DEPARTMENT OF PUBLIC SAFETY
CITY of SARATOGA SPRINGS, NEW YORK

DRAFT REPORT
on the
CIRCUMSTANCES SURROUNDING the DEATH
of
DARRYL MOUNT

Respectfully submitted to the Mayor and City Council,
February 15, 2022

James Montagnino
Commissioner of Public Safety

Prefatory Remarks

Darryl Mount was a human being. He was a son, a stepson and a brother. He was a friend to many. His passing at age 22 was a tragedy that not only cut short his life but also robbed his family and friends of a cherished member. These facts must be expressed by the writer and understood clearly by the reader before any discussion of the circumstances surrounding his death can be undertaken in an appropriately solemn manner. The analysis that follows is intended to be objective and dispassionate. That perspective, of necessity cold and unemotional, must not be misinterpreted as disrespectful to the memory of a young man who, while he had his limitations and made his mistakes, was a member of our community and whose life touched the lives of many in a positive way.

Jim Montagnino
Commissioner of Public Safety
City of Saratoga Springs

Introduction

On August 31, 2013 Darryl Mount was approached on the street by officers of the Saratoga Springs Police Department. Mr. Mount ran off. The officers pursued him. At the end of the chase, Mr. Mount was found unconscious, face down, in an alley. He never fully regained consciousness and was never again able to speak. He died of complications of his injuries nine months later on May 13, 2014.

Exactly what happened on that night eight years ago has been the subject of unending controversy up to the present moment. Even the question of whether the matter was ever investigated is in dispute: Christian Mathiesen, the Public Safety Commissioner at the time of the incident, insists that there were three separate investigations conducted, while others contend that no official investigation has ever taken place. Gregory Veitch, the police chief at the time, told a reporter that two separate investigations had been initiated and were under way. Later, under oath, he admitted that this statement was untrue and intended to mislead. What is clear is that no comprehensive written report of any investigation has ever been made available to the public. This document is offered as a draft report presenting a distillation and analysis of much of the evidence that has been made available by the Saratoga Springs Police Department, augmented significantly with testimonial and documentary evidence adduced in the discovery phase of the civil litigation commenced by Mr. Mount's family in 2014 and pending still. This report is labeled a "draft" because additional evidence is known to exist, but has not yet been made publicly available. For example, Medical Examiner Dr. Michael Sikirica was Court ordered to provide additional deposition testimony and has already done so; additionally,

another civilian witness has come forward and has been deposed on videotape. These two depositions have not been publicly filed as of this writing.

The layout of this report requires some explanation. Each step of the incident is traced; a discussion of the law applicable to the actions of the police at each step is given. At times, Mr. Mount's actions are also discussed in relationship to specific factors (such as his parole status) that may have influenced his actions. A number of sidebar commentaries are also provided to give additional context and to provide points for further discussion.

It is important to note that the majority of the testimony referenced in this draft report is drawn from the City's papers submitted by its counsel in support of a motion for summary judgment. Though submitted two years ago, no opposition papers to that motion have been served or filed by plaintiff's counsel. Instead, plaintiff's counsel moved for relief seeking, among other things, additional discovery. That motion was granted; additional discovery has been done; more discovery is under way; a motion for a protective order has been served and filed by the City's attorney; and additional motion practice may result before any papers will have been submitted by plaintiff's counsel in opposition to the City's anticipated renewed motion for summary judgment. Accordingly, while this draft report draws upon voluminous material to substantiate its factual presentation, that the motion for summary judgment is not fully submitted must, in all fairness, be stressed. For although the City's attorney has served and filed more than a thousand pages of transcripts, photographs and other exhibits, the plaintiff's position in the civil litigation is currently supported, in the main, by the allegations of the initial pleadings.

Sidebar: Summary Judgment

Often, when a civil lawsuit has been prepared to the point of trial readiness, one side or the other (and sometimes both) file a motion for summary judgment. The motion is a request for an order determining that there are no material factual issues in dispute and that, therefore, one side is entitled to prevail without the need for a trial. In order to succeed on such a motion, the moving party must support its position with competent evidence to show that it is entitled to judgment as a matter of law. In order to oppose such a motion successfully, the non-moving party must either show that the movant has not produced legally sufficient evidence to support its position or, in the alternative, the non-moving party must put forth competent evidence of its own which demonstrates the existence of a triable issue of fact. In New York, a judicial determination either granting or denying summary judgment is appealable. As a result, in a case such as this, many months may be spent litigating the issues surrounding a motion for summary judgment.

As will be discussed in detail later, the best vehicle for providing comprehensive answers to the numerous questions presented by the Darryl Mount case would be a grand jury report prepared pursuant to Article 190 of the Criminal Procedure Law. Such a report could only be prepared under the direction of the District Attorney or the Attorney General (who, as will be discussed also, would need an Executive Order of the Governor to confer jurisdiction). Ron Kim, Saratoga Springs Mayor, with the unanimous consent of the City Council, formally requested that the District Attorney undertake such an

investigation. On February 3, 2022, Saratoga County District Attorney Karen Heggen denied this request.

The author is the fourth person to hold the title of Commissioner of Public Safety since the Darryl Mount incident occurred. That eight years have passed without any individual in authority's having issued a public report on the incident is beyond shameless. While this draft report is far from perfect, it is offered as a best effort at providing sufficient facts and analysis from which a reasonably objective reader can draw the conclusions needed to answer the questions that have remained open for far too long. Whether a grand jury investigation will ever be conducted and whether the civil lawsuit will ever see the inside of a trial courtroom are questions that cannot and are not answered here. Nonetheless, the community is entitled to know as much as possible about what actually happened on August 31, 2013 and beyond in order to be able to make informed decisions for the future and in order to re-establish trust in our local institutions and leadership.

Darryl Mount's Background

It is important to understand a little about the person of Darryl Mount to be able to assess the decisions he made on the night he suffered his fatal injuries. The publicly available record contains a wealth of information, including school reports and psychological assessments made during his childhood. It would be inappropriate here to explore Mr. Mount's educational and psychological history as deeply as the documents filed in connection with the summary judgment motion do, as his family deserves some level of privacy, at least as to details which would not be relevant to the events

surrounding his death. Accordingly, only the main points which may shed some light on his decision-making process are discussed here.

Mr. Mount had been diagnosed as suffering from attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD). Symptoms of ADHD include difficulty focusing and impulsive behavior. Individuals suffering from ODD are often uncooperative and combative with parents, teachers and other authority figures. The causes of these conditions are not well understood. Both are chronic and often lifelong illnesses that can be difficult to manage successfully. No publicly available information indicates whether Mr. Mount was receiving ongoing treatment for either of these conditions as of August 2013.

At the time of the incident, Mr. Mount was on parole supervision. He had been convicted of Burglary in the Third Degree, a non-violent felony offense, and had been sentenced, as a first felony offender, to one and one-third to four years in state prison. He had been initially released to parole supervision after having served the minimum period of incarceration; however, he was subsequently found to have violated the terms of his parole release, though the specific nature of the violation does not appear in the publicly filed documents. He was returned to prison for an additional 90 days. On July 11, 2013 he was released once again to parole supervision.

The relevance of Mr. Mount's parole status and previous violation of parole should be obvious: he had some understanding, from his own experience, of how the parole system works and how re-incarceration for violations of parole are routine. Mr. Mount also knew – or at least had reason to know – that, as will be discussed more fully later, on August 31, 2013 he was violating the terms of his parole by not being at home

after curfew, by consuming alcohol to the point of intoxication, and by being subject to arrest for an offense for which a sentence of incarceration was possible.

Sidebar: The Parole System

For generations, individuals convicted of felonies in New York and sentenced to incarceration for more than one year have been subject to supervision after their release. Traditionally, "indeterminate" sentences of imprisonment are imposed where both a minimum and a maximum sentence of incarceration are specified at the time of conviction. For certain classes of felonies and for most first-time felony offenders, the minimum period is one-third of the maximum period. For others, the minimum period is one-half of the maximum.

One of the intended goals of the parole system is to encourage offenders to take positive steps toward rehabilitation while they are incarcerated. To accomplish this, a three-member parole board reviews an offender's record and determines after a hearing whether to release the offender after service of the minimum period or whether to hold the offender longer. Over the years, a byzantine system of "good time credits," "earned eligibility certificates," "conditional release dates" and the like has been developed. This renders it all but impossible for anyone to know with precision when a particular offender will be released to parole supervision, if at all.

From time to time, the parole system comes into public focus. Usually this occurs when an individual who is on parole commits a particular egregious offense. In 1950, for example, a gruesome robbery and murder occurred which came to be known as the "Reader's Digest" case because the perpetrators, one of whom, Harry Stein, was already

on parole for a prior robbery conviction, robbed and killed a truck driver who was delivering subscription payments to Reader's Digest Magazine's headquarters in Westchester County. In the wake of the publicity surrounding this case, which ended with the executions of three defendants, there were numerous calls for the abolition of parole release for convicted felons. Nonetheless, the system remained in place.

In his first year in office in 1995, former New York Governor George Pataki announced his intention to abolish parole for violent felons. What resulted was the "Sentencing Reform Act of 1995." For crimes considered violent felonies, indeterminate sentencing was abolished. In its place, "determinate sentences" were to be imposed. These sentences are calculated in whole or half-year amounts. Thus, a defendant convicted of Robbery in the First Degree, which used to carry an indeterminate sentence ranging from a minimum of two to six years to a maximum of twelve and one-half to twenty-five years, now faces a determinate sentence ranging from five years through twenty-five years.

As always, though, the devil is in the details. While a determinate sentence of seven years, for example, would seem to imply that the offender would serve seven years in prison and then be released, in practice this is not the case. First, the offender is entitled to a "good time credit" of up to one-seventh of the sentence. So a prisoner serving a determinate sentence of seven years who has incurred no disciplinary infractions while in state prison is eligible for release after having served only six years of that seven year sentence.

Imagine the confusion that this system causes. When a client asks an attorney, "When would I get released from a ten year sentence," how does the attorney explain, in

words that the client can understand, that release will occur after service of six-sevenths of that sentence? (One creative attorney, Jerome P. Kiley, Esq., has come up with an answer: he tells his clients, "They give you Sundays off." After a pause, while the client contemplates how unbelievable this sounds, the attorney continues, "Of course, they can't let you out every Sunday. Instead, they just count the Sundays and give them to you at the back end.")

This is hardly the end of the analysis, though. While parole was supposedly abolished for violent felons, it was replaced with "post release supervision." So after an individual has served a determinate sentence, he or she is not yet truly free. Instead, for a period of up to 25 years following release, the defendant is still subject to supervision. And this supervision is overseen by none other than the Department of Corrections and Community Supervision, the successor agency to the Division of Parole! Moreover, a violation of the terms of post release supervision can result in re-incarceration in the same way that a violation of parole can. Accordingly, parole for violent felons has not ended, it has merely been given a different name.

The terms of parole (or post release supervision) can be violated in any number of ways. Failure to report to a parole officer, failure to abide by curfew, intoxication, commission of a new offense – these and many other things can result in summary arrest for violation of parole. And when a parolee is accused of violating parole by the commission of a new offense, even a subsequent acquittal for that offense may not absolve the offender of liability for a parole violation. The burden of proof at a parole revocation hearing is proof by a preponderance of evidence, while the burden at a

criminal trial is proof beyond a reasonable doubt. And so, paradoxically, one can potentially be acquitted of a crime but still find oneself back in prison.

One final note: as completely unfathomable as it may sound, there are more than one hundred people in New York who have fully served the entirety of their determinate sentences and yet are still incarcerated. This is because the law provides that, under certain circumstances, an offender can be required to serve a period of post release supervision at a "residential treatment facility." The drafters of this provision envisioned this to mean that a person under post release supervision may be required to live in a group home or halfway house where he or she could be provided with the necessary supportive services to ensure that the offender remained drug and alcohol free. Instead, some Machiavellian officials have decided to designate certain state prisons as residential treatment facilities. As a result, there are individuals who are still in prison despite having served their full sentences, as they have been required to serve their post release supervision at a residential treatment facility that is itself a state prison.

Darryl Mount's Physical Condition

Another relevant background consideration is Mr. Mount's physical condition. In 2010 he suffered a broken neck in a diving accident in a swimming pool. He had to undergo spinal fusion surgery. This left him with a titanium rod and screws rigidly connecting his vertebrae from C7 (the seventh cervical vertebra) to T5 (the fifth thoracic vertebra). In other words, five of his vertebrae, ordinarily cushioned by and free to flex on their intravertebral discs, were rendered completely immovable by the surgery. This left Mr. Mount permanently disabled per the criteria of the Social Security

Administration. The information relating to this injury is clearly set forth in medical records, in the report of the plaintiff's expert and the report of the city's expert. These facts will be particularly relevant to the ultimate analysis of the extent of Mr. Mount's injuries suffered on August 31, 2013.

The Initial Encounter

In the evening of August 30, 2013 Mr. Mount came to Saratoga Springs from his home in Ballston Spa, where he lived with his mother, Patty Jackson. He was accompanied by his girlfriend, Morgan McLean. The two were socializing and drinking at several of the bars located along Caroline Street. Eventually, both would become intoxicated and they would quarrel.

Patrolling Caroline Street that night were Saratoga Springs Police Officers Eric Warfield, John Bateholts, Adam French and Tyler McIntosh. Sergeant Aaron Benware was in a police cruiser, the others were on foot. At about 2:20 am, a woman approached Officers Warfield and McIntosh. She told them that she had just seen a man slap a woman in the face. She pointed out Mr. Mount and Ms. McLean to the officers. The witness, who did not provide her name, apparently then walked away.

The two officers approached Mr. Mount and Ms. McLean. Officer Warfield took Mr. Mount to one side, while Officer McIntosh stayed with Ms. McLean. Each officer asked whether the two had been fighting. Both denied any altercation. With this, the officers let the two of them go with no further action taken.

At her deposition in the civil lawsuit, Ms. McLean stated under oath that, in fact, there had been a physical incident between herself and Mr. Mount at around 2:00 am. She

said that the two had been quarreling. Mr. Mount, who was holding her ID card in his hand, had slapped her across the face with it.

Sidebar: Intimate Partner Violence; Evidence-Based Prosecution

It is currently well understood that intimate partner violence is a widespread and seemingly intractable problem in our society. Complicating the investigation and prosecution of such criminal conduct is the frequent reluctance of the victims of such abuse to come forward. Even when some victims initially report violent incidents, they frequently recant, fail to cooperate with police, or otherwise refuse to proceed with prosecution. Accordingly, domestic violence training for law enforcement, prosecutors and court staff now emphasizes the importance of gathering independent evidence of intimate partner violence whenever possible. A third-party witness to domestic violence, for example, is far less likely to recant than the victim of that violence, particularly where the witness has no family or social connection to either the victim or the perpetrator. In the present case, the unidentified woman who told police that she had seen the initial incident might, under different circumstances, have been a valuable witness.

Sidebar: Reasonable Suspicion

The question of when a police officer has the authority to stop an individual on the street and question him or her is, of course, an essential one. New York Courts have carefully analyzed innumerable scenarios over the years and have crafted a multi-tiered approach to the question. Simply put, the degree of intrusion permissible is directly related to the quality and quantity of information available to the police at the time of the

encounter. Relatively little evidence is needed to justify an officer's merely approaching an individual and asking a question; significantly more is needed before the officer can actually detain the person – however briefly – for questioning. Even more evidence is, of course, needed before an individual may be frisked for weapons; still more before an individual may be placed under arrest.

A "stop and inquire," such as occurred here at about 2:20 am, requires "reasonable suspicion." This is defined as the amount of evidence that would lead a person of ordinary prudence and caution to believe that some form of offense is either being committed or has been committed. It is settled law that when a private citizen reports having observed what constitutes an offense, (here, perhaps, the violation of harassment in the second degree), reasonable suspicion to allow an officer to stop and question the individual identified as having committed the offense has been established.

The Second Incident

At her deposition, Ms. McLean testified that a second incident occurred some time after the slap with the ID card. She recounted how she and Darryl Mount were in the Paddock Bar when Mr. Mount pulled her hair. This incident was neither witnessed by nor reported to any police officer. Accordingly, it is not directly relevant to the ultimate questions posed in this case. It is offered simply to complete the narrative of events and demonstrate a course of conduct.

Later, at about 3:00 am, Ms. McLean was on Caroline Street near where it intersects with Broadway. She was walking on the sidewalk and talking with an unidentified young man. From the other side of the street, Mr. Mount charged after her.

He was swinging his arms in the air and shouting, "F—k you!" Officers McIntosh and Warfield, who were on the side of Caroline Street opposite that on which Ms. McLean was walking, witnessed this. They shouted to Mr. Mount and directed him to stop. The officers then headed toward Mr. Mount, who was still running toward Ms. McLean.

Before the officers could reach Mr. Mount, he grabbed Ms. McLean's head in both his hands and shoved her into the brick wall of a nearby building. Ms. McLean crumpled to the ground from the blow. Though Ms. McLean would later deny, in a videotaped interview with a blogger, that her head had, in fact, made contact with the wall, she ultimately admitted to it under oath when she was deposed for the civil lawsuit. In her testimony, Ms. McLean stated that she suffered bruising, swelling and a cut under her hairline.

After having shoved Ms. McLean's head into the wall, Mr. Mount ran toward Broadway. Officers McIntosh and Warfield gave chase, with McIntosh being the faster runner than Warfield. As they pursued Mr. Mount, he turned left onto Broadway. The officers followed, communicating with fellow officers by radio.

Sidebar: Probable Cause

The warrantless arrest of an individual is only authorized when "probable cause" exists. This is defined as the amount of evidence needed to show that it is more likely than not that the individual being pursued or arrested has been engaged in criminality. Here, even if Ms. McLean's head had not contacted the wall, what the officers observed – namely, Mr. Mount charging at Ms. McLean, swearing at her, grabbing her and shoving her – gave them probable cause to believe that Mr. Mount had, at the very least,

committed the violation of harassment in the second degree. That offense is committed when a person, intending to harass, annoy or alarm another individual, subjects that individual to unwanted physical contact. Here, Mr. Mount's intentions may be inferred from the surrounding circumstances, and the physical contact between Mr. Mount and Ms. McLean was directly observed by the two police officers.

Additionally, even without Ms. McLean's head having hit the wall, the officers had probable cause to believe that Mr. Mount had committed the class B misdemeanor of Attempted Assault in the Third Degree. That offense is committed when a person, intending to cause physical injury to another, attempts to cause such injury. (Physical injury is defined in the Penal Law as "impairment of physical condition or substantial pain.")

Indeed, even though it is not reflected in any of the police reports filed in connection with this matter and subsequently released to the public, nor is it referenced in District Attorney Heggen's letter of February 3, 2022, there is evidence to support a conclusion that the officers had probable cause to believe that Darryl Mount had committed the class E felony of Attempted Assault in the Second Degree. That offense shares the elements of Attempted Assault in the Third Degree, but contains the additional element of the use of a "dangerous instrument." A dangerous instrument is defined as any instrument, article or substance which, in the way it is being used, threatened to be used, or attempted to be used, is capable of causing serious physical injury. Accordingly, there is a sound legal argument that the brick wall constituted a dangerous instrument and, therefore, the offense rose to the level of a felony. In any case, however, whether the evidence supports the conclusion that there was probable cause to believe that a felony,

misdemeanor or even just a violation had been committed, there was sufficient probable cause to authorize the police officers on the scene to pursue Darryl Mount and effectuate his arrest. Moreover, Mr. Mount's flight from the police constituted the separate offense of Resisting Arrest, a class A misdemeanor.

Some have posed the question of whether, even if probable cause were to be conceded, it was appropriate to have pursued Mr. Mount to arrest him. These commentators concede that the officers *could* pursue him; they ask instead whether they *should* have pursued him. They argue that, since the police radio transmissions confirm that the police knew Darryl Mount by name, they could simply have gone to his home some time later and served him with a summons to appear in court.

This argument proceeds, however, with the clarity of a hindsight that was available to no one as the incident was unfolding. The information known to the officers at the time militated in favor of immediate action. Only an hour before, these officers had been approached by an individual who said she had witnessed Mr. Mount strike Ms. McLean in the face. These same officers had now just seen for themselves a second attack on the same victim (and we now know that this was actually the third within an hour's time). Accordingly, the conclusion that the officers acted appropriately under the circumstances as they existed at the time is supported by clear evidence.

The Pursuit; the Deployment of Tasers

Darryl Mount ran south on Broadway with Officers McIntosh and Warfield running behind, shouting for him to stop. Mr. Mount then turned and ran into the narrow alley between two buildings on Broadway. Each of the officers then paused, drew their

Tasers, and fired a total of four prongs toward Mr. Mount. None of the prongs hit their intended target.

Sidebar: Tasers

The Taser (an acronym for Tom A. Swift Electric Rifle) was invented about fifty years ago but was not put to use by law enforcement until the early 1990's. The device works by delivering a high-voltage electric charge which briefly incapacitates the person struck by its conductive prongs. The Taser has become nearly ubiquitous as a tool for subduing noncompliant subjects because it is generally effective and usually safe for police officers, bystanders and the subjects themselves.

Hundreds of individuals have been killed by Tasers, however, since the device was initially marketed. Yet the Taser defies ready classification as a deadly weapon, since it causes no significant or lasting injury in the vast majority of situations in which it is employed. In relevant literature, the Taser is referred to as "non-lethal force," though this term is not defined in New York or in Federal law. New York recognizes "physical force" as being distinct from "deadly physical force," though the Taser is not specifically recognized as an instrumentality of either in any statute.

This potential for confusion is not limited to New York. In Fulton County, Georgia, the same prosecutor who charged police officers with felony assault when those officers used a Taser inappropriately against student protesters refused to concede that another officer may have acted properly when he shot a suspect who had stolen that officer's Taser, had fired one prong at the officer, and was threatening to fire the other at him.

For purposes of the present case, the state of New York law in 2013 as it relates to Tasers was the same as it is today. While the law remains somewhat murky, there is neither statutory nor case law to suggest that a police officer acts improperly when he or she deploys a Taser in an attempt to subdue a subject who is resisting a lawful arrest. As noted previously, Mr. Mount was resisting a lawful arrest, supported by probable cause, by fleeing from the police. Thus, there was no impropriety in the pursuing officers' having discharged their Tasers in an attempt to subdue him.

Mr. Mount Falls and Sustains his Injuries

The alley down which Mr. Mount proceeded to run was the site of ongoing construction work. Chain link fencing had been put in place to prevent access to the area. Mr. Mount climbed over the fencing and continued onto the site. The building on his right had a fire escape that served a number of apartments facing the alley. Ahead of him and to the left was temporary scaffolding that had been erected for the construction of, among other things, a staircase that would eventually lead pedestrians from the relatively high surface elevation of Broadway to the lower elevation of Putnam Street, a short distance to the east down the alleyway. The upper surface of the scaffolding was 19 ½ feet above the level of the alley below.

Officer McIntosh climbed over the chain link fencing, while Officer Warfield proceeded further south along Broadway and then turned down another alley which linked up to the one into which Mr. Mount had run. Officer McIntosh, who had lost sight of Mr. Mount as he ran into the darkness, slowed his pursuit and stopped on the scaffolding. Below him was the unilluminated alley. Mr. Mount was not to be seen.

Meanwhile, Matthew Pedersen, Lisa Boucher and Keith Burstyn were working in the bar area of Gaffney's Restaurant near the side door, which lay open to the alley. The three of them heard a sudden crash. Ms. Boucher described what she heard as being similar to the sound of a door being slammed shut or of a large object being thrown into a trash bin. Mr. Pedersen, on the other hand, later recalled in deposition testimony that the sound was eerily like something he had heard before: the sound of a head hitting a solid object like a wall or the pavement. With Mr. Pedersen in the lead, all three immediately entered the alley and began walking in the direction from which the sound had emanated.

As Mr. Pedersen walked into the dark end of the alley, he could see a flashlight on the scaffolding above. Officer McIntosh called down to him, "Did you see anybody running through here?" Mr. Pedersen replied, "No." A moment later, Mr. Burstyn saw immediately in front of him Mr. Mount, lying motionless on the loose-packed asphalt pavement of the alley. Mr. Burstyn shouted, "Oh shit, there's a guy on the ground!" Mr. Pedersen and Ms. Boucher then approached and also saw Mr. Mount lying there.

Officer McIntosh then radioed, "We got him," turned to his right and climbed onto the fire escape. He descended to the lower level of the alley and was quickly joined by Sergeant Benware and Officers Warfield and French, who had entered the alley from Putnam Street, which parallels Broadway to the east. Sergeant Benware placed handcuffs on Mr. Mount, who was breathing but unresponsive. Realizing that Mr. Mount was unconscious, and seeing a puddle of blood by Mr. Mount's face, Sergeant Benware called for Emergency Medical Services and directed Officer Warfield to remove the handcuffs.

Within minutes, Investigator James Bell arrived and began taking photographs of Mr. Mount and the surrounding area. EMS personnel came and placed Mr. Mount onto a

backboard. They brought him by ambulance to Albany Medical Center. Shortly after his arrival there, Patty Jackson was contacted and informed about what had occurred. She rushed to her son's bedside.

Ms. Jackson testified at her deposition that one of the emergency room doctors, whose name she did not recall, took her aside and told her that he suspected Mr. Mount's injuries might have been the result of an assault. Ms. Jackson then telephoned the police station to register a complaint. Meanwhile, upon learning from the police that Mr. Mount was at Albany Medical Center, Ms. McLean alleged that he was the victim of police brutality.

Mr. Mount's Injuries

Mr. Mount suffered multiple fractures to numerous bones on the left side of his face. These included a broken orbital socket and a broken jaw, which required later surgery to repair. But the most serious injury he suffered was brain damage, which resulted from bleeding within his brain. Though his physical condition began to slowly improve, he remained comatose. While he regained consciousness to a degree, he was not able to communicate. Ultimately, as a result of his prolonged immobility, Mr. Mount contracted pneumonia. He passed away, shortly after his 22nd birthday, on May 13, 2014.

An Investigation?

Almost immediately after Darryl Mount was taken to Albany Medical Center, police investigators began canvassing the neighborhood for potential witnesses to the incident. In all, they interviewed more than a dozen individuals and received signed

statements from most of them. Copies of these statements – with the names and identifying information of the witnesses redacted – have been released by the Saratoga Springs Police Department and are available on their website. The three Gaffney's workers, Mr. Pedersen, Ms. Boucher and Mr. Burstyn, were among these witnesses. (Mr. Pedersen and Ms. Boucher were later deposed in connection with the civil litigation; Mr. Burstyn left New York and so was apparently not available for deposition.) A witness who lived in the vicinity wrote that he had heard an authoritative male voice shout commands just before the witness heard two popping sounds. The witness noted that the sounds were not those of gunshots, but could have been made by a Taser.

Another witness, a man who lived in an apartment facing the alley, gave a statement describing how he was awakened at around 3:00 am by a noise that sounded to him like someone jumping onto the fire escape. This witness also stated that he looked out his window and saw a police officer with a flashlight. The witness went on to state that he heard the officer ask someone in the alley if he had seen anyone running through it. He heard someone in the alley reply, "No," and then a moment later heard someone say that they could see somebody lying on the ground.

Another individual stated that he had been walking down Putnam Street past the alley when he saw an individual being turned on his side and handcuffed by a police officer. This witness went on to say that, while he was acquainted with Darryl Mount, he did not realize that it was Mr. Mount who was being handcuffed until some time later. The witness said that he had seen Mr. Mount earlier that night and recognized the red shirt and shoes worn by the individual in the alley as being those worn by Mr. Mount earlier that night.

Investigator Bell took numerous high-definition photographs of the scene. He also noted smudged palmprints on two trash barrels, but determined that these were unsuitable for analysis. He did not report looking for fingerprints on the scaffold framing, the fire escape or any other surface in the vicinity. Though it had been raining earlier on the night of the incident, Investigator Bell did not recover any footprint evidence from the surface of the scaffolding or the fire escape. His report does not indicate whether he had sought such evidence.

The Saratoga Springs Police Department had in place at the time General Order #25, which mandated an internal affairs investigation whenever a complaint was lodged alleging serious police misconduct. Despite both Ms. Jackson's and Ms. McLean's having both alleged that Mr. Mount had been assaulted by the police, no such investigation was ever initiated. Instead, then-Police Chief Gregory Veitch issued an email on September 2, 2013 which stated, "I will take a statement from someone who alleges the police beat Mount knowing it is false . . . ."

When contacted on October 15, 2013 by Caitlin Morris, then a reporter for the Saratogian newspaper, Chief Veitch told her in an email that there were two parallel investigations under way. He said that one was a criminal investigation into the alleged crimes committed by Darryl Mount on August 31, 2013, and that the other was an "internal investigation" into the allegations of police misconduct. When he was later deposed for the civil lawsuit, Chief Veitch admitted under oath that he had intentionally "misled" the reporter. He conceded that there had never been an internal investigation.

The City Charter of Saratoga Springs places the ultimate responsibility for overseeing the police department on the Commissioner of Public Safety, an elected

official. The Charter also gives the Commissioner the obligation of setting policy and ensuring discipline in the uniformed services. Christian Mathiesen, Public Safety Commissioner at the time when Mr. Mount suffered his injuries and when he died, was also deposed for the civil lawsuit. When asked about setting police department policy, he testified, "I would leave it up to the police chief to manage his department."

Commissioner Mathiesen was also asked questions as to why there had been no internal investigation, even though there was a standing rule mandating one. He defended the lack of investigation by contending that the rule only mandated internal investigations of misconduct when the allegations were "substantiated." General Order #25 states, in pertinent part:

> Complaint – For the purposes of this order, a complaint shall be defined as . . . [a]ny alleged act or omission which, if substantiated, is contrary to the rules, policies and procedures of the department . . . [or] would constitute a violation of law.
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> * * *
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> The Chief of Police shall be promptly notified about all complaints, and shall designate an Internal Affairs Designee . . . to investigate any serious complaint . . . .

Clearly, the phrase "if substantiated" means, in its context, that if an allegation on its face made out a violation of law or policy, it would need to be investigated. Under Commissioner Mathiesen's logic, however, the phrase means that the allegation had to be proven true before it could be investigated. This puts the proverbial cart before the horse: if an allegation had to be proven before it could be investigated, there would be no need for investigation; conversely, any allegation that had yet to be proven would not be investigated and therefore could never be proven. This interpretation of the language of the rule is therefore erroneous, as it leads to an absurd result.

A more appropriate interpretation of General Order #25 would be that it mandates the internal investigation of all complaints of serious misconduct. The facts and circumstances surrounding the complaint would dictate the scope of the investigation. Accordingly, a vague complaint or one based merely on uncorroborated hearsay might warrant only a cursory investigation to satisfy the order. A more specific complaint, on the other hand, might warrant a far more detailed investigation.

At this juncture, it would be appropriate to pursue the question whether former Chief Veitch himself violated General Order #25 not once, but twice: first, by having failed even to take the initial step of appointing an Internal Affairs Officer to investigate the complaints that Mr. Mount had been beaten by police officers, and second, for having deliberately – by his own eventual sworn admission – misled the press (and by extension the public) into believing that he had commenced the required internal investigation. These specific issues, moreover, beg the inevitable question of why Veitch was never held to account, and instead was allowed to remain Chief until his eventual retirement in 2019. The complete lack of accountability demonstrated here renders it not at all surprising that many have lost trust in their local government leadership.

Particularly with a matter as sensitive as police brutality, our leaders must learn that there are consequences in taking a dismissive attitude toward or in downplaying the severity of allegations of abuse of force. Yet even as recently as 2006 the New York State Commission on Judicial Conduct chose only to censure and not to remove an Albany City Court Judge who told a police officer at whom a criminal defendant had made an obscene gesture, “If you are so upset about it, why don’t you just thump the shit out of him outside the courthouse . . . ?” Even though the Commission recognized that this

"suggests to a police officer, and to anyone else who heard respondent's words, that the court sanctioned violence as an acceptable means of retaliating against unruly defendants," they allowed this Judge to remain on the bench (*Matter of Carter*, Sept 26, 2006 at p 8). It should come as no surprise, therefore, that some individuals will likely continue to question whether Darryl Mount was the victim of an assault.

The Ultimate Question: The Source of Mr. Mount's Injuries

None of the witnesses to have come forward have testified to having direct knowledge of how Mr. Mount came to be face down and unconscious on the pavement in the alley. We know from both testimony and video evidence that he ran south on Broadway and turned into the alley where construction was ongoing. The three eyewitnesses from Gaffney's are consistent in their reports that they saw Mr. Mount unconscious in the alley before any police officer approached him. So the question remains, how did he sustain his injuries?

Dr. Michael Sikirica, the medical examiner, opined that Mr. Mount fell from the scaffold and thereby suffered his injuries. This conclusion was challenged by Dr. Cyril Wecht, the expert retained by Mr. Mount's family. Dr. Wecht pointed to a number of facts that call into question the theory that Mr. Mount fell nearly 20 feet. First, Wecht noted that a conscious individual falling from such a height would have instinctively thrust his hands out in front of him. Hitting the ground from 20 feet, the individual would be expected to exhibit injuries to the fingers and hands. Yet Mr. Mount's fingers and hands were unharmed.

Dr. Wecht also opined that a fall from such a height would have resulted in additional and significant internal injuries. Other than the bleeding in his brain, Mr. Mount exhibited no internal injuries. Ergo, reasoned Dr. Wecht, Mr. Mount's injuries were not consistent with a fall from a significant height; rather, he inferred, the injuries were consistent with a physical assault.

It would be wise at this point to focus on Dr. Wecht's precise claim, that Mr. Mount's injuries were "consistent with trauma sustained from a direct assault, i.e., physical beating." It implies that, if an individual was physically assaulted, he or she would exhibit the injuries presented by Mr. Mount upon his admission to Albany Medical Center. Yet Dr. Wecht takes this one step further, and in doing so, he violates basic rules of logic. Dr. Wecht draws the ultimate conclusion that a person exhibiting such injuries had, in fact, been physically assaulted.

The error of Dr. Wecht's reasoning can be explained simply. He implicitly posits a conditional premise: if a person was physically assaulted, he would exhibit injuries like Mr. Mount's. But then Dr. Wecht improperly turns the conditional statement around to conclude that the result proves the condition: that is, if a person exhibits Mr. Mount's injuries, he was physically assaulted.

A simple analogy can demonstrate the flaw in Dr. Wecht's logic: getting wet is consistent with walking through a lawn sprinkler. John is wet. Therefore, John walked through a lawn sprinkler. The flaw in reasoning is easy to see here, for walking through a lawn sprinkler is *sufficient* to get wet; yet walking through a lawn sprinkler is not *necessary* in order to get wet. Obviously, many other possibilities exist to explain how John may have gotten wet. Similarly, while a physical assault may be *sufficient* to cause

brain injuries and broken facial bones, these injuries are not *necessarily* the result of a physical assault. Other causes may have brought about this result.

So the question remains, what actually caused the injuries that led to Mr. Mount's death? If Dr. Sikirica is wrong in concluding that Mr. Mount fell nearly 20 feet and Dr. Wecht is also wrong in concluding that Mr. Mount was physically assaulted, what really happened? It can be shown that there are sufficient facts in the established record to harmonize the eyewitness testimony with the medical evidence.

First, the Gaffney's witnesses, corroborated in part by video footage, establish that there was no physical assault. These witnesses not only were the first persons to see Mr. Mount lying unconscious in the alley, they also put Officer McIntosh up on the scaffold and not down in the alley at the time of their initial approach. Moreover, the video footage shows that Sergeant Benware and Officer French did not enter the alley from Putnam Street until after the Gaffney's workers had already walked down the alley. Accordingly, there is overwhelming evidence from which a reasonable person can conclude that no police officer was near Mr. Mount at the time he suffered his fatal injuries.

Second, both of the medical experts fail to account for the fact that Mr. Mount had relatively minor abrasions on his hands and knees. An abrasion on Mr. Mount's right hand can clearly be seen in a photograph taken while a police officer was checking his pulse. The medical records from Albany Medical Center also describe minor abrasions to both of Mr. Mount's knees. These are injuries that suggest that Mr. Mount fell while running, not after falling from a 20 foot height.

Additionally, the spot on which Mr. Mount is shown lying in the photographs is some considerable distance from the scaffolding. This further suggests that he did not fall from the scaffold. Instead, it suggests that he fell *after* he had begun running in the alley *after* having descended, either from the scaffold or from the fire escape, to the lower part of the alley.

Both the testimony of the witnesses as well as the video footage show that Broadway was well lighted, while the alley at the base of the scaffolding was very dark. In fact, Mr. Pedersen testified that he only spotted Mr. Mount when he was almost on top of him. Testimony and photographs show that the surface of the alley was loose-packed asphalt. The Albany Medical Center records show that Mr. Mount's blood alcohol content was .18%, or more than twice the level needed to prove intoxication. Is it not reasonable to conclude that an intoxicated man, running in a panic from the police, having just descended from a well-lighted area into nearly complete darkness, might have tripped and fallen on the loose-packed asphalt surface of an alley?

But how did Mr. Mount get down from the scaffolding without falling 20 feet? There are several possibilities here. First, the fire escape provided Officer McIntosh the means to get down to the base of the alley without injury. Mr. Mount might simply have climbed down the fire escape. Second, it is possible that Mr. Mount might have climbed down the framing of the scaffolding itself. Mr. Mount could even have jumped the short distance between the scaffolding and the fire escape and descended by climbing down the outside of the fire escape. In short, there are a number of ways he could have reached the bottom of the alley without having fallen the full distance of 20 feet.

Yet the ultimate question still remains: if Mr. Mount was able to get to the base of the alley and begin running, how can it be that simply tripping and falling could have led to fatal injuries? The answer to this question may be found in the one piece of medical evidence not considered by either of the experts as a potential factor in their analyses: Mr. Mount's prior spinal injury. As noted earlier, the 2010 diving accident left Mr. Mount with five fused vertebrae. Beyond any doubt, this surgery would have left Mr. Mount with limited flexibility in his upper body and neck. The injury was certainly sufficient to have convinced the Social Security Administration to determine that he was incapable of employment in any capacity, as he had been found by them to be permanently disabled. The physical limitations caused by this prior injury were thus shown to have been significant.

All of us have tripped and fallen at some point in our lives. Rarely, however, does a fall result in serious, much less fatal, injury. Yet most of us, while falling forward, are able to avoid having our faces and heads take the full force of the impact. This is due in large part to the flexibility of our upper bodies.

Now consider what might happen if a man without upper body flexibility should suffer a headlong fall, particularly when running in a panic. The impact of the full weight of his body would be focused exclusively on his head. Moreover, the momentum imparted by his forward velocity while running would magnify the force of the impact substantially. The possibility of serious and even life-threatening injury would thus be significant.

The likelihood of the veracity of this explanation is further corroborated by the fact that Mr. Mount was found lying with the left side of his face – the sole locus of the

serious external injuries – on the ground. Additionally, the only blood found on the scene was immediately under the spot where Mr. Mount's face lay. This further suggests that he struck the ground hard when he fell, face first, to the pavement, and remained, unconscious, at the very spot where he had tripped and fallen.

Additional support can be found in the medical records regarding the trauma to Mr. Mount's brain. These records indicate that he suffered from bleeding in a number of locations in his brain. From this comes the reasonable inference that Mr. Mount's head was moving forward at considerable speed when his injury was sustained. The momentum of the brain mass caused it to continue moving forward in the skull after the head had suddenly decelerated upon impact with the pavement. This, in turn, caused the massive bleeding that ultimately led to Mr. Mount's death.

Of course, there are other and simpler hypotheses. If Mr. Mount did not fall the full 20 feet from the top of the scaffolding, perhaps he was able to climb down part way and fell a lesser distance. There is also the possibility that he might have landed safely on the floor of the alley only to run headlong into a wall in the darkness. In the end, the exact etiology of the injuries is secondary to the essential point that, at least at present, there is no evidence in the public domain that suggests anything other than Mr. Mount's accidental sustaining of his injuries.

Where do things stand now?

The internal investigation mandated by the rules in effect in 2013 was never done. Multiple requests for investigation by the Office of the Attorney General were referred to the Office of the Saratoga County District Attorney. By resolution passed unanimously

by the Saratoga Springs City Council in January 2022, the District Attorney was formally asked to undertake the impaneling of a Grand Jury pursuant to Criminal Procedure Law Article 190 in order to investigate and report on the circumstances surrounding Darryl Mount's death. The District Attorney refused this request.

Since 2015, New York law has empowered the Attorney General with original jurisdiction over matters involving the death of unarmed civilians during encounters with police. This law is not, however, retroactive to 2013. Accordingly, it would take an Executive Order of the Governor to authorize the Attorney General to perform the CPL Article 190 investigation refused by the District Attorney.

A Grand Jury investigation by the Attorney General would be the best vehicle for finally establishing all the facts of this case, or at least as many facts as can be ultimately determined at this late date. Grand Jury proceedings are secret, and witnesses before the Grand Jury are immune from prosecution for any offense arising out of the substance of their testimony (with the sole exception being perjury in the Grand Jury itself). Thus, if there are indeed any witnesses otherwise reluctant to come forward publicly, CPL 190 would allow them to testify behind closed doors and cloaked with immunity from subsequent prosecution.

As previously noted, a civil lawsuit was commenced by Patty Jackson in 2014. That case is still pending. In fact, all of the sworn testimony relied upon in this draft report has come from depositions of witnesses in this civil litigation. In late 2019, the City's attorneys moved for summary judgment. That motion was not opposed by plaintiff's counsel; instead, they have sought, and have received, additional discovery. Some of plaintiff's discovery requests have been objected to, and this part of the

litigation continues. It is likely that the case will continue in the Courts for at least another year. A renewed motion for summary judgment will ultimately be filed on behalf of the City; that motion will need to be answered by plaintiff's counsel. The trial Judge's decision will undoubtedly be appealed by whichever side is unsuccessful on the motion. The appellate process itself could take another year or more.

In the meantime, Dr. Sikirica was deposed a second time. Another witness was also deposed. This individual, who only came forward very recently, apparently corroborates the testimony of the Gaffney's employees. Neither the transcript of this deposition nor of the further deposition of Dr. Sikirica is yet available for public inspection, however.

It would be inappropriate to speculate as to when and how the civil lawsuit will ultimately end. Yet the overwhelming weight of evidence currently available for public inspection militates in favor of the City, as Dr. Wecht is, at present, the only known witness who supports plaintiff's theory of liability. The weaknesses in Dr. Wecht's analysis was discussed earlier here. We may wait for the judicial process to run its course, though a reasonable person might well find that sufficient evidence is currently available to support a reliable conclusion as to what really happened on August 31, 2013 and afterward.

There is, of course, another possibility: the City could extend an olive branch to the family of Darryl Mount by offering to negotiate a settlement of the civil lawsuit. Even in the absence of evidence that Mr. Mount was mistreated in any way by the patrol officers of the Saratoga Springs Police Department, there is more than sufficient proof that the misconduct of former Chief Veitch has caused Mr. Mount's family considerable

pain and suffering. Moreover, a significant percentage of the information developed by investigation into the events of August 31, 2013 was brought to light through the efforts of the attorney representing Patty Jackson. Accordingly, it would be appropriate for both sides to sit down at the table and make a good faith effort at settling the litigation along mutually acceptable and fair terms.

What Lessons Can We Learn?

In this era of reform, communities across the country have been focused more than ever on issues surrounding policing, incarceration, pretrial detention, parole and probation. At the same time, the ongoing problem of intimate partner violence has also gotten the attention of the public. The Darryl Mount case represents a unique confluence of many of these issues.

No evidence whatsoever has yet been produced to show misconduct on the part of the police officers who were immediately involved in the events of August 31, 2013. Their initial approach of Darryl Mount at about 2:20 am was based on reasonable suspicion provided by the unidentified female witness. They later personally observed Mr. Mount shove Morgan McLean's head into the wall. This provided them with probable cause to arrest him. The deployment of the Tasers during the pursuit was in accordance with existing (and currently accepted) standards of police practice. And there is no evidence of any physical assault on Darryl Mount.

Some criticism might be leveled against Sergeant Benware for his having handcuffed Mr. Mount despite his being clearly unconscious and injured. Sergeant Benware's training, however, would have prompted him to ensure that the scene was

secure, so handcuffing a suspect would have been all but automatic. In any event, there is nothing to suggest that Mr. Mount's injuries were exacerbated by his having been briefly handcuffed, and Sergeant Benware had the cuffs removed before EMS arrived. This fact is corroborated by photographs taken by Investigator Bell at the scene.

The real criticism lies in the failure of leadership. Former Chief Veitch was obliged under existing rules to ensure that an internal affairs investigation was conducted. Not only did he fail to discharge this obligation, he openly took a position that presupposed a particular conclusion. Most troubling, however, was his admitted deception of a reporter, as this equates with the deliberate deception of the public. One may understand his loyalty to the officers whom he had known and worked with for years; his professional obligations, however, should have transcended that sentiment. Instead, his mistakes only served to cast a cloud of suspicion over his Department. That he was never formally disciplined for his misconduct in office is inexcusable.

Former Commissioner Mathiesen bears some responsibility here as well. He was – and remains – a highly regarded member of the community. He was entrusted by the voters, for three terms of office, with the duties of his elected position. Unfortunately, his deference to former Chief Veitch ran contrary to the obligations imposed upon him by the City Charter. The framers of that document envisioned civilian oversight of the City's uniformed services. Deferring to the Chief in important matters of policy was thus an abdication of that responsibility.

To those who have repeatedly alleged that the Darryl Mount case was never adequately investigated, Mr. Mathiesen responds with the claim that there were three investigations: the one done by the police; the one done by the City's insurance carrier;

and the one done in preparation for litigation by the law firm representing the City. But no investigation can be called complete without a comprehensive written report. The Warren Commission issued its report on the assassination of President Kennedy; The 9/11 Commission issued its report on the attacks on the World Trade Center and the Pentagon; and the Mueller Commission issued its report on alleged Presidential collusion and obstruction. The death of Darryl Mount deserves an investigation that culminates in a comprehensive written report. This draft is offered as a starting point toward that eventual goal.

Saratoga Springs is a small city. Its elected leaders come from all walks of life. Some of those leaders come to their tasks lacking the knowledge, wisdom and courage needed to discharge their obligations effectively in times of crisis. These all-too-human shortcomings can have lasting and painful consequences. Let us strive to do better for the future.

Verbum sapienti sateat.

Conclusion

Darryl Mount's death was a tragedy. Its repercussions have been felt by the Saratoga Springs community for years. Mr. Mount's family and friends have sought a closure that is painfully slow in coming. While Mr. Mount may have had his shortcomings, "Let him who is without sin cast the first stone."

It is hoped that this draft report will provide enough information so that reasonable people can be empowered to begin to draw their own conclusions about what happened in that alley. It is also hoped that Saratoga Springs can turn a page in its history

and move toward a renewed trust in its institutions and in its public servants. May Darryl Mount rest in peace, and may his memory be a blessing to his family and to his friends.

Respectfully submitted,

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City of Saratoga Springs, New York