cuffed it as well. The officer patted Mr. Henry's pants pockets and outer clothing. Then, the officer walked Mr. Henry around the van to the sidewalk in front of the Starbucks. At that point, Mr. Henry saw other officers approaching.

There were about four officers on the scene, including the officer who handcuffed him. He recalled that all of the officers were male. Mr. Henry had his back against the van and the officers formed a half-circle around him, approximately an arms-length away from him. Mr. Henry asked them what this was about, told them his work was right around the corner, and asked the officers to call his work to explain that he would be late for his shift. He also tried to explain to the officers that he did not need to steal, that he had two jobs, and that he had four boys at home. At times, Mr. Henry asked the officers to loosen his handcuffs or move them to the front of his body because they were hurting him. The officers largely ignored him, though one nodded his head in response to the things Mr. Henry was saying. Mr. Henry felt that one officer in particular (later identified as Off. Fitzpatrick), was dismissive of Mr. Henry's attempts to communicate with the officers and provide evidence of his non-involvement in any crime. Because of this officer's perceived discourtesy, Mr. Henry told him that he would like the officer to come to Elements and deliver a personal apology to Mr. Henry after everything was over and Mr. Henry was determined to be innocent of any wrongdoing. The officer replied "yeah, yeah" in what Mr. Henry interpreted to be a sarcastic tone.

After about 30 minutes, another officer (later identified as Sgt. Cray) told Mr. Henry that he was caught on video stealing something from CVS. Mr. Henry asked if he had been stopped because he was Black. Sgt. Cray replied that he and the other officers were not racist. Mr. Henry asked to see the surveillance video, but Sgt. Cray told him he would need to go to the police station and make a request. Mr. Henry told the officers he could show them the receipt on his phone to prove he did not steal from CVS. The officers conferred and then one officer took a cuff off of one of Mr. Henry's wrists and asked to see the e-mail receipt. Mr. Henry showed the e-mail to the officer, who then put the cuff back on. Then, one officer opened the sliding door of the van to see the contents of the CVS bag sitting on the seat on the passenger side. He also looked in a backpack

on the floor containing Mr. Henry's computer and some books. Mr. Henry does not recall whether the officer asked for permission to look in the car or backpack.

After looking in the van, the officers conferred again. One of the officers returned to Mr. Henry, took the handcuffs off, and said they would let him go "for now." Mr. Henry estimated that he had been handcuffed for 35 to 45 minutes. The officers took Mr. Henry's phone number, e-mail address, and house address. They said he would get something in the mail. He asked the officers for their names and badge numbers, which he wrote on a piece of paper. Mr. Henry recalled that at least one of the officers just walked away from him when he asked for the officer's information.

Mr. Henry went to his place of work, but states that he was too shaken up to complete his shift and decided to leave. He remained out of work for the next few days due to the lingering pain in his wrists from the handcuffs. When he left work the day of the incident, he went directly to the Needham Police Station to request the video and other records related to the incident. The officers at the front desk gave Mr. Henry a form to fill out to request the CVS video. Mr. Henry later got an e-mail on Monday, January 27, 2020 informing him that his request for the video was denied because the video and other records were investigatory materials that were necessary to keep out of the public view.

B. The Officers' Accounts of Mr. Henry's Seizure & its Aftermath

The following section details the officers' accounts of the events of January 25, 2020 and the aftermath. In total, five (5) Needham Police Department officers were involved: Officers Fitzpatrick, Kelleher, McMahon, L. Schlitter, and Sgt. Cray. Each officer was interviewed as part of NPD's internal investigation and by SEA&L investigators. As part of the SEA&L investigation, notes of the officers' interviews with NPD's internal investigators ("IA Notes") were reviewed and are included in this summary as are statements attributed to the officers in the final report of NPD's internal investigation ("IA Report") and the official report of the incident itself ("the Incident Report"). Where there are material inconsistencies in an officer's account as reported to IA or to SEA&L, it is noted in the below summary.

1. The events of January 25, 2020

This section contains the officers' accounts of the events leading to and including Mr. Henry's seizure.

a. Off. Kelleher

Off. Kelleher was assigned to stationhouse duty on January 25, 2020. His responsibilities included answering phones and dispatching calls for service. At 3:04 p.m., he received a call from a CVS employee, who stated that there was a shoplifting in progress at the CVS on Highland Avenue. The caller reported that there were two suspects: one male and one female. After receiving the initial report, Off. Kelleher, while still on the phone with the caller, dispatched the patrol car assigned to the area, along with any other units that were available. Off. Kelleher stayed on the phone with the caller collecting information while simultaneously relaying that information to the responding officers via radio. During his interview with SEA&L, Off. Kelleher could initially only recall that the caller described the suspects as large and wearing dark clothes. He then recalled the caller saying the male suspect wore a grey hoodie, and that Off. Kelleher radioed that to the responding officers. He recalled the caller sounded excited and spoke with an accent. When Off. McMahon arrived at the CVS, Off. Kelleher concluded the call so the caller could speak

directly with Off. McMahon. Off. Kelleher did not independently recall Off. McMahon calling in a license plate number or Officers Fitzpatrick or Schlittler calling in a driver's license number.

b. Off. McMahon

Off. McMahon drafted and submitted the Incident Report, the official record of Mr. Henry's January 25, 2020 seizure. Both Off. Fitzpatrick and Off. Schlittler recalled discussing the circumstances of Mr. Henry's seizure with Off. McMahon for purposes of the initial report. As detailed in the next section, Off. McMahon conducted a follow-up investigation of the shoplifting incident that included review of surveillance footage. She modified the original Incident Report at least twice to incorporate those activities. Sgt. Cray approved the Incident Report on February 22, 2020. The report provides the following description of the events leading to Mr. Henry's seizure:[2]

> On 01/25/2020 at approximately 1512 hours I (N573) responded to CVS on Highland Avenue for a report of a male party, later identified as Marvin Henry (04-15-1982), and a female party, later identified as [redacted], shoplifting from the store.
>
> Upon arrival I entered the store and was immediately met by the Operations Manager, [redacted], who stated Henry had just exited the store on the Highland Avenue side. Officer Fitzpatrick (N574) and Officer L. Schlittler (UC) arrived on scene. Officer Fitzpatrick, [redacted] and I exited through the Highland Ave door and located Henry speaking with Officer L. Schlittler (UC) next to [redacted] vehicle [redacted]. [redacted] stated he recognized Henry as he was walking down the street (Highland Ave) and confirmed that he was the suspect. Officer L. Schlittler and Officer Fitzpatrick detained Henry while we investigated the matter. We were unable to locate [redacted].

Figure 1: Excerpt of NPD incident report entered January 25, 2020, modified January 30, 2020, and approved February 22, 2020.

According to the IA Report, Off. McMahon, Off. Fitzpatrick, and Witness #1 were in front of the CVS while Off. Schlittler was speaking with Mr. Henry in front of Starbucks. However, the notes of Off. McMahon's IA interview reflect her having reported that she went outside the CVS with Witness #1; there is no mention of Off. Fitzpatrick.[3] The IA notes further reflect Off. McMahon's report that, upon exiting CVS, Witness #1 said to her, "That's him" and pointed excitedly toward Mr. Henry. This is consistent with the account Off. McMahon gave to the SEA&L investigators. She went on to tell SEA&L that Off. Fitzpatrick appeared from behind her and Witness #1 shortly thereafter and that she assumed Off. Fitzpatrick was coming from inside CVS to join her and Witness #1. Off. McMahon added that she did not recall any conversation between Off. Fitzpatrick and Witness #1 regarding identification of Mr. Henry as the suspected shoplifter.

The IA Report goes on to state that, from her view in front of CVS, Off. McMahon described the situation with Mr. Henry and Off. Schlittler as seemingly calm and stated that she did not see Mr. Henry being shoved or handcuffed. She reported that she did not approach Mr. Henry but rather went back into CVS with Witness #1 to review the surveillance footage.

[2] The "female party" referenced in the Incident Report is the registered owner of the car Mr. Henry was driving on January 25, 2020.

[3] We note that, in the Incident Report, Off. McMahon states that she, Off. Fitzpatrick and Witness #1 exited CVS through the Highland Avenue door. The report does not state that they all exited together nor does it state when Witness #1 told the officers that he recognized Mr. Henry and confirmed that Mr. Henry was the suspect.

According to the Incident Report, Witness #1 and Witness #2 informed Off. McMahon of the shoplifting suspects' modus operandi upon her return to CVS to review the surveillance footage.

> [redacted] and the Store Manager, [redacted] stated Henry and [redacted] have successfully shoplifted from the store two or three times in the past few months. They stated they have video footage that has been provided to NPD. Henry and [redacted] were never identified in the past incidents. [redacted] and [redacted] stated Henry and [redacted] entered CVS separately from the parking lot side about a minute or two apart. They stated Henry and [redacted] both were on the phone and had individual carts, walking up and down the aisles separately while filling the carts. [redacted] and [redacted] immediately recognized the two from previous shoplifting incidents. [redacted] stated she followed Henry and [redacted] and noticed Henry stopped filling the carts and went to check out/purchase a small amount of product. Henry and [redacted] then exited the store shortly after while leaving their accumulated carts in the middle of the aisles.
>
> [redacted] and [redacted] showed me video footage, which clearly showed Henry and [redacted] entering CVS. [redacted] entered at approximately 2:52pm and Henry entered at approximately 2:53pm. A copy of the footage will be entered into evidence.
>
> [redacted] and [redacted] stated the incidents in the past have been almost identical to this one. Henry and [redacted] would usually come on a Saturday around 3:00pm or 4:00pm. They would both fill up individual carts with very similar items each time. [redacted] and [redacted] stated that in the past Henry and [redacted] have successfully walked directly out of the store with the carts, which were filled with unpaid items. [redacted] and [redacted] filled out a voluntary statement that is attached to this report.

Figure 2: Excerpt of NPD incident report entered January 25, 2020, modified January 30, 2020, and approved February 22, 2020.

Although the Incident Report reflects that Off. McMahon reviewed the January 25, 2020 CVS video footage purportedly showing Mr. Henry filling a shopping cart and exiting the store, it appears from the IA Notes that Off. McMahon admitted that she did not spend much time reviewing the surveillance footage and planned to conduct follow-up analysis later. In her interview with SEA&L, Off. McMahon said she could not recall whether she viewed surveillance footage from the time the suspects were in the store while she was in CVS, though she did recall requesting a CD of the CVS video to review at a later time. Off. McMahon's report concludes by stating that Mr. Henry was released when the CVS employees confirmed that they did not see Mr. Henry take any items from the store that day:

> [redacted] and [redacted] both confirmed they did not see Henry or [redacted] take any items from the store. Henry was released after confirming his identification and address. While on scene, Henry informed that he was currently employed at Elements Massage located at 855 Highland Ave. This matter, along with the previous shoplifting incidents, is under investigation.

Figure 3: Excerpt of NPD incident report entered January 25, 2020, modified January 30, 2020, and approved February 22, 2020.

c. Off. Fitzpatrick

According to the IA Report, Off. Fitzpatrick briefly entered CVS when he first arrived on scene, though he did not recall doing so. The IA Report further states that, as Off. Fitzpatrick exited CVS, he observed a party matching the description of the shoplifting suspect – later identified as Mr. Henry – and Off. Schlittler in his cruiser in very close proximity to Mr. Henry. Off. Fitzpatrick radioed "Leo, that's him, right there, right there, right there." The IA Report goes on to state that Off. Fitzpatrick, Off. McMahon, and Witness #1 were in front of CVS while Off.

Schlittler was with Mr. Henry in front of Starbucks. Off. Fitzpatrick told SEA&L that, after he radioed Off. Schlittler that Mr. Henry was on his right, Off. Fitzpatrick went inside CVS where he encountered Off. McMahon and Witness #1. He said that he, Off. McMahon, and Witness #1 then walked out of the CVS together where they observed Off. Schlittler and Mr. Henry from approximately 100 feet away.

The IA Report states that Witness #1 observed Mr. Henry and confirmed that he was the suspect. The IA Report also states that, according to Off. Fitzpatrick, Witness #1 then informed Off. Fitzpatrick and Off. McMahon of the modus operandi of previous shopliftings. Then, according to the IA Report, Off. Fitzpatrick asked Witness #1 whether the "gentleman speaking with the officer in the dark jacket [was] the man you called us about?" to which Witness #1 replied "Yes." This is largely consistent with what Off. Fitzpatrick reported to the SEA&L investigators. However, he told SEA&L that he did not recall the exact moment in which he learned about the previous shopliftings or from whom he gleaned that information, only that he recalled learning about them at some point that day. He said that after Witness #1 identified Mr. Henry as the suspect, Off. McMahon went back inside the CVS with Witness #1, while Off. Fitzpatrick walked to the Starbucks to join Off. Schlittler and Mr. Henry. Off. Fitzpatrick said he did not recall a specific conversation with Off. McMahon about who would go where. He said that, usually, the officer that gets dispatched to a call is the "primary officer" and stays with the complainant to collect information.

Most of the statements attributed to Off. Fitzpatrick in the IA report are consistent with what he told the SEA&L investigators. Off. Fitzpatrick stated that, when he joined Off. Schlittler and Mr. Henry, Off. Schlittler and Mr. Henry were speaking to each other and both were "calm and cool." Off. Fitzpatrick informed Off. Schlittler that Witness #1 had positively identified Mr. Henry and informed him of the previous shoplifting schemes. The officers decided to detain Mr. Henry while Off. McMahon conducted further investigation; and at that point, Off. Schlittler placed Mr. Henry in handcuffs. Off. Fitzpatrick states that he did not see Off. Schlittler shove Mr. Henry nor did he hear Mr. Henry say anything about the handcuffs being too tight. Off. Fitzpatrick told SEA&L that he did not believe that he or Off. Schlittler searched Mr. Henry's person, but he said that he did not exactly recall.

One notable difference in Off. Fitzpatrick's statements relates to Mr. Henry's demeanor. Off. Fitzpatrick told SEA&L that, at times, Mr. Henry appeared defensive, raised his voice, and seemed agitated. Off. Fitzpatrick recalled that, early in his interaction with Mr. Henry, Off. Fitzpatrick asked Mr. Henry "Where's the woman?"[4] He said Mr. Henry got defensive at that point, saying there was no woman. Off. Fitzpatrick told SEA&L Mr. Henry then starting saying he was going to be late for work and lose money as a result. Off. Fitzpatrick said he tried to deescalate the situation by explaining to Mr. Henry that he was suspected of shoplifting from CVS, an employee had identified him as the suspect, the police were investigating, and Mr. Henry needed to let the officers do their job. However, in the notes of his IA interview, Off. Fitzpatrick reportedly described Off. Schlittler's, Mr. Henry's, and his own demeanor as "regular (calm) [and] not over the top."

[4] "The woman" refers to Jane Doe. At another point in his interview with SEA&L, Off. Fitzpatrick said he asked Mr. Henry whether there was a woman with him. When asked to clarify how he asked about the female suspect (*i.e.*, demanding "Where's the woman?" versus asking whether there was a woman with him), Off. Fitzpatrick said he could not recall his exact phrase, but the tone was conversational.

Off. Fitzpatrick did, in fact, offer to apologize to Mr. Henry. However, he states that the apology was conditioned upon Mr. Henry not appearing on the CVS surveillance video *at all*. Off. Fitzpatrick told SEA&L that he did intend to apologize if that was the case, but that he knew it was unlikely given that Mr. Henry had already admitted to being inside CVS that day.

Off. Fitzpatrick observed Mr. Henry's CVS bag in his vehicle. He reports that he asked Mr. Henry if they could look in the bag and Mr. Henry agreed. He states he did not look in any other bag. He states that Sgt. Cray informed Mr. Henry that Mr. Henry would receive a summons in the mail and that Mr. Henry was released. He also recalls Mr. Henry's request for the officers' names and badge numbers and states that he wrote his name and badge number on his notepad, then handed the paper and pen to Mr. Henry to write information from Sgt. Cray and Off. Schlittler.

d. Off. Schlittler

Off. Schlittler was in his cruiser at the intersection of Highland Avenue and West Street when Off. Fitzpatrick radioed "Leo, that's him, right there, right there, right there." He observed Mr. Henry standing by a minivan and based on Off. Fitzpatrick's transmission, the description of the suspect, and Mr. Henry's proximity to CVS, he exited his cruiser to speak with Mr. Henry. In his SEA&L interview, Off. Schlittler recalled that Off. Kelleher broadcasted a description of the shoplifting suspect as wearing a hoodie but stated that while he remembered that Mr. Henry was wearing dark pants, a black leather jacket, and a grey shirt; he did not recall whether the shirt was a hoodie.

Off. Schlitter states that he approached Mr. Henry in a calm, cordial manner and said "Hey, you got a sec?" He asked Mr. Henry whether he had been in CVS and Mr. Henry said "yes." Off. Schlittler then informed Mr. Henry that there was a report of a shoplifting there. They talked for a few more minutes about CVS, Mr. Henry's job, and that Mr. Henry's vehicle belonged to Mr. Henry's friend.

Off. Schlittler told SEA&L that Off. Fitzpatrick joined him approximately five minutes after Off. Schlittler initially approached Mr. Henry. He told SEA&L that Off. Fitzpatrick confirmed Mr. Henry was the suspect and that he was on CVS video preparing to walk out of the store with unpaid items. According to the IA Report, Off. Schlittler also stated that Off. Fitzpatrick told him what Witness #1 reportedly stated about the previous shoplifting incidents. The IA Report states that Off. Schlittler said Off. Fitzpatrick told him that "it had been multiple, multiple times" and that the shoplifting had "been an issue with this guy." The officers decided to detain Mr. Henry and Off. Schlittler took Mr. Henry by the arm, turned him around, rested him against his vehicle, and placed him in handcuffs.

Off. Schlittler states that he did not shove Mr. Henry and that he took extra time putting the handcuffs on Mr. Henry due to the bulky sleeves on Mr. Henry's winter jacket. He double locked the handcuffs. In the notes of Off. Schlittler's IA interview it appears that he did recall Mr. Henry complaining that the handcuffs were too tight. However, the IA Report merely states that Off. Schlittler checked the handcuffs for tightness by placing a finger in the handcuff to see if there was extra room and that Off. Schlittler said he was able to get his full index finger in the handcuffs without mention of whether Off. Schlittler did so in response to Mr. Henry's complaints. Off. Schlittler said Mr. Henry did not resist. He said that, at some point after handcuffing Mr. Henry, they moved from behind Mr. Henry's vehicle, to beside it on the sidewalk.

The IA Report and the notes from Off. Schlittler's IA interview both state that Off. Schlittler frisked Mr. Henry for items from CVS. However, Off. Schlittler told SEA&L that he did not recall searching Mr. Henry's person for CVS items or anything else. He also told SEA&L that he did not recall telling IA that he frisked Mr. Henry. Off. Schlittler told SEA&L he did not recall exactly what he said to Mr. Henry, but he informed Mr. Henry that the officers were investigating a shoplifting that happened in CVS and that an employee said Mr. Henry was the suspect that took the items.

Off. Schlittler states that he does not recall who asked Mr. Henry whether the officers could look inside the CVS bag in his car but told IA investigators that he does remember that Mr. Henry granted permission for the officers to look in the bag. Off. Schlittler told SEA&L he did not recall whether anyone asked Mr. Henry for permission to look inside his vehicle. He recalled that Off. Fitzpatrick opened the vehicle's sliding door and stuck his hand inside. He said that he did not recall seeing Mr. Henry's work bag in the vehicle and that Off. Fitzpatrick did not look anywhere else in the vehicle other than the CVS bag.

According to Off. Schlittler, Mr. Henry was released after Sgt. Cray determined that it was appropriate to do so. He did not recall Mr. Henry asking for his name and badge number but he said that if Mr. Henry did make that request, he would have provided that information.

e. Sgt. Cray

When Sgt. Cray arrived at the scene, he observed the officers near Starbucks with Mr. Henry. He also observed Off. Fitzpatrick talking back and forth with Mr. Henry and all seemed to be calm. The officers provided Sgt. Cray with a brief explanation of the situation, including the past shopliftings, and why Mr. Henry had been stopped. Sgt. Cray felt the officers' reasoning was appropriate. IA's notes from Sgt. Cray's interview state that Sgt. Cray did not recall whether Mr. Henry was in handcuffs, and he did not recall Mr. Henry making an "overt call for removal of cuffs." This is largely consistent with Sgt. Cray's statements during his interview with SEA&L. Sgt. Cray confirmed to SEA&L that, although probable cause existed to arrest Mr. Henry based on Witness #1's identification, Mr. Henry was not considered to be under arrest. Sgt. Cray told SEA&L he does not like to arrest people based on the word of a store employee without additional investigation "because mistakes happen; people make inaccurate IDs."

Sgt. Cray went inside CVS to the manager's officer where the CVS video was being reviewed. According to the IA Report, Witness #1 said to Sgt. Cray, "the guy that's stopped, talking to your officers, is the guy." Witness #1 and Witness #2 confirmed they had not seen the suspects take anything from the store that day, so Sgt. Cray decided to release Mr. Henry and conduct further investigation. IA's notes from Sgt. Cray's interview do not contain any references to Witness #1 telling Sgt. Cray that the man with the officer was the guy. Sgt. Cray told SEA&L that, when he entered CVS, Off. McMahon was in the office area reviewing CVS's surveillance video with Witness #1. He said Off. McMahon provided Witness #1 and Witness #2 with a form to provide a voluntary statement. Sgt. Cray estimated that he was inside CVS for approximately ten minutes.

Sgt. Cray returned outside and advised Mr. Henry of the reason he was being detained, that he was being released, and that the investigation was ongoing. Sgt. Cray also informed Mr. Henry that he may receive a summons in the mail and Sgt. Cray said Mr. Henry "seemed OK with it." Mr. Henry then showed the officers the CVS receipt on his phone, and Off. Fitzpatrick looked at the receipt. Sgt. Cray told SEA&L that Off. Fitzpatrick may have also "taken a brief look" inside

Mr. Henry's vehicle to look inside the CVS bag. He said he did not recall anyone doing an "active search" of the vehicle.

The IA Report states that Sgt. Cray could not recall what information he provided to Mr. Henry in response to Mr. Henry's request for the officers' names and badge numbers. IA's notes from Sgt. Cray's interview indicate that Sgt. Cray stated that he provided the information Mr. Henry requested. Sgt. Cray told SEA&L that he provided his name and badge number to Mr. Henry either verbally or by giving Mr. Henry his card.

Sgt. Cray told SEA&L he did not ask Off. Schlittler or Off. Fitzpatrick to complete an incident report on Mr. Henry's seizure. He said did not think a report was warranted because Mr. Henry was ultimately released.

2. Off. McMahon's Follow-up Investigation

Off. McMahon also conducted a follow-up investigation of the shoplifting incidents under Sgt. Cray's supervision. Sgt. Cray confirmed to SEA&L that he was kept abreast of the follow-up investigation. Neither Off. Fitzpatrick nor Off. Schlittler had any involvement with Off. McMahon's follow-up investigation. It does not appear that the follow-up investigation was addressed in the police department's internal investigation.

During the follow-up investigation, Off. McMahon identified who she believed to be the female shoplifting suspect based on the fact that the male and female suspects were believed to be working as a team and the car Mr. Henry was driving was registered to a woman. As detailed in a supplemental incident report dated January 30, 2020 and modified February 3, 2020, Off. McMahon obtained and reviewed CVS surveillance footage from the two previous shoplifting incidents (August 4, 2019 and October 19, 2019) and identified Mr. Henry as the male depicted in both incidents:

On 01/30/2020 I (N574) reviewed the video footage of the CVS shoplifting incidents from 08/04/2019 and 10/19/2019.

The incident on Sunday, 08/04/2019 shows the following sequence of facts:

4:49pm - [redacted] enters (CVS Highland Ave door)
4:50pm - Henry enters (CVS Highland Ave door) while talking on the phone
4:58pm - [redacted] exits left (CVS Highland Ave door) with full cart of misc. items, unbagged, unpaid for
5:01pm - [redacted] returns (CVS Highland Ave door) with an empty cart
5:10pm - Henry exits (CVS Highland Ave door)
5:11pm - [redacted] exits left (CVS Highland Ave door) with full cart of misc. items, unbagged, unpaid for
5:14pm - [redacted] returns (CVS Highland Ave door) with an empty cart

The incident on Saturday, 10/19/2019 shows the following sequence of facts:

4:30pm - Henry enters (CVS Highland Ave door) with gray hoodie, dark pants and hat while on the phone
4:41pm - [redacted] exits left (CVS Highland Ave door) with a full cart of misc. items, unbagged, unpaid for
4:45pm - [redacted] returns (CVS Highland Ave door) with an empty cart
4:46pm - Henry puts items in [redacted] cart and both parties interact
4:53pm - [redacted] exits left (CVS Highland Ave door) with a full cart of misc. items, unbagged, unpaid for
4:55pm - [redacted] returns (CVS Highland Ave door) with an empty cart
5:01pm - [redacted] stashed multiple hats displayed on a jewelry stand into her purse
5:01pm - [redacted] exits left (CVS Highland Ave door) with a full cart of misc. items, unbagged, unpaid for, and her purse in which she stashed the hats
5:04pm - [redacted] returns with no cart

Figure 4: Excerpt of NPD supplemental narrative entered January 30, 2020, modified February 3, 2020, and approved February 22, 2020.

Off. McMahon also compared the videos of the previous incidents to driver's license photos of Mr. Henry and the van owner and deduced that the van owner was, in fact, the female shoplifting suspect:

[redacted] is clearly identified as the offender for all three incidents. Henry is identified as assisting [redacted] on 10/19/2019. Both identifications are based on the RMV photos. After Henry placed items in [redacted] cart and interacted with her, Henry went to the counter to purchase a small amount of items while [redacted] left with the unpurchased items out of the CVS Highland Ave door.

Figure 5: Excerpt of NPD supplemental narrative entered January 30, 2020, modified February 3, 2020, and approved February 22, 2020.

Sgt. Cray states that, in working with Off. McMahon on the follow-up investigation, they developed a theory that Mr. Henry was potentially pocketing money from Elements Massage that was entrusted to him for the purchase of supplies from CVS:

Looks good so far. View the video footage from the previous incidents and attempt to identify if it's the same individual(s) involved. Also contact Elements Massage on Highland Ave and speak with the manager/owner. See if they have the suspect "purchase" products for the business. They might give him cash to buy product, which he then pockets and steals the product to give to the business. Document all findings.

Create Date:	01/30/2020	Create Time:	1008	Created By ID:	8675
Modify Date:	01/30/2020	Modify Time:	1008	Modified By ID:	8675

Figure 6: Sgt. Cray's remarks dated January 30, 2020.

Off. McMahon issued another supplemental report dated February 9, 2020 documenting her meeting with Witness #3 regarding the individual she suspected to be Jane Doe:

On 02/07/2020 at approximately 1300 hours I met with [redacted] I brought photos from the video footage of who I believed to be [redacted] from the CVS incidents. After showing [redacted] two photos of the suspect, he quickly confirmed that it was not [redacted] and did not match her description.

[redacted] stated that [redacted] was not working on the day the incident happened, 01/25/2020, and showed me the schedule for confirmation. [redacted] Based on my investigation I determined that [redacted] is not our suspect.

Figure 7: Excerpt of NPD supplemental narrative entered February 9, 2020, modified February 22, 2020, and approved February 22, 2020.

Off. McMahon told SEA&L that, after Mr. Henry wrote a letter to the Needham Police in July 2020, she revisited the surveillance video from January 25, 2020. She confirmed that the actual shoplifting suspect is visible on the video. Off. McMahon said the video shows Mr. Henry exiting the store at the exact same time as the actual suspect; Mr. Henry went right and the suspect went left within a second of one another. Off. McMahon issued another supplemental report on July 31, 2020:

Mr. Henry is not being investigated and is not considered a suspect in any of the shoplifting incidents in Needham.

Figure 8: Excerpt of NPD supplemental narrative entered and approved on July 31, 2020.

Needham Police Chief John Schlittler also issued a supplemental report, dated September 21, 2020, clearing Mr. Henry of suspicion:

This is to confirm that Mr. Marvin Henry does not appear in the surveillance videos taken at the CVS store on 936 Highland Avenue on August 4, 2019 and October 19, 2019, and provided to the Needham Police Department.

Figure 9: Excerpt of NPD supplemental narrative entered September 21, 2020.

V. FACTUAL FINDINGS

As evidenced by the factual summaries set forth above, Mr. Henry and the responding officers offer vastly different accounts of the events in question. Similarly, the investigation revealed internal inconsistencies in the officers' individual accounts (as relayed to the SEA&L investigators and to NPD's internal investigators) as well as in the officers' versions of the same events. In an attempt to resolve these inconsistencies, SEA&L considered information shared during interviews with Mr. Henry, the officers, and witnesses, information from the IA Report, CVS surveillance video, and Needham PD dispatch and radio audio recordings. Drawing logical inferences from these various sources of evidence, and applying a preponderance of the evidence standard, SEA&L determined the most likely sequence of events to be as follows:

A. The Suspected Shoplifting in Progress at CVS

At approximately 3:01 p.m. on January 25, 2020, Mr. Henry walked into CVS from the Highland Avenue side of the store. Mr. Henry was wearing a black bomber-style leather jacket, dark green or grey crewneck shirt, light-colored pants, and a knit cap. A few minutes earlier, an unidentified Black male ("John Doe") entered the Highland Avenue door. An unidentified Black female ("Jane Doe") entered the Highland Avenue door approximately 30 seconds after John Doe. John Doe then exited from the parking lot side of the store and reentered seconds later pushing a shopping cart. John Doe was dressed in a dark hooded jacket, light grey hooded sweatshirt, black pants and a dark baseball cap. John Doe was speaking on his phone as he entered the store. Two minutes later, Jane Doe also exited from the parking lot side of the store only to reenter the store seconds later, pushing a shopping cart.

Figure 10: 2:53:11 p.m. - John Doe enters CVS through the Highland Avenue door..

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Figure 11: 2:53:55 - John Doe exits CVS through the parking lot door.

Figure 12: 2:54:10 - John Doe reenters CVS through the parking lot door pushing a shopping cart.

Figure 13: 3:01:29 p.m. - Mr. Henry enters CVS through Highland Avenue door.

Witness #1, the store's operations manager, observed Jane and John Doe walking through the store. As detailed in the NPD incident report, CVS had reported two previous shoplifting incidents in which the suspects, a Black man and Black woman who appeared to be working as a team, entered the store separately, retrieved shopping carts from outside the store, returned to the store to fill the carts with various items, and pushed the carts out of the store without paying for the items. According to Witness #1, Jane and John Doe matched the description of the suspects from the August 4, 2019 and October 19, 2019 incidents. He alerted the store's general manager, Witness #2, who instructed him to call the police while she agreed to monitor John Doe's movements.

At 3:04 p.m., Witness #1 left the sales floor to call Needham Police. Off. Kelleher took the call. At nearly the exact same time, Mr. Henry was completing his purchase at the cash register. Witness #1, a non-native English speaker, reported the suspected shoplifting and described Jane and John Doe to Off. Kelleher. It is clear from the audio recording of the call that Off. Kelleher had some difficulty discerning what Witness #1 was saying. However, as he was speaking to Witness #1, Off. Kelleher can also be heard broadcasting to NPD personnel the nature of what was occurring at CVS and a general description of the suspects:

3:06:00 (Kelleher broadcasting on radio): Units responding, they're leaving the store and heading toward the exit on Highland Ave, described as a very large black male and a female. Trying to get a clothing description.
(Kelleher to Witness #1): What was the male wearing?
(Witness #1): So a black—grey—I'll say grey hoodie and, um, a hat on it.
(Kelleher): OK. What about the female?
(Witness #1): The female is black, um, big one too, and uh kind of wearing the black clothes.
(Kelleher): OK. Dark clothes.
(Witness #1): Yeah, dark clothes, yeah.

(Kelleher broadcasting on radio): Male with a grey hoodie and female in all dark clothes.

Witness #2, who was still on the sales floor, approached John Doe, who was pushing a shopping cart in the cleaning products aisle. She asked him whether she could help him with anything. Witness #2 recalled John Doe gave her an unpleasant look and declined her offer. Witness #2 remained in close proximity of John Doe to monitor his movements until the police arrived. However, when another customer called her away with a question, Witness #2 lost sight of John Doe. She did not see John Doe leave the store.

At 3:05 p.m., Mr. Henry can be seen leaving the store with a small bag. He turns right onto Highland Ave. Three seconds later, John Doe leaves from the same door and turns left onto Highland Ave.[5]

Figure 14: 3:05:07 p.m. - Mr. Henry exits CVS through the Highland Avenue door.

[5] Jane Doe exited the store using the parking lot door about two minutes later. She was not pushing a shopping cart and appears to have made a small purchase.

Figure 15: 3:05:11 p.m. - John Doe exits CVS through the Highland Avenue door.

At Off. Kelleher's instruction, Witness #1 returned to the sales floor to determine whether the suspects were still in the store. As he is speaking with Off. Kelleher, he is joined on the sales floor by Off. McMahon who entered the store from the parking lot side at 3:07 p.m. She can be seen conferring with Witness #1. Less than 20 seconds later, Off. Fitzpatrick entered CVS through the Highland Avenue door. It is unclear whether he and Off. McMahon spoke while in the store. However, Witness #1 recalls standing with a female officer when a young male officer entered the store. Witness #1 pointed to the door and told the male officer that the suspect had exited via the Highland Ave door. Off. McMahon reported that same information from her walkie-talkie.

3:08:15 (McMahon): This is 573 to control.
(Kelleher): Control's on.
(McMahon): I'm in the store now. The party already left out on the Highland exit. If you wanted to search the area, I'll talk to the manager.
(Kelleher): Alright. Received.

B. Witness #1's "Identification" of Mr. Henry

Almost immediately after entering the store, Off. Fitzpatrick can be seen exiting the Highland Avenue door. He began walking slowly to the left, while looking behind him over his shoulder. Off. Fitzpatrick then turned around and began walking quickly in the opposite direction (towards Starbucks).

Figure 16: 3:08:41 - Off. Fitzpatrick exits CVS to the left.

Figure 17: 3:08:45 - Off. Fitzpatrick heads towards Starbucks and appears to reach for his handheld microphone.

Figure 18: 3:08:45 - Off. Fitzpatrick walks quickly towards the Starbucks.

It appears from the video that Off. Fitzpatrick is reaching for his handheld microphone as he heads swiftly down Highland Avenue towards West Street. He radios Off. Schlittler who is approaching Highland Avenue from West Street.

3:08:49 (Fitzpatrick): On your right, Leo. Right there, right there, right there.

1. Off. Fitzpatrick's Account

In interviews with NPD's internal investigators as well as SEA&L, Off. Fitzpatrick reported that he spotted Mr. Henry walking down Highland Avenue towards the Starbucks. Believing that Mr. Henry fit the shoplifter's description, he alerted Off. Schlittler. He then entered the CVS where he was joined by Off. McMahon and Witness #1. The three exited the store together and walked to the corner. By that time, according to Off. Fitzpatrick, Off. Schlitter and Mr. Henry were standing together outside Starbucks. He states that he asked Witness #1 whether "the man in the dark jacket speaking with [Off. Schlittler] was the man about whom [Witness #1] called the police," to which Witness #1 responded "that's him." According to NPD's internal investigation, Off. Fitzpatrick also stated that Witness #1 "informed [Officers McMahon and Fitzpatrick] of the modus operandi of the shoplifting scheme, including the purchase of small items." At that point, Off. Fitzpatrick left Off. McMahon and Witness #1 and headed to the Starbucks to inform Off. Schlittler that Mr. Henry had been positively identified. According to the IA Report, Off. Fitzpatrick also informed Off. Schlittler that Witness #1 "provided a description of how the shopliftings had been committed, including paying for small items." Off. Schlittler then placed Mr. Henry in handcuffs.

Off. Fitzpatrick's account conflicts with the evidence in a number of key respects. First, the surveillance video clearly shows Off. Fitzpatrick exit CVS alone and, after briefly heading left, turning right and appearing to walk to his right at a quickened pace as he radios excitedly to Off. Schlittler that the suspected shoplifter is "right there." Three seconds later, Off. McMahon and Witness #1 exit CVS through the Highland Avenue door. They look to the right and Off.

McMahon begins walking towards the Starbucks leaving Witness #1 alone in the doorway. Off. Fitzpatrick is no longer in view.

Figure 19: 3:08:52 - Off. McMahon and Witness #1 exit CVS and Off. McMahon walks towards the Starbucks.

One can reasonably infer, based on the audio and video evidence, that when faced with the decision to either wait outside the CVS for Off. McMahon and Witness #1 to join him (thereby leaving Off. Schlittler to fend for himself with the suspect) or to continue down Highland Avenue to assist Off. Schlittler with the suspected shoplifter, that Off. Fitzpatrick would have chosen the latter.

2. Witness #1's Account

Off. Fitzpatrick's account also conflicts with Witness #1's recollection of events. Witness #1, who returned to work at CVS early this year after a lengthy trip overseas, was interviewed by NPD's internal investigators and by the SEA&L investigative team. During his first interview, at his home on January 15, 2021, Witness #1 was shown his January 25, 2020 written statement and asked if it refreshed his recollection as to the events of that day. He stated that it did and told the SEA&L investigators that he observed two suspected shoplifters in the store and called NPD to report what he had seen. He spoke with a female officer (presumably Off. McMahon) and informed her that the male suspect exited the store onto Highland Avenue and turned right. Although the surveillance video shows that he and Off. McMahon exited the store together, Witness #1 recalled that the female officer left the store and that he followed shortly thereafter. Once outside, Witness #1 stated that he turned right and observed the suspected shoplifter being handcuffed by the police while leaning face-forward against a car parked on Highland Avenue in front of Starbucks.[6] A short while later, the female officer returned to CVS to obtain a written statement from him. She was joined sometime later by a male officer who told Witness #1 "We got him!"

[6] Witness #1 described the car as an SUV but Mr. Henry was driving a minivan on January 25, 2020.

One week later, on January 22nd, NPD's internal investigators interviewed Witness #1 at CVS. The following is an excerpt from the internal investigators' report:[7]

> [redacted] indicated he then went out front of CVS on Highland Ave with an officer (McMahon) and observed another officer (L. Schlittler) speaking with the male party (Henry) in front of Starbucks. [redacted] believed the man was the shoplifter. He stated he told this to the officers with him (Fitzpatrick and McMahon). He stated the male officer (Fitzpatrick) walked over to Starbucks and he [redacted] remained in front of CVS with Officer McMahon. This is consistent with [redacted] and officers' prior statements. We further asked [redacted] about the atmosphere by the car between the officers and Henry. He stated all appeared calm and the parties were talking. We asked [redacted] if he observed any officers shove, push, or treat Henry in a rough manner. He replied he did not observe any of these actions. He stated he observed one of the officers holding Mr. Henry's wrist stating he was unsure if he was handcuffing him or simply holding his wrist. We asked [redacted] if there was a crowd forming in front of Starbucks. He stated there was "no one around." He stated he then went back in the store with the officer (McMahon) to review the camera footage.

Figure 20: Excerpt of NPD IA Report Addendum.

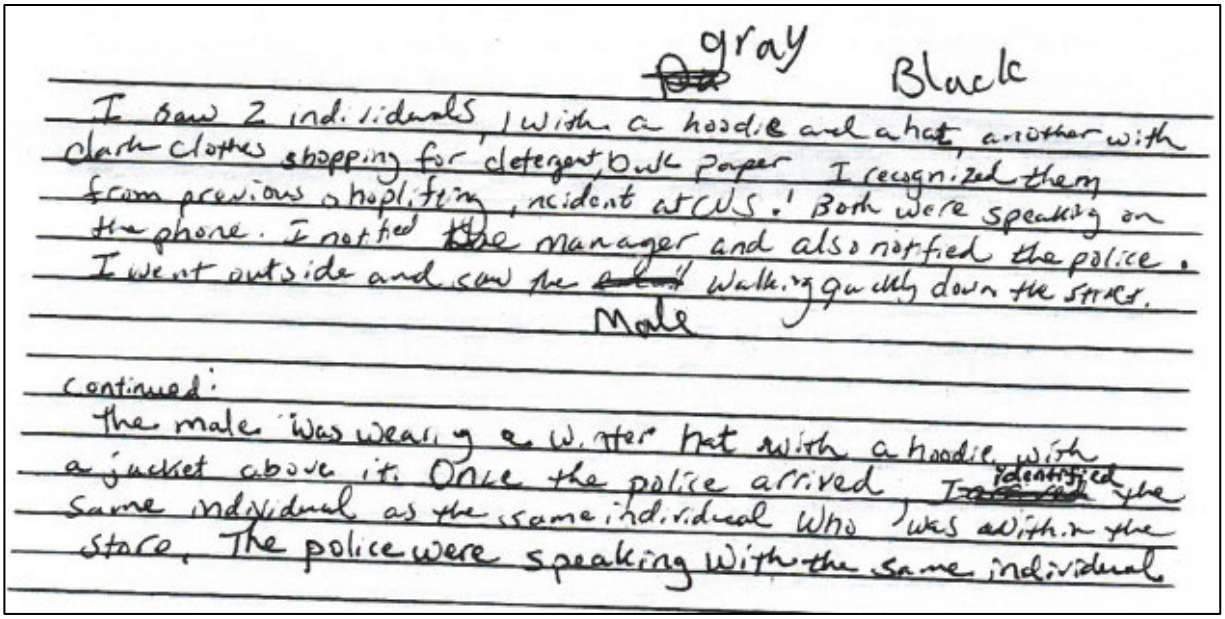
A few days later, the SEA&L investigators interviewed Witness #1 by phone. He said he remembered seeing a female officer (McMahon) and young male officer (presumably Fitzpatrick) in the store. Witness #1 told the officers that the suspects left through the Highland Avenue door and Off. Fitzpatrick ran towards the door. Off. McMahon and Witness #1 went outside. When Witness #1 was outside, he saw an officer holding a man (Mr. Henry) with the front of Mr. Henry's body against a vehicle; the officer was behind Mr. Henry either handcuffing him or holding his hands behind his back.[8] Witness #1 recalled Off. McMahon walked down the street towards Starbucks to look for Jane Doe.

3. Witness #1's January 25, 2020 written statement

The statements attributed to Witness #1 in Off. McMahon's incident report and the supplemental IA Report are consistent with the NPD's interpretation of Witness #1's January 25, 2020 written statement in which he writes:

[7] NPD completed its internal investigation and reported its findings to Mr. Henry on January 11, 2021. After interviewing Witness #1, the internal investigators issued an addendum to the original report but did not amend their original findings.

[8] As further discussed in the next section, the internal investigators' report is silent as to why an NPD officer would "simply" be holding a suspect's wrist or whether Witness #1 was asked whether Mr. Henry was leaning face forward onto a car at the time the officer was holding his wrist (body positioning commonly connected to handcuffing).


I saw 2 individuals, gray with a hoodie and a hat, another with Black
dark clothes shopping for detergent, toilet paper. I recognized them
from previous shoplifting incident at CVS.! Both were speaking on
the phone. I notified the manager and also notified the police.
I went outside and saw the Male walking quickly down the street.

continued:
the male was wearing a winter hat with a hoodie with
a jacket above it. Once the police arrived, I identified the
same individual as the same individual who was within the
store. The police were speaking with the same individual

Figure 21: Witness #1's voluntary statement from January 25, 2020..

The question of whether Witness #1's use of "identified" can fairly be construed to mean that he identified Mr. Henry to the officers is an important one as the decision to handcuff and detain Mr. Henry for nearly 30 minutes is based primarily on the officers' assertion that Witness #1 identified Mr. Henry as the suspected shoplifter *to the officers* while he was standing outside the CVS. In their analysis of the constitutional implications of the officers' decision to detain Mr. Henry, the internal investigators state, "In this case, Off. Schlittler was in a lawful public place, had a reasonable belief that a crime had been committed, and had the authority to conduct a threshold inquiry when he stopped [Mr. Henry]. **Off. Fitzpatrick's relay of [Witness #1's] identification to Off. Schlittler resulted in probable cause**…" In their report addendum, the internal investigators report that Witness #1 "confirmed that what he indicated in his written statement was what he observed and what he told the officers on the phone and on-scene. He reiterated multiple times that the man **he identified to the officers** was the same man that he believed was shoplifting in the store.[9]" The internal investigators go on to conclude that Witness #1's statement that he identified Mr. Henry to Officers McMahon and Fitzpatrick is "consistent with [Witness #1's] prior statements."

While Witness #1's statements to the SEA&L investigators stand in sharp contrast to the statements attributed to him in Off. McMahon's incident report and by NPD's internal investigators, they are entirely consistent with the audio and video recordings. They are also consistent with an interpretation of Witness #1's use of "identified" to mean that he "recognized" Mr. Henry as the individual he had seen in the store. It is also consistent with Off. McMahon's description, in the Incident Report, that Witness #1 stated he "recognized [Mr. Henry] as he was walking down the street (Highland Ave) and confirmed that he was the suspect.[10]" In our view, it is unlikely that Witness #1, a non-native English speaker, would intentionally use the word

[9] The investigators' report addendum goes on to state that Witness #1 "confirmed" this version of events to the SEA&L investigator "multiple times."

[10] Notably, the Incident Report does not state when, and to whom, Witness #1 stated that he recognized Mr. Henry and confirmed that Mr. Henry was the suspect.

"identified" as the term is colloquially used in law enforcement to mean that a witness has formally identified or "ID'd" a suspect in a show-up or some other identification procedure.

4. Off. McMahon's Account

Having determined that the evidence does not support Off. Fitzpatrick's statement that Witness #1 identified Mr. Henry to him and Off. McMahon as the three stepped out of CVS together and stood outside, we turn next to Off. McMahon's statement to NPD's internal investigators and SEA&L investigators that once she and Witness #1 exited CVS, Witness #1 pointed excitedly towards Mr. Henry and exclaimed, "that's him!" She further stated to the SEA&L investigators that "within 30 seconds" of Witness #1's identification, Off. Fitzpatrick joined her and Witness #1 although she was unable to recall from where Off. Fitzpatrick came. Off. McMahon's interview statements conflict with those in her incident report where she states, "Off. Fitzpatrick, [Witness #1] and I exited through the Highland Ave door and located [Mr. Henry] speaking with Officer L. Schlittler…[Witness #1] stated he recognized [Mr. Henry] as he was walking down the street (Highland Ave) and confirmed that he was the suspect." Notably, neither the incident report, nor Off. McMahon's interview statements corroborate Off. Fitzpatrick's account that he asked Witness #1 whether Mr. Henry was the person about whom Witness #1 had called the police and that he discussed the modus operandi of the previous shoplifting incidents with Witness #1.

Here, as with Off. Fitzpatrick, Off. McMahon's account is contradicted by the video evidence. As noted above, after she and Witness #1 exit the CVS, Off. McMahon turned to the right and continued walking out of view of the camera. It does not appear that she was with Witness #1 long enough to ask him to identify Mr. Henry as the suspected shoplifter nor does it appear that she paused or looked towards Witness #1 before heading down Highland Ave to join her fellow officers. Witness #1 stayed by the CVS door, in view of the surveillance camera.

5. Off. Fitzpatrick and McMahon's Follow up Interviews

The SEA&L investigators conducted follow-up interviews of Officers Fitzpatrick and McMahon during which each was shown the surveillance footage detailed above and asked if they had any explanation for the apparent inconsistencies between their previous interview statements and the video evidence.

After watching the video, Off. McMahon altered her account, saying that Off. Fitzpatrick must have been on the sidewalk outside of CVS instead of behind her in the store as she had previously described. Off. McMahon noted that she, Off. Fitzpatrick, and Witness #1 were all in pretty close proximity. She clarified that they were within eyesight and earshot and on the same side of the street. She stated that everything happened so quickly that she was unsure of some of the details.

Off. Fitzpatrick seemed less sure about his timeline after watching the video. He stated that he did not exactly remember what he did next after walking past the CVS door and radioing to Off. Schlittler that Mr. Henry was "right there." He did not recall whether he came back to the CVS to speak with Witness #1 or the exact point at which he and Witness #1 spoke. He then stated that when he spoke with Witness #1, it was on the corner. He reiterated that Off. McMahon was present, that Off. Fitzpatrick asked Witness #1 "Is that man speaking with the officer the one you called about?" and that Witness #1 said "That's him."

If Off. Fitzpatrick did ask Witness #1 to identify Mr. Henry, it appears that it could only have occurred during the four-second window when Witness #1 is out of camera view. During this time, Off. Fitzpatrick presumably left Off. Schlittler and walked back towards the CVS to speak with Witness #1. It is certainly possible that Witness #1 saw an officer talking to him or walking towards him, which caused him to walk out of camera view for a brief period. It is also possible that Witness #1 and the officer then may have spoken briefly before Witness #1 returned to camera view and went back inside the store. However, it is unlikely that Off. Fitzpatrick and Witness #1 engaged in the extended dialogue Off. Fitzpatrick reported both in his initial SEA&L interview and as reflected in the IA Report. Even assuming that Witness #1 identified Mr. Henry to the officers during this small window, the identification would have come on the heels of Witness #1 standing by the door of CVS for 25 seconds watching three police officers with Mr. Henry, who was likely handcuffed or in the process of being handcuffed during that time.

C. NPD's Seizure of Mr. Henry

Upon hearing Off. Fitzpatrick's radio transmission alerting him that the suspected shoplifter was "right there," Off. Schlitter turned right onto Highland Avenue from West Street. He states that he observed Mr. Henry standing in the street on the driver's side of his car. Although he recalled Off. Kelleher's dispatched description of the suspect as wearing a grey hooded sweatshirt, Off. Schlittler observed that Mr. Henry was wearing a grey shirt but does not remember whether it was hooded. He states that he approached Mr. Henry saying "Hey, you got a sec?" and engaged him in conversation while waiting for additional information from the other responding officers. About five minutes later, they were joined by Off. Fitzpatrick who told Off. Schlitter that Mr. Henry had been identified by Witness #1. At that time, according to Off. Schlittler, he moved Mr. Henry to the sidewalk and placed him in handcuffs.

As detailed above, Off. Fitzpatrick reported in his initial interview with the SEA&L investigators and in his interview with NPD's internal investigators that Witness #1 identified Mr. Henry as the suspected shoplifter as they stood outside of CVS with Off. McMahon and that, based on Witness #1's positive identification, he (Fitzpatrick) walked to Starbucks to inform Off. Schlittler and assist in detaining and handcuffing Mr. Henry. For the reasons articulated in the previous section, this account is not supported by the evidence. The evidence does, however, support Mr. Henry's account of the initial stages of the encounter, at least in part.

Mr. Henry states that he was approached by an officer saying "Hey you! Come here!", shoved against his vehicle, handcuffed, and searched almost immediately and that there were at least 3 officers present.[11] Officers Schlittler and Fitzpatrick maintain that Mr. Henry was not handcuffed until Off. Fitzpatrick left CVS and joined Off. Schlittler in front of Starbucks, which is corroborated by the video evidence and Witness #1 who reports that when he exited CVS, he turned right and observed Mr. Henry being held by the wrist or handcuffed while leaning forward against a parked car. As discussed, the video evidence shows Off. Fitzpatrick moving quickly toward Mr. Henry and Off. Schlittler while Off. Fitzpatrick radioed to Off. Schlittler that the suspect was "right there." Factoring in the time it would have taken for Off. Schlittler to pull his cruiser alongside Mr. Henry's vehicle and exit the cruiser, it is likely Off. Fitzpatrick arrived within seconds. This short timeframe does not support Off. Schlittler's account of engaging Mr. Henry

[11] While Mr. Henry has consistently maintained that he saw four male officers on Highland Avenue, it is unclear whether he recalls seeing them all at the same time or if they alternated throughout the encounter. His account also would appear to exclude Off. McMahon, the lone female officer.

in conversation for any significant period of time before Off. Fitzpatrick arrived. Given that Witness #1, who exited CVS three seconds after Off. Fitzpatrick radioed Off. Schlittler, saw Mr. Henry facing his vehicle and leaning against it while being held by the wrist, the evidence supports Mr. Henry's account that he was handcuffed almost immediately upon approach. Without additional evidence, it is unclear what tone Off. Schlittler used when he approached Mr. Henry and what force he used when he handcuffed Mr. Henry.

That leaves Off. McMahon who, in interviews with SEA&L investigators and NPD's internal investigators, reported that after Witness #1 excitedly pointed to Mr. Henry and said, "that's him," the two of them remained at the CVS entrance and eventually went back inside the store. She further states that, from her vantage point outside of CVS with Witness #1, she did not see any of the interaction between Mr. Henry and the other officers, specifically whether Mr. Henry was shoved or handcuffed. Here too, Off. McMahon's account is unsupported by the evidence.

Figure 22: 3:08:52 - Off. McMahon and Witness #1 exit CVS and Off. McMahon walks towards the Starbucks.

Off. McMahon is captured on the CVS surveillance video exiting the store and heading to the right at a quickened pace. According to Witness #1, he watched as Off. McMahon walked down Highland Avenue towards Starbucks in search of Jane Doe, leaving Witness #1 alone outside of the store. The surveillance video corroborates his account as does Off. McMahon's request, roughly 15 seconds later, that Off. Kelleher check the license plate of the car Mr. Henry was driving:

3:09:21 (McMahon): Control, Mass plate when you're ready.
(Kelleher): Send it.
(McMahon): [XXXXXX]
(Kelleher): Roger.

In her January 25, 2020 incident report as well as her initial interview with SEA&L investigators, Off. McMahon stated that she identified Mr. Henry's suspected accomplice (*e.g.*,

Jane Doe) based on the fact that she was the registered owner of the car Mr. Henry was driving.[12] During a follow-up interview, Off. McMahon was asked how she was able to connect the minivan to Mr. Henry from her vantage point outside the CVS (more than 100 feet away). Initially, Off. McMahon did not recall calling in the license plate. Upon hearing the radio transmission, she said she did not remember how she associated the vehicle with Mr. Henry. After watching the surveillance video of her walking off camera towards the Starbucks, Off. McMahon was asked whether she associated the vehicle with Mr. Henry while she was walking towards Starbucks. She then conceded that it was possible. She also said that she may have called in the license plate due to Mr. Henry's proximity to the vehicle. She noted that it is common to run the license plates of cars in the proximity so they are on the call. However, she did not call in any other license plates during the time Mr. Henry was seized.

Although she is unable to recall whether and how far down Highland Avenue she walked or whether she did so in an attempt to locate Jane Doe, Off. McMahon was clearly close enough to Mr. Henry's parked car to read the license plate and to witness the initial stages of Mr. Henry's seizure (despite her reported inability to remember). From there, she likely remained close enough to Off. Fitzpatrick and Off. Schlittler to discuss their next steps. It appears the three officers agreed that Off. McMahon would go back inside CVS to conduct further investigation, because she reentered CVS approximately a minute after she requested the license plate information. Additionally, both Off. Fitzpatrick and Off. Schlittler radioed that Off. McMahon was speaking with CVS management approximately three-and-a-half minutes after Off. McMahon returned to CVS, indicating discussion and agreement among the officers. As Off. McMahon is re-entering the store, she can be seen acknowledging via her hand-held microphone that Off. Kelleher has provided the vehicle's registration information.

[12] As detailed later in this report, Off. McMahon conducted a follow-up investigation aimed towards gathering additional evidence that Mr. Henry and the car's registered owner committed the string of thefts from CVS dating back to the previous summer.

Figure 23: 3:10:16 - Off. McMahon returns inside CVS.

Mr. Henry's contention that the officers "patted the outside of his clothing" is also supported by the evidence. According to NPD's internal investigators, Off. Schlittler admitted as much when he reported that he "pat-frisked [Mr. Henry] for anything from CVS."[13] Two months later, when asked by the SEA&L investigators whether he searched or frisked Mr. Henry during the encounter, Off. Schlittler stated that he did not recall doing so. When asked whether he recalled telling NPD's internal investigators that he pat-frisked Mr. Henry for items from CVS, Off. Schlittler again replied that he did not recall. Nonetheless, the evidence supports a finding that he did, in fact, search Mr. Henry.[14]

Mr. Henry stated that he recalled a Starbucks patron staring at him through the Starbucks window, and that a man shielded a child's eyes. SEA&L investigators were unable to confirm this account based on an interview with Witness #5.

With the exception of Off. Fitzpatrick's report to SEA&L, the officers agree that, based on their respective observances, Mr. Henry's demeanor during his seizure was calm. Although Off. Fitzpatrick told SEA&L that Mr. Henry became agitated and defensive at times, he told IA that the overall tone of the interaction was "regular (calm) [and] not over the top." Thus, the evidence supports Mr. Henry's calm and compliant behavior, rather than Off. Fitzpatrick's claim of Mr.

[13] Off. Schlittler's pat frisk of Mr. Henry for shoplifting evidence is discussed further in the next section.

[14] It also appears likely that Off. Schlitter obtained Mr. Henry's driver's license during the search of Mr. Henry's person. At 3:10:13, roughly one minute and 24 seconds after Off. Fitzpatrick leaves CVS to assist Off. Schlittler, he radios Off. Kelleher to check Mr. Henry's driver's license number (presumably to confirm its active status and to check whether Mr. Henry had a criminal record). Moments later, Off. Schlittler radios Off. Kelleher that he had already queried Mr. Henry's driver's license (most likely by using the mobile terminal in his patrol car). Records from the Department of Criminal Justice Information Services ("CJIS") confirm that Off. Schlittler queried Mr. Henry's driver's license number prior to Off. Fitzpatrick's request for similar information from Off. Kelleher.

Henry's agitation. Off. Fitzpatrick stated that he agreed to apologize to Mr. Henry, but he told NPD's internal investigators and SEA&L that he only said he would apologize if Mr. Henry was not on the CVS video. Thus, his promise to apologize was disingenuous because he already knew Mr. Henry had been inside CVS and, in all likelihood, would appear on the surveillance video. This is consistent with Mr. Henry's characterization of Off. Fitzpatrick as unnecessarily antagonistic and rude.

While Mr. Henry recounted that the officers largely ignored him during the encounter, it is likely that Off. Schlittler and/or Off. Fitzpatrick did explain to Mr. Henry that the officers were investigating a shoplifting at the CVS, prompting Mr. Henry to offer to show the officers his receipt. It is likely Mr. Henry also offered to show the officers his CVS bag in an attempt to prove his innocence, and permitted the officers to access the CVS bag in his vehicle. Mr. Henry claims that the officers also looked in his backpack, which was also located in the vehicle. However, without additional evidence, it is unclear whether the officers went beyond the scope of that permission and looked in Mr. Henry's backpack.

After Sgt. Cray informed Mr. Henry that he was being released, Mr. Henry asked the officers for their names and badge numbers. He said that one officer walked away without providing the information. Off. Fitzpatrick recalled writing his name on a piece of paper from his note pad, then giving the paper and his pen to Mr. Henry to write down additional information. Mr. Henry's notes from that day support Off. Fitzpatrick's recollection. It appears that there are two different sets of handwriting on the paper, likely Off. Fitzpatrick's handwriting noting his own name and badge number, and possibly Off. Schlittler's name and badge number as well. The date, NPD address, and "Sgt. Cray" appear to be in a different handwriting. Sgt. Cray's badge number does not appear on the note, indicating that he was the officer who walked away from Mr. Henry without providing his information.

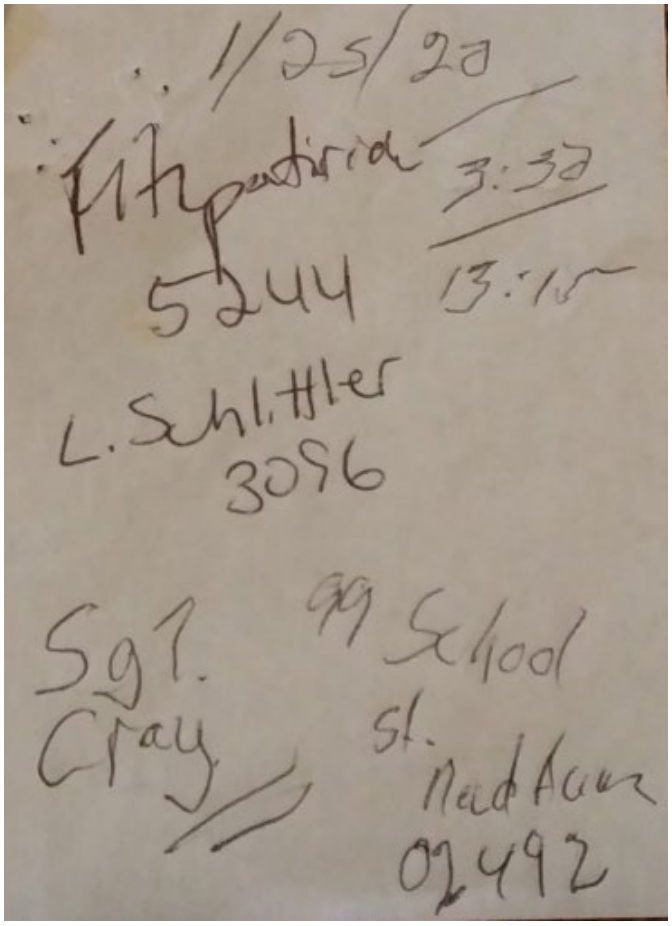


Figure 24: Mr. Henry's notes from January 25, 2020.

At 3:35:28, Off. Schlittler radioed that he was clearing the scene. Sgt. Cray also called in that he was clearing the scene approximately five minutes later. Because Mr. Henry had been wearing Off. Schlittler's handcuffs, it is likely that Mr. Henry left the scene sometime before Off. Schlittler cleared it at 3:35. In sum, it appears that Mr. Henry's encounter with the police lasted approximately 27 minutes starting from the time Off. Fitzpatrick radioed Off. Schlittler at 3:08.

D. Investigation Inside CVS

Off. McMahon stated that, when she went back inside the CVS, she inspected and inventoried the shopping carts the suspects abandoned in the store aisles. She said she also went to the CVS office area to retrieve surveillance video. The Incident Report states Witness #1 and Witness #2 showed Off. McMahon video footage that "clearly showed" Mr. Henry entering CVS at approximately 2:53 p.m.[15] She collected a CD of the video footage to enter into evidence. However, during her interview with SEA&L, Off. McMahon was uncertain whether she viewed any video footage taken during the suspected shoplifting while she was in the CVS. Witness #1 and Witness #2 both stated that they did not review the video footage that day.

[15] It was John Doe who entered CVS at 2:53 p m.; Mr. Henry entered the store approximately eight minutes later at 3:01 p.m.

When Sgt. Cray arrived at the CVS, Witness #1 recalled him saying they got the male shoplifting suspect. In his interview with SEA&L, Witness #1 said he believed he was speaking with the same young male officer who came into the CVS earlier (Off. Fitzpatrick). Witness #1's confusion of Sgt. Cray and Off. Fitzpatrick is likely attributable to the fleeting nature of his earlier interaction with Off. Fitzpatrick.

Sgt. Cray recalled that Witness #1 said he believed Jane Doe and John Doe were the individuals who had shoplifted from the CVS on previous occasions. However, Sgt. Cray determined that there was no evidence at that time that any items had been taken that day. As such, Mr. Henry would be released while additional information was gathered. Sgt. Cray and Off. McMahon provided Witness #1 and Witness #2 with NPD's voluntary statement form before returning outside to Off. Fitzpatrick, Off. Schlittler, and Mr. Henry, as described above.

VI. THE POLICE DEPARTMENT'S INTERNAL INVESTIGATION IS DEFICIENT IN SEVERAL KEY AREAS

In September 2020, the Needham Police Department ("NPD") launched an internal investigation of the allegations raised in Mr. Henry's letter. It is unclear whether NPD has a dedicated internal investigations unit but the department does have an Internal Affairs policy that empowers the Chief of Police to designate an individual to fulfill the department's internal affairs function.[16] Here, the Chief's designee, Lieutenant Chris Baker, assigned two other lieutenants to conduct the investigation and to report their findings to him for review and approval. On January 11, 2021, Lieutenant Baker notified Mr. Henry of the investigation's results:

[16] Chief John Schlittler was excluded from the investigation because his brother, Off. Leo Schlittler, is a subject of the investigation.

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John J. Schlittler
Chief of Police
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jschlittler@needhamma.gov

January 11, 2021

Mr. Marvin Henry
[redacted]

Dear Mr. Henry,

The purpose of this letter is to inform you of the results of the investigation that was conducted following receipt of the letter dated July 20, 2020 from your attorney. Please see below for the final disposition of the applicable charge(s) for each Officer involved in the incident.

Charge	Officer(s)	Disposition
Policy 1.01- Use of Force	Officer L. Schlittler	Not Sustained
Policy 1.07- Threshold Inquiry	Officer L. Schlittler	Exonerated
Policy 1.11- Arrest	Officer L. Schlittler Officer Fitzpatrick Sergeant Cray	Exonerated
Policy 1.11- Arrest (Reporting)	Officer L. Schlittler Sergeant Cray	Sustained
Policy 1.18- Bias Based Profiling	Officer Kelleher Officer McMahon Officer L. Schlittler Officer Fitzpatrick Sergeant Cray	Exonerated

Exonerated – The complaint or incident did occur, but our personnel's actions were lawful and proper.
Not Sustained – Insufficient evidence either to prove or disprove the complaint or incident.
Sustained – The complaint or incident is supported by sufficient evidence of misconduct by department personnel.

As a result of the above findings, the Department has undertaken appropriate action where applicable.

Sincerely,

Lt. Christopher Baker
Needham Police Department

Figure 25: NPD letter to Marvin Henry dated January 11, 2021.

In reaching the above findings, the IA investigators reviewed the available audio and video recordings, relevant caselaw and departmental policies and procedures, and official reports of Mr. Henry's detention as well as previous shoplifting incidents that resulted in arrests of non-Black suspects (ostensibly to address Mr. Henry's request, as detailed in the complaint letter, for NPD policies regarding the magnitude of police response to a call for service). The IA investigators also interviewed Mr. Henry, Officers Fitzpatrick, Kelleher, McMahon and Schlittler, Sgt. Cray,

Witness #2, Witness #3, and an employee of the Starbucks where the encounter took place. The investigators completed and submitted their report for Lt. Baker's review on October 29, 2020 and later submitted an addendum to that report summarizing their interview of Witness #1. The January 22, 2021 addendum did not materially alter the original report's findings. Rather, it concluded that Witness #1 confirmed that what he had written in his voluntary statement reflected the events of January 25, 2020.

In sum, the IA investigators concluded that (1) neither Mr. Henry's detention, nor the search of Mr. Henry's person and vehicle violated Needham PD policy or the Fourth Amendment to the U.S. Constitution; (2) the officers did not use improper force when handcuffing Mr. Henry; (3) there was no evidence to support that the officers' decisions and/or actions were motivated by Mr. Henry's race; (4) the number of officers who responded to the shoplifting call was standard; and (5) Sgt. Cray and Off. Schlittler violated Needham PD policy by failing to complete a report regarding Mr. Henry's detention.

Having reviewed the IA investigation in light of the available evidence including audio and visual recordings, witness and officer statements, relevant case law, and the NPD policies and procedures governing the conduct under review, we find that the IA investigation is deficient in several key areas which are addressed individually below.

A. The IA Investigation Does Not Adequately Address Factual Inconsistencies

As discussed in the previous section, Off. Fitzpatrick's original account of Witness #1's identification of Mr. Henry and relaying of details of the previous shoplifting incidents: (1) is not corroborated by Off. McMahon or the Incident Report; (2) conflicts with Witness #1's account; and (3) is directly contravened by the CVS surveillance video. Nonetheless, the IA investigators appear to have accepted this account without challenge and assigned it enough evidentiary weight to support their finding that there was probable cause to arrest Mr. Henry at the moment Off. Fitzpatrick joined Off. Schlittler at Starbucks. While the IA Report describes the content of the surveillance videos in broad terms, indicating that the investigators reviewed the recordings, the report is silent (as are the investigators' notes) as to whether the video evidence was put to any meaningful use during the investigation itself.

The IA Report states that Witness #1, Off. McMahon and Off. Fitzpatrick were in front of CVS while Off. Schlittler was speaking with Mr. Henry in front of Starbucks. It goes on to state that, after Off. Fitzpatrick, Off. McMahon, and Witness #1 exited CVS, Witness #1 informed the officers of the modus operandi of the previous shoplifting incidents (i.e., purchasing small items, but pushing a cart full of large unpaid items out of the store). During this same conversation, according to the IA Report, Off. Fitzpatrick asked Witness #1 whether the man speaking with Off. Schlittler was the man he had called the police about, and Witness #1 answered "yes." At that point, the IA investigators write, Off. Fitzpatrick walked over to Off. Schlittler and Mr. Henry.

The IA investigators' interview of Witness #1 is similarly flawed. Putting aside Witness #1's conflicting statements to the SEA&L investigators and accepting the statements attributed to Witness #1 in the IA Report Addendum, his account is still unsupported by the surveillance video and in conflict with the Incident Report. The SEA&L investigators were not able to review notes of the IA investigators interview of Witness #1 and it remains unclear whether Witness #1 was asked to describe the events of January 25, 2020 in his own words or simply asked to adopt the contents of his written statement (which states that Witness #1 "identified" Mr. Henry). Nor is it clear whether and to what extent Witness #1's account was challenged (given the available

evidence) or if he was asked any follow-up questions to his purported statement that he observed an officer holding Mr. Henry's wrist but was unable to see any handcuffs.

B. The IA Investigation Does Not Sufficiently Assess the Officers' Conduct Pursuant to Relevant NPD Policies

The IA investigators assessed the officers' conduct pursuant to a number of NPD policies and procedures. In some instances, however, the evaluation suffered from the lack of investigative zeal detailed in the preceding section. There were also a few policy areas within which the officers' alleged conduct clearly fell but that the IA investigators neglected to address.

1. *NPD Policy § 1.07: Threshold Inquiries*

The IA Report includes an analysis of whether the officers' seizure of Mr. Henry and subsequent search of his person and vehicle violated department policy and/or Mr. Henry's Fourth Amendment right to be free from unreasonable searches and seizures. The report correctly identifies the *Threshold Inquiries* policy as implicated by the officers' alleged conduct. The policy states, in pertinent part that "an officer may make a brief investigative stop and inquiry" under certain circumstances including when he/she is in a public place and "reasonably believes that a crime has been or is being committed." The IA Report asserts that the initial stop of Mr. Henry was justified because Off. Schlittler "had a reasonable belief that a crime had been committed, and had the authority to conduct a threshold inquiry when he stopped [Mr. Henry]." The IA Report is silent as to how the officers reached that conclusion. Similarly, while the *Threshold Inquiries* policy permits officers to frisk for weapons where there is a reasonable belief that the individual is armed and dangerous, the IA Report does not address the propriety of Off. Schlittler's pat frisk of Mr. Henry for "anything from CVS" except to state that the "search" of Mr. Henry's person for evidence was lawful as a Search Incident to Arrest. In so concluding, the IA Report is silent as to why Off. Schlittler's "pat frisk" was re-characterized as an evidentiary search and whether such action was justified at the time it purportedly took place.

Mr. Henry's seizure and his complaint's allegation of racial profiling presents an opportunity to discuss the sufficiency of evidence required to justify a police officer's threshold inquiry, or *Terry* stop,[17] of a Black person. In *Commonwealth v. Warren*,[18] the Supreme Judicial Court ("SJC") set forth the below factors for consideration when determining whether the information available to the police is sufficiently specific to establish reasonable suspicion of involvement in a crime:

a. Description

The description of the suspected perpetrator must give the police enough information for them to reasonably and rationally target an individual as a potential suspect. In *Warren*, the description of three black males, two wearing dark clothing and one wearing a red hoodie, was insufficient. The SJC listed other physical characteristics, such as facial features, hairstyles, skin tone, height, and weight, which could contribute to the officers' ability to distinguish the defendant from any other Black male wearing a hoodie. Ultimately, the Court held that where the description

[17] *Terry v. Ohio*, 392 U.S. 1, 30-31 (1967) (holding that when a police officer observes unusual conduct which leads him or her to reasonably conclude that criminal activity may be afoot and the person may be armed and dangerous, the officer is entitled to stop the person, make reasonable inquiries, and conduct a carefully limited search of the person's outer clothing for weapons without violating the Fourth Amendment).
[18] 475 Mass. 530 (2016).

of a suspect lacks sufficiently specific details, there must be other facts present to establish reasonable suspicion for the police to conduct a stop.

Here, Witness #1, in his call to NPD, described the male shoplifting suspect as Black, big, and wearing a grey hoodie and hat. Off. Kelleher relayed to the responding officers that the suspect was Black, big, and wearing a grey hoodie. Essentially, the only difference between this description and the one provided in *Warren*, is the characterization of the suspect as being "big." The SJC noted that height and/or weight are physical characteristics that could assist the police with targeting a suspect. However, "big" could apply to height, weight, or both. Thus, the description provided to Off. McMahon, Off. Fitzpatrick, and Off. Schlittler was likely not enough to stop Mr. Henry without additional facts to support a potential connection to the shoplifting. Notably, while the officers could find that Mr. Henry fit the description of being Black and big, his clothing did not fit the description provided because he was not wearing a hoodie.

b. Proximity in time and location

The proximity of the stop to the time and location of the crime can be significantly probative of reasonable suspicion, especially "when the distance is short and the timing is close."[19] In *Warren*, the SJC found that stopping an individual a mile from the scene of the crime approximately 25 minutes after the victim called the police was not probative of individualized suspicion. Further, the police did not know which direction the perpetrator headed after committing the crime. Under these circumstances, the location and timing of the stop were no more than random occurrences.

In this case, Off. Fitzpatrick spotted Mr. Henry approximately 100 feet away from the CVS within four minutes of Witness #1's call to NPD reporting the suspected shoplifting. He also spotted Mr. Henry immediately after entering CVS where Witness #1 pointed towards the exit and reported that the suspect had just left. Such close proximity to the reported crime, both in time and location, weigh in favor of the police having reasonable suspicion to stop Mr. Henry in relation to the shoplifting.

c. Lack of other potential suspects

In *Warren*, the SJC was not persuaded by the lack of other potential suspects observed on the street, particularly given the lapse of time and the narrow geographical scope of the search. The Court found that presence on the street some distance away from the crime was not probative of individualized suspicion.

Here, none of the officers reported having observed any other Black males on the street during the time Mr. Henry was detained. While the *Warren* Court found the absence of other potential suspects in the area (25 minutes after the crime occurred) of little probative value to the determination of individualized suspicion, it may be a more significant factor here where Mr. Henry was stopped within a few minutes of the shoplifting report and within seconds of Witness #1 saying the suspect had just exited the store. The lack of other Black males with a larger build near the CVS under these circumstances weighs in favor of the police having reasonable suspicion to stop Mr. Henry in relation to the shoplifting.

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[19] *Warren*, 475 Mass. at 536 (citing *Commonwealth v. Doocey*, 56 Mass. App. Ct. 550, 555 n.8 (2002).

Considered individually, the factors discussed above do not carry enough weight to establish reasonable suspicion for the officers to stop Mr. Henry on suspicion of shoplifting from CVS.[20] However, when viewing the totality of the circumstances, it appears likely that reasonable suspicion did exist. The description provided to the officers of a big, Black male wearing a grey hoodie would likely not have been sufficiently specific to establish reasonable suspicion in the *Warren* case, which involved a similar of description of a group of suspects located in the Roxbury section of Boston. Paradoxically, however, in this case, the description of a large, Black man wearing a hoodie in Needham where, according to 2019 U.S. Census data, only 2.9% of its population is Black, could be sufficient to establish reasonable suspicion to support a stop of an individual fitting that general description.. The description of the suspect, considered together with the geographic and temporal proximity of the reported crime and the stop (100 feet from CVS within minutes of the call) likely supports reasonable suspicion to conduct a threshold inquiry of Mr. Henry.

While the initial stop of Mr. Henry was likely consistent with applicable caselaw and NPD policy, Off. Schlittler's pat frisk of Mr. Henry for "anything from CVS" is not supported by applicable caselaw and appears to be violative of NPD's *Threshold Inquiries* policy. Off. Schlittler described Mr. Henry as calm and cordial. The offense under investigation was shoplifting. There were no specific and articulable facts that would warrant a reasonable belief that Mr. Henry was armed and dangerous and the officers do not posit one. Rather, Off. Schlittler, in his IA interview, stated that he pat frisked Mr. Henry for CVS items, which corroborates Mr. Henry's contention that he was searched. Evidentiary searches are not within the scope of threshold inquiries and, as such, we find that a preponderance of the evidence supports a finding that Off. Schlittler violated the policy.[21]

2. *NPD Policy § 1.11: Arrest*

The IA Report's Fourth Amendment analysis continues with NPD's policy on arrests which requires that officers have probable cause to make an arrest without a warrant.[22] The report goes on to state that, pursuant to Massachusetts General Law Chapter 266, Section 30A, a merchant or employee's statement that an individual has committed a shoplifting offense constitutes probable cause for a warrantless shoplifting arrest by any officer authorized to make an arrest in the jurisdiction in which the offense takes place. Although the officers did not tell Mr. Henry he was under arrest or transport him to the police station for booking, courts have long recognized that, under certain circumstances, an investigatory stop supported by reasonable suspicion can

[20] The final *Warren* factor, evasive conduct, is not applicable here as Mr. Henry was compliant and did not attempt to evade or resist the officers during the encounter. In fact, the officers generally agree that Mr. Henry was calm and compliant throughout the encounter, even when being handcuffed and waiting on the sidewalk for nearly 30 minutes. We note, however, that even if Mr. Henry were to have demonstrated evasive or nervous behavior, his doing so could evidence his "desire to avoid the recurring indignity of being racially profiled," rather than any consciousness of guilt. *Warren,* 475 Mass. at 540.

[21] The *Threshold Inquiries* policy also requires officers, in every instance, to "document the circumstances in accordance with departmental procedures to include the identity of the person stopped and all important facts relative to the incident…" Off. Schlittler did not document the investigative stop nor did the IA Report determine that the failure to do so violated the policy. However, it is unclear from the policy whether NPD officers are required to document threshold inquiries when an investigation detention results in an arrest as it did in this case.

[22] Although the officers used words like "detain" in place of "arrest" to describe the seizure of Mr. Henry, the IA Report's Fourth Amendment analysis presupposes that Mr. Henry was under arrest. We agree.

evolve into a *de facto* arrest, requiring probable cause.[23] The factors, such as the number of officers involved, the use of handcuffs, and the degree of force employed by the officers, are not considered in isolation but rather are viewed in their totality along with other factors such as the efforts made to confirm or dispel the officers' suspicions.

Here, the evidence shows that Mr. Henry was handcuffed and searched almost immediately after he was seized. The officers obtained his driver's license and inquired as to whether he had a criminal history or any outstanding warrants. They searched him for evidence of the crime under investigation. He was held for roughly 30 additional minutes while they continued their investigation after which he was released. The IA investigators determined that there was probable cause to arrest Mr. Henry based on "Officer Fitzpatrick's relay of [Witness #1's] identification to Off. Schlittler." As discussed in previous sections of this report, Off. Fitzpatrick's original account of Witness #1's identification of Mr. Henry (upon which the IA Report's conclusion that probable cause existed is based) is not supported by the evidence. However, we cannot determine, by a preponderance of the evidence, the moment in which Mr. Henry's seizure morphed from a *Terry* stop to an arrest or whether the officers had developed sufficient probable cause by that time.[24] Witness #1, who has apparently offered conflicting accounts, was out of camera view for a short period and it is possible that he, as the employee who witnessed the suspected shoplifting, communicated to the officers that Mr. Henry was the person he observed in the store which would have provided the officers with probable cause to arrest Mr. Henry.

3. *NPD Policy § 1.18: Bias-Based Profiling*

Mr. Henry's letter also notes that the officers' conduct "raises concerns of racial profiling and stereotyping." NPD's *Bias-Based Profiling* policy provides, in pertinent part, that officers are prohibited from considering race when "deciding to take police action and in deciding the scope or substance of action to be taken." As part of its assessment of the officers' conduct in light of this policy, the IA investigators asked the officers whether they considered Mr. Henry's race in their decision-making, to which they each responded, "no."

The IA investigators also examined three recent NPD shoplifting arrests of white males to rebut the allegation that NPD's response to the January 25, 2020 CVS shoplifting incident was disproportionate based on Mr. Henry's race.[25] In each case, store employees witnessed the unlawful activity and reported it to NPD and multiple officers responded to each incident. From there, however, they are all readily distinguishable from Mr. Henry's seizure. For instance, in each of the historical shoplifting arrests, the officers had additional information to assist them in

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[23] *See Commonwealth v. Sanderson*, 398 Mass. 761, 767 (1986) (finding that a forty-minute detention during which six state troopers were present and the defendant was not free to leave was "inconsistent with a brief *Terry*-type investigative stop to determine the defendant's identity or to maintain the status quo momentarily while obtaining more information.") (quotation omitted).

[24] Based on the IA Report's finding that Off. Schlittler's pat frisk of Mr. Henry was permissible as a Search Incident to Arrest, it would appear that the internal investigators place the timing of Mr. Henry's *de facto* arrest in the immediate aftermath of the seizure.

The IA Report concludes that Off. Schlittler and Sgt. Cray violated the *Arrest* policy in their failure to document Mr. Henry's arrest. We agree that the policy requires officers to make "a full and complete report" of any arrest made and that the preponderance of the evidence supports a finding that the policy was violated.

[25] Mr. Henry's letter does not expressly allege that the officers' response to the shoplifting was disproportionate or that said response was rooted in bias. Rather, the letter requests that NPD provide Mr. Henry, through his attorneys, "[c]opy of policies regarding the magnitude of police response (i.e. number of officers called to respond) to a call for service)."

targeting a particular suspect, something more than race and body type. In one case, the officer himself observed the interaction between the store employee and the suspect, thus allowing the officer to quickly and accurately identify the suspect. In the two other cases, the officers were also provided with a description of the suspects' vehicles—in one incident, the arresting officer also had a description of the suspect's clothing and shoes and an opportunity to review surveillance video before placing the suspect under arrest.

Recently, in *Commonwealth v. Long*,[26] the SJC addressed "the persistent and pernicious problem of racial profiling in traffic enforcement." The defendant in *Long*, a Black male, was driving his girlfriend's Mercedes on a residential street. Two Boston Police Department officers in an unmarked vehicle queried the license plate, which indicated that the vehicle was registered to a Black woman and lacked an inspection sticker. The officers stopped the vehicle and collected the defendant's information. Upon learning that he had outstanding warrants and that his driver's license was suspended, they searched the vehicle and found a gun in a bag in the backseat. As a result, the defendant was charged with several firearms offenses. He moved to suppress the evidence seized from the vehicle on the ground that the stop was due to selective enforcement based on race. The Court "expressly acknowledge[d] that discriminatory motor vehicle stops are profoundly harmful to persons and communities of color[.]"[27] In an effort to lessen the burden for defendants when seeking to suppress evidence from a racially-motivated traffic stop, the Court expanded the evidence on which a defendant may rely to raise a reasonable inference that a stop was racially-motivated from statistical data indicating history of race-based stops to evidence regarding the totality of the circumstances surrounding the stop.[28]

Absent any evidence of outright discrimination or data evidencing how each of the subject officers responded to past shoplifting incidents, it is difficult to discern whether they racially profiled Mr. Henry or if they were somehow biased in their decision-making, albeit implicitly. What is clear, and what sets Mr. Henry's seizure apart from the historical arrests examined by the IA investigators, is that, viewed most charitably, the factual support for the officers' stop of Mr. Henry consisted of his having been in CVS and Witness #1's having recognized him as the suspected shoplifter and identifying him to the officers from more than 100 feet away. From that, they immediately handcuffed him and held him for nearly 30 minutes unlike the response in two of the previous arrests where NPD officers engaged in some additional investigative activity to buttress probable cause before placing the suspect in handcuffs. In this regard, the prior arrests stand in stark contrast to Mr. Henry's seizure.

As noted in the discussion of NPD's *Threshold Inquiries* policy, the officers appear to have had reasonable suspicion to stop Mr. Henry based on his physical description and temporal and geographic proximity to the reported suspected shoplifting. The authority to conduct a threshold inquiry, or *Terry* stop, is limited in scope and should be no longer than necessary for the officers to confirm or dispel their suspicions.[29] Here, it appears that the officers undertook great effort to *confirm* their suspicion about Mr. Henry but did very little to *dispel* suspicion even when faced with ample opportunity to do so. While we cannot conclude, by a preponderance of the evidence, that the officers' decision-making was influenced by Mr. Henry's race, implicitly or otherwise, we note that the officers appear to have ignored or given short shrift to facts that, when considered in

[26] 485 Mass. 711 (2020).
[27] *Id.* at 737 (Budd J., concurring).
[28] *Id.* at 724-25.
[29] *Terry*, 392 U.S. at 30-31.

their totality, supported Mr. Henry's denial of any involvement in criminal activity including, but not limited to the following:

- *The grey hooded sweatshirt* – the responding officers were informed by Off. Kelleher that the shoplifting suspect was wearing a grey hooded sweatshirt. However, none of the officers noted that they compared the clothing description to Mr. Henry's clothes, or considered why his clothing did not fit the description;
- *The availability of surveillance video* – during the period in which Mr. Henry was handcuffed on Highland Avenue, Off. McMahon and Sgt. Cray were in CVS with Witness #1 and Witness #2 and could have asked to view the surveillance footage to determine whether Mr. Henry was, in fact, the suspected shoplifter or to ask Witness #1 to confirm his identification (assuming that he did, in fact, identify Mr. Henry while outside the store);
- *The modus operandi of the suspected shoplifters* – according to Witness #1 and Witness #2, the suspected shoplifters' scheme involved filling shopping carts with high-priced items and wheeling the carts out of the store. Mr. Henry's car was parked more than 100 feet away meaning that, had he managed to successfully complete his crime, he intended to wheel a CVS shopping cart full of stolen items down Highland Avenue across West Street at 3:00 p.m. on a Saturday in Needham Highlands. It does not appear that the officers considered the implausibility of such a scenario;
- *Mr. Henry stopped for lunch* – upon leaving CVS, Mr. Henry went to Town Pizza to pick up his lunch order and had just put it, and the CVS bag, on the front passenger seat of his car when he was stopped. Off. Schlittler reported seeing a sub roll and a CVS bag in the car through the passenger side window.[30] Yet, it does not appear that the officers considered whether stopping to place a lunch order down the street from a CVS where you have allegedly engaged in multiple criminal acts over the course of a year is inconsistent with criminal wrongdoing;
- *Mr. Henry's CVS purchase* – despite Mr. Henry's protestations and offer to show the officers the receipt for items he purchased from CVS, both Off. Fitzpatrick and Sgt. Cray dismissed the factual significance of Mr. Henry's purchase because it purportedly fit the pattern of the previous shoplifting incidents;
- *The proximity of CVS to Mr. Henry's workplace* – Mr. Henry told the officers where he worked and implored them to visit Elements Massage to confirm. The officers did not. Rather than consider whether an individual would engage in a pattern of shoplifting activity within two city blocks of his workplace, Sgt. Cray and Off. McMahon theorized that Mr. Henry's shoplifting activity was part of an ongoing scheme to embezzle petty cash from Elements.

Again, there is insufficient evidence to support Mr. Henry's allegation that he was racially profiled or stopped because of his race. Similarly, we cannot conclude, by a preponderance of the evidence, that the officers' unwillingness to afford Mr. Henry the benefit of the doubt and their

[30] Although Mr. Henry recalls buying a chicken Caesar salad that day, Witness #4 reports that Mr. Henry is a regular customer who, more often than not, orders a chicken Caesar sandwich wrap.

apparent failure to consider the possibility that they had the wrong guy are evidence of bias. We merely note that where the law vests ample discretion to police in their enforcement decision-making, it is difficult to determine when a facially neutral and impartial doctrine, like stop and frisk, is being applied in a discriminatory manner.[31]

4. *Other Applicable NPD Policies & Regulations*

While not raised in Mr. Henry's letter, the investigation revealed certain facts that fall within NPD departmental policies and procedures and, as such, warrant consideration as part of an internal investigation. They include the following:

- ***NPD Policy § 1.12: Eyewitness Identifications***
- ***NPD Policy § 2.01: Follow-up Investigations***
- ***NPD Rules & Regulations 7.3: Courtesy to the Public***
- ***NPD Rules & Regulations 7.4: Requests for Officer Identification (Name/Badge Number)***

C. Operational & Procedural Deficiencies that May Erode Community Confidence in Internal Investigations

NPD policy 4.01, *Internal Affairs*, governs the conduct of the department's internal investigations and notes that, "[T]o a large degree, the public image of this department is determined by how well it responds to allegations of misconduct against the department or its officers." We agree and, in addition to the deficiencies identified in the preceding sections, submit the following operational and procedural recommendations to help prevent erosion of public confidence in the police department ability to "police its own."

1. Standard of Proof for Internal Investigations

We recommend that the *Internal Affairs* policy be amended to include the standard of proof for sustaining a complaint. As currently written, the policy tasks investigators with submitting a written report at the conclusion of an investigation that includes "an evaluation of the complaint and a definitive conclusion of fact" as to whether each allegation made by the complainant was "supported by sufficient evidence." Neither the policy, nor the IA Report assessing the officers' conduct with regards to Mr. Henry's complaint, defines sufficiency or articulates what standard applies in determining whether a policy violation occurred.

Notice of the evidentiary burden/standard of proof serves an important due process function for individual officers. It also offers the community some assurance that complaints are investigated fairly and uniformly and that the police department will not 'move the goalposts' to achieve a desired outcome. We believe that a preponderance of the evidence standard comports with best practices for conduct of police internal investigations and recommend that the department incorporate same here.

2. Recording of Officer/Witness Interviews

As detailed throughout this report, there were several instances in which statements attributed to witnesses in the IA Report conflicted with the accounts given to the SEA&L investigators during witness interviews, most notably in the case of Witness #1. Other times, the officers reported an inability to recall certain details in response to questions from SEA&L

[31] *See Long*, 485 Mass. at 716-18.

investigators while appearing to have provided fulsome responses to the same questions when posed by the internal investigators. Adopting a practice of recording IA interviews would protect the integrity of internal investigations in the event that a witness later recants his/her account or where allegations are raised that the investigation was somehow manipulated to achieve a desired outcome. It would also better enable the department to review and audit its own completed investigations to ensure that this critical function is performed in a fair and thorough manner.

VII. CONCLUSION

More than once during our interviews of NPD officers, we heard words to the effect of, "Mr. Henry wasn't charged, so…," as if to infer that his release from arrest without further law enforcement involvement was essentially *no harm, no foul*. It is similarly tempting for others to casually encapsulate Mr. Henry's experience with NPD as his having been 'in the wrong place at the wrong time,' or to minimize as a "petty indignity," what he endured: a roughly 30 minute detention in handcuffs on a public street in the middle of a Saturday afternoon, a mere two blocks from his workplace. These seizures, the *Terry* Court noted, represent a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[32]" As we are all too aware from recent events, these encounters can also have tragic consequences for people of color, Black men in particular. Fortunately, that was avoided here. Our hope is that Mr. Henry's experience will serve as an impetus for greater awareness of the issues raised in this matter, implementation of the policy and procedural modifications we submitted above, and an overdue acknowledgment of the harm caused to Mr. Henry.

[32] 392 U.S. 1, 17 (1967).