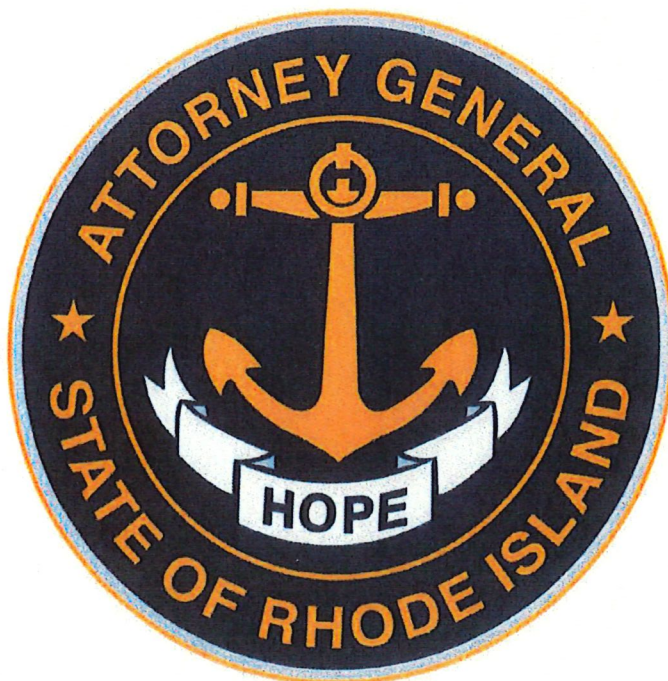


STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

Peter F. Neronha
Attorney General



INVESTIGATIVE REPORT
March 6, 2024

Incident Type: Death Investigation of Wayne Levo
Incident Location: Whitehall Street, Providence, R.I.
Incident Date: December 31, 2022
Police Department: Providence Police Department
Involved Officers: Multiple Providence Police Officers

March 6, 2024

Colonel Oscar L. Perez
Chief of Police
Providence Police Department
325 Washington Street
Providence, Rhode Island 02903

RE: Custodial Death of Wayne Levo on December 31, 2022

Colonel Perez:

The Attorney General has completed its review of the in-custody death of Wayne Levo in Providence on December 31, 2022. As you know, the Attorney General Protocol requires review of incidents where a person dies while in policy custody or during the apprehension or attempted apprehension of a person. Our review is limited to a determination of whether the conduct of any of the officers involved was objectively reasonable under the law, and if not, whether it gives rise to criminal liability. It is not for this Office to determine whether any of the involved officers, or any other party, including the City of Providence, acted or failed to act in a way that was civilly negligent or otherwise breached a duty of care giving rise to civil liability. Additionally, it is ultimately the responsibility of the Providence Police Department, rather than this Office, to determine whether the officers complied with Department rules, regulations and training.

In this case, Mr. Levo's death occurred while in the custody of the Providence Police. Although some force was used to take Mr. Levo into custody, there were no credible allegations that excessive force was used, no evidence of deadly force, and the medical evidence reviewed did not attribute Mr. Levo's cause of death to any of the force used by police. Nevertheless, as this was a custodial death, review of the officers' actions to ensure they complied with the law was warranted. As part of this review, we considered the applicable law, your department's policies, and all of the facts and circumstances of the incident.

We utilized the following investigative materials furnished to us by your department, the Rhode Island State Police and other government agencies:

1. Providence Police Office of Professional Responsibility Investigative Action Report – 16 pages
2. Providence Police Incident Report and Telestaff Report – 12 pages
3. Providence Police Use of Force Policy, issued January 5, 2022 – 15 pages
4. Providence Fire Policy on Excited Delirium Syndrome – 2 pages

5. Providence Fire Patient Care Report – 3 pages
6. Providence Police and 911 Call Lists – 3 pages
7. Criminal Background for Wayne Levo – 13 pages
8. Transcript of Interview with Providence Police Officer Michael Pesola – 17 pages
9. Transcript of Interview with Providence Police Officer Nathaniel Eastman – 8 pages
10. Transcript of Interview with Providence Police Officer Marco Figueroa – 10 pages
11. Transcript of Interview with Providence Police Officer William Sherrill – 11 pages
12. Transcript of Interview with Providence Police Sergeant Sean Lafferty – 10 pages
13. Transcript of Interview with Providence Fire Lieutenant Peterson Carto – 17 pages
14. Transcript of Interview with _____ – 21 pages
15. Body Worn Camera – Providence Police Officer Michael Pesola
16. Body Worn Camera – Providence Police Officer Nathaniel Eastman
17. Body Worn Camera – Providence Police Officer Marco Figueroa
18. Body Worn Camera – Providence Police Officer William Sherrill
19. Body Worn Camera – Providence Police Sergeant Sean Lafferty
20. RI Office of State Medical Examiners Autopsy Report for Wayne Levo – 4 pages
21. RI Department of Health Toxicology Laboratory Toxicology Report – 7 pages

Applicable Law:

When considering a police officer's actions which involve the use of force in his/her capacity as a peace officer, a two-part analysis is required. First, it must be determined if the officer's use of force in arresting or detaining the suspect was necessary and reasonable. If an officer's conduct is deemed to be necessary and reasonable, then the inquiry ends, and no criminal charges will stem from the incident. If, however, it is determined that the use of force was not necessary and not reasonable then an inquiry must be made as to whether the use of force meets the elements of the applicable criminal statute which in this case is Simple Assault and/or Battery under RIGL §11-5-3. Since we find the officers' use of force to be reasonable, we will not conduct an analysis under this section of the law.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A "seizure" of a "person," can take the form of "physical force" or a "show of authority" that "in some way restrain[s] the liberty" of the person. Terry v. Ohio, 392 U.S. 1, 19, n. 16 (1968). An arrest or seizure of a person carries with it the right of police officers to use some degree of force. Graham v. Connor, 490 U.S. 386, 396 (1989). "All claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest ... or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard...." Graham, 490 U.S. at 395; Tennessee v. Garner, 471 U.S. 1 (1985).

The Fourth Amendment instructs that the *degree* of force police are permitted to use must be “objectively reasonable” under the totality of circumstances. Tennessee v. Garner, 471 U.S. 1, 8-9 (1985). Relevant facts include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting or attempting to evade arrest by flight.” Graham, 490 U.S. at 396. The reasonableness of an officer’s use of force “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Graham, 490 U.S. at 396. The Supreme Court has held that the determination of reasonableness must allow “for the fact that police officers are often forced to make split-second judgements – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” Graham, 490 U.S. at 396-97. Critically, the reasonableness inquiry is an objective, not a subjective, one. The “question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” Id. (emphasis added). The Supreme Court could not have made this clearer: “An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.” Id. at 397. In other words, in an excessive force case, for purposes of the first part of the test, it does not matter what is in the particular officer’s mind at the time of the use of force. What matters is what the reasonable officer would have done if faced with the situation at hand.

Rhode Island law must be applied in light of these constitutional principles. Under Rhode Island law, an arrest is made by the restraint of the person to be arrested or by his submission of his person to the custody of the person making the arrest. R.I. Gen. Laws § 12-7-7. Rhode Island law further provides that “no greater restraint than is necessary shall be used for the detention of any person, and no unnecessary or unreasonable force shall be used in making an arrest.” R.I. Gen. Laws § 12-7-8.

Statement of Facts:

On December 31, 2022 at 5:49 p.m., 911 dispatchers received a call that was immediately patched through to Providence Police. The female caller complained of a white male blocking traffic outside 166 Whitehall Street. She said the man was frantically yelling for help and claiming that he couldn’t see. The caller thought he was “on something.” A subsequent call to 911 from a male caller also said he saw “somebody inside a car ... looked like he was drunk” and people were chasing him trying to get him out of the car.

Multiple Providence Police officers responded, and they all activated their body worn cameras.¹ Officer Michael Pesola arrived on the scene first at 5:55 p.m.² and he

¹ Additionally, police secured approximately one hour of surveillance footage from a nearby business. That video captures much of the incident.

² It should be noted that the time stamps on the officers’ body worn cameras and the time stamps on the radio calls are not synced but are within about a minute of each other. Accordingly, all times are approximate.

observed two men in what appeared to him to be a fight near 166 Whitehall outside a laundromat. Officer Pesola soon realized that it was not an altercation between the two individuals but rather a medical emergency. One of the men, _____, was attempting to assist another man, Wayne Levo, to the side of the road.

Before police arrived, Mr. _____ had come upon Mr. Levo stopped in the street behind the wheel of a Dodge Charger. Mr. Levo was honking his horn and screaming, "I'm on fire! Help me!". Mr. Levo attempted to drive down the street with his door open, but he was boxed in by other vehicles. A crowd of people gathered, and traffic was stopped. Mr. _____ approached Mr. Levo and tried to calm him down. Another unidentified man was trying to assist Mr. Levo at this time as well. According to Mr. _____, when someone yelled out that the "cops [are] already on the way", Mr. Levo got even more agitated. He was "slamming on his horn" and trying to drive away. Much of the incident is captured on surveillance video which clearly shows Mr. Levo's car lurch forward with Mr. _____ just outside the vehicle's open door.

Mr. _____ then got into the car to prevent Mr. Levo from proceeding any further and possibly harming himself or other motorists. He sat on Mr. Levo's lap, put the car in park, and took the keys out of the ignition. Mr. _____ then unbuckled Mr. Levo's seatbelt and tried to help him get out of the car. As he was assisting Mr. Levo to the curb, Officer Pesola arrived. Officer Pesola, with the help of Mr. _____, moved Mr. Levo to the side of the road and placed him in a seated position on the pavement. Once police took control of Mr. Levo, Mr. _____ moved the Charger from the lane of travel on Whitehall Street to a nearby parking lot and gave police Mr. Levo's car keys.

Mr. Levo was secured in handcuffs and immediately Officer Pesola called for a rescue for "MHI" which stands for mental health incident at 5:55 p.m.³ Mr. Levo continued to claim he was "on fire" as he moved from lying on his back, to his side and eventually to a seated position. Ptlm. Pesola attempted to prop Mr. Levo to a seated position. He was assisted by Ptlm. Figueroa who attempted to place a knee behind Mr. Levo in order to keep him in a seated position. The officers continued to attempt to calm Mr. Levo down. They also kept asking him what he took; Mr. Levo said "nothing" and spoke incoherently. While Mr. Levo continued to moan and yell, officers told him to relax. As other police units arrived, Mr. Levo settled down into a lying position on his side/back on the wet pavement while awaiting rescue. At one point, Mr. Levo rolled onto his stomach with his face in a puddle. He remained in the prone position for about a minute, before officers rolled him onto his back and again tried to engage him, telling him to relax and assuring him that help is coming.

At this point, up to six officers were gathered around Mr. Levo monitoring his activity. Officers noticed that initially he was breathing and still claiming to be "on fire", but within a few minutes Mr. Levo became more sedate. Officers again tried to prop Mr. Levo up to a sitting position and then lowered him slowly to the ground. At about 6:05 p.m., that is ten minutes after the initial call to rescue, Officer Sherrill asked over

³ At 5:59 p.m., Rescue 2 stated they are responding "Code C" which means with caution.

Channel 1: "do you have an ETA on that rescue, possibly on some form of narcotics, he's rolling on the ground."⁴ Approximately twelve minutes after handcuffing, the officers suspected that Mr. Levo was overdosing. At 6:08 p.m., Officer Sherrill called over Channel 1: "step it up, he might be OD'ing."⁵ Officer Figueroa ran to his vehicle to get Narcan and Officer Sherrill began to give Mr. Levo a sternum rub. Officer Figueroa then administered two doses of Narcan to Mr. Levo. This was also reported over the radio. Mr. Levo reacted by taking a deep breath but then there was no further response. Officers then turned Mr. Levo to the side and the officers took off the handcuffs as Rescue arrived, at about 6:10 p.m.

From Officer Pesola's radio call for a rescue, to rescue's arrival, approximately fifteen minutes had elapsed.

Once rescue arrived, they assumed treatment of Mr. Levo. Rescue personnel noted a "faint pulse" as they administered additional Narcan. They initiated CPR on scene and continued through transport along with repeated doses of epinephrine. Rescue arrived at Rhode Island Hospital at 6:47 p.m. Four minutes later, Mr. Levo was pronounced dead by hospital staff.

Acting Chief of the Office of State Medical Examiners, Dr. Alexander Chirkov, conducted an autopsy of Mr. Levo. As set forth in his autopsy report, the cause of death was determined to be "acute intoxication due to the combined effects of cocaine and tricyclics" and the manner of death was classified as an accident. The medical examiner's conclusions are supported by the accompanying toxicology report that indicates the presence of cocaine and tricyclics (antidepressants) in Mr. Levo's system. They are also supported by the fact that the officers seized a white powdery substance that they suspected to be cocaine from Mr. Levo's vehicle. Additionally, Officer Figueroa noted that he recognized Mr. Levo from prior encounters, and he knew him to be a drug user. There were no injuries noted in the report, apart from "small, linear red bruises" on Mr. Levo's wrists "consistent with handcuff use." The medical examiner's report also noted a number of other underlying health conditions that were "significant."

⁴ At 6:05 p.m., police dispatch asks fire dispatch for an ETA. He does not advise them that the man may be under the influence narcotics and rolling around on the ground. Fire dispatch advises that rescue is coming from Rhode Island Hospital with no lights or sirens. (Of note, Lt. Carto who was in Rescue 2 that night stated at his interview that the rescue responded with lights and sirens.) Police dispatch tells Officer Sherrill that rescue "should be there shortly" as they are coming from the hospital.

⁵ At 6:08 p.m. police dispatch advises fire dispatch to "step it up" and that the man started overdosing and Narcan was administered. Fire dispatch asks Rescue 2 to expedite. Rescue 2 acknowledges, stating they are about 30 seconds away.

Legal Analysis:

In a situation involving a custodial death, our objective is to determine whether the death was the result of any action or inaction by the officers involved, and if so, whether the officer's actions were legally justified under the circumstances. In this case, the medical examiner's report clearly concludes that Mr. Levo's cause of death was the result of an accidental overdose. The report noted no traumatic injuries and our review of the evidence in this case establishes conclusively that none of the officers involved in this incident used force that contributed to Mr. Levo's death.

The entire interaction between the Providence Police officers and Mr. Levo was captured on the body worn camera recordings of the responding officers as well as a security camera of a nearby business.⁶ Those recordings likewise establish that only minimal force was used by Officer Pesola to handcuff Mr. Levo.

Upon his arrival on scene, Officer Pesola quickly recognized that this was a medical event and not an arrest. As captured on his body worn camera, Officer Pesola calmly approached Mr. [redacted] and Mr. Levo saying, "What's up, what's up" and worked with Mr. [redacted] to get Mr. Levo on the ground in a sitting position. Officer Pesola was not yelling commands or being physically forceful in any way. Officer Pesola and Mr. [redacted] got Mr. Levo off his feet and into a sitting position where he could be handcuffed. Other than the force necessary to get Mr. Levo's hands behind his back and secure the handcuffs around his wrists, no additional force was used to handcuff Mr. Levo. At no point does Mr. Levo complain of pain from the handcuffing or the officer's efforts to control him. Officer Pesola's body worn camera and the surveillance video from a nearby building clearly show Officer Pesola acted within the parameters of legal force in his effort to secure Mr. Levo.

Considering Mr. Levo's agitated and incoherent state when Officer Pesola first encountered him, it was objectively reasonable for the officer to place him in handcuffs. The officer attempted to engage Mr. Levo in conversation but he was behaving irrationally. It was reasonable for the officer to conclude that Mr. Levo would not obey the officer's commands and continue resistive behavior. It was apparent that Mr. Levo had to be contained in order to receive medical and/or mental health treatment. Additionally, there were a number of pedestrians in the area of Whitehall and Union Streets and it is a busy intersection for vehicles. Thus, for the safety of all who were present, including Mr. Levo and Officer Pesola, handcuffing was the safest, least restrictive option which is consistent with Providence Police policy.⁷ Importantly,

⁶ We note that several minutes after the officers' arrival on scene, they muted their body worn cameras. It is for the Providence Police Department to determine whether the officers' decision to mute their body worn cameras under these circumstances complied with departmental policy. See Providence Police General Order 320.02. The fact that the cameras were muted prevented us from hearing what, if anything, the officers were discussing regarding Mr. Levo's condition.

⁷ Providence Police Use of Force Policy 300.01, pages 7-8. Parameters for Use of Less-Lethal Force reads in relevant part: "To take resistive person into custody...[in] the following [situations]: a. Persons who are a danger to themselves or others. b. Persons incapacitated by foreign substances such as alcohol or

surveillance video also shows that Officer Pesola was the only police officer on scene for the initial encounter with Mr. Levo making handcuffing more necessary for officer safety. In any event, there is no evidence that the use of handcuffs contributed in any way to Mr. Levo's death.

In his interview with the Providence Police Office of Professional Responsibility, Officer Pesola stated: "I didn't see myself as using force. I just detained a subject that was irate. . . for his safety, my safety, everyone there. I mean, I honestly, the handcuffs seemed like the best thing possible. It's just going to keep him contained to himself. That's it." When Mr. [redacted] was interviewed by the Providence Police, he was asked whether he was surprised that Mr. Levo was handcuffed. Mr. [redacted] said: "Yes and no. I mean you don't know what this guy is capable of. . . I mean, he wasn't swinging but he was all whacked out." His impression was that the handcuffs were meant to keep both Mr. Levo safe and those around him safe.

Once handcuffed, Officer Pesola and his fellow officers made efforts to ensure that Mr. Levo was comfortable. They allowed him to move from a seated position to lying down position based upon his comfort level. In adjusting to each new position, Mr. Levo was assisted and monitored by officers. While sitting in an upright position, officers supported Mr. Levo's back by using a knee to steady him. At one point, Mr. Levo maneuvered himself into a face-down position in a small puddle of water and officers, with minimal physical assistance, moved him into a safer position. At no point during this interaction do police use what could be characterized as excessive force. Additionally, officers were attentive to Mr. Levo's positioning during this incident, ensuring that he was on his back. This both minimized the danger of positional asphyxia and allowed the officers to better monitor Mr. Levo's condition.

Having established that none of the officers used excessive force, we also considered whether the officers took, or failed to take, any other action that violated any other criminal laws. We conclude that they did not.

Officer Pesola called for rescue immediately upon taking Mr. Levo into custody using the "MHI" code for mental health incident. Although Mr. Levo was likely experiencing some kind of excited delirium and discomfort, he was conscious, verbal, moving and breathing until about 6:07 p.m. During that time, the officers closely monitored Mr. Levo's condition and attempted to occasionally engage and reassure him that help was coming. At about 6:05 p.m., they attempted to sit Mr. Levo up while one of the officers called to check on the status of the rescue response. Dispatch relayed that "it should be there shortly" as it was coming from Rhode Island Hospital. Certainly, it is frustrating to observe a group of officers stand around a person in obvious distress with limited ability to address his discomfort. But the officers, who have limited medical

narcotics." Further, Providence Police Policy 330.17 (Mentally Ill Persons) authorizes officers to take a person into custody when they "present a danger to the health and safety of himself/herself or any other person" or if they "require medical treatment" and further permits the use of restraints "if the respondent is violent or resistive." *Id.* at pages 4 & 9.

training, had no control over rescue's response time, nor could they have predicted that Mr. Levo would overdose, much less when.⁸ It also bears noting that the officers likely limited their interactions with Mr. Levo because they did not want to further agitate him given his mental health status.⁹

At approximately 6:07 p.m. – 12 minutes after being restrained – Mr. Levo's condition began to quickly deteriorate and the officers realized he was likely overdosing. According to Officer Pesola, he was breathing but moving "towards an unconscious state." Other officers described Mr. Levo at this time, as "not responsive" and "turning flush...[with] a light pulse". Immediately upon observing Mr. Levo to be in medical distress, officers employed their training and responded by providing first aid. Officer William Sherrill administered sternum rubs to Mr. Levo as Officer Marco Figueroa ran across the street to his cruiser to obtain Narcan nasal spray. Within a minute, at about 6:08 p.m., Officer Sherrill again radioed dispatch to ask rescue to "step it up" and reported that the man was overdosing and that Narcan was being administered. Officer Figueroa administered two doses of Narcan spray, which initially had no effect, but following the second dose Mr. Levo took "a large, gaping breath." Within seconds after the administration of Narcan, Providence Rescue arrived on the scene as the handcuffs were removed from Mr. Levo. On these facts, we cannot discern any violation of Rhode Island criminal laws.

Finally, nothing about the police interaction with Mr. Levo once rescue arrives indicates any unlawful use of force. As rescue personnel took control of Mr. Levo, Providence Police officers assisted them in getting him onto a stretcher and into the ambulance. Rescue remained on the scene for approximately thirty minutes trying to revive Mr. Levo but once he was taken into the ambulance, Providence Police had no additional contact with him. Providence Police met rescue at Rhode Island Hospital to monitor Mr. Levo's condition but did not travel in the rescue to the hospital.

Conclusion

It is clear from a thorough examination of all the evidence that the Providence Police officers' interactions with Mr. Levo were objectively reasonable and lawful. Furthermore, there is no evidence that the officers used excessive force or that the minimal force used contributed to Mr. Levo's death. The officers used minimal force (handcuffs) to secure Mr. Levo which they reasonably believed was necessary to ensure his and the public's safety while awaiting medical personnel. The handcuffs were removed by the time rescue arrived to facilitate immediate medical treatment. The

⁸ We note that this is the second custodial death we have reviewed involving the Providence Police Department where rescue was called for a mental health incident and the decedent died from an overdose. See Report of Death Investigation of Joseph Ventre, issued February 2, 2023. In that case, it took rescue approximately 12 minutes to respond. Here, it took rescue 15 minutes. It is beyond the scope of this review to opine on whether these response times/response protocols are reasonable or align with national standards and best practices.

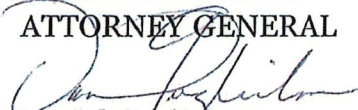
⁹ See, e.g., Providence Police General Order 330.17 (Mentally Ill Persons) at pg. 6: "Officers should avoid (1) forcing discussion, (2) direct continuous eye contact, (3) touching the person (unless essential to safety), (4) crowding the person or moving into his or her zone of comfort"

officers promptly sought medical care for Mr. Levo and provided first aid when he began overdosing.

This matter is therefore closed.

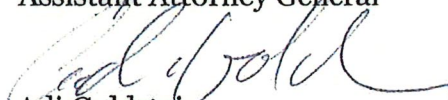
Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL



Daniel Guglielmo

Assistant Attorney General



Adi Goldstein

Deputy Attorney General