

# The Metropolitan Police Department and the Use of Deadly Force: The Deon Kay Case

May 25, 2021

A report by The Bromwich Group LLC and Steptoe & Johnson LLP





# Office of the District of Columbia Auditor

May 25, 2021

The Hon. Muriel Bowser  
Mayor of the District of Columbia  
The John A. Wilson Building  
Washington, DC 20004

The Hon. Phil Mendelson  
Chairman, Council of the District of Columbia  
The John A. Wilson Building  
Washington, DC 20004

Dear Mayor Bowser and Chairman Mendelson:

The report that follows is a study of the Metropolitan Police Department's investigation of the use of deadly force in the death of Deon Kay on September 2, 2020. This is the fifth in a series of case studies prepared for the Office of the D.C. Auditor (ODCA) by The Bromwich Group, led by Michael R. Bromwich, who served as Monitor for a Memorandum of Agreement (MOA) on police use of force between the District and the Department of Justice from 2001 to 2008. His team partnered with Steptoe & Johnson LLP as they did on the earlier report released in March: [The Metropolitan Police Department and the Use of Deadly Force: Four Case Studies 2018-2019](#).

As in the earlier cases involving firearms, the new report concludes that the use of deadly force was justified – that Officer Alexander Alvarez fatally shot Mr. Kay in self-defense. Beyond that conclusion based on the split-second decision to shoot, however, the case study finds that the Seventh District Crime Suppression Team officers acted recklessly and without a plan, that they “squandered any opportunity to de-escalate the situation” and that Officer Alvarez “unnecessarily placed himself in [the] situation” that led to Mr. Kay's death. The review found supervision of the Crime Suppression Team largely absent and concludes that the Department “needs to address promptly and aggressively the weaknesses in its system for investigating uses of deadly force.”

ODCA began the review of 2018-2019 officer-involved fatalities last summer and added two 2020 cases at the request of the Police Reform Commission. Over the last six months in preparing this report the authors tracked the MPD internal investigation in real time including sitting in on witness interviews. I am grateful to Chief Robert J. Contee III and his predecessor, Chief Peter Newsham, and their leadership teams for facilitating that access.

In his response published here Chief Contee pledges to adopt and implement the recommendations made in both reports including ensuring that investigations by the Internal Affairs Division and oversight by the Use of Force Review Board are far more comprehensive, and that MPD develops policies governing foot chases and defining the purpose and function of the Crime Suppression Teams. We applaud the chief's earlier commitment to making use of force investigative reports public, and hope that begins with the MPD report on the Deon Kay case. The final report in this series will review the MPD investigation of the October 26, 2020, death of Karon Hylton-Brown, which remains under review by the Office of the U.S. Attorney.

In the shooting cases reviewed thus far we found that at the split second when an officer fired a fatal shot the officer had reason to fear for his safety. But it is also clear that, in some if not all of these cases, effective policing in the moments leading up to that split second may well have prevented that split second from arriving. District policymakers are engaged in a serious conversation about public safety policy and practice and it is our hope that these reviews help leaders reach sound conclusions and act accordingly.

I would like to thank The Bromwich Group and Steptoe & Johnson for their expertise and good work and Chief Contee and his leadership teams for their collaboration and response.

Sincerely yours,



Kathleen Patterson  
District of Columbia Auditor

cc: D.C. Councilmembers



# MPD AND THE USE OF DEADLY FORCE: THE DEON KAY CASE



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## Executive Summary

On September 2, 2020, Deon Kay, an 18-year-old Black man, was shot and killed by Metropolitan Police Department (MPD) Officer Alexander Alvarez in a parking lot adjacent to 225 Orange Street, Southeast in Washington, D.C. We were asked to undertake an in-depth review of this case by the Office of the District of Columbia Auditor (ODCA); this review follows a similar review of four incidents in 2018 and 2019 that was released on March 23, 2021 (March 2021 Report).<sup>1</sup>

This report evaluates whether the actions of Officer Alvarez and other MPD members were consistent with MPD policy and best policing practices; assesses MPD's investigation of this incident; and explores the adequacy of MPD's internal oversight and review. The report also looks at the MPD policies implicated by this case, and makes recommendations that flow from that review. As with our March 2021 Report, our goals are to assist MPD and District of Columbia communities to mitigate the occurrence of use of force incidents; minimize the risks stemming from those incidents; and enhance the credibility and efficacy of MPD's use of force investigations.

In this report, we first provide a brief background of our previous work with MPD, our review's procedures, and MPD's use of force policies. Second, we provide an overview of the facts surrounding the incident that led to the death of Deon Kay. We describe the investigation conducted by members of the Internal Affairs Division (IAD) of MPD's Internal Affairs Bureau (IAB), analyze the investigator's findings, and address the Use of Force Review Board's (UFRB's) review of the investigation. Third, we make recommendations relevant to the Kay case. Finally, we provide a brief progress report on the implementation of the recommendations we made in the March 2021 Report.

### A. Facts

On September 2, 2020, Officer Alvarez and several members of the MPD Seventh District Crime Suppression Team (CST) were monitoring an Instagram Live feed from the account of "Babyfifty1." The account was used by Marcyelle Smith, a rapper who releases music videos as "Baby Fifty." During the live broadcast, Mr. Smith, Deon Kay, Deonte Brown, and an unidentified male were in a distinctive vehicle, at times displaying two handguns.

As a result of these observations, the CST team, led by Sergeant Terrence Welsh, Jr., began looking for Mr. Smith, Mr. Kay and the other men. Officer Alvarez and two other CST team members were in an unmarked MPD vehicle driven by Sergeant Welsh. As Sergeant Welsh's vehicle approached the driveway alongside 225 Orange Street, the

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<sup>1</sup> The March 2021 Report is available at <https://dcauditor.org/report/the-metropolitan-police-department-and-the-use-of-deadly-force-four-case-studies-2018-2019/>.

MPD members observed a black 2011 Dodge Caliber backed into a parking spot with the motor running. The vehicle and location matched what the MPD members had seen on the Instagram Live feed. As soon as Sergeant Welsh's vehicle turned into the driveway of the parking lot, the man who had been in the rear passenger seat opened the door and sprinted away from the car. Almost simultaneously, the MPD members in the cruiser got out of their vehicle. Officer Alvarez was the first officer out of the cruiser, and he immediately began pursuing the fleeing man.

Officer Alvarez drew his Glock 17 service pistol and ran past the Dodge, yelling "Don't move," but the man he had been pursuing had too much of a head start to be caught. Alvarez slowed down and holstered his service weapon. Almost simultaneously, Mr. Kay emerged from the rear passenger side of the Dodge and began running in the same direction as Officer Alvarez. Officer Alvarez then turned towards Mr. Kay, who had a pistol in his right hand. Officer Alvarez drew his weapon and fired once, from approximately eight feet away from Mr. Kay. The pistol Mr. Kay had been holding flew through the air and Mr. Kay fell to the ground. This sequence of events, from the time Officer Alvarez got out of the police vehicle until the time that Mr. Kay fell to the ground, took approximately 10 seconds, and only one second elapsed from the time Officer Alvarez began to turn towards Mr. Kay to the time Officer Alvarez shot Mr. Kay. One of the other officers immediately began administering first aid to Mr. Kay, but he was pronounced dead at 4:36 pm. The weapon in Mr. Kay's possession at the time he was shot was subsequently recovered and analyzed. Mr. Smith and Mr. Brown were arrested on various charges, including firearms charges. The man who had fled from the scene was not apprehended.

## **B. The Investigation**

The Internal Affairs investigation began immediately after the incident and included same-day interviews of the four MPD members in Sergeant Welsh's car. The evidence collected included body-worn camera (BWC) footage from the four officers on scene, forensic evidence, the Instagram Live feed, and medical and autopsy reports for Mr. Kay.

The initial interviews of Officer Alvarez, Sergeant Welsh, and the two other officers were generally consistent with each other and with the facts described above. Officer Alvarez said that as Mr. Kay ran towards him, Mr. Kay began to raise the handgun, and Officer Alvarez feared that Mr. Kay was going to shoot him.

Although the initial round of interviews of Officer Alvarez and the other officers at the scene took place in the immediate aftermath of the incident, further investigation awaited a decision from the United States Attorney's Office (USAO) on whether criminal charges would be brought against Officer Alvarez. By letter dated November 20, 2020, the USAO declined to prosecute.

After a lengthy series of discussions with the review team, during which the review team suggested multiple lines of inquiry, MPD agreed to incorporate some areas of questioning but rejected others as beyond the scope of the investigation as MPD conceived it. For example, MPD agreed to interview the lieutenant who supervised the Crime Suppression Team, but not the commander. MPD also agreed to ask some questions about the CST's use of social media, and about the CST officers' prior familiarity with Mr. Kay and the other suspects, but not about the overall mission of the unit.

MPD resumed its interviews on February 4, 2021. The interview of the lieutenant supervising the Crime Suppression Team revealed that she was generally not well-informed about the activities of the CST, and had only limited discussions with Sergeant Welsh or his team prior to their departure from the Seventh District headquarters on September 2, 2020. In early March, the lead investigator scheduled a series of follow-up interviews with the members of Sergeant Welsh's team who were directly involved in the events of September 2.

During his follow-up interview, Sergeant Welsh acknowledged that he and his squad did not formulate a specific plan in advance of finding the Dodge in the parking lot, and had no plan for what to do if they found the suspects they had been searching for. Officer Alvarez, in his follow-up interview, acknowledged that he ran past the occupied Dodge, believing the fleeing unidentified male was armed and dangerous and therefore wanting to apprehend him.

Based on his factual findings, the investigator recommended that Officer Alvarez's use of force against Mr. Kay be classified as Justified, Within Departmental policy. On March 29, 2021 the final investigative report (Kay Report) was finalized, and on that same date four levels of supervisory/command personnel in the investigator's chain of command signed off on the investigation and its findings, indicating their concurrence.

The UFRB convened the day after the Kay Report was finalized. Its members focused on a number of significant issues about the chain of command's involvement with—and awareness of—the activities of the CST. Among other things, the Board members expressed concern about the absence of a plan to deal with the contingencies that Sergeant Welsh's squad might face if they were successful in finding the car with the suspects. They also asked about “over-penetration” —Officer Alvarez's actions in running past the Dodge when he had reason to know that other armed individuals were still in the car. Based on these criticisms and concerns, the UFRB rejected the Kay Report's recommendation that the shooting of Mr. Kay be found to be “Justified, Within Policy.” The Board unanimously concluded that Officer Alvarez's use of deadly force shooting was justified, but that the tactics used by Officer Alvarez and his colleagues were deeply flawed and unnecessarily created a threat to both the officers and the

suspects. All members of the Board concurred in the judgment that the shooting be deemed Justified, but with a Tactical Improvement Opportunity, one of the alternative dispositions provided for in the applicable MPD General Order.

### C. Analysis

We agree with the UFRB's finding that the use of force by Officer Alvarez was Justified, Tactical Improvement Opportunity. We reviewed and analyzed the available evidence, including the testimony of the involved officers and their BWC footage, which in this case was crucial to a full understanding of what happened. The BWC footage captures the brief and deadly interaction between Officer Alvarez and Mr. Kay, and it is generally consistent with the account of Officer Alvarez and the other witnesses.

The evidence shows that immediately upon the arrival of the MPD members at the parking lot, one of the suspects emerged from the Dodge and began running away. Officer Alvarez took off after the suspect but terminated the pursuit within a few seconds. As he turned back to face the Dodge and the other MPD members, Officer Alvarez saw Mr. Kay in his peripheral vision. Mr. Kay had a gun and was running towards Officer Alvarez with his arms swinging. In response, Officer Alvarez fired a single shot at Mr. Kay. From the time Officer Alvarez begins to turn to the time Officer Alvarez shoots, approximately one second elapses – this was the quintessential split-second decision.

At that moment, Officer Alvarez was justified in using deadly force. The evidence shows that Mr. Kay was running toward Officer Alvarez, with his arms swinging and a gun in his right hand. While we will never know precisely Mr. Kay's intentions, it was reasonable for Officer Alvarez to believe that he was under "imminent" attack from an armed man and further to believe that he was at risk of death or serious bodily injury. We therefore found MPD's conclusion that Officer Alvarez shot Mr. Kay in self-defense to be supported by the facts.

However, the tactics that led to the use of force are a different matter, and we strongly disagree with the Kay Report's tactical analysis that generally blessed the actions of the officers. First, as all of the involved officers acknowledged, no operational plan of any kind had been formulated. The CST members saw four men brandishing two guns on the Instagram Live feed, and immediately launched a search for the Dodge and the armed suspects without consulting a higher level of management or devising anything resembling a tactical plan. Then, when the officers came upon the Dodge, events unfolded rapidly and unpredictably – putting the officers at unnecessary risk. Because of the way the officers proceeded, they squandered any opportunity to de-escalate the situation and limit that risk.

Second, Officer Alvarez recklessly decided to pursue on foot the first person who emerged from the Dodge. In doing so, he ran directly past three other individuals in the car who he had every reason to believe were armed based on the Instagram Live footage of minutes before. This created a grave risk to Officer Alvarez that someone might shoot him from within the Dodge, or emerge from the Dodge with a gun, which is precisely what happened a few seconds later. Officer Alvarez's lack of awareness of the risks presented by running past the Dodge could have cost him his life. In addition, Officer Alvarez's initiation of the pursuit without discussion of any kind with his colleagues meant that he had no situational awareness of where they were, and therefore no idea whether they could be in the line of fire when he shot Mr. Kay. In short, although Officer Alvarez's split-second decision to shoot was justified, he unnecessarily placed himself in that situation.

Third, because there was no plan, the squad members' approach to the two suspects who had remained in the Dodge was entirely improvised. There appears to have been no substantive discussion or coordination whatsoever among the squad members. The development of a plan, or even limited communication once they spotted the Dodge with the suspects in the vehicle, could have clarified roles, reduced confusion, and considered the safety of the officers, suspects, and any bystanders.

Finally, Sergeant Welsh and the CST's failure to notify the supervising lieutenant – who had no knowledge of the operation until after the shooting took place – demonstrates a broader failure by the MPD chain of command that is strategic as much as it is tactical. In general, supervision of the CSTs appears to be very loose, leaving much to the sergeant's discretion.

The UFRB met to discuss the Kay Report and its recommendations on March 30, 2021. It was apparent from the Board's engagement and questions posed to the investigator that the UFRB members had reviewed and carefully considered the Kay Report. They ultimately disagreed with the recommendation, approved up through the Internal Affairs Bureau's chain of command, that the shooting of Mr. Kay be found to be Justified, Within Policy. Though the UFRB was troubled by the tactics used by the officers, which they judged to be unwarranted and risky, the UFRB did not reach broader conclusions on how the MPD should respond to the shortcomings it identified.

#### **D. Recommendations**

We make the following recommendations as a result of our review of this matter:

- **Recommendation #1:** MPD should revise its Use of Force investigations policy to ensure that IAD investigations are sufficiently comprehensive. The IAD investigation should address the topics that the UFRB is required to review, including risk management issues, the adequacy of training,

and analysis of the events leading up to and following the incident. Current IAD investigations fail to do so.

- **Recommendation #2:** IAB should mandate that, in every case involving the use of deadly force, interviews of relevant witnesses be conducted at least twice, once immediately after the incident and at least once after all the relevant evidence has been collected and analyzed.<sup>2</sup>
- **Recommendation #3:** MPD should create a policy that defines the purpose and function of Crime Suppression Teams. The need for such a policy is demonstrated by the lack of management and supervision above the sergeant level that existed in this case, and underscored by the community criticism of CSTs.
- **Recommendation #4:** Sergeants and lieutenants assigned to CSTs should receive specialized training in management and leadership principles, as well as risk assessment, planning, and leadership.
- **Recommendation #5:** MPD should create a policy on the use of social media in conducting criminal investigations. We understand the development of such a policy is in process.
- **Recommendation #6:** MPD should develop a policy on foot pursuits. Such pursuits are among the most common actions taken by police officers and among the most potentially dangerous, as the events in this case (and others) demonstrate. We understand the development of such a policy is in process. We recommend that its review and approval be expedited.
- **Recommendation #7:** The UFRB should improve the way it memorializes its feedback. As we stated in the March 2021 Report, we recommend that the UFRB re-visit how it presents the outcome of its review, including more detailed findings of fact, more detailed “soft

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<sup>2</sup> In its May 14, 2021 response to a draft of this report, MPD agreed with all recommendations but expressed concern with the language in Recommendation #2 that all “relevant witnesses” be interviewed at least twice, due to the potentially elastic definition of “relevant witnesses.” We understand that concern. So long as MPD does not limit the meaning of “involved officers” to the officer(s) who personally uses deadly force, and interprets “involved officers” to mean, at a minimum, all officers directly involved in the events leading up to the use of deadly force, as well as in its use, we are satisfied with MPD’s response.

feedback” on how the officers could have improved tactically, and more specific recommendations related to MPD training and policy.

#### **E. Progress Report on Implementation of Previous Recommendations**

Our March 2021 Report contained numerous recommendations that grew out of our review of the four 2018–2019 cases. We were pleased to learn on April 22, 2021 that, in response to those recommendations, MPD created a committee responsible for implementing them, headed by the Executive Assistant Chief. We hope this committee will serve as a resource for Chief Contee as the recommendations are implemented, and that the committee will provide the DC Auditor with progress reports.

According to MPD, there has been progress on the implementation of several recommendations. MPD has advised us that implementation of March 2021 Recommendations # 2, enhanced training of IAD investigators who handle serious use of force cases, and # 5, designation and training of force investigation specialists, has begun: an initial group of approximately five strong investigators has been identified, and a training curriculum is being developed. We noted that March 2021 Recommendations # 3 and # 12, relating to thorough decision point analysis by the UFRB, were implemented for the first time in the Kay case, and feedback from the UFRB was generally positive. We hope implementation of these recommendations continues.

On the specific recommendation to release MPD’s investigative reports in deadly force cases, March 2021 Recommendation # 7, we understand that Chief Contee has put caveats around the agreement to release the investigative reports by the end of 2021. We view this recommendation as among our most important, and a recommendation that is critical to MPD’s continuing efforts to gain credibility with the DC community. We urge MPD to start by releasing the investigative report in this case.

#### **F. Conclusion**

Our review of this case follows our March 2021 review of four incidents in which the actions of MPD officers caused the deaths of young Black men. As we said in our March 2021 Report, MPD owes the DC community and the public a robust system for investigating and reviewing uses of force.

The investigation in this case was professional and thorough, but again we saw a reluctance to expand the scope of the investigation beyond the four corners of the “shoot/don’t shoot” decision. Ultimately, MPD explored the issue of social media use and was more attentive to tactical issues than we saw in our review of the four 2018–2019 cases. But our recommendation that the investigation extend to the mission of CSTs and the training of officers within CST was rejected by IAD. We were encouraged by the UFRB’s attention to these issues, and their endorsement of more searching

inquiries into these issues. However, by the time the UFRB faults an investigation for inadequate exploration of these issues, the opportunity to explore them has come and gone.

Our review of the death of Deon Kay reinforces our view that MPD needs to address promptly and aggressively the weaknesses in its system for investigating uses of deadly force. It is critical that MPD's investigations are thorough, credible, and can withstand public disclosure and examination. If MPD is to meet the challenges it faces, the Department must mobilize. The ability to repair and strengthen the fabric of the policies, practices, and procedures relevant to its review of these critical and tragic encounters is within its grasp.

## I. Introduction

On September 2, 2020, Deon Kay, an 18-year-old Black man, was shot and killed by Metropolitan Police Department (MPD) Officer Alexander Alvarez in a parking lot adjacent to 225 Orange Street, Southeast D.C. The 7<sup>th</sup> District Crime Suppression Team observed Mr. Kay and others displaying handguns on an Instagram Live streaming feed, initiated a search of the neighborhood, and found Mr. Kay and the others in the parking lot where the shooting occurred. We were asked to undertake an in-depth review of this case by the Office of the District of Columbia Auditor (ODCA); this review follows a similar review, of four incidents in 2018 and 2019, that was released on March 23, 2021 (March 2021 Report).<sup>3</sup>

This report evaluates whether the actions of Officer Alvarez and other MPD members were consistent with MPD policy and best policing practices. The report also assesses the completeness and sufficiency of MPD's investigation of this incident, and the adequacy of MPD's internal oversight and review of the incident. More specifically, we were asked to determine whether MPD members at each stage of the process complied with existing law and MPD policy, best policing practices, and the terms of a June 2001 Memorandum of Agreement (MOA) between MPD, the District of Columbia, and the U.S. Department of Justice. The report also looks at the MPD policies implicated by the review of this case and makes recommendations that flow from that review, and briefly discusses MPD's implementation of the recommendations made in the March 2021 Report. The overarching goal of our review is to: assist MPD and District of Columbia communities in mitigating the occurrence of use of force incidents; minimize the risk to the general public and MPD members stemming from those incidents; and enhance the credibility and efficacy of MPD's use of force investigations.

Both the review team and ODCA recognize that this review comes at a critical moment in the relationship between the police and public, both nationally and within the District of Columbia. We conducted our review mindful of the fraught context in which police interactions with minority communities currently take place, including the May 2020 killing of George Floyd by the Minneapolis Police Department, and the more recent deaths at the hands of police of Adam Toledo in Chicago, and Daunte Wright in Brooklyn Center, Minnesota. Policing issues have been front and center in Washington, D.C., where local groups have sought greater transparency and accountability from MPD, and where a D.C. Police Reform Commission recently issued a sweeping report

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<sup>3</sup> The March 2021 Report is available at <https://dcauditor.org/report/the-metropolitan-police-department-and-the-use-of-deadly-force-four-case-studies-2018-2019/>.

recommending broad changes in the way MPD and other city agencies deal with a wide range of issues.<sup>4</sup>

We hope this report contributes to this important, ongoing dialogue. In this context, it is more important than ever that MPD focus on fostering trust and confidence in the community by demonstrating that uses of force are taken seriously, and that they are investigated and overseen in a transparent, even-handed manner.

As we summarized in our March 2021 Report, the history of substantial reform attempts in MPD, with respect to use of force, goes back 20 years. Beginning in 2002, an independent monitoring team (including two members of our current review team) oversaw MPD's implementation of a broad MOA<sup>5</sup> between MPD, the District of Columbia, and the U.S. Department of Justice (DOJ) that focused on many of the issues at the core of our current review: use of force policies, use of force investigations, and MPD's internal investigations review mechanism: the Use of Force Review Board (UFRB). The MOA and the monitorship followed an investigation by the Civil Rights Division of the DOJ, requested by former MPD Chief Charles H. Ramsey, that found MPD was engaged in a pattern or practice of civil rights violations, primarily through the excessive use of force.

The MOA was a detailed charter for reforming MPD but specifically focused on the use of force by MPD officers. It included detailed prescriptions for appropriate use of force policies; the implementation of those policies, including training; the reporting and investigation of uses of force by MPD officers; and many other related issues. Federal oversight by the DOJ and the independent monitor ended in 2008, at the recommendation of the independent monitor. In 2015, ODCA retained the Bromwich Group LLC to perform a review of MPD policies and practices with respect to the use of force. The results of that review (the 2016 Report) were in many ways positive.<sup>6</sup> We concluded that many of the reforms implemented during the monitorship remained in

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<sup>4</sup> *Decentering Police To Improve Public Safety: A Report of the DC Police Reform Commission* (April 1, 2021), available at <https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf>.

<sup>5</sup> *Memorandum of Agreement Between the United States Department of Justice and the District of Columbia and the District of Columbia Metropolitan Police Department* (June 13, 2001), available at <http://www.dccwatch.com/police/010613.htm>.

<sup>6</sup> *The Durability of Police Reform: The Metropolitan Police Department and Use of Force: 2008-2015* (Jan. 28, 2016), available at [http://zd4l62ki6k620lqb52h9ldm1.wpengine.netdna-cdn.com/wpcontent/uploads/2018/07/Full-Report\\_2.pdf](http://zd4l62ki6k620lqb52h9ldm1.wpengine.netdna-cdn.com/wpcontent/uploads/2018/07/Full-Report_2.pdf) (2016 Report).

place, while others had eroded over time. The 2016 Report set forth a number of detailed recommendations – many of which MPD agreed should be implemented.

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With this context in mind, this report proceeds in four parts. First, we provide a brief background of our previous work with MPD, our review’s procedures, and MPD’s use of force policies. Second, we provide an overview of the facts of the incident that led to the death of Deon Kay, describe the investigation conducted by members of the Internal Affairs Division (IAD) of MPD’s Internal Affairs Bureau (IAB), analyze the investigator’s findings, and address the UFRB’s review of the investigation. Third, we make recommendations relevant to the Kay case. Fourth, we provide a brief progress report on the implementation of the recommendations we made in the March 2021 Report.

## **II. Background**

### **A. The 2008 Final Monitoring Report and the 2015-16 Review<sup>7</sup>**

This report is the fourth and most recent assessment of the MPD undertaken by members of the review team.

Our 2008 review was the culmination of a six-year independent monitorship of MPD, in which we assessed MPD’s implementation of the June 2001 MOA. In April 2008, the monitoring team recommended the MOA and the monitorship be terminated, even though MPD had not yet achieved substantial compliance on a small number of MOA provisions, because the MOA’s reforms had become “embedded in the Department’s internal policies and practices.”<sup>8</sup>

In 2015, ODCA hired The Bromwich Group to undertake a fresh review, to determine whether the reforms implemented from 1999 (when the DOJ investigation was launched) to 2008 (when the MOA and independent monitoring were terminated) remained in place. The 2016 Report reviewed the full set of MPD’s use of force policies, finding that the policies were both consistent with the MOA and generally reflected best practices in law enforcement. However, the 2016 Report identified problems with the review process for fatal shootings by MPD officers, while finding that the data did not support the claim that MPD officers used their firearms excessively. The 2016 Report

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<sup>7</sup> A more detailed discussion of this background appears in the March 2021 Report.

<sup>8</sup> Independent Monitor, *Final Report of the Independent Monitor for the Metropolitan Police Department* (June 13, 2008), available at <http://www.policemonitor.org/MPD/reports/080613reportv2.pdf> (2008 Final Report) at 3-4.

also noted with concern that the quality of use of force investigations had deteriorated following the merger of the elite Force Investigations Team into MPD's IAB.

## **B. The 2020–2021 Reviews**

In July 2020, ODCA asked The Bromwich Group to conduct a review of the four fatal use of force incidents that occurred in 2018 and 2019. The purpose of the review was to evaluate these cases and the MPD internal affairs investigations that followed to ensure consistency with existing law and MPD policy, the MOA, and best policing practices. The review team also looked more broadly at opportunities to improve MPD's policies, practices, and training, particularly in light of our 2016 recommendations. The team was later asked to review the September 2, 2020, death of Deon Kay, and the October 23, 2020, death of Karon Hylton-Brown.<sup>9</sup>

The review team for this report (Bromwich/Steptoe team) is led by Michael R. Bromwich, who had served as the independent monitor from 2002 through 2008, and as the head of the 2015–16 and March 2021 review teams. The review team includes policing expert Ann Marie Doherty, the former Superintendent of the Boston Police Department. Mr. Bromwich and Superintendent Doherty served on the independent monitoring team, the 2016 review team, and the March 2021 review team. The review team also includes as full participants Michael G. Scavelli and Emma S. Marshak from the Washington D.C.-based law firm Steptoe & Johnson LLP, who served on the March 2021 review team.<sup>10</sup>

In the March 2021 Report, we reviewed four cases involving deaths at the hands of MPD officers – Jeffrey Price, Jr. on May 4, 2018; D'Quan Young on May 9, 2018; Marquese Alston on June 12, 2018; and Eric Carter on September 16, 2019. Our review looked broadly at not only the officers involved in the use of force incidents, and the internal affairs investigators, but also supervisory personnel and the UFRB. We considered not only whether MPD personnel complied with existing MPD policies and best policing practices, but also whether there were opportunities to improve MPD policies, practices, and training.

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<sup>9</sup> The review of Mr. Hylton-Brown's death is ongoing and will be addressed in a separate report.

<sup>10</sup> Other members of our review team are Dennis E. Nowicki, the former Chief of Police in Joliet, Illinois, and Charlotte, North Carolina; and Kerr Putney, also the former Chief of Police in Charlotte. Superintendent Doherty was the lead policing expert in the review of this case, although Chief Nowicki and Chief Putney provided helpful advice and counsel.

The March 2021 Report found significant shortcomings in all four cases, ranging from the failure to employ principles of de-escalation to tactical failures that needlessly endangered the lives of MPD members and civilians. We also found serious deficiencies in the way MPD’s internal investigations were conducted and the manner in which the investigations were reviewed within MPD. As a result of the review, we made numerous recommendations. Among the most significant recommendations were a recommendation that the scope of MPD’s internal investigations be broadened well beyond the moment of the use of force itself (March 2021 Recommendation #1); that the UFRB employ a true decision point analysis in assessing the use of deadly force by MPD members (March 2021 Recommendation #4); and that MPD release the final investigative report to the public (March 2021 Recommendation #7). Those recommendations, and many others, are very relevant to our review of the Kay case.

For this report, the review team thoroughly reviewed the investigative materials collected as part of MPD’s investigation into the use of deadly force by Officer Alvarez. We reviewed audio recordings of investigative interviews and participated in a handful of interviews conducted after the United States Attorney’s Office for the District of Columbia (USAO) declined to prosecute Officer Alvarez. We reviewed body-worn camera (BWC) footage, photos and reports on physical evidence collected, documentary evidence, and autopsy reports, among other evidence. The team also attended, by video, the UFRB’s consideration of the Kay investigation.

### C. Use of Force, Use of Force Investigation, and UFRB Policies

Three MPD General Orders provide the core policy and regulatory framework for our review of the death of Mr. Kay. These General Orders were addressed in detail in the March 2021 Report, and the discussion is repeated here to provide important context. The first is **GO-RAR-901.07**, which addresses the use of force and includes a delineation of the circumstances in which deadly force may be used.<sup>11</sup> The second is **GO-RAR-901.08**, which covers Use of Force Investigations and provides the requirements for conducting such investigations.<sup>12</sup> The third is **GO-RAR-901.09**, which establishes the structure, function, and membership of the UFRB, which is responsible for reviewing all cases involving the serious use of force, including deadly force.<sup>13</sup>

#### 1. Use of Force Policy

GO-RAR-901.07 (GO 901.07) is the foundational use of force policy that governs the actions of MPD members. It has been modified over the years to reflect evolving

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<sup>11</sup> Attached as Appendix A.

<sup>12</sup> Attached as Appendix B.

<sup>13</sup> Attached as Appendix C.

best practices in the law enforcement profession, as well as MPD's own experience implementing the policy. Major changes were made to the policy in August 2016, when two core principles governing the use of force – sanctity of human life and principles of de-escalation – were explicitly incorporated into the policy. The policy was most recently revised in 2017.

The policy is divided into various sections, including subsections on topics such as use of less lethal weapons, use of neck restraints, and handcuffing. The core of the policy is stated as follows:

The policy of the Metropolitan Police Department (MPD) is to value and preserve the sanctity of human life at all times, especially when lawfully exercising the use of force. Therefore, MPD members shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others. When using force, members shall continuously reassess the perceived threat in order to select the reasonable use of force response, or one that is proportional to the threat faced by him, her, or others.<sup>14</sup>

This policy defines serious uses of force to include, among other things, firearms discharges, any use of force that results in serious physical injury or death, and any use of neck restraints.

Consistent with the nationwide emphasis on de-escalation, GO 901.07 was amended in August 2016 to place this requirement front and center in MPD's use of force policy:

All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present, shall, if possible, first attempt to defuse the situation through advice, warning, verbal persuasion, tactical communication, or other de-escalation techniques. Members shall attempt to defuse use of force situations with de-escalation techniques whenever feasible.<sup>15</sup>

This policy also requires MPD members to determine whether the victim of the use of force requires medical assistance, to perform emergency first aid, and immediately to call for medical assistance.

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<sup>14</sup> GO 901.07 II.

<sup>15</sup> GO 901.07 IV.A.

Deadly force may be used by an MPD officer only when it is “necessary and objectively reasonable,” in response to an actual or threatened attack that could result in death or serious bodily injury to the MPD officer or some other person – and only after all other options have been exhausted or are not feasible under the circumstances. Deadly force may also be used in limited circumstances when an officer is in pursuit of a “fleeing felon.” Those circumstances are: 1) if a suspect poses an immediate threat of death or serious bodily harm to another person (including the officer); or 2) the suspect has committed or attempted to commit a felony involving the threat of death or bodily harm, the suspect poses a continuing threat, *and* the use of deadly force does not threaten the lives of innocent people.<sup>16</sup>

Although GO 901.07 addresses a broad range of additional issues, the elements of the policy described above are the provisions most relevant to our present review and analysis.

## 2. Use of Force Investigations Policy

GO-RAR-901.08 (GO 901.08), MPD’s policy governing use of force investigations, requires that all serious uses of force by MPD officers must be investigated thoroughly and impartially to address, among other things, “the decision to use force.”<sup>17</sup> The investigations of the use of deadly force, and serious uses of force, are conducted by the IAD, which also is responsible for investigating any other case where there is the possibility that the use of force may have amounted to criminal conduct. In cases involving potential criminal conduct, MPD is required to consult with the USAO DC, which makes the determination whether the use of force involves criminal wrongdoing. If the USAO determines that there is no criminal wrongdoing, it notifies MPD in a declination letter, and MPD proceeds to complete its administrative investigation.

GO 901.08 mandates that IAD investigators report to the scene of the use of force and immediately take charge of the investigation. GO 901.08 IV.I. mandates that:

- All relevant evidence be collected, documented, and analyzed.
- The scene of the use of force be canvassed to locate all potential witnesses.
- All witnesses be interviewed separately.
- Leading questions during interviews be avoided to the maximum extent possible.

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<sup>16</sup> GO 901.07 IV.G.1.

<sup>17</sup> GO 901.08 II.

- Inconsistencies among witnesses, including MPD members, be identified and addressed.

In addition, the statements of all members and material witnesses must be recorded and transcribed, so that personnel in the Internal Affairs chain of command and members of the Use of Force Review Board can refer to them when they review the investigative reports.<sup>18</sup>

The introduction of BWCs in MPD, which was completed in December 2016,<sup>19</sup> has made available a significant new source of evidence for IAD investigators of serious uses of force. GO 901.08 IV.I requires that all BWCs and cellphones belonging to MPD members who were participants in or witnesses to the use of force be collected and uploaded to a website, Evidence.com, where they are available for review and analysis by IAD investigators.<sup>20</sup>

GO 901.08 mandates that investigative reports must include a complete summary of the use of force, a summary and analysis of all the relevant evidence collected during the investigation, and proposed findings. The investigator is required to reach conclusions on whether the use of force was consistent with MPD policy and training; whether proper tactics were used; and whether alternative and less serious uses of force were reasonably available under the circumstances.

MPD uses a classification scheme for use of force investigations, with four possible findings:

- Justified, within Department Policy (the use of force was justified and consistent with MPD policies).
- Justified, Policy Violation (the use of force was justified, but the officer nevertheless violated one or more MPD policies).
- Justified, Tactical Improvement Opportunity (the use of force was justified, and there was no policy violation, but the officer(s) made tactical errors).
- Not Justified, not within Department Policy (the use of force was not justified and violated one or more MPD policies).

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<sup>18</sup> GO 901.08 V.D.4.

<sup>19</sup> MPD, *MPD and Body-Worn Cameras*, available at <https://mpdc.dc.gov/page/bwc>.

<sup>20</sup> GO 901.08 IV.I.

In addition, for allegations of excessive force or misconduct, MPD policy requires one of the following findings:

- Unfounded – no facts to support that the incident occurred.
- Sustained – the allegation is supported by evidence, using a preponderance of the evidence standard.
- Insufficient Facts – there is not adequate evidence to determine whether misconduct occurred.
- Exonerated – the conduct occurred but did not violate MPD policy, procedure or training.<sup>21</sup>

In some cases, there may not be any “allegations” of excessive force or misconduct, only the facts themselves. This creates some ambiguity as to when the second category of findings must be applied.<sup>22</sup>

### 3. Use of Force Review Board

The Use of Force Review Board (UFRB) is the internal entity within MPD that reviews serious use of force investigations, including all investigations of uses of force that result in death. The UFRB reviews all use of force investigations completed by the Internal Affairs Division; any other use of force investigation sent to it by the Internal Affairs Bureau; and all vehicle pursuits that end in death.<sup>23</sup>

The UFRB is chaired by an Assistant Chief, who is selected by the MPD Chief, and consists of seven additional voting members, as well as a non-voting representative of the Fraternal Order of Police. The UFRB generally meets twice each month, and is assisted by the UFRB administrator, who deals with logistical and administrative matters. The UFRB’s mandate includes:

...the actions of all members used in the use of force incident, not just the actions of the member(s) who used force. The actions of the member(s) leading up to and following the use of force shall be reviewed to identify

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<sup>21</sup> GO 901.08 V.J.3.

<sup>22</sup> This ambiguity and recommendations for correcting it are discussed at length in the March 2021 Report (March 2021 Recommendation # 8).

<sup>23</sup> GO-RAR-901.09

commendable actions(s) and/or conduct warranting corrective intervention by the MP and, as appropriate, recommend training.

The scope of the UFRB's review includes: compliance with MPD policies; assessment of MPD tactics; evaluation of risk management issues raised by the incident; the adequacy of relevant training; and findings on whether the use of force was appropriate in light of all relevant circumstances.<sup>24</sup> The UFRB is empowered to make recommendations to the Chief on investigative policies and procedures, standards for use of force investigations, and changes in training that result from the UFRB's review.

The UFRB policy requires the use of a Decision Point Analysis Matrix, which must be incorporated into the record, but which is not further described or defined in the policy.<sup>25</sup> The UFRB is required to either support or reject the findings made by the IAD investigation, using the same two sets of categories and classifications described above. Based on its review of the investigation, the UFRB may return the investigation to IAD for further investigation or other types of follow-up, but the rule requires that any follow-up be completed within five days.

As a result of its review of an individual case or group of cases, the UFRB has the power and authority, among other things, to make training recommendations for one MPD officer or, if appropriate, the entire Department. The UFRB also has the power to refer substantiated allegations of policy violations to the Disciplinary Review Division, which reports back to the UFRB on any discipline imposed on an MPD member. In addition to its review of individual use of force investigations, the UFRB is required to furnish an annual report to the MPD Chief analyzing uses of force that occurred in that year, and identifying any patterns, problems, or issues that have come to the UFRB's attention.<sup>26</sup>

### **III. Review of the Death of Deon Kay**

#### **A. Summary of Facts**

On September 2, 2020, Officer Alexander Alvarez and several members of the MPD Seventh District (7D) Crime Suppression Team (CST) were on duty in the Seventh District Station. They were monitoring a publicly-available Instagram Live

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<sup>24</sup> GO 901.09 V.C.1.

<sup>25</sup> GO 901.09 V.C.3.

<sup>26</sup> GO 901.09 V.E.5.

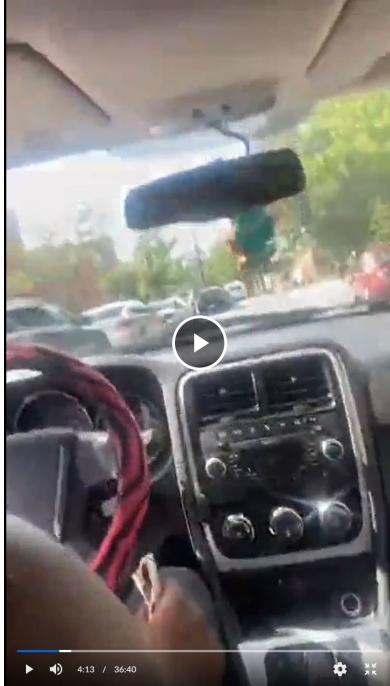
feed from the account “Babyfifty1.”<sup>27</sup> Babyfifty1 is a known alias for Mr. Marcyelle Smith, a rapper who releases music videos under the name “Baby Fifty.”

During the live feed, Mr. Smith, Mr. Deon Kay, Mr. Deonte Brown, and an unidentified male were observed seated in a vehicle and displaying two [handguns](#). On multiple occasions, the handguns were [pointed](#) at the [camera](#). [Three](#) of the men [brandished](#) one or the other of [the handguns](#) at various times during the live feed.

Officer Alvarez and other 7D CST members were familiar with Mr. Smith and Mr. Kay from previous contacts, and they were familiar with the specific areas in 7D in which Mr. Kay and Mr. Smith were known to spend time. While observing the Instagram Live feed, Officer Alvarez and his CST colleagues noticed specific features of the vehicle, specifically a distinctive steering wheel cover and an interior that appeared to indicate the vehicle was a Dodge. They also observed the brick wall of the building behind the car and identified that the wall probably was part of an apartment building in Patrol Service Area (PSA) 707. As a result of their observations, the CST team, led by Sergeant Terrence Welsh, Jr., decided to look for Kay and the other men they had observed on the Instagram video in PSA 707. At approximately 3:30pm, the members of Sergeant Welsh’s squad left the station in search of the Dodge.

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<sup>27</sup> Facts related to the incident are drawn from the Final Investigative Report (Kay Report), dated March 29, 2021, unless otherwise noted.



*(L) The steering wheel cover and interior, as seen on the Instagram video at approximately 3:07 p.m.*



*(R) The brick wall behind Mr. Kay, as seen on the Instagram video at approximately 3:20 p.m.<sup>28</sup>*

Sergeant Welsh was driving an unmarked, blue Chevrolet Malibu. Officer Alvarez was in the front passenger seat, Officer Trevor Wilks was in the right rear passenger seat, and Officer Alexander Farley was in the left rear passenger seat. In addition to the four MPD members who were in Sgt. Welsh's car, at least two additional cars with eight additional MPD members were involved in the search for the Dodge and the men the members had observed on Instagram Live. The members knew from the video that there were four subjects in the vehicle and that they possessed at least two firearms. Officer Alvarez had previously encountered Mr. Smith and Mr. Kay.

During their search for the vehicle containing the four men and the two weapons, Sergeant Welsh turned onto the 200 block of Orange Street, Southeast a westbound one-way street. As the vehicle approached the driveway alongside 225 Orange Street, the MPD members observed a black 2011 Dodge Caliber, with District of Columbia Tag GF7944, backed into a parking spot with the motor running. The MPD members noted that the vehicle had a distinctive steering wheel cover closely resembling the cover they had observed on the Instagram Live feed, and they could

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<sup>28</sup> This video was provided by Instagram in response to a search warrant from the Superior Court of the District of Columbia. The video begins at approximately 3:03 p.m. on September 2, 2020.

see multiple occupants inside the vehicle. The MPD members also noted that the brick wall behind the vehicle matched the brick wall they had observed on the Instagram Live feed. At approximately 3:49pm, Sergeant Welsh parked the MPD cruiser at the entrance to the parking lot, with the cruiser facing downhill. The cruiser was approximately 50 feet from the Dodge, and at a higher elevation.

According to Sergeant Welsh and the other officers, as soon as they turned into the driveway of the parking lot and observed the vehicle, occupants of the vehicle opened the car doors and the man who had been in the rear passenger seat sprinted away from the car. Almost simultaneously, the MPD members in the cruiser got out of their vehicle and activated their body-worn cameras (BWCs).<sup>29</sup> Officer Alvarez, who had been seated in the front passenger seat, was the first officer out of the cruiser, and he immediately began pursuing the fleeing man. Officers Farley and Wilks immediately followed. Sergeant Welsh got out of the cruiser approximately 20 seconds later, after Mr. Kay had already been shot. While the Bromwich/Steptoe team was unable to corroborate this fact through BWC footage or radio recordings from the D.C. Office of Unified Communications, Sergeant Welsh stated that he radioed the other CST members that the vehicle the team had been searching for had been located before exiting the cruiser.

Officer Alvarez, believing that he was pursuing Mr. Smith, drew his Glock 17 service pistol and ran toward the Dodge and the other occupants of the vehicle. Having reviewed the Instagram Live feed, Officer Alvarez would have had reason to believe that the occupants of the vehicle he was running toward were armed, and that he was therefore leaving himself exposed to multiple people who remained in the car.

The subsequent events were captured on Officer Alvarez's [BWC](#) and on Officer Farley's [BWC](#).<sup>30</sup> By the time Officer Alvarez reached the Dodge, which had the front passenger door open, the man who had sprinted away from the Dodge had reached the

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<sup>29</sup> All four MPD members activated their BWCs as the cruiser came to a stop. This meant that the two minutes leading up to the activation were captured by the pre-recording buffer, which captures video but not audio. EO-18-014 is attached as Appendix D. Although the BWCs were activated in time to capture the most relevant sequence of events, their activation was delayed, in violation of applicable MPD General Orders. As a result, separate investigations were ordered for that policy violation.

<sup>30</sup> Officer Wilks activated his BWC as he exited the cruiser, but the lens of the camera was blocked by his hand until a few seconds after Mr. Kay had been shot, although the audio was activated and captured the sound of the shot. Sergeant Welsh stayed in the car until after Mr. Kay had been shot and his BWC therefore captured the sound of the shot but no relevant video.

edge of the parking lot. Officer Farley and Officer Wilks were approximately 30 feet behind Officer Alvarez.



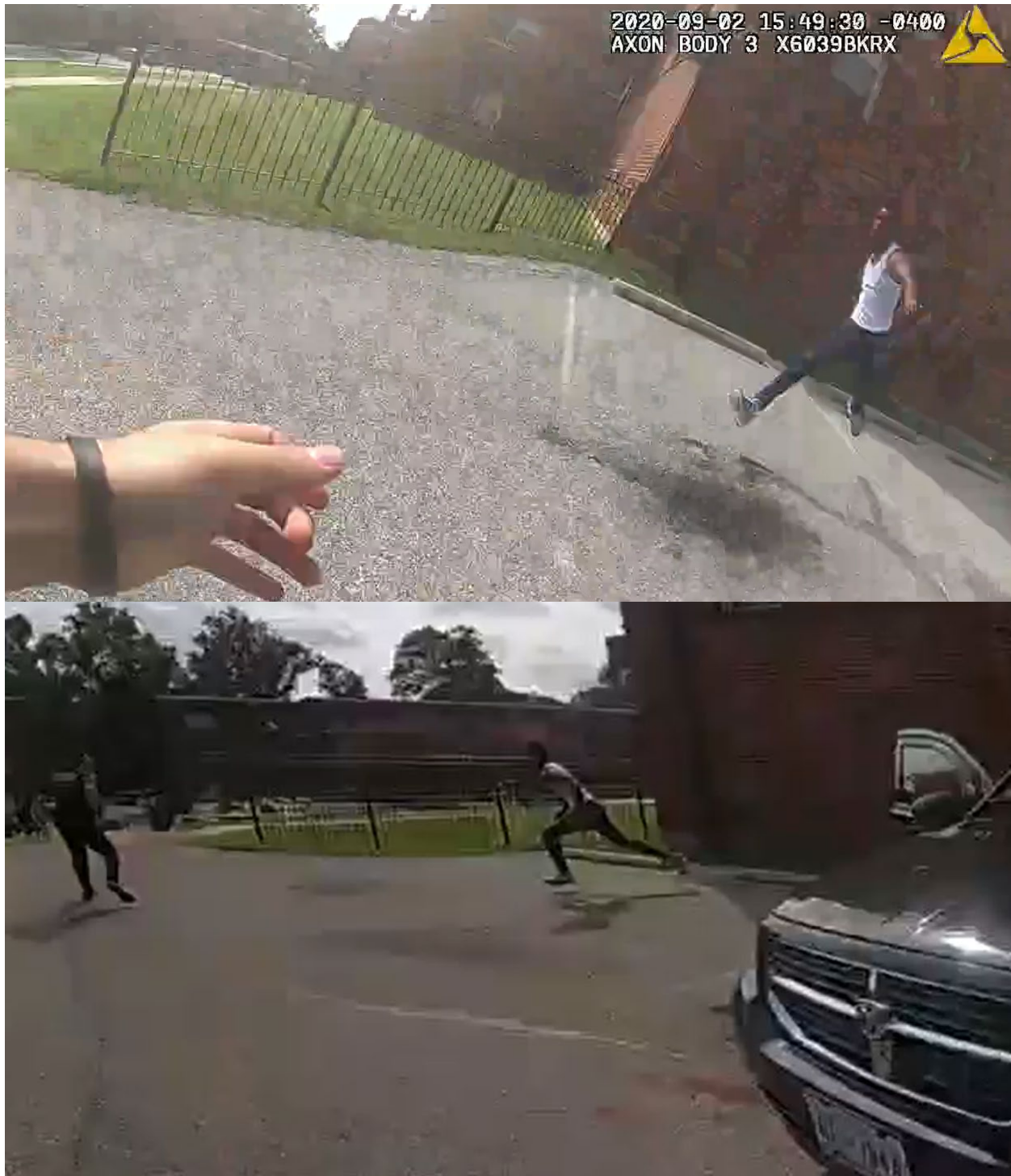
*As Officer Alvarez reached the Dodge, the fleeing man (in the yellow circle) exited the parking lot.<sup>31</sup>*

Officer Alvarez continued running past the Dodge, yelling “Don’t move,” but by the time he was close to the end of the parking lot Officer Alvarez determined that the man he had been pursuing had too much of a head start to be caught and slowed down,

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<sup>31</sup> Top image: BWC of Officer Farley at 2:05 (15:49:28). Bottom image: BWC of Officer Alvarez at 2:07 (15:49:28).

holstering his service weapon. Almost at the same moment, Mr. Kay emerged from the rear passenger side of the Dodge and began running in the same direction as Officer Alvarez. From the video it appears that Officer Alvarez's attention was still on the person he had been pursuing. Officer Alvarez turned toward Mr. Kay, who had a pistol in his right hand. After Officer Alvarez turned, Mr. Kay appeared to be running toward Officer Alvarez. Officer Alvarez continued yelling, "Don't move! Don't move! Don't move!"



*Officer Alvarez turns towards Mr. Kay, who is running.<sup>32</sup>*

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<sup>32</sup> Top image: BWC of Officer Alvarez at 2:09 (15:49:30). Bottom image: BWC of Officer Farley at 2:07 (15:49:30).

As Mr. Kay ran toward Officer Alvarez, Officer Alvarez drew his weapon.



*Officer Alvarez draws his weapon.<sup>33</sup>*

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<sup>33</sup> BWC of Officer Farley at 2:07 (15:49:30). The top image is two frames before the bottom image. The gun is visible in Mr. Kay's right hand.

As Officer Alvarez aimed his weapon at Mr. Kay, Officers Farley and Wilks ran past the front of the Dodge, which still had two occupants.



*Officer Alvarez aims at Mr. Kay, who is holding a pistol in his right hand, as Officers Farley and Wilks run past the front of the Dodge.<sup>34</sup>*

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<sup>34</sup> BWC of Officer Alvarez at 2:09 (15:49:30).



*Officer Alvarez aims at Mr. Kay, who is holding a pistol in his right hand.<sup>35</sup>*

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<sup>35</sup> BWC of Officer Farley at 2:07 (15:49:30). The top image is four frames before the bottom image. Review of the BWC footage shows that Officer Alvarez fired his weapon three frames after the bottom image.

Officer Alvarez discharged his weapon once, from approximately eight feet away from Mr. Kay. The pistol Mr. Kay had been holding then flew through the air. A frame-by-frame review of Officer Alvarez's video does not clearly show whether Mr. Kay threw the gun or whether it was the impact of the shot that caused the gun to fly through the air, because the shooting and the flight of the gun occur within two frames of each other. A frame-by-frame review of Officer Farley's video shows what appears to be the pistol in the air over Officer Alvarez's head.



*The gun leaves Mr. Kay's hand.<sup>36</sup>*

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<sup>36</sup> BWC of Officer Alvarez at 2:09 (15:49:30).



*Immediately after Officer Alvarez shot Mr. Kay, the pistol (in yellow circle) flew through the air.<sup>37</sup>*

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<sup>37</sup> BWC of Officer Farley at 2:08 (15:49:30). The top image is eight frames after Officer Alvarez shot Mr. Kay; the lower left image is two frames after that; and the lower right image is nine frames after that. The gun is visible, in the air, for 24 frames of Officer Farley's BWC footage.

Mr. Kay fell to the ground. This sequence of events, from the time Officer Alvarez got out of the police vehicle until the time that Mr. Kay fell to the ground, took approximately 10 seconds.

Officer Farley, who was approximately ten feet away when Mr. Kay fell to the ground, ran to Mr. Kay, and shouted to Officer Alvarez that Mr. Kay's gun had landed in the grass. Officer Farley immediately began administering first aid, applying pressure to Mr. Kay's wound to slow the bleeding, and talking to Mr. Kay to try to keep him conscious.

Mr. Smith exited the front passenger side of the Dodge shortly after Mr. Kay and was a few feet away from the car when Mr. Kay fell to the ground. Based on Officer Wilks' [BWC](#), approximately two seconds after Mr. Kay was shot, Officer Wilks turned and saw Mr. Smith heading back towards the car and directed him to get on the ground.



*Officer Wilks directing Mr. Smith to get on the ground.*<sup>38</sup>

Sergeant Welsh notified dispatch that an officer had been involved in a shooting and requested the District of Columbia Fire and Emergency Medical Services Department (DCFEMS) to come to the scene to attend to Mr. Kay. Sergeant Welsh further reported that no officer was injured and requested that the appropriate notifications within MPD be made.

Officer Alvarez radioed an alert for the suspect who had fled on foot and [searched the grassy area for the pistol that Mr. Kay had been carrying](#). After a brief

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<sup>38</sup> BWC of Officer Wilks at 2:11 (15:49:33).

search, Officer Alvarez located the weapon – a Bersa Thunder 45 Ultra Compact Pro, .45 ACP caliber handgun, serial number E05997 – in the grass on the terrace below the level of the parking lot. The handgun was later determined to be loaded with one round in the chamber, and seven rounds in the magazine. It was similar in appearance to one of the handguns the men in the Dodge had been holding during the Instagram Live feed. Officer Alvarez stood over the weapon after he found it but did not handle it.<sup>39</sup>

While Officer Alvarez was searching for the weapon and Officer Farley was administering first aid to Mr. Kay, Officer Wilks placed Mr. Smith in handcuffs. Officer Wilks also ordered Mr. Brown, who had been seated in the driver’s seat, not to move. Officer Wilks conducted a pat down of Mr. Smith and discovered a Polymer 80<sup>12</sup> model PF940C, .40 S&W caliber handgun, with an obliterated serial number, concealed in the crotch area of Smith’s pants. Mr. Smith was subsequently placed under arrest for carrying a pistol without a license. That weapon, which was similar in appearance to one of the handguns displayed by Mr. Smith, Mr. Kay, and the unidentified male during the Instagram Live feed, was later determined to be loaded with one round in the chamber, and 13 rounds in the magazine. Officer Wilks ordered Mr. Brown out of the vehicle and determined that he did not possess a valid driver’s license. Mr. Brown was subsequently placed under arrest for driving without a license.

Residents began to gather at the scene of the shooting. To better control the scene and the growing crowd, and to allow access by DCFEMS, MPD officers requested the presence of additional personnel. As a result, MPD members from the First and Sixth Patrol Districts arrived at the location to control and disperse the crowd. As a result of the presence of neighborhood residents, the involved members, including Officer Alvarez, were driven to a parking lot located in the 1500 block of Alabama Avenue, Southeast D.C., accompanied by other non-involved members.

DCFEMS Ambulance 15 transported Mr. Kay to George Washington University Hospital, where a doctor pronounced him dead at 4:36 pm. At approximately 6:40 pm, Mr. Kay’s mother was notified of his death by a doctor and two MPD members.

The D.C. Department of Forensic Sciences (DFS) was requested to respond to the scene, and Crime Scene Scientists processed the scene. The lead IAD investigator obtained the Incident Summary (IS#20-002577) and prepared the Preliminary Investigation, which was completed on September 6, 2020.

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<sup>39</sup> BWC of Officer Alvarez at 3:50 (15:51:14).

On September 2, 2020, an IAD agent notified the U.S. Attorney's Office for the District of Columbia (USAO) of the incident, and that Mr. Kay had died as a result of Officer Alvarez's use of deadly force. The USAO received the results of the Preliminary Investigation on September 8, 2020. The Autopsy Report was completed by the D.C. Office of the Chief Medical Examiner on September 21, 2020. The USAO sent a Letter of Declination to MPD on November 20, 2020, declining to pursue criminal charges against Officer Alvarez.

## **B. Summary of Investigation**

A sergeant in IAD was designated as the lead investigator for the use of deadly force by Officer Alvarez. The investigation began immediately after the incident and included: interviews of the four MPD members in Sergeant Welsh's car (Officer Alvarez, Sergeant Welsh, Officer Farley, and Officer Wilks); an interview of the CST manager, Lieutenant Nikki Lavenhouse; an interview of a civilian witness who called 911 to report the shooting; BWC footage from the four officers on scene; forensic evidence, including recovery and analysis of the two guns recovered at the scene; evidence received on the Instagram Live feed; and medical and autopsy reports for Mr. Kay. On December 21, 2020, Officer Alvarez completed a Force Incident Report (FIR) related to this event, as required by MPD general orders, but the FIR did not provide any additional probative information.

### 1. Initial Interviews of Officers

On September 2, Internal Affairs personnel interviewed Officers Alvarez, Farley and Wilks, and Sergeant Welsh.<sup>40</sup> Their statements were generally consistent with each other and with the relevant facts described above. Officer Alvarez added his perspective on the facts, including that as Mr. Kay ran towards him, Mr. Kay began to raise the handgun, and Officer Alvarez feared that Mr. Kay was going to shoot him and responded by discharging one round of his service weapon at Mr. Kay. Officer Farley stated he saw Mr. Kay running after Officer Alvarez and then raise the gun – which he described as a “black object” – from his waist. Officer Farley stated that he heard a gunshot, observed smoke, and saw Mr. Kay release the gun, which flew through the air and landed in a nearby grassy area.

Sergeant Welsh, the squad supervisor, said he did not see Mr. Kay run in the direction of Officer Alvarez, nor did he see the discharge from Officer Alvarez's weapon.

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<sup>40</sup> In addition to interviews of the involved officers, IAD investigators interviewed another CST officer about how the CST members had obtained information from social media. This officer was not on the scene until after the shooting of Mr. Kay.

Officer Wilks stated he focused on the men who remained in the vehicle: Marcyelle Smith and Deonte Brown. Officer Wilks said he was working to take Mr. Smith into custody when he heard a gunshot come from behind him, and immediately turned and observed Mr. Kay fall to the ground, but that he was largely occupied with trying to place Mr. Smith in handcuffs. This statement does not match Officer Wilks' BWC footage, which shows that at the time Mr. Kay was shot, Officer Wilks was approximately 15 feet from the Dodge, and that Officer Wilks did not try to place Mr. Smith in handcuffs until approximately fifteen seconds after Mr. Kay had been shot. Nor does this statement match the BWC footage from Officer Alvarez, which shows Officer Wilks facing him as Mr. Kay falls to the ground. Furthermore, as soon as Officer Wilks activated his BWC he placed his left hand in front of it, and held his hand there as he was running – he did not stop blocking the camera lens until he drew his service weapon and held it with both hands.

Also, on September 2, 2020, the lead investigator conducted walkthroughs of the scene with Sergeant Welsh, Officer Farley, and Officer Wilks, separately. These walkthroughs were not recorded. The written summaries of the walkthroughs by the lead investigator were generally consistent with their initial interviews.

## 2. Civilian Witnesses

Mr. Brown was arrested for driving without a permit and transported to the Seventh District, where he was advised of his Miranda Rights. Mr. Brown declined to make a statement without an attorney present, and no statements were obtained from him on that date or subsequently.

Mr. Smith was arrested for carrying a firearm without a license and transported to the Seventh District, where he was advised of his Miranda Rights. Mr. Smith declined to make a statement without an attorney present, and no statements were obtained from him on that date or subsequently.

A civilian witness called 911 on September 2, 2020, to report the shooting and ask the dispatcher how the police were going to justify the shooting.<sup>41</sup> That same day, members of the Seventh District Detective's Office canvassed 225 Orange Street, Southeast D.C. According to the Kay Report, no additional probative witnesses were identified. On October 16, 2020, the investigator interviewed the witness by phone. The witness said that he heard a gunshot, and when he looked out the window, he observed Officer Alvarez standing over Mr. Kay, who was lying on the ground. He said he did not see what took place. He said that after he called 911, he went outside but was not able to get near the scene because it had already been

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<sup>41</sup> Audio recording of 911 call at 1:15, 1:28.

blocked off. The witness said he was dubious about MPD's claim that it had located and recovered Mr. Kay's weapon so far from the place in the parking lot where the shooting occurred but provided no evidence to support his suspicions.

MPD personnel conducted a search for surveillance camera footage and determined that a surveillance camera was located at 400 Orange Street, Southeast. However, an MPD member who investigated the matter was informed by a resident at that location that the camera was inoperable. Although not reflected in the Kay Report, during the March 30, 2021, UFRB meeting to consider the Kay case, the lead investigator stated that a second attempt to obtain any video footage from the surveillance camera was similarly unsuccessful.

### 3. Forensic Evidence

Mr. Kay's weapon, initially found by Officer Alvarez, was recovered and secured by DFS personnel, who determined that the safety of the pistol was on. An examination report from the DFS Forensic Biology Unit found the DNA evidence recovered from the pistol was incapable of being interpreted. DNA swabs from the pistol were determined to be a mixture of DNA from two or more people. Forensic analysts were unable to isolate any DNA that could be attributable to Mr. Kay.

The weapon recovered from Mr. Smith was a Polymer 80 Inc. PF940C, .40 S&W caliber handgun without a serial number. The Firearms Examination Unit test-fired this handgun on September 3, 2020, and determined that it was operable.

All relevant BWC footage from the cameras of the four officers who entered the parking lot as well as additional forensic evidence was collected and analyzed.

The Office of the Chief Medical Examiner prepared an Autopsy Report, dated September 21, 2020. This report concluded that Mr. Kay's cause of death was a "Gunshot Wound of the Chest," that went from, "front to back and slightly downward." The bullet struck both Mr. Kay's right lung, and his heart. Mr. Kay also had several small abrasions on his back, elbow, knee and thigh. A toxicology screen detected the presence of Tetrahydrocannabinol, or THC (the active compound in marijuana) in a blood sample obtained from Mr. Kay.

On December 21, 2020, Officer Alvarez completed a Force Incident Report related to this event, as required by MPD general orders, but the report did not provide any additional probative information.

### 4. Declination and Post-Declination Investigation

Although the initial round of interviews of Officer Alvarez and the other officers at the scene of the shooting took place in the immediate aftermath of the incident,

further investigation awaited a decision from the USAO on whether criminal charges would be brought against Officer Alvarez. As mentioned above, the declination letter was provided on November 20, 2020.

In the meantime, as a result of discussions among then-MPD Chief Peter Newsham, the District of Columbia Auditor, and the co-chairs of the D.C. Police Reform Commission, it was agreed that the role of the Bromwich/Steptoe team would be different from their role in the report on the 2018 and 2019 cases. With respect to the Kay investigation, the Bromwich/Steptoe team would work with the lead investigator, discuss further steps in the investigation, and participate in witness interviews. As part of that process, members of the Bromwich/Steptoe team began meeting in late September on a weekly basis with the IAD lead investigator and met on a bi-weekly basis with Wilfredo Manlapaz, the Assistant Chief of MPD's Internal Affairs Bureau.

At the outset of these discussions, the lead investigator stated that he believed the final investigative report would closely resemble the Preliminary Report completed shortly after the incident. He initially stated that he did not see the need for further interviews, even though the bulk of the relevant evidence, including the BWC footage, was not available at the time the initial interviews took place on the day of the incident. After a series of discussions in which the Bromwich/Steptoe team advocated for the utility of additional interviews, the lead investigator acknowledged that there could be value in conducting such interviews, and said he would schedule them after the declination was received, which occurred on November 20, 2020.

While the lead investigator waited for the production of a key piece of evidence—the Instagram Live footage that served as the basis for the actions of the CST on September 2, 2020, which was produced by Instagram on January 9, 2021—the Bromwich/Steptoe team engaged in a series of discussions, over the course of several weeks, with Assistant Chief Manlapaz and the lead investigator. The discussions focused on the personnel to be interviewed and the scope of those follow-up interviews. At MPD's request, the Bromwich/Steptoe team supplied suggested areas of questioning for the interviews that broadened the scope of the investigation beyond the events that happened at 225 Orange Street, including: the mission of the Crime Suppression Team; the CST supervision structure above the sergeant level; the CST's use of social media as an investigative tool; and the involved officers' prior contacts with Mr. Kay and the other suspects.

As a result of further discussions, MPD agreed to incorporate some of the Bromwich/Steptoe team's suggestions in its follow-up interviews but rejected others as beyond the scope of the investigation as MPD conceived it. MPD agreed to interview the lieutenant who supervised the Crime Suppression Team, but not the commander. MPD also agreed to ask some questions about the use of social media, and about the officers' prior familiarity with Mr. Kay and the other suspects, but not about the overall mission of the unit.

MPD resumed its interviews on February 4, 2021 with an interview of Lieutenant Nikki Lavenhouse, the supervisor of the Crime Suppression Team.<sup>42</sup> As reflected in the transcript of the interview, Lieutenant Lavenhouse said she had only limited discussions with Sergeant Welsh or his team prior to when they left 7D on September 2, 2020, and was not notified that they planned to search for the suspects who had been broadcasting on Instagram Live. She said she knew nothing about it until she reported to the scene of the shooting and was advised about it by the other CST sergeant.

In response to questions about the use of social media as the basis for enforcement activities, Lieutenant Lavenhouse said that she was aware that CST officers regularly monitor open-source social media but was not aware of the details. Although she is the CST supervisor/manager, Lieutenant Lavenhouse said she frequently is not aware of the activities of the CST teams at any given time because of her involvement in various administrative matters. She said that unless the plan for CST involves the execution of a search warrant, the sergeants usually do not discuss their plans for the day with her.

Beginning in early March 2021, the lead investigator scheduled a series of follow-up interviews with the members of Sergeant Welsh's team who were directly involved in the sequence of events leading to the shooting. On March 3, 2021, the lead investigator conducted a follow-up interview with Sergeant Welsh.<sup>43</sup> Sergeant Welsh explained that the CST squads get their direction from a variety of sources, including information from the community or the chain of command. Sergeant Welsh said he did not recall receiving any specific instructions from his lieutenant or commander, and stated the "default plan is to patrol, interdict illegally possessed firearms, and deter violent crime in the Seventh District." Sergeant Welsh explained that CST employs Instagram and other open sources to identify criminal behavior, and that information from social media has been used to make arrests and obtain search warrants in other cases. He said he does not ask the officers under his supervision to keep records of what they view, due to the sheer volume. Sergeant

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<sup>42</sup> Because the Bromwich/Steptoe team was not given notice of the interview, no member of the team could participate, or make suggestions about areas of questioning or specific follow-up questions.

<sup>43</sup> The police union objected to the involvement of the Bromwich/Steptoe team in the investigative interviews. Union representatives placed the union's objections on the record and submitted a written version of the objections. At the first interview in which the Bromwich/Steptoe team participated, the web-camera (used by the review team to remotely attend interviews) was focused on the MPD investigator rather than the witness. At the Bromwich/Steptoe team's request, that decision was reversed and in subsequent interviews the camera was trained on the witness. This should have been the case for all interviews.

Welsh stated that, to his recollection, he was not familiar with Messrs. Kay, Brown, or Smith prior to September 2, 2020.

Sergeant Welsh stated that because the circumstances can be so varied and fluid, he and his squad did not formulate a specific plan in advance of finding the Dodge in the parking lot. In this circumstance, he said his initial thought was to use the parked cars as cover to move towards the Dodge, but he was not able to communicate that to the officers in his car, because the unidentified male ran from the Dodge immediately upon their arrival. When pressed by the investigator, Sergeant Welsh acknowledged that his team had formulated no plan on what to do if they found the suspects in the Dodge. Sergeant Welsh acknowledged that Officer Alvarez's pursuit of the unidentified male was not the most prudent action but stated that he found it difficult to second guess Officer Alvarez after the fact. His narrative of the events that occurred after he pulled the cruiser into the parking lot at 225 Orange was generally consistent with the statement he provided on September 2, 2020.

The lead investigator also conducted follow-up interviews with the other members of Sergeant Welsh's CST squad. On March 10, 2021, the lead investigator conducted a follow-up interview with Officer Farley. Officer Farley explained that the use of social media by CST members was not uncommon; he said he has used it in several other cases. Officer Farley said he did not specifically recall having any prior contacts with Mr. Kay prior to September 2, 2020, but that he had become familiar with Mr. Smith on several occasions, including through numerous videos posted on YouTube and other internet sites. In some of those postings, he saw Mr. Smith in possession of firearms and drugs. On September 2, 2020, Farley recalled that when he was in the 7D CST office, someone announced that they planned to search for the Dodge, but Officer Farley did not recall who made the statement.

Officer Farley explained that things moved quickly once he and his colleagues arrived in the parking lot at 225 Orange. He said that when he saw Officer Alvarez run past the Dodge, he was intending to yell for Officer Alvarez to slow down. He also explained that it can be a common tactic for people engaged in criminal activity to have one person run from the car, or location, to serve as a distraction to the officers. The officers then chase this person, who is not in possession of any unlawful items; the distraction, according to Officer Farley, provides the other suspects with a chance to flee. Officer Farley made clear that when the squad members arrived at the scene, no one in Sergeant Welsh's car had a specific assignment, noting that the CST operates on an informal "pick up the slack method." He said this means that an officer looks for the next task that needs to be done. Officer Farley said his intention was to provide back-up to Officer Alvarez, although there was no explicit communication among the CST members.

In his March 10, 2021, follow-up interview, Officer Wilks said he did not recall who initiated the search for the car containing the suspects on September 2,

2020, but he said he knew that the objective was to locate the Dodge in the PSA 707 area. He said he did not recall any discussion on what would occur if the Dodge was located. Officer Wilks said he knew Mr. Kay was frequently in and around the PSA 707 area, and that he may have been one of the officers involved in a previous arrest of Mr. Kay on a robbery warrant. He said he was unaware of any prior interaction he had with Mr. Smith prior to September 2, 2020, and he did not know anything about Mr. Brown prior to this incident.

Finally, on March 11, 2021, the lead investigator conducted a follow-up interview with Officer Alvarez. Officer Alvarez confirmed that the use of social media for investigative purposes is common and that he was unaware of any guidance or requirements for its use. Officer Alvarez said he had previously encountered Mr. Kay in 2019 related to an arrest for an illegal firearm.<sup>44</sup> He said he had encountered Mr. Smith multiple times in the area of the Mellon market in connection with various claims of disorderly conduct. He said he did not recall any prior interactions with Mr. Brown.

In his description of the events of September 2, 2020, Officer Alvarez acknowledged that he ran past the occupied Dodge, believing that the fleeing unidentified male was armed and dangerous and therefore wanting to apprehend him. He said he knew that there were other CST officers nearby to assist. Based on his experiences of working with the other officers, Officer Alvarez said he expected the other officers on the scene to secure the vehicle and the occupants. As he ran past the Dodge, Officer Alvarez said he realized the unidentified male had too much of a lead and stopped his pursuit.

While he was pursuing the fleeing suspect, Officer Alvarez said he saw movement in his peripheral vision and turned to see Mr. Kay running towards him. Officer Alvarez said that he immediately saw what appeared to be a handgun in Mr. Kay's right hand and that Mr. Kay was raising his arm with the handgun in Officer Alvarez's direction. Officer Alvarez stated that he believed that no one else was in his field of fire.<sup>45</sup>

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<sup>44</sup> This statement is supported by Officer Alvarez's BWC footage from September 2, 2020, when he responded to the question "Is [Mr. Kay] a juvenile?" with "I dunno if he is . . . he was like a year ago, I think." BWC of Officer Alvarez at 6:34 – 6:39 (15:53:55 – 15:54:01).

<sup>45</sup> In addition to the interviews described above, the lead investigator did a follow-up interview with the officer who was most involved in monitoring social media for the CSTs. That officer stated that she had not received any specific guidance about using social media from her supervisors, and that her supervisors have not put any limits or controls on her social media usage. She said she knew Mr. Smith as a rapper

## 5. Kay Report Summary, Conclusions and Finding

The Kay Report's Summary and Conclusions found that the following facts had been established:

On September 2, 2020, Officer Alexander Alvarez, and other members of the Seventh District Crime Suppression Team observed an Instagram livestream made by Mr. Marcyelle Smith. In this livestream Mr. Smith, Mr. Deon Kay, and an unidentified male, were displaying two different handguns, while driving around the PSA 707 area. The vehicle was being driven [b]y Mr. Deonte Brown. As well, the individuals appeared to be smoking marijuana. The CST members concluded that the vehicle in question was likely a Dodge, with a distinctive, pink steering wheel cover, and the Dodge was later parked near a red brick wall.

After developing a plan to canvass the PSA 707 area, Sergeant Terrence Welsh, Jr., Officer Alexander Farley, and Officer Trevor Wilks, began to canvass in an unmarked cruiser. Other CST members were also canvassing for the Dodge.

At 15:49:21 hours, Sergeant Welsh parked the cruiser at the entrance to the parking lot located at 225 Orange Street, Southeast, where the Dodge Journey [sic] was parked backed up to a brick wall. Officer Alvarez, Officer Wilk, and Officer Farley exited the cruiser.

Officer Alvarez observed an unidentified male flee from the Dodge. Believing that this was Mr. Smith, and that he was armed with an illegal handgun, Officer Alvarez began to run after the individual, drawing his service pistol. Officer Farley ran along the same general path with the intent to provide back up for Officer Alvarez, as Officer Wilks moved towards the parked Dodge.

As the unidentified male had too much of a lead, Officer Alvarez discontinued his foot pursuit, and holstered his service pistol [at] 15:49:29. Mr. Kay exited the Dodge, and began to run towards Officer

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using the name 'Baby Fifty' who frequently posted music videos on social media. Because no one knew the exact location of the vehicle, CST members to her knowledge did not make any specific plans beyond locating the vehicle. In addition, the investigator interviewed the other CST sergeant, whose recollection of the events of September 2, 2020, was very hazy and who was not involved in the events until the report of the shooting came over the radio.

Alvarez holding a pistol in his right hand, and raising it towards Officer Alvarez.

Officer Alvarez then drew his service pistol, and at 15:49:30, discharged one round, striking Mr. Kay in the chest. Mr. Kay then released the handgun he was holding, and it landed on the ground on the terrace below the parking lot. Mr. Kay then fell to the ground. Officer Alvarez located the handgun that Mr. Kay had thrown.

Officer Farley began to provide immediate medical care and Mr. Kay was transported to the George Washington University Hospital, where he was pronounced deceased by [a] [d]octor . . . at 16[:]36 hours.

Given the hostile crowd, the involved members were moved from the scene, to a nearby parking lot. This information was relayed both to the on-scene managers, and over the Seventh District radio zone. Outside resources were required to respond to assist in securing the scene.

Kay Report at 57–58.

Based on these findings, the investigation recommended that Officer Alexander Alvarez’s use of force against Mr. Deon Kay on September 2, 2020, be classified as Justified, Within Departmental Policy. According to the Kay Report, before its completion, a preliminary conference with an Internal Affairs lieutenant was conducted. The lieutenant concurred with the findings of the investigation.

On March 29, 2021, the Kay Report was finalized. Also, on March 29, 2021, four levels of supervisory/command personnel in the lead investigator’s chain of command signed off on the investigation and its findings, indicating their concurrence.<sup>46</sup>

On March 29, 2021, the Bromwich/Steptoe team was informed that the UFRB would convene the following day, March 30, 2021, to discuss the case.

### **C. Use of Force Review Board**

The UFRB convened the day after the Kay Report was finalized. Members of the Bromwich/Steptoe team attended the meeting by video, as observers. The members of the Board were clearly very familiar with the facts and asked pointed questions of the lead investigator. They focused on a number of significant issues about supervisory

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<sup>46</sup> On April 5, 2021, Assistant Chief Manlapaz informed the Bromwich/Steptoe team, during a regular bi-weekly meeting, that the investigation was approaching the deadline for commencing any potential disciplinary action, and he had reviewed earlier versions of the draft that had been circulated prior to March 29.

involvement with—and awareness of—the activities of the CST. These questions were consistent with some of the issues we had advocated be explored during the investigation and that were only reluctantly and partially investigated. The Board members expressed concern about the absence of a plan to deal with the contingencies that Sergeant Welsh’s squad might face if they were successful in finding the car with the suspects.

In addition, the Board members asked about “over-penetration” — Officer Alvarez’s actions in running past the Dodge when he had reason to know that other armed individuals were still in the car. In the words of the Board chair, Officer Alvarez ran past and turned his back on “three other threats.” Other members of the Board were likewise critical of the tactics employed. The head of MPD’s Academy criticized the MPD members for taking bad pursuit angles and leaving other officers in the line of fire.

The UFRB rejected the Kay Report’s recommendation that the shooting of Mr. Kay be found to be “Justified, Within Policy.” The Board unanimously concluded that Officer Alvarez’s use of deadly force shooting was justified because of the threat immediately posed by Mr. Kay, but that the tactics used by Officer Alvarez and his colleagues, including Sergeant Welsh, were deeply flawed and unnecessarily created a threat to both the officers and the suspects. The Board noted that, in addition to its concerns about the actions of the officers in the parking lot, it was extremely troubled by the lack of supervision of the CST within the Seventh District’s command structure, and by the lack of a plan by Sergeant Welsh’s squad once it embarked on the search for the Dodge. All members of the Board concurred in the judgment that the shooting be deemed Justified, but with a Tactical Improvement Opportunity, one of the alternative dispositions provided for in the applicable General Order. However, the Board was less specific in defining the set of tactics that needed to be reviewed. The Board also discussed the way training might be improved but was, again, less specific in defining how it should do so.

In addition to the Tactical Improvement Opportunity finding, the UFRB also directed that additional internal investigations be initiated. The Board directed that IAD investigate the failure of all four of the involved MPD members to activate their BWCs at the outset of their search for the Dodge—a self-initiated assignment requiring BWC activation. Finally, the Board ordered IAD to investigate failures of management and supervision over the CST.

#### **D. Analysis**

We agree with the UFRB’s finding that that the use of force by Officer Alvarez was Justified, Tactical Improvement Opportunity.

1. Relevant Policy

MPD's Use of Force Policy, GO 901.07, governs Officer Alvarez's actions in the encounter with Mr. Kay that ended in Mr. Kay's death. Section V.G authorizes the use of deadly force in the following limited circumstances:

Authorized Use of Deadly Force

a. Defense of Life

Members may use deadly force in the performance of police duties under the following circumstances:

- (1) When is it necessary and objectively reasonable; **and**
- (2) To defend themselves or another from an actual or threatened attack that is imminent and could result in death or serious bodily injury; **and**
- (3) When all other options have been exhausted **or** do not reasonably lend themselves to the circumstances.

(emphasis in original).<sup>47</sup> MPD officers are also governed by the duty to de-escalate situations: to take all reasonable steps to avoid the use of any type of force, including deadly force. MPD's de-escalation policy, incorporated as a central element of MPD's use of force policy in 2016, provides:

All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present, shall, if possible, first attempt to defuse the situation through advice, warning, verbal persuasion, tactical communication, or other de-escalation techniques, Members shall attempt to defuse use of force situations with de-escalation techniques whenever feasible.<sup>48</sup>

Indeed, consistent with the growing consensus among major police departments in the United States, the de-escalation requirement is the first principle listed under MPD's use of force regulations. This reflects the primacy of de-escalation and its overarching applicability to situations in which the use of force may be necessary.

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<sup>47</sup> MPD regulations also authorize the use of deadly force in a limited set of circumstances involving fleeing felons. GO 901.07 IV.G.1.b.

<sup>48</sup> GO 901.07 IV.A.

The UFRB's policies and procedures, which govern its consideration of investigations of serious uses of force by the IAD, require the preparation and use of a Decision Point Analysis Matrix, which is incorporated into the record of the Board's proceedings.<sup>49</sup>

## 2. Justification for Use of Force

We have reviewed and analyzed the available evidence, including the testimony of the involved officers and their BWC footage. The BWC footage captures the brief and deadly interaction between Officer Alvarez and Mr. Kay, and it corroborates the account of Officer Alvarez and the other witnesses. The evidence shows that immediately upon the arrival of the four CST members in Sergeant Welsh's vehicle at 225 Orange St., one of the suspects emerged from the Dodge and began running away from the Dodge and from the MPD members. Without any discussion, and not knowing whether the fleeing suspect was armed, Officer Alvarez took off in pursuit. After just a few seconds, he ended the pursuit. As he turned back to face the Dodge and the other MPD members, Officer Alvarez saw Mr. Kay in his peripheral vision. Mr. Kay had a gun and was running towards Officer Alvarez with his arms swinging.<sup>50</sup> In response, Officer Alvarez fired a single shot that killed Mr. Kay. From the time Officer Alvarez begins to turn to the time Officer Alvarez shoots, approximately one second elapses—this was the quintessential split-second decision.

At that moment, Officer Alvarez was justified in using deadly force. The evidence shows that Mr. Kay was running toward Officer Alvarez, with his arms swinging and a gun in his right hand. While we will never know precisely Mr. Kay's intentions, it was reasonable for Officer Alvarez to believe that he was under "imminent" attack from an armed man and believe that he was at risk of death or serious bodily injury. We therefore found MPD's conclusion that Officer Alvarez shot Mr. Kay in self-defense to be supported by the facts. However, the tactics that led to the use of force are a different matter. As will be more fully discussed below, use of appropriate tactics by the involved members could have avoided this tragic incident all together.

As to whether the actions of Sergeant Welsh, Officer Alvarez, and the other two officers at the scene were consistent with MPD's policy requiring de-escalation, it is

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<sup>49</sup> GO 901.09 V.C. 3.

<sup>50</sup> The Kay Report is less equivocal than this, stating definitively that Mr. Kay was "raising [the gun] towards Officer Alvarez." Our careful, frame-by-frame review of Officer Alvarez's BWC footage does not allow us to reach this certain a conclusion, although it certainly could have appeared that way in the moment to Officer Alvarez.

clear that de-escalation could not have been considered because of the rapidly unfolding events once Sergeant Welsh's vehicle had pulled into the parking lot. Indeed, the MPD members squandered any opportunity for de-escalation because they had no plan for what to do if they found the Dodge they were searching for. Had they formulated a plan, and discussed it among themselves, they may have been able to approach the vehicle in a manner that placed a high priority on both their own safety and that of the armed occupants of the car. Such an approach could have incorporated principles of de-escalation and may have avoided the deadly confrontation. As one member of the UFRB aptly stated during the hearing, the officers needed to consider how their approach would have been different if they were not carrying their service weapons.

Foot pursuits are inherently dangerous, and the decision to engage in one inherently escalates any situation. A foot pursuit policy might have provided guidance to Officer Alvarez and his colleagues about whether the risk of a foot pursuit in these circumstances was worth taking. MPD currently lacks such a policy.

### 3. Tactical Issues

Although Officer Alvarez's action in shooting Mr. Kay was justified as a matter of self-defense, the tactics of Sergeant Welsh's squad were poor and contributed to the deadly encounter between Officer Alvarez and Mr. Kay. We fully agree with the UFRB's consensus on this issue.

First, there was a total absence of operational planning. The CST members saw the four men brandishing two guns on the Instagram Live feed and immediately embarked on a search for the Dodge and the armed suspects. They did not advise their lieutenant or any superior Seventh District member of their operational plans, to seek guidance and approval. Even without consulting a higher level of management, Sergeant Welsh and his squad members should have devised a tactical plan in the event they located the vehicle and the suspects, incorporating all that they knew about the suspects. Although the investigation focused on the officers traveling in Sergeant Welsh's police vehicle, there were at least three vehicles and 12 officers involved in the search for the Dodge and the armed suspects. The only direction provided was to locate the vehicle and the armed suspects. In addition, Sergeant Welsh provided no guidance to his unit members, and acted as a member of the team rather than as the on-scene supervisor.

Second, Officer Alvarez decided to pursue on foot the first person who came out of the Dodge. In doing so, Officer Alvarez ran past the three other individuals in the Dodge who he had reason to believe were armed – this created a grave risk to Officer Alvarez that someone might shoot him from within the Dodge, or emerge from the Dodge with a gun, which is precisely what happened a few seconds later. This lack of awareness of the risks presented by running past the Dodge could have cost Officer

Alvarez his life if one of the occupants had shot him. In addition, Officer Alvarez's initiation of a foot pursuit without discussion of any kind with his colleagues meant that he had no situational awareness of where they were, and therefore no idea whether they could be in the line of fire when he shot Mr. Kay. In short, Officer Alvarez was in a situation where his decision to shoot Mr. Kay was justified – but he unnecessarily placed himself in a dangerous situation, which made the use of lethal force more likely. Although speculating about what might have happened is always difficult, had Officer Alvarez made a different tactical choice, the shooting of Mr. Kay might have been avoided.

Third, because there was no plan, the squad members' approach to the two suspects who had remained in the Dodge was entirely improvised. Police officers frequently have to make split-second decisions and respond in the moment on matters of life and death, but there appears to have been virtually no discussion or coordination whatsoever among the squad members. The development of a plan, or even limited communication once they spotted the Dodge with the suspects in the vehicle, could have clarified roles, reduced confusion, and improved the safety of the officers, suspects, and any bystanders.

Finally, the fact that no information about the search for the Dodge was shared above the sergeant level, and that the lieutenant had no knowledge of it until after the shooting took place, reflects a broader supervisory failure that is strategic as much as it is tactical. In general, supervision of the CSTs appears to be very loose, leaving much to the sergeants' discretion.

The Kay Report devotes five full pages to a detailed Tactical Analysis of the incident. This section of the report contained background information about the legal and policy framework for analyzing the use of force, and the actions taken by the MPD members from the time they observed the suspects on the Instagram Live feed to the shooting itself. But the balance of the section is devoted to a detailed and elaborate justification for the actions taken by the officers rather than a balanced and critical analysis of their conduct. For example:

While Officer Alvarez did expose himself to the risk of an attack emanating directly from the Dodge, his action was not unreasonable given the circumstances as he knew them at the time. While officers must always take action in the safest manner possible, it is not feasible to eliminate all risk. Given all the factors that Officer Alvarez knew, or should have known at this time, it was an acceptable risk for him to take.

Kay Report at 56. We view this as an unjustifiably charitable view of Officer Alvarez's actions, as did the UFRB.

#### 4. Investigative Issues

The lead investigator on this matter had substantial experience reviewing uses of force. He and other members of IAD conducted initial interviews with the involved officers on September 2, 2020, the day of the incident. Subsequently, walkthroughs were conducted with Sergeant Welsh, Officer Farley, and Officer Wilks in the parking lot at 225 Orange St. – but not with Officer Alvarez, who apparently was not asked to do a walkthrough. The initial interviews were brief: Sergeant Welsh’s lasted approximately 15 minutes, Officer Farley’s lasted seven minutes, Officer Wilks’ lasted approximately five minutes, and Officer Alvarez’s lasted approximately 27 minutes.<sup>51</sup> We view these initial interviews as inappropriately brief.

##### *a. Follow-up Interviews*

These initial interviews took place almost immediately following the incident, when the memories of the involved officers were freshest. However, at that time, the relevant evidence of the incident (including forensic evidence and BWC footage) was not available. In addition, because the initial interviews were spread across multiple investigators, the investigators were in no position to probe the witnesses for inconsistent accounts of how the events unfolded. Therefore, the Bromwich/Steptoe team was surprised to learn that at the outset of our multiple discussions with the lead investigator, he had no plan to conduct re-interviews of the involved officers but instead planned to rely on the initial, brief interviews; the BWC footage; and the forensic evidence. However, over the course of our discussions, he agreed there would be benefits to conducting follow-up interviews. The investigator decided to wait to conduct the follow-up interviews until MPD obtained the Instagram Live footage.

We recommended that the second round of interviews include not only the four involved MPD members, but also supervisors, including the lieutenant over the CSTs and the Seventh District personnel above the lieutenant.<sup>52</sup> The purpose of this recommendation was to better understand the extent to which the lieutenant and other supervisors in the Seventh District were aware of the operation undertaken on September 2, 2020, by the CSTs, but also to better understand the mission and purpose of the CSTs. MPD eventually agreed to interview Lieutenant Nikki Lavenhouse, the

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<sup>51</sup> The only officer outside the CST squad who was interviewed immediately following the shooting was the officer who was familiar with social media, who was interviewed concerning the September 2, 2020, Instagram Live feed.

<sup>52</sup> Initially, the lead investigator questioned the need to re-interview any witness other than Officer Alvarez. Ultimately, he agreed to schedule follow-up interviews with Sergeant Welsh, Officers Farley and Welsh, the officer who was familiar with social media, and the other CST sergeant.

supervisor of the CST, but rejected the recommendation to interview anyone at a higher supervisory level.

*b. Scope of Interviews*

The Bromwich/Step toe team had numerous discussions, beginning in February 2021, with the lead investigator and Assistant Chief Manlapaz regarding the scope and substance of the second round of interviews. At MPD's request, we provided a set of witnesses to be interviewed and a set of topics to be covered. The witnesses included personnel above Sergeant Welsh that we suggested be interviewed on a range of topics including: the purpose and function of the 7D CST; the scope of its authorization and discretionary authority; the method of selecting officers for the CST, and screening of officers who are members; and the specific authorization that higher-level supervisors gave to the September 2, 2020, operation. MPD rejected these areas of inquiry, taking the position these inquiries would unnecessarily expand the scope of the investigation well beyond the incident itself.<sup>53</sup> MPD's position on the scope of the investigation was articulated in general terms, as well as in response to specific suggestions of areas to cover during the follow-up interviews. Ultimately, MPD conducted an interview with Lieutenant Lavenhouse, but declined to interview any 7D officials above Lavenhouse. Assistant Chief Manlapaz made clear that he considered it unnecessary and inappropriate to broaden the scope of the investigation significantly beyond the four corners of the incident. Over the course of regular biweekly discussions in January and February 2021, Assistant Chief Manlapaz specifically rejected the recommendation that the investigation should explore the mission and objectives of the CSTs and the scope of their authorization.

When the UFRB reviewed the investigation on March 30, 2021, the Board explicitly expressed concern about the lack of information about the specific issues we had suggested exploring: the definition and scope of the CST's mission, the scope of its authorization, and the lack of knowledge above Sergeant Welsh's level of the operation being undertaken by the CSTs on September 2, 2020.

The interviews of the involved officers that took place in March 2021 were far longer and more substantive than the interviews conducted in the immediate aftermath of the September 2, 2020, shooting. The interview of Sergeant Welsh lasted close to an hour (59 minutes), while the interviews of Officers Farley, Wilks, and Alvarez lasted approximately 40 minutes, 26 minutes, and 50 minutes, respectively. The follow-up interviews not only permitted the witnesses to again describe the sequence of events immediately surrounding the shooting, but for the investigator to ask them questions

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<sup>53</sup> MPD did agree to explore during the follow-up interviews issues including prior contacts the CST members had with the suspects in the Dodge, the extent of social media monitoring as an investigative tool, and tactical considerations.

about their use of social media as an investigative tool, their prior contacts with Mr. Kay and the other occupants of the vehicle, and other topics of interest.

#### 5. UFRB Review

The UFRB met to discuss the Kay Report and its recommendations on March 30, 2021. The Bromwich/Steptoe team sat in on the meeting and discussion. As discussed above, it was apparent from the Board's engagement and questions that the UFRB members had reviewed and carefully considered the Kay Report. Board members asked numerous questions of the investigator. At various times, they seemed dissatisfied with the investigator's answers, and they ultimately disagreed with the recommendation, approved up through the Internal Affairs Bureau's chain of command, that the shooting of Mr. Kay be found to be Justified, Within Policy.

The UFRB was troubled by the tactics used by the officers, which they judged to be unwarranted and risky, and disturbed by the lack of involvement by senior supervisors in the Seventh District in the management and supervision of the CSTs.

At the same time, the UFRB did not reach broader conclusions on how the MPD should respond to the shortcomings it identified. What additional training was required for the involved officers? Will they inform the investigator on areas in which he needs to improve? What tactical improvements should be made by Officer Alvarez? What additional feedback should be conveyed to the other involved officers? Each of these questions remained unanswered after the hearing.

#### IV. Recommendations

- **Recommendation #1:** MPD should revise its Use of Force investigations policy to ensure that IAD investigations are sufficiently comprehensive to allow the UFRB to meet its mandate to "identify commendable actions(s) and/or conduct warranting corrective intervention by the MPD and, as appropriate, recommend training."<sup>54</sup> MPD's current policy does not ensure that IAD's use of force investigations provide the UFRB with the range of information it needs. As we recommended in our recent review of four 2018-2019 cases, IAD's investigation should mirror the areas that the UFRB is required to review. This includes investigating and presenting to the UFRB risk management issues, the adequacy of training, and analysis of the events leading up to and following the incident. The resistance we found to broadening the scope of the Kay investigation underscores the need for this revision.

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<sup>54</sup> GO 901.09 V.C.1

- **Recommendation #2:** IAB should mandate that, in every case involving the use of deadly force, interviews of relevant witnesses be conducted at least twice: first, as soon after the event as possible, and second, after all the relevant evidence has been collected and analyzed. The practice currently seems to be uneven and left to the discretion of the investigator. Interviews immediately following the event have the virtue of capturing the recollections of the involved officers when they are freshest in their minds. For this reason, walkthroughs with the involved officers should be recorded. Interviews after all the evidence has been collected gives the investigator the ability to incorporate the insights provided by that evidence into the follow-up interviews. In most cases, these follow-up interviews, with the exception of the officer(s) whose conduct is under review by the USAO, need not wait for the USAO declination.<sup>55</sup>
- **Recommendation #3:** MPD should create a policy that defines the purpose and function of Crime Suppression Teams. The need for such a policy is demonstrated by the lack of management and supervision above the sergeant level that existed in this case. The need for such a policy is further underscored by the community criticism of CSTs. An important step in addressing those concerns is defining the scope, purpose, and range of operations of the CSTs. The policy should also include the process by which members of CSTs, or any successor, specialized, non-patrol units, are selected and vetted, and how they are supervised.
- **Recommendation #4:** We agree with the lead investigator's recommendation that sergeants and lieutenants assigned to CSTs should receive specialized training in management and leadership principles, as well as risk assessment, planning, and leadership. We also agree with his recommendation that all CST members should be trained, and retrained at regular intervals, on matters relevant to their assignments and should "embrace the principles of working with the community, reducing bias, and improving cultural competency."
- **Recommendation #5:** MPD should create a policy on the use of social media in conducting criminal investigations. As the use of social media of various sorts in criminal investigations continues to grow, MPD members need guidance and structure on their use of social

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<sup>55</sup> We likewise made this recommendation in the March 2021 Report (March 2021 Recommendation #13).

media. We understand the development of such a policy is in process. We recommend that its review and approval be expedited.

- **Recommendation #6:** MPD should develop a policy on foot pursuits. Such pursuits are among the most common actions taken by police officers and among the most potentially dangerous, as the events in this case demonstrate. Like many departments, MPD does not have a policy that would provide needed advice and guidance that balances the need for foot pursuits in some circumstances against the substantial risks they create or exacerbate. We understand the development of such a policy is in process. We recommend that its review and approval be expedited.
- **Recommendation #7:** The UFRB had a fairly robust discussion about the number of ways the MPD can learn from this incident – e.g. better training, better policies, better IAD investigations. But this feedback was not sufficiently memorialized. As we stated in the March 2021 Report, we recommend that the UFRB re-visit how it presents the outcome of its review. This should include more detailed findings of fact, more detailed “soft feedback” on how the officers could have improved tactically, and more specific recommendations related to MPD training and policy.

In its May 14, 2021 response to a draft of this report, MPD agreed with all of the above recommendations, with one exception.<sup>56</sup> It expressed concern with the language in Recommendation #2 that all “relevant witnesses” be interviewed at least twice. While agreeing that all “involved officers” be interviewed at least twice, MPD expressed discomfort with the potentially elastic definition of “relevant witnesses.” We understand that concern. So long as MPD does not limit the meaning of “involved officers” to the officer(s) who personally uses deadly force, and interprets “involved officers” to mean, at a minimum, all officers directly involved in the events leading up to the use of deadly force, as well as in its use, we are satisfied with MPD’s response. The recommendation, which grew out of our review of this case and the cases discussed in our March 2021 Report, was addressed to what we found to be the prevailing assumption among IAD investigators in the cases we reviewed that a single interview was sufficient, even if it took place before a substantial amount of relevant evidence became available. MPD’s response suggests that it realizes that this prevailing assumption needs to be reversed and has committed itself to “conduct[ing] complete and thorough

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<sup>56</sup> Letter from Chief Robert J. Contee III, May 14, 2021, attached to the end of this report as the Agency Comment (“Contee Letter”).

interviews in all cases.”<sup>57</sup> We are pleased that MPD has committed to target implementation dates of September 2021 for Recommendations # 1, # 2, # 3, # 5, and # 6, and October 2021 for Recommendations # 4 and # 7.

## **V. Progress Report on Implementation of Previous Recommendations**

Our March 2021 Report contained numerous recommendations that grew out of our review of the four cases. By letter dated March 15, 2021, then-Acting Chief Robert J. Contee III responded to the recommendations by stating, “MPD agrees with all of the report’s recommendations and will begin working on implementation immediately. We are targeting implementation of all recommendations by the end of 2021.”<sup>58</sup>

Since that time, we have inquired regularly about the status of MPD’s implementation and shared our concerns that MPD has not adequately mobilized to implement the recommendations, and that the response was fragmented and lacked accountability. We were pleased to learn on April 22, 2021, that MPD has created a committee, headed by the Executive Assistant Chief, and with members including high-ranking officials from the executive staff, IAD, and the MPD Office of the General Counsel. We hope this committee will serve as a resource for Chief Contee as the recommendations are implemented, and that the committee will provide the D.C. Auditor with progress reports.

According to MPD, there has been progress on the implementation of several other recommendations as well. MPD has advised us that implementation of March 2021 Recommendations # 2, enhanced training of IAD investigators who handle serious use of force cases, and # 5, designation and training of force investigation specialists, has begun: An initial group of approximately five strong investigators has been identified, and a training curriculum is being developed. March 2021 Recommendations # 3 and # 12, relating to thorough decision point analysis by the UFRB, were implemented for the first time in the Kay case, and feedback from the UFRB was generally positive. We hope implementation of these recommendations continues.

March 2021 Recommendation # 13, follow-up interviews, was implemented in the Kay case largely due to pressure from the Bromwich/Steptoe team. We are encouraged that the UFRB found this additional information helpful, and, as we recommend again in Recommendation # 2, above, such follow-up interviews should be conducted in every case.

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<sup>57</sup> Contee Letter, at 2.

<sup>58</sup> Chief Contee’s letter is attached to the March 2021 Report at Appendix O and to this report as Appendix E.

On the specific recommendation to release MPD’s investigative reports in deadly force cases, March 2021 Recommendation # 7, we understand that Chief Contee has put caveats around the agreement to release the investigative reports by the end of 2021. Chief Contee stated in prepared testimony at his confirmation hearing that “A number of the recommendations are current practices at MPD, and others are aligned with my vision for the agency. Accordingly, MPD has already begun working on implementation.”<sup>59</sup> But when questioned specifically about the release of the reports at his confirmation, Chief Contee stated, “I’m certainly open to it. I am. Because I think that again, this situation came out as a result of the auditor’s report. I just need to talk to my team about the best way to do that. I think my goal is to work towards yes.”<sup>60</sup> In a follow-up interview conducted by a local journalist, Chief Contee said, “I’m not sure what all the obstacles are we need to overcome to get there,” but his “goal is to get to a ‘yes’ for serious uses of force, making sure the public has visibility in that.”<sup>61</sup> We view this recommendation as among our most important, and a recommendation that is critical to MPD’s continuing efforts to gain credibility with the D.C. community. We urge MPD to start by releasing the investigative report in this case.

## VI. Conclusion

Our review of this case follows our review, published in March 2021, of four incidents in which the actions of MPD officers caused the deaths of young Black men. As we said in our March 2021 Report, MPD owes the D.C. community and the public a robust system for investigating and reviewing uses of force. That system must ensure that appropriate policies are in place for investigating serious uses of force, that MPD investigators are adequately trained to investigate such cases, and that the review and oversight system both in the Internal Affairs Bureau and the Use of Force Review Board is demanding and rigorous.

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<sup>59</sup> Testimony of Robert J. Contee III, Acting Chief of Police, before the Committee on the Judiciary & Public Safety, Council of the District of Columbia (March 25, 2021) at 3, available at [https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/release\\_content/attachments/Testimony\\_COP%20Contee%20Confirmation\\_FINAL.pdf](https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/release_content/attachments/Testimony_COP%20Contee%20Confirmation_FINAL.pdf).

<sup>60</sup> Mitch Ryals, *Auditor’s Report Frustrates and Confuses Families of Men Killed by DC Police*, Washington City Paper (March 26, 2021), available at <https://washingtoncitypaper.com/article/512568/auditors-report-frustrates-and-confuses-families-of-men-killed-by-d-c-police/>.

<sup>61</sup> Mitch Ryals, *A To-Do List for Robert Contee as He Prepares to Take the Helm of MPD*, Washington City Paper (April 8, 2021), available at <https://washingtoncitypaper.com/article/513945/robert-contee-to-do-list-mpd/>.

If any policies relevant to an incident are unclear, that lack of clarity should be identified during the course of an investigation and brought to the attention of MPD officials so they can address the issue. If a set of facts presents thorny and difficult issues, IAD investigators must be adequately trained to identify those issues and thoroughly investigate them. And if an investigation fails to address the full range of issues presented by the use of deadly force, reviewing officials within IAD and the UFRB must identify those shortcomings and insist that all the relevant issues – not just those at the time that the ultimate decision to use force was made – be addressed. As we have previously observed, those obligations exist for every investigation of serious uses of force, but they apply with even greater urgency to incidents resulting in death.

The investigation in this case was professional and thorough, but again we saw a reluctance to expand the scope of the investigation beyond the four corners of the “shoot/don’t shoot” decision. Ultimately, MPD explored the issue of social media use and was more attentive to tactical issues than we saw in our review of the four 2018–19 cases, but investigation into the mission of CSTs and the training of officers within CST were rejected. We were encouraged by the UFRB’s attention to these issues, and their endorsement of more searching inquiries into these issues. However, by the time the UFRB faults an investigation for inadequate exploration of these issues, the opportunity has come and gone. In this case, we were pleased to see that the UFRB directed an investigation into the failure of the CST lieutenant to be sufficiently aware of what the CST was doing.

Our review of the death of Deon Kay reinforces our view that MPD needs to address promptly and aggressively the weaknesses in its system for investigating uses of deadly force. It is critical that MPD’s investigations are thorough, credible, and can withstand public disclosure and examination. If MPD is to meet the challenges it faces, the Department must mobilize. The ability to repair and strengthen the fabric of the policies, practices, and procedures relevant to its review of these critical and tragic encounters is within its grasp.

May 2021



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Michael R. Bromwich  
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Ann Marie Doherty  
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## Glossary

7D	Seventh District
BWC	Body-worn camera
CST	Crime Suppression Team
DCFEMS	District of Columbia Fire and Emergency Medical Services Department
DFS	Department of Forensic Services
DOJ	Department of Justice
FIR	Force Incident Report
IAB	Internal Affairs Bureau
IAD	Internal Affairs Division
MOA	Memorandum of Agreement
MPD	District of Columbia Metropolitan Police Department
ODCA	Office of the District of Columbia Auditor
PSA	Patrol Service Area
UFRB	Use of Force Review Board
USAO	U.S. Attorney's Office for the District of Columbia

## **Agency Comments**

On April 30, 2021, we sent a draft copy of this report to the D.C. Metropolitan Police Department (MPD). MPD responded with comments on May 14, 2021. Agency comments are included here in their entirety.



**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**METROPOLITAN POLICE DEPARTMENT**

May 14, 2021

Kathleen Patterson  
District of Columbia Auditor  
Office of the District of Columbia Auditor  
717 14<sup>th</sup> Street, NW, Suite 900  
Washington, DC 20005

Dear Ms. Patterson,

Thank you for providing the Metropolitan Police Department (MPD) with an opportunity to review the draft Office of the District of Columbia Auditor (ODCA) report, “*MPD and the Use of Deadly Force: The Deon Kay Case.*” We recognize that as our country tackles the important issue of police reform nationwide, we must ensure that our policies and training continue to serve as models for de-escalating situations whenever possible and promoting the sanctity of human life.

The loss of Mr. Kay’s life is tragic, for his family, friends, and community, and indeed, our city. Nevertheless, the report confirmed our findings that the officer’s use of deadly force in this case was justified. As a progressive police department committed to fair and constitutional policing, we remain open to examining and improving our policies and training to ensure that deadly force is used only as a last resort. Accordingly, with one limited exception, we agree with the recommendations outlined in your report, and have started working on implementation. Our specific responses to your recommendations, along with projected implementation dates, appear below.

<b>ODCA Recommendation Summary</b>	<b>MPD Response</b>
<b>1. Revise the MPD use of force investigations policy to ensure that IAD investigations are sufficiently comprehensive to allow the UFRB to meet its mandate.</b>	<b>AGREE</b> MPD agrees with this recommendation. MPD is currently revising our use of force orders consistent with your previous report and will include this recommendation in our revision.  <b>Target Implementation: September 2021</b>
<b>2. IAB should mandate that, in every case involving the use of deadly force, interviews of relevant witnesses be conducted at least twice and walkthroughs with involved officers should be recorded.</b>	<b>AGREE IN PART</b> MPD agrees in part with this recommendation. MPD agrees that involved officers should be interviewed at least twice in every case involving deadly force and that walkthroughs should be recorded. However, we believe the recommendation’s wording of interviewing “relevant witnesses” may be interpreted too broadly to mean that every witness will be interviewed twice, including non-involved officers

ODCA Recommendation Summary	MPD Response
	<p>and witnesses. While we do not believe interviewing witnesses twice is always necessary, we will ensure our investigators conduct complete and thorough interviews in all cases. As you know, MPD cooperated with the auditor’s suggestion that the audit team supply areas of questioning for the interviews in the Kay investigation, and we will use what we have learned to strengthen our investigative questioning techniques going forward.</p> <p>The requirements that involved officers be interviewed at least twice in deadly force cases and that walkthroughs be recorded will be memorialized in our updated use of force order when it is published.</p> <p><b>Target Implementation: September 2021</b></p>
<p><b>3. MPD should create a policy that defines the purpose and function of Crime Suppression Teams.</b></p>	<p><b>AGREE</b> MPD agrees with this recommendation. MPD will issue a policy governing the operations of the district crime suppression teams.</p> <p><b>Target Implementation Date: September 2021</b></p>
<p><b>4. CST officials should receive specialized training in management and leadership principles, as well as risk assessment, planning, and leadership. CST members should be trained, and retrained at regular intervals, on matters relevant to their assignments and should “embrace the principles of working with the community, reducing bias, and improving cultural competency.”</b></p>	<p><b>AGREE</b> MPD agrees with this recommendation. MPD’s Metropolitan Police Academy is developing training for both CST officials and officers that addresses the recommended topics.</p> <p><b>Target Implementation Date: October 2021</b></p>
<p><b>5. MPD should create a policy on the use of social media in conducting criminal investigations.</b></p>	<p><b>AGREE</b> MPD agrees with this recommendation. MPD is drafting a policy governing the use of social media for investigative purposes.</p> <p><b>Target Implementation Date: September 2021</b></p>
<p><b>6. MPD should develop a policy on foot pursuits.</b></p>	<p><b>AGREE</b> MPD agrees with this recommendation. MPD has reached out to other jurisdictions as well as the International Association of Chiefs of Police to review best practices. We have also engaged with our union to begin discussing development of a policy that will provide guidance to our officers</p>

ODCA Recommendation Summary	MPD Response
	<p>that appropriately balances the need for foot pursuits in some circumstances with the potential risk factors pursuits may present to officer safety and members of the public.</p> <p><b>Target Implementation Date: September 2021</b></p>
<p><b>7. The Use of Force Review Board (UFRB) findings should improve how Board feedback is memorialized by including more detailed findings of fact, more detailed “soft feedback” on how the officers could have improved tactically, and more specific recommendations related to MPD training and policy.</b></p>	<p><b>AGREE</b> MPD agrees with this recommendation. The UFRB will revise the format of their findings to better capture recommendations and feedback provided by the Board.</p> <p><b>Target Implementation Date: October 2021</b></p>

In closing, we would like to thank your office and The Bromwich Group for your continued work on this important issue. MPD is committed to ensuring our use of force policies, training, and practices remain a model for the nation, and we believe the implementation of these recommendations will further strengthen our agency and serve the District of Columbia. Please do not hesitate to contact us if you have any further questions.

Sincerely,



Robert J. Contee III  
Chief of Police

# **APPENDIX A**

# GENERAL ORDER



DISTRICT OF COLUMBIA

<b>Title</b> <b>Use of Force</b>		
<b>Topic</b>	<b>Series</b>	<b>Number</b>
<b>RAR</b>	<b>901</b>	<b>07</b>
<b>Effective Date</b> <b>November 3, 2017</b>		
<b>Replaces:</b> GO-RAR-901.07 (Use of Force), Effective Date December 1, 2016		
<b>Related to:</b> GO-OPS-301.03 (Vehicular Pursuits) GO-RAR-306.01 (Canine Teams) GO-RAR-901.01 (Handling of Service Weapons) GO-RAR-901.04 [Oleoresin Capsicum (OC) Spray Dispensers] GO-RAR-901.08 (Use of Force Investigations) GO-RAR-901.09 (Use of Force Review Board) GO-RAR-901.11 (Force-Related Duty Status Determination)		

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## I. BACKGROUND

Regulations pertaining to the use of force by law enforcement officers are outlined in chapter six of the District of Columbia Code of Municipal Regulations (DCMR), the Fourth Amendment of the United States (U.S.) Constitution, and various other sections in the Official Code of the District of Columbia (D.C. Official Code). The DCMR provides guidance regarding a law enforcement officer's use of force including, but not limited to, outlining the circumstances permitting appropriate levels of force and imposing restrictions on firearm discharges. The Fourth Amendment of

the U.S. Constitution guarantees people “the right to be secure in their persons” and provides a framework in which the courts can evaluate the use of force by law enforcement officers, including the “objective reasonableness” standard established in *Graham v. Connor* 490 U.S. 386 (1989). The purpose of this order is to outline when members may use force.

## **II. POLICY**

The policy of the Metropolitan Police Department (MPD) is to value and preserve the sanctity of human life at all times, especially when lawfully exercising the use of force. Therefore, MPD members shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others. When using force, members shall continuously reassess the perceived threat in order to select the reasonable use of force response, or one that is proportional to the threat faced by him, her, or others.

## **III. DEFINITIONS**

When used in this directive, the following terms shall have the meanings designated:

1. Active resistance – physically evasive movements to defeat or deflect the member’s attempts to control a subject, including but not limited to, bracing, tensing, pushing, or verbally signaling an intention not to be taken into or retained in custody, provided that the intent to resist has been clearly manifested.
2. Carotid artery hold ("sleeper hold" or "v hold") – any technique which is applied in an effort to control or disable a person by applying pressure or force to the carotid artery or the jugular vein or the sides of the neck with the intent or purpose of controlling a person's movement or rendering a person unconscious by constricting the flow of blood to and from the brain (D.C. Official Code, § 5-125).
3. Less lethal weapon – any object or device deployed with the intent or purpose of nullifying a threat without causing death (e.g., rubber bullets, oleoresin capsicum spray, and tactical batons).
4. Member – sworn or civilian employee of MPD or MPD Reserve Corps member.
5. Non-deadly force – any use of force that, when employed in accordance with Department training, is neither likely nor intended to cause death or serious physical injury.
6. Objective reasonableness – the standard requiring the reasonableness of a particular use of force must be judged from the perspective of a reasonable member on the scene in light of the facts and circumstances confronting the member.

7. Resisted handcuffing – occurs when a person actively resists being placed in handcuffs, and the member must forcibly move the person's wrists or arms, or physically maneuver the person's body so that the handcuffs can be applied. The "resistance" may range from an active struggle to a person simply "locking" his or her arms to prevent their being moved to the handcuff position.
8. Serious physical injury – any injury or illness that results in admission to the hospital or that creates a substantial risk of death, serious disfigurement, loss of consciousness, disability, a broken bone, or protracted loss or impairment of the functioning of any body part or organ.

NOTE: Admission to the hospital must be *directly associated* with the use of force, and should not include treatment or hospitalization for those injuries incurred prior to the use of force (e.g., drug or alcohol use, medical conditions such as high blood pressure).

9. Serious use of force – actions by members including:
  - a. All firearm discharges by a member with the exception of range and training incidents, and discharges at animals;
  - b. All uses of force by a member resulting in a serious physical injury;
  - c. All head strikes with an impact weapon;
  - d. All uses of force by a member resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ;
  - e. All incidents where a person receives a bite from an MPD canine;
  - f. All uses of force by an MPD member involving the use of neck restraints or techniques intended to restrict a subject's ability to breathe; and
  - g. All other uses of force by a member resulting in a death.
10. Service weapon – any instrument issued or authorized by the Department that is used to control or overcome a subject, carried or kept readily available by MPD members.
11. Take down – maneuver in which a subject is forcibly brought to the ground.

12. Trachea hold ("arm bar hold" or "bar-arm hold") – any technique using the member's arm, a long or short police baton, or a flashlight or other firm object that attempts to control or disable a person by applying force or pressure against the trachea, windpipe, or the frontal area of the neck with the purpose or intent of controlling a person's movement or rendering a person unconscious by blocking the passage of air through the windpipe. (D.C. Official Code, § 5-125.02)
13. Use of force – any physical coercion used to effect, influence or persuade an individual to comply with an order from an officer.
  - a. The following actions are designated "reportable uses of force":
    - (1) Deadly force;
    - (2) Serious use of force;
    - (3) Use of a less-than-lethal weapon;
    - (4) Any use of force indicating potential criminal conduct by a member; and
    - (5) Any use of force resulting in injury or a complaint of injury or pain where the injury or pain is directly associated with a member's use of force.
  - b. The following actions are designated "reportable force incidents" as long as the use of force does not result in injury or a complaint of injury or pain:
    - (1) All solo or team takedowns, where there is no complaint of pain or injury; and
    - (2) The drawing and pointing of a firearm at, or in the direction of, another person when no other force was used.

NOTE: Minor injury or discomfort resulting from the application and general wearing of handcuffs is not, in and of itself, considered a "reportable use of force" or a "reportable force incident".

14. Use of force framework – an adaptation of the decision making model (Attachment A) specifically applicable to situations potentially resulting in the use of force. The use of force framework contains five categories of perceived threats and responses, all of which are fluid, dynamic, and non-sequential. The use of force framework allows officers to

determine which action or actions are objectively reasonable and proportional, given the perceived threat.

15. Use of force indicating potential criminal conduct by a member – includes, but is not limited to, all strikes, blows, kicks or other similar uses of force against a handcuffed subject and all accusations or complaints of excessive force made against the member. This includes any use of force that **clearly** goes beyond that which an objectively reasonable officer would use in light of the circumstances under which the force was used, or any use of force which may rise to the level of a criminal act.
16. Vehicle ramming attack – form of attack in which a perpetrator deliberately rams, or attempts to ram, a motor vehicle at a crowd of people with the intent to inflict fatal injuries.

#### IV. REGULATIONS

- A. All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present, shall, if possible, first attempt to defuse the situation through advice, warning, verbal persuasion, tactical communication, or other de-escalation techniques. Members shall attempt to defuse use of force situations with de-escalation techniques whenever feasible.
- B. When using force, members must be able to articulate the facts and circumstances surrounding their tactics, decision making, and the extent of force used in any given situation.
- C. When any force response is employed, members shall:
  1. Conduct a visual and verbal check of the subject to ascertain whether the subject is in need of medical care.
  2. Summon medical assistance immediately if a person is injured, complains of pain, or demonstrates life-threatening symptoms as established in GO-PCA-502.07 (Medical Treatment and Hospitalization of Prisoners).
  3. Render first aid as soon as the scene is safe.
- D. Any excessive force by a member may subject him or her to disciplinary action and possible criminal prosecution or civil liability.
- E. Use of Force Framework (Attachment B)
  1. The use of force framework contains five categories of perceived threats and responses, all of which are fluid, dynamic, and non-sequential.

a. Member's Perception of the Threat:

- (1) Cooperative – the subject responds in a positive way to a member's presence and is easily directed with verbal requests and commands. The subject who requires control or searching offers no resistance.
- (2) Passive resister – the subject displays a low level of noncompliant resistance. The noncompliance is passive, and offers no physical or mechanical energy. The subject does not respond to a member's lawful request or commands and may be argumentative.
- (3) Active resister – the subject is uncooperative and will not comply with the member's requests or comments. The subject exhibits physical and mechanical defiance, including evasive movements to defeat the member's attempt at control, including but not limited to, bracing, tensing, pushing, or verbally signaling an intention not to be taken into or retained in custody, provided that the intent to resist has been clearly manifested.
- (4) Assaultive – the subject has gone beyond the level of simple non-cooperativeness, and is actively and aggressively resisting the officer's attempt to arrest. The subject has demonstrated a lack of concern for the member's safety; however, the subject does not pose an immediate threat of death or serious bodily injury to the member or others.
- (5) Serious injury or death – the subject poses an immediate danger of death or serious physical injury to the member or to another person, but not himself or herself. The subject's actions demonstrate his or her intent to inflict death or serious injury upon the member or another person immediately.

b. Member's Force Response:

- (1) Cooperative controls – the least physical force response category on the use of force framework. Cooperative controls include communication skills with cooperative subjects and are often achieved by non-verbal acts such as gestures, stance, and facial expressions in accordance with Department training and standards.
- (2) Contact controls – low-level mental and physical tactics to gain control and cooperation. The contact controls can

be psychologically manipulative (e.g., strong verbal persuasion) as well as physical (e.g., soft empty hand control, firm grip, and escorting), and can include additional verbal persuasion skills or waiting for backup to show strength in numbers in accordance with Department training and standards.

- (3) Compliance techniques – actions [e.g., control holds, joint locks, and oleoresin capsicum (OC) spray, solo or team takedowns] that may induce pain or cause discomfort to the subject who is actively resisting until control is achieved, but will not generally cause an injury when used in accordance with Department training and standards.
  - (4) Defensive tactics – actions to forcibly render the subject into submission; however, these actions are not likely nor designed to cause death or serious physical injury. The purpose of defensive tactics is primarily the safety of the member and others. Examples of “defensive tactics” include the use of ASP baton strikes, chemical agents, and electronic control devices (ECDs) in accordance with Department training and standards.
  - (5) Deadly force – any use of force likely to cause death or serious physical injury. The primary purpose of deadly force is to neutralize a subject who poses an immediate threat of death or serious injury to the member or others; however, this does not include a subject who poses a threat solely to himself or herself. Examples include, but are not limited to, the use of a firearm or a strike to the head with a hard object.
2. In response to a perceived threat, members shall apply the proportionate and objectively reasonable force response, as outlined in the use of force framework. To ensure the force response is objectively reasonable and proportionate to the perceived threat, members shall:
- a. Continuously assess the threat and develop strategies, consider their authority and Department policies, identify options and contingencies, take action and review, and gather information. This approach requires members to:
    - (1) Consider the seriousness of the crime, the level of threat or resistance presented by the suspect, the imminence of danger, the suspect’s mental capacity, his or her access to weapons, agency policies, and available options (e.g., calling upon members with specialized training for assistance).

- (2) Initiate the proportionate and objectively reasonable force response, when feasible, to overcome resistance.
  - (3) Modify their level of force in relation to the amount of resistance offered by a suspect. As the subject offers less resistance, the member shall lower the amount or type of force used. Conversely, if resistance escalates, members are authorized to respond in an objectively reasonable manner.
  - (4) Intervene in and subsequently report any use of force incident in which they observe another member utilizing excessive force or engaging in any type of misconduct.
3. Members shall not use techniques or defensive weapons when employing force unless they have received the requisite training and the technique or weapon has been approved for use by the Department. However, members may employ force as necessary to protect the life of a civilian or member subject to the imminent threat of death or serious physical injury, when no other options are feasible, and the force is objectively reasonable and proportionate to the perceived threat.

F. Conditions that May Authorize the Use of Non-Deadly Force

1. A member's decision to use non-deadly force shall involve one or more of the following considerations:
  - a. To protect life or property;
  - b. To make a lawful arrest;
  - c. To prevent the escape of a person in custody;
  - d. To control a situation, or subdue and restrain a resisting individual; or
  - e. To effect a lawful stop of a fleeing individual.
2. A member shall use the force response that is reasonably necessary to bring the situation under control. If de-escalation tactics are not effective, the member may use an increasing level of force to overcome the level of resistance, as long as the force response remains proportionate to the perceived threat. As soon as the incident is under control, the member's use of force response shall diminish proportionally.

## G. Conditions that May Authorize the Use of Deadly Force

### 1. Authorized Use of Deadly Force:

#### a. Defense of Life

Members may use deadly force in the performance of police duties under the following circumstances:

- (1) When it is necessary and objectively reasonable; **and**
- (2) To defend themselves or another from an actual or threatened attack that is imminent and could result in death or serious bodily injury; **and**
- (3) When all other options have been exhausted **or** do not reasonably lend themselves to the circumstances.

#### b. Fleeing Felon

To apprehend a fleeing felon **only** when every other reasonable means of affecting the arrest or preventing the escape has been exhausted; **and**

- (1) The suspect fleeing poses an immediate threat of death or serious bodily harm to the member or others; **or**
- (2) There is probable cause to believe the crime committed or attempted was a felony that involved an actual or threatened attack that could result in death or serious bodily harm; **and**
  - (a) There is probable cause to believe the person fleeing committed or attempted to commit the crime, **and**
  - (b) Failure to immediately apprehend the person places a member or the public in immediate danger of death or serious bodily injury; **and**
  - (c) The lives of innocent persons will not be endangered if deadly force is used.

### 2. Unauthorized Use of Deadly Force

- a. Members shall not use deadly force in any circumstance other than those outlined Part IV.G.1.

- b. Members shall not utilize deadly force against subjects that only present a threat of harm to themselves.

#### H. Less Lethal Weapons

1. The objective of less lethal weapons is to preserve human life and prevent further escalation of force.
2. Less lethal weapons may only be used by members with the appropriate specialized training.
3. During instances of civil disobedience, members shall follow use of force procedures outlined in Department SOP-16-01 (Handling First Amendment Assemblies and Mass Demonstrations).

#### I. Positional Asphyxia Precautions

1. In order to avoid asphyxiation, members shall:
  - a. Whenever possible, avoid tactics that may impede a subject's ability to breathe, result in chest or throat compressions, or airway blockage.
  - b. Position the individual in a manner to allow free breathing once the subject has been controlled and placed under custodial restraint using handcuffs or other authorized methods.
  - c. Seek medical assistance immediately if a person appears to be having difficulty breathing or is otherwise demonstrating life-threatening symptoms. An official shall direct that alternative means to maintain custody be utilized, if appropriate.
2. Members are prohibited from:
  - a. Placing a person in a prone position (i.e., lying face down) for a prolonged period of time or during transport except during exigent circumstances. Prisoners shall be carefully monitored while in a prone position as a prone position may be a contributing factor to cause a prisoner to suffocate, also referred to as positional asphyxiation.
  - b. Employing unauthorized use of restraints while transporting a subject in a vehicle.
  - c. Attaching handcuffs or flex-cuffs to leg restraints in such fashion that forces the legs and hands to be close to one another (i.e., "hog-tying").

#### J. Neck Restraints

1. The use of neck restraints of any kind including, but not limited to, the use of “trachea holds” and “carotid artery holds” as they are defined in D.C. Official Code § 5-125.02 are not authorized use of force options and are prohibited.

NOTE: Members are reminded of the legal restrictions against certain types of neck restraints outlined in D.C. Official Code § 5-125.01, *et seq.* (Limitation on Chokehold), and that members who use a “trachea hold” or “carotid artery hold” may be found in violation of the law.

2. In the event that a member employs a neck restraint or chokehold of any kind, he or she shall request emergency medical services immediately.

K. Use of the Department-Issued Firearm

1. When feasible, members shall identify themselves as a police officer and issue a verbal warning before discharging a firearm.
2. No member shall discharge his or her firearm under the following circumstances:
  - a. As a warning;
  - b. Into a crowd;
  - c. In a felony case which does not involve an actual attack, but involves a threatened attack, unless the member has reasonable cause to believe the threatened attack is imminent and could result in death or serious bodily injury;
  - d. In any misdemeanor offense, unless under exceptional circumstances;
  - e. Solely to protect property interests; or
  - f. To stop an individual on mere suspicion of a crime simply because the individual flees.
3. Members shall not discharge their firearms either at or from a moving vehicle unless deadly force is being used against the member or another person. For purposes of this order, a moving vehicle is not considered deadly force except when it is reasonable to believe that the moving vehicle is being used to conduct a vehicle ramming attack. Members shall, as a rule, avoid tactics that could place them in a position where a vehicle could be used against them.
4. No member shall draw and point a firearm at or in the direction of another person unless there is a reasonable perception of a substantial

risk that the situation may escalate to the point where deadly force would be permitted.

- a. When it is determined that the use of deadly force is not necessary, as soon as practicable, firearms shall be secured or holstered.
  - b. Drawing and pointing a firearm at or in the direction of a person is a reportable incident and members shall notify an official in accordance with SO-06-06 [Instructions for Completing the Reportable Incident Form (RIF: PD Forms 901-g and 901-h).
5. In accordance with GO-RAR-901.01 (Handling of Service Weapons), no member of the Department shall carry, use, or discharge any unauthorized ammunition in their issued service weapons. Members shall not obtain service ammunition from any source except through official Department channels. Members are further required to carry only the requisite amount of service ammunition as applicable to the authorized service weapon they are utilizing.

#### L. Carrying Prohibited Weapons

1. Members shall not:
  - a. In the normal exercise of their responsibilities, carry, use or discharge any firearm or other weapon, except those issued or approved for use by the MPD under direction of the Chief of Police.
  - b. Carry any Department-issued weapon prior to successfully completing Department-approved training courses directed by the Chief of Police.
  - c. Carry a non-Department-issued weapon (e.g., blackjack, sap, nunchaku, kenpo stick, brass knuckle, or weighted glove).

#### M. Pain or Injury Associated with Handcuffing

1. Members are reminded the proper application and general wearing of handcuffs may lead to complaints of minor pain or injury (e.g., pinching of skin or scratches).
2. When a subject complains of pain or injury that is associated with the application or wearing of handcuffs, members shall notify an official.
  - a. The official shall investigate the complaint or injury and document his or her findings in the PD Form 313 (Prisoner Illness/Injury Report) in accordance with GO-PCA-502.07 (Medical Treatment and Hospitalization of Prisoners).

- (1) If the investigating official determines the subject's injury or complaint of pain is exclusively the result of the application and wearing of handcuffs, no further force-related investigation or reporting is necessary.

Example: A member places handcuffs on a non-resistant subject. The subject claims the handcuffs are causing him discomfort but the official concludes the pain is due exclusively to discomfort associated with wearing handcuffs.

- (2) If the investigating official determines the subject's injury or complaint of pain is not exclusively the result of the application and wearing of handcuffs or force was required to apply the handcuffs, he or she shall initiate a use of force investigation in accordance with GO-RAR-901.08 (Use of Force Investigations).

Example: The subject complains of discomfort in his right wrist. During the investigation, the arresting member tells the official he had to twist the subject's right wrist in order to place him in handcuffs. The official concludes the subject's discomfort is associated with the member's action of twisting the subject's wrist, not exclusively the discomfort associated with wearing handcuffs.

- b. Investigating officials shall provide counseling and conduct an administrative investigation as appropriate for policy violations in cases where, based on the totality of circumstances, a member applied the handcuffs improperly, but the associated injury does not warrant a use of force investigation.

Example: The arresting member places handcuffs on an unresisting subject but neglects to activate the double-lock function. Since the handcuffs are not double-locked, the subject inadvertently tightens them on himself while he is transported back to the station. The tightening of the handcuffs results in a minor rash on the prisoner's right wrist. This injury is due to the wearing of handcuffs and is therefore not a reportable use of force; however, it would not have occurred if the member had applied the handcuffs properly.

- N. Members are prohibited from employing any use of force technique or defensive weapon against a subject in handcuffs **unless** the subject is engaged in assaultive behavior as described in this order or the subject is attempting to escape police custody or resisting members' efforts to maintain custody of the individual (e.g., the subject will not get out of the transport vehicle). In these cases, members shall limit their force responses to the

minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control.

O. Civilian Employees of the Department

1. Civilian employees of the department are prohibited from receiving or carrying Department-issued weapons of any kind.

NOTE: Civilian employees may handle weapons when required as part of their assigned duties (e.g., civilian firearm instructors, civilian firearm examination technicians, civilian evidence technicians).

2. Civilian members shall only use force in defense of themselves or others.

P. Reporting Use of Force Incidents

1. All incidents involving a reportable use of force, as defined in Part III.13.A of this order, shall be reported in accordance with SO-10-14 [Instructions for Completing the Use of Force Incident Report (UFIR: PD Forms 901-e and 901-f)]. All reportable force incidents shall be reported in accordance with SO-06-06 [Instructions for Completing the Reportable Incident Form (RIF: PD Forms 901-g and 901-h)].

Example 1: A member uses OC Spray on a subject. This is a reportable use of force and requires the completion of a PD Form 901-e (commonly referred to as a "UFIR") in accordance with SO-10-14.

Example 2: A member employs a takedown technique to bring a resistive subject to the ground so he or she can be placed in handcuffs. The takedown and handcuffing does not result in injury or complaint of pain or injury. The use of a takedown is a reportable force incident and requires the completion of a PD Form 901-g (commonly referred to as a "RIF") in accordance with SO-06-06.

2. Members who are aware of a complaint regarding the use of force by another member shall notify their supervisor.

**V. ATTACHMENTS**

Attachment A: Decision Making Model

Attachment B: Use of Force Framework

**VI. CROSS REFERENCES**

A. Directives

1. GO-OPS-304.10 (Police-Citizen Contacts, Stops, and Frisks)
2. GO-PCA-502.07 (Medical Treatment and Hospitalization of Prisoners)
3. GO-RAR-901.01 (Handling of Service Weapons)
4. SO-06-06 [Instructions for Completing the Reportable Incident Form (RIF: PD Forms 901-g and 901-h)]
5. SO-10-14 [Instructions for Completing the Use of Force Incident Report (UFIR: PD Forms 901-e and 901-f)]
6. SOP-16-01 (Handling First Amendment Assemblies and Mass Demonstrations)

B. D.C. Official Code

1. D.C. Official Code, § 5-125 (Limitation on Chokeholds)



Peter Newsham  
Chief of Police

PN:KDO:MOC:SMM

<i>Amendment #</i>	<i>Page #</i>	<i>Description of Change</i>	<i>Effective Date of Change</i>	<i>Name and Title of Authorizing Member</i>
1	11	Revised Part IV.K.2.outline format to include the previously missing letter "d".	11/7/2017	Maureen O'Connell, Director, Policy and Standards Branch

# Metropolitan Police Department

## Decision Making Model



The goal of **every** encounter is  
**Voluntary Compliance!**

Officers must **continually**

- *Gather information and assess the threat.*
- *Consider authority, policy and tactics.*
- *Identify options and contingencies.*
- *Develop a strategy.*
- *Take action and review.*

Threat Assessment Observation should include the subject's:

- *Emotional state.*
- *Resistive Tension.*
- *Early warning signs.*
- *Pre-attack postures or Gestures.*
- *Access to a Weapon.*
- *Apparent willingness to sustain injury.*



# Metropolitan Police Department

## Use of Force Framework



The goal of **every** encounter is **Voluntary Compliance!**

Officers must continually

- *Gather information and assess the threat.*
- *Consider authority, policy and tactics.*
- *Identify options and contingencies.*
- *Develop a strategy.*
- *Take action and review.*

Resistance and response are dynamic. The subject's behavior and the use of force to control it may escalate or de-escalate during any given altercation until complete control of the subject is achieved.

**Immediately summon emergency medical assistance and render first aid as soon as the scene is safe.**



# **APPENDIX B**

# GENERAL ORDER



DISTRICT OF COLUMBIA

<b>Subject</b> <b>Use of Force Investigations</b>		
Topic	Series	Number
<b>RAR</b>	<b>901</b>	<b>08</b>
<b>Effective Date</b> <b>September 13, 2017</b>		
<b>Replaces:</b> GO-RAR-901.08 (Use of Force Investigations), Effective Date October 7, 2002		
<b>Related to:</b> GO-RAR-901.01 (Handling of Service Weapons) SO-06-06 (Instructions for Completing the Reportable Incident Form) SO-10-14 (Instructions for Completing the Use of Force Incident Report) SO-12-18 (Preliminary Reports)		
<b>Rescinds:</b> TT-06-049-08 (Administrative Processes for Instances Involving Hand Controls), Issued June 13, 2008 GOC-10-04 [GO-RAR-901.08 (Use of Force Investigations)] , Effective Date August 16, 2010 TT-01-074-14 (Internal Affairs Division Use of Force Investigative Responsibilities), Issued January 29, 2014 TT-08-019-17 (Electronic Control Device and Extended Impact Weapon Investigations), Issued August 7, 2017		

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## I. BACKGROUND

Accurate and timely reporting of use of force incidents is essential for Department monitoring and training. Fair and accurate follow-up investigations of use of force incidents increase Department and community awareness of the integrity and appropriateness of decisions to use force. Use of force investigations enhance the Department's ability to make decisions regarding the incident and to provide necessary guidance to members on appropriate levels of use of force.

## II. POLICY

The policy of the Metropolitan Police Department (MPD) is to value and preserve the dignity of human life at all times; especially when lawfully exercising the use of force. Therefore, MPD members shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others. When using force, members shall continuously reassess the perceived threat in order to select the reasonable use of force response, or one that is proportional to threat faced by him, her, or others.

Furthermore, it is the policy of the MPD to investigate all reportable use of force incidents and to ensure a thorough and impartial investigation into the decision to use force by its members.

## III. DEFINITIONS

When used in this directive, the following terms shall have the meanings designated:

1. Deadly force – any use of force likely to cause death or serious physical injury, including but not limited to the use of a firearm or a strike to the head with a hard object.
2. Duty status – the designation of a police authority category granted by the Department to a member as it relates to the permission and ability to engage in the full spectrum of authorized police duties.
3. Less lethal weapon – any object or device deployed with the intent or purpose of nullifying a threat without causing death (e.g., rubber bullets, oleoresin capsicum (OC) spray, electronic control devices (ECD), tactical batons).
4. Member – sworn or civilian employee of the MPD or MPD Reserve Corps member.
5. Objective reasonableness – the standard requiring that the reasonableness of a particular use of force must be judged from the perspective of a reasonable member on the scene in light of the facts and circumstances confronting the member.
6. Preponderance of the evidence – the standard of proof in administrative investigations in which it is more likely than not that the event occurred.
7. Probable cause – a set of facts, circumstances, or reliable information that would lead a reasonable, prudent, and cautious police officer to believe a crime has been or is about to be committed and that a certain person committed it.

8. Serious physical injury – any injury or illness that results in admission to the hospital or that creates a substantial risk of death, serious disfigurement, loss of consciousness, disability, a broken bone, or protracted loss or impairment of the functioning of any body part or organ.

NOTE: Admission to the hospital must be *directly associated* with the use of force, and should not include treatment or hospitalization for those injuries or illnesses incurred prior to the use of force (e.g., drug or alcohol use, medical conditions such as high blood pressure).

9. Serious use of force – actions by MPD members, including:
  - a. All firearm discharges by a member with the exception of range and training incidents, and discharges at animals;
  - b. All uses of force by a member resulting in a serious physical injury;
  - c. All head strikes with an impact weapon;
  - d. All uses of force by a member resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ;
  - e. All incidents where a person receives a bite from an MPD canine;
  - f. All uses of force by an MPD member involving the use of neck restraints or techniques intended to restrict a subject's ability to breathe; and
  - g. All other uses of force by a member resulting in a death.
10. Use of force – any physical coercion used to effect, influence or persuade an individual to comply with an order from an officer.
  - a. The following actions are designated “reportable uses of force” and require the completion of a PD Form 901e [Use of Force Incident Report (UFIR)]:
    - (1) Deadly force;
    - (2) Serious use of force;
    - (3) Use of a less lethal weapon;

- (4) Any use of force indicating potential criminal conduct by a member; and
  - (5) Any use of force resulting in injury or a complaint of injury or pain where the injury or pain is directly associated with a member's use of force.
- b. The following actions are designated "reportable force incidents" as long as the use of force does not result in injury or a complaint of injury or pain and require the completion of a PD Form 901g [Reportable Incident Form (RIF)]:
- (1) All solo or team takedowns, where there is no injury or complaint of pain or injury;
  - (2) The drawing and pointing of a firearm at, or in the direction of, another person when no other force was used.

NOTE: In accordance with GO-RAR-901.07 (Use of Force), minor injury or discomfort resulting from the application and general wearing of handcuffs is not, in and of itself, considered a "reportable use of force" or a "reportable force incident".

11. Use of force indicating potential criminal conduct by a member – includes, but is not limited to, all strikes, blows, kicks or other similar uses of force against a handcuffed subject and all accusations or complaints of excessive force made against the member where there is corroborating information indicating potential criminal conduct or other serious misconduct. This includes any use of force that *clearly* goes beyond that which an objectively reasonable officer would use in light of the circumstances under which the force was used, or any use of force which may rise to the level of a criminal act.

#### IV. REGULATIONS

##### A. Investigative Responsibilities

1. Use of force investigations shall be conducted by the Internal Affairs Division (IAD), Criminal Investigations Division (CID), Security Officers Management Branch (SOMB), or chain of command officials, as outlined in this section.
2. The Internal Affairs Division shall be responsible for investigating the following types of incidents:
  - a. All incidents involving deadly force, serious use of force, or the use of force indicating potential criminal conduct as defined in Part III of this order.

- b. With the exception of discharges at an animal and firearm range and training incidents, any discharge of a service pistol; authorized off-duty pistol; duty shotgun; or duty rifle, regardless of location, by a sworn member of the following agencies:
  - (1) MPD;
  - (2) District of Columbia Housing Authority Police;
  - (3) Authorized, armed members of the District of Columbia Fire and Emergency Medical Services Department's Arson Investigation Unit; and
  - (4) Authorized, armed members of the District of Columbia Office of the Inspector General.
- c. Fatal and non-fatal shootings within the District of Columbia resulting from the discharge of a firearm involving any on-duty sworn active law enforcement member from an outside law enforcement agency, acting under the color of law, except for non-fatal shootings and non-fatal uses of force by members of the United States Park Police (USPP).
  - (1) MPD IAD shall investigate all fatal shootings and fatal uses of force by USPP.
  - (2) Non-fatal shootings and non-fatal uses of force by the USPP will be investigated by the USPP.
- d. Fatal use of force incidents within the District of Columbia involving commissioned special police officers and armored car guards in the performance of their duties.

NOTE: Non-fatal use of force incidents involving special police officers that fall under the purview of SOMB will be investigated by SOMB.
- e. Any use of force resulting in the death of a subject by any police officer employed by a bona-fide police agency legally empowered to operate or function within the District of Columbia.
- f. All deaths while the deceased was in the custody or under the control of any member of MPD, or while the deceased was housed in any facility under the exclusive command of MPD.
- g. MPD vehicular pursuits resulting in death.

- h. Negligent discharges by a member while handling a weapon that has been recovered as evidence.
- i. The final investigation for all use of force incidents involving ECDs and extended impact weapons, except discharges at animals and training incidents.
- j. Any use of an MPD canine resulting in a bite, to include any allegations of a canine bite.
- k. MPD confirmed head strikes with an impact weapon, or any other object, excluding allegations with no corroborative evidence or resulting injury.
- l. Complaints of excessive force where the Internal Affairs Bureau (IAB) identifies potential criminal conduct by an MPD member:
  - (1) This includes any use of force that *clearly* goes beyond that which an objectively reasonable officer would use in light of the circumstances under which the force was used, or any use of force that may rise to the level of a criminal act; and
  - (2) This does not include complaints of illegal or improper searches, unless the search severely and negatively impacts the civil rights of any individual involved.

NOTE: In accordance with the *Neighborhood Engagement Achieves Results Act of 2015* (D.C. Law 21-125; D.C. Official Code § 5-1107), members are reminded that MPD is required to notify the Office of Police Complaints (OPC) of all external complaints received regarding sworn members. The OPC is responsible for determining whether MPD or OPC will investigate individual complaints.

- m. MPD collateral misconduct directly related to an IAD use of force investigation.
  - n. Other investigations as directed by the Chief of Police or the Assistant Chief of the IAB.
3. The Criminal Investigations Division (CID) shall be responsible for investigating the following types of incidents in the District of Columbia:
- a. With the exception of the incidents outlined in Part IV.A.2, all firearm discharges by a retired MPD member or an outside law enforcement member (active or retired) authorized to carry a concealed weapon under H.R. 218 [Law Enforcement Officers Safety Act (Title 18 U.S. Code, Section 926)];

- b. MPD member suicides, regardless of the means; and
  - c. Any discharge of a privately owned firearm not authorized for off-duty use unless used under the color of law within the District of Columbia by a sworn member of the agencies identified in Part IV.A.2.b.
- 4. The SOMB shall be responsible for investigating non-fatal use of force incidents involving special police officers that fall under their purview.  
  
NOTE: SOMB does not regulate or investigate private security working as a contractor for the federal government on federal property or armored car guards.
- 5. The involved member's chain of command shall be responsible for investigating the following incidents involving MPD members:
  - a. All reportable use of force incidents not investigated by IAD, CID, or SOMB;
  - b. Firearms range and training incidents;
  - c. Discharges at animals; and
  - d. The preliminary investigation for all ECD and extended impact weapon deployments.
- B. No supervisor who was involved in a use of force shall be responsible for the investigation.
- C. In chain of command investigations, the commanding official may delegate responsibility for conducting the investigation to another official, as long as the official is of a higher rank than the involved member.
- D. The standard of review in a criminal investigation is probable cause. The standard of review in an administrative investigation is a preponderance of the evidence.
- E. IAD shall reserve the right and have the authority to assume control of the investigation of any force-related incident.
- F. Investigating officials, regardless of the type of investigation (e.g., IAD, chain of command) shall review relevant body-worn camera (BWC) recordings and document findings during the course of an investigation in accordance with GO-SPT-302.13 (Body-Worn Camera Program).
- G. In the event that a civilian member of the Department uses force during the performance of his or her official duties, the member shall immediately report

the force to an on duty official assigned to his or her element, and the incident shall be investigated in accordance with MPD policies and procedures.

- H. The Department's Use of Force Review Board shall be responsible for reviewing all use-of-force incidents as required by GO-RAR-901.09 (Use of Force Review Board).
- I. The Collective Bargaining Agreement between MPD and the Fraternal Order of Police shall not be superseded by this order.

## **V. PROCEDURES**

### **A. Members Involved in a Use of Force Incident**

- 1. In accordance with GO-RAR-901.07 (Use of Force), when members use force they shall:
  - a. Conduct a visual and verbal check of the subject to ascertain whether the subject is in need of medical care.
  - b. Summon medical assistance immediately if a person is injured, complains of pain, or demonstrates life-threatening symptoms in accordance with GO-PCA-502.07 (Medical Treatment and Hospitalization of Prisoners).
  - c. Render first aid as soon as the scene is safe.

### **B. Notification and Reporting of Use of Force Incidents**

- 1. In accordance with GO-RAR-901.07 (Use of Force), members shall intervene and subsequently report any use of force incident in which they observe another member using excessive force or engaging in any type of misconduct.
- 2. After an incident involving a "reportable use of force" as defined by Part III.10.a of this order, members shall immediately notify a supervisor and prepare the associated reports in accordance with SO-10-14 [Instructions for Completing the Use of Force Incident Report (UFIR: PD Forms 901-e and 901-f)].
- 3. After an incident involving a "reportable force incident", as defined by Part III.10.b of this order, members shall prepare the associated reports in accordance with SO-06-06 [Instructions for Completing the Reportable Incident Form (RIF:PD Form 901-g and 901-h)].

### C. Initiating Use of Force Investigations

1. Supervisors of higher rank than the reporting member shall respond to all use of force incidents (i.e., reportable uses of force and reportable force incidents).
  - a. Supervisors shall be guided by Part IV.A to determine which unit (i.e., IAD, CID, SOMB, or the member's organizational element) is responsible for conducting the investigation, when required, and make notifications accordingly.
  - b. Watch commanders shall respond to the scene of all serious uses of force, all uses of force indicating potential criminal conduct, and all ECD and extended impact weapon deployments.
    - (1) For all ECD and extended impact weapon deployments, prior to the end of their shift, watch commanders shall obtain incident summary (IS) numbers and email a completed PD Form 901b (Preliminary Report Form – Use of Force Incidents) along with any supporting documentation (e.g., Arrest Report, Incident Report) to iad.adminbox@dc.gov with carbon copies (cc) to the involved member's chain of command officials, to include the official's administrative captain.
    - (2) The IAD shall be responsible for conducting the final investigation of all deployments of ECDs and extended impact weapons.
  - c. District watch commanders or appropriate element supervisors shall ensure the Office of Unified Communications (OUC) and Command Information Center (CIC) are notified of all reportable use of force incidents.

### D. Investigation of Use of Force Incidents within the District of Columbia

1. Rights of Members Involved in Use of Force Incidents
  - a. In all cases involving deadly force, serious use of force, or any force indicating potential criminal conduct, the involved members shall not be compelled to make a statement (including interviews that are recorded by video or audio) until one of the following occurs:
    - (1) The United States Attorney's Office (USAO) has issued a written declination; or

- (2) The element watch commander receives approval from the on-call IAD manager (lieutenant or above) to issue a reverse garrity warning.
  - b. In accordance with GO-SPT-302.13 (Body-Worn Camera Program), members shall be permitted to view the use of force incident from their body-worn camera prior to making a statement, except in the case of a police shooting. Pursuant to the *Body-Worn Camera Program Amendment Act of 2015*, members involved in a police shooting **shall not** review their BWC recordings, or other members' recordings, related to the case.
  - c. Members may consult with their own attorney prior to providing a statement in cases involving deadly force, serious use of force, or any force indicating potential criminal conduct.
2. Response to Deadly Force, Serious Use of Force, or a Use of Force Indicating Potential Criminal Conduct
  - a. The notified supervisor shall:
    - (1) Ensure the scene is maintained and preserved.
    - (2) Ensure witness canvasses are conducted.
    - (3) Provide the assistance of district personnel to IAD members conducting the investigation, as necessary.
  - b. The watch commander on the scene of a serious use of force shall ensure:
    - (1) All members involved in, or witness to, the force incident deactivate their BWCs as soon as the scene is secure.
    - (2) All members' BWCs and Department-issued cell phones are collected and turned over to the ranking IAD member as soon as he or she arrives on the scene.
    - (3) If a member is injured and must leave the scene to seek medical care, that the member's BWC and Department-issued cell phones are taken and handled in accordance with this order.
3. Response to Incidents Not Involving Deadly Force, Serious Force, or Force Indicating Potential Criminal Conduct

- a. All reportable uses of force not investigated by IAD, CID, or SOMB shall be investigated by the involved member's chain of command.
- b. Upon determination that a reportable use of force is to be investigated by the involved member's chain of command, the notified supervisor shall:
  - (1) Notify the watch commander.
  - (2) Conduct the initial investigation, including notifying any other relevant investigate personnel (e.g., CID, IAD, or SOMB).
  - (3) Request incident summary (IS) numbers from the Personnel Performance Management System (PPMS) prior to the end of the shift.
  - (4) Direct the member to complete the PD Form 901-e in accordance with SO-10-14 (Instructions for Completing the Use of Force Incident Report) or the PD Form 901-g (Reportable Incident Form) in accordance with SO-06-06 (Instructions for Completing the Reportable Incident Form) and all other relevant reports.
  - (5) Collect and furnish all initial documentation and forward it to the watch commander.
  - (6) Interview and photograph any person on whom force was used.
  - (7) Ensure that photographs of injuries to involved members and subjects are documented.
- c. Watch commanders shall:
  - (1) Receive all initial documentation from the notified supervisor and conduct the preliminary investigation.
  - (2) If applicable, prepare the PD Form 901-b (Preliminary Report Form) in accordance with SO-12-18 (Preliminary Reports) and forward to the involved member's chain of command officials, to include the official's administrative captain.
  - (3) Attach copies of the PD Form 901-b, 901-e, and other applicable documentation to the PD Form 150 (Tour of Duty Supervisor's Report).

4. Interviewing Complainants, Members, and Witnesses involved in Use of Force Incidents
  - a. When conducting use of force investigations, investigators shall ensure:
    - (1) Whenever practicable and appropriate, complainants and witnesses are interviewed at sites and times convenient for them (e.g., residences or places of business).
    - (2) Members involved in use of force incidents are sequestered until they are interviewed by a member of IAD or by appropriate supervisory personnel.
    - (3) All complainants and witnesses, including MPD members, are interviewed separately.
    - (4) Leading questions are avoided to the maximum extent possible.
    - (5) Supervisors of the involved members are notified, as appropriate.
    - (6) All appropriate MPD members, including supervisors, are interviewed.
    - (7) All appropriate evidence is collected, preserved, documented and analyzed, including canvassing the scene to locate witnesses and obtaining complainant medical records, where appropriate.
    - (8) Any inconsistencies in member, complainant, and witness interview statements gathered during the investigation are identified and reported in writing.
5. Investigation of Offenses Leading Up to a Serious Use of Force Incident
  - a. When applicable, a CID official shall designate a lead investigator for the crime that led up to the use of force.
  - b. CID shall immediately respond to begin their investigation and secure evidence, witnesses, and other information related to the crime that led up to the use of force.
  - c. CID is responsible for handling the arrest and processing of any individual charged as a result of the offense leading up to the use of force.

- d. Members from the Department of Forensic Science/Crime Scene Investigations Division (DFS/CSID) will respond and be responsible for evidentiary crime scene processing.
- e. The DFS/CSID evidence technician handling the scene shall be required to coordinate all evidentiary information with IAD throughout the duration of the investigation.

E. Use of Force Incidents Outside of the District of Columbia

- 1. In incidents where a member is involved in a use of deadly force, a serious use of force, or a use of force indicating potential criminal conduct outside of the District of Columbia, whether on or off duty:
  - a. The member shall immediately notify the watch commander of his or her element through the CIC.
  - b. After receiving notification from his or her assigned member, the watch commander shall notify IAD via the CIC.
  - c. An IAD investigator shall respond to the scene immediately.
  - d. The jurisdiction of occurrence will maintain primary responsibility for the criminal investigation.
  - e. IAD shall initiate a concurrent administrative investigation and shall work closely with the investigators from the originating police jurisdiction.
- 2. In incidents where a member is involved in a use of force other than deadly force, serious force, or force indicating potential criminal conduct outside of the District of Columbia, whether on or off duty:
  - a. Members shall make the required notifications in accordance with Part V.E.1 of this order.
  - b. An official from the involved member's organizational element shall respond to the scene.
  - c. In such cases, the appropriate law enforcement authority of the jurisdiction of occurrence will handle all criminal investigations.
  - d. IAD shall only conduct a policy review in this circumstance.

#### F. Use of Force Incidents Indicating Potential Criminal Conduct

1. IAD shall consult with the USAO about incidents of serious use of force, deadly force, use of force indicating potential criminal conduct, and in-custody deaths involving an MPD member.
2. The USAO or relevant prosecuting authority will make the determination as to whether criminal wrongdoing is present in any use of force incident for allegations referred to them.
3. When evidence of criminal wrongdoing is determined, IAD shall:
  - a. Coordinate prosecutorial needs between the USAO or other appropriate prosecuting entity and the affected element or investigative unit.
  - b. Serve as a liaison with other applicable law enforcement agencies.

#### G. In-Custody Deaths

1. When a member becomes aware of a possible in-custody death, the initial responsibilities of the member shall be to ensure that the scene is safe, render first aid (if applicable), secure the scene's integrity, and notify a supervisor.
2. Deaths occurring while a subject is in Department custody shall be reported immediately to both the IAD and the CID.
3. In cases involving in-custody deaths, CID shall respond to the scene immediately and be responsible for completing the PD Form 120 (Death Report) and an Incident Report.
4. IAD shall consult with the USAO about in-custody deaths and shall be responsible for conducting the investigation.

#### H. Determination of Duty Status of Involved Members

Determination as to the duty status members involved in use of force incidents shall be made pursuant to GO-RAR-901.11 (Force-Related Duty Status Determination).

#### I. Internal Affairs Division Investigations

1. IAD investigators shall:
  - a. Respond to the scene of the incident, except for ECD and extended impact weapon deployments, and assume responsibility for the investigation.

NOTE: IAD investigators are not required to respond to the scene of ECD and extended impact weapon deployments, but they are responsible for completing the final investigation in accordance with this order.

- b. Ensure BWCs and Department-issued cell phones from all members involved in, or witness to, the force incident have been collected from the watch commander as soon as the scene is secure, and ensure:
  - (1) The related recordings are immediately uploaded into Evidence.com;
  - (2) Recordings are labeled and categorized in accordance with GO-SPT-302.13 (Body-Worn Camera Program); and
  - (3) BWCs and Department-issued cell phones are transferred to an official in the members' unit for return to members prior to their next shift.
- c. When interviewing complainants, members, and witnesses involved in a use of force incident, comply with the provisions outlined in Part V.D.4 of this order.
- d. Record by audio or video in conformance with applicable laws and MPD directives the interviews of subjects, involved members, and material witnesses. If a subject or non-member witness refuses to be recorded, then a written narrative of the statement shall be prepared to be signed by the witness.
- e. For the following incidents, ensure that all recorded statements are transcribed and included in the investigative file:
  - (1) Fatal uses of force;
  - (2) Police shootings resulting in injury;
  - (3) Cases where identified misconduct will likely result in an adverse action hearing;
  - (4) In-custody deaths;
  - (5) Vehicle pursuits resulting in a fatality; and
  - (6) Any other cases as determined by the commanding official of IAD.
- f. Prior to being relieved from duty:

- (1) Submit a preliminary report to the Assistant Chief of IAB.
    - (2) Prepare a transmittal document for the Mayor of the District of Columbia from the Chief of Police describing the circumstances of any accidental or performance-of-duty firearm discharge.
  - g. Handle all arrests of police officers related to use of force investigations.
  - h. Notify and consult with the USAO within 24 hours or the next business day.
  - i. Continue to pursue any investigative leads and collaborate with the USAO or relevant prosecuting authority while the matter is under review.
  - j. After receiving a Letter of Declination from the USAO or upon the conclusion of a criminal prosecution (absent special circumstances that must be documented), complete a final investigative report with conclusions and recommendations by the assigned deadline.
- J. Final Use of Force Investigative Report Contents
1. For both IAD and chain of command investigations, the final investigative report shall include a description of the use of force incident and any other uses of force identified during the course of the investigation, a summary and analysis of all relevant evidence gathered during the investigation, and proposed findings.
  2. The proposed findings shall include a determination of whether the force was consistent with MPD policy and training, a determination as to whether proper tactics were employed, and a determination as to whether alternative levels of force were reasonably available.
  3. Use of force incidents shall be classified by one of the following findings:
    - a. Justified, Within Department Policy – a use of force is determined to be justified, and during the course of the incident the subject member did not violate Department policy.
    - b. Justified, Policy Violation – a use of force is determined to be justified, but during the course of the incident the subject member violated Department policy.

- c. Justified, Tactical Improvement Opportunity – a use of force is determined to be justified, and during the course of the incident no Department violations occurred. However, the investigation revealed tactical errors that could be addressed through non-disciplinary and tactical improvement endeavors.
  - d. Not Justified, Not within Department Policy – a use of force is determined to be not justified, and during the course of the incident the subject member violated a Department policy.
4. Allegations of excessive force or misconduct shall be classified by one of the following findings:
- a. Unfounded – there are no facts to support that the incident occurred.
  - b. Sustained – the allegation is supported by a preponderance of the evidence to determine that the incident occurred and the actions of the member were improper.
  - c. Insufficient facts – there is a lack of evidence to make a decision as to whether or not the alleged misconduct occurred.
  - d. Exonerated – a preponderance of the evidence shows that the alleged conduct did occur, but did not violate MPD policies, procedures, or training.

## VI. ROLES AND RESPONSIBILITIES

### A. Watch commanders shall ensure:

1. The IAD is immediately notified of any incident involving deadly force, serious use of force, or use of force indicating potential criminal conduct through the CIC.
2. All reportable uses of force and reportable force incidents are reported in writing to the IAB and IS numbers are obtained prior to the end of the shift.

### B. Commanding officials shall ensure:

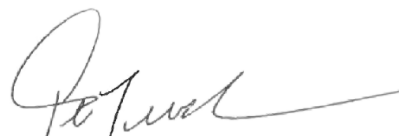
1. IAB is notified if there is evidence of any wrongdoing as a result of a member being involved in any use of force investigated at the element level.
2. All applicable routine administrative follow-up duties regarding involved officers are carried out. Administrative duties include but are not limited to:

- a. Completion of necessary event reports;
  - b. Issuing and updating the PD Form 77 (Notice of Revocation of Police Powers), as appropriate;
  - c. Adherence to the Medical Services Division and Employee Assistance Program follow-up;
  - d. Completing the PD Form 42 (Illness/Injury Report) certification, if applicable;
  - e. Completing the PD Form 43 (Report of Damage to or Loss of District Government Property) certification, if applicable;
  - f. Service weapon replacement;
  - g. Processing of the injured/arrested person (if applicable); and
  - h. Providing guard details.
3. Use of force investigations are completed and submitted by their assigned due dates.
- C. The Commanding Official of the Metropolitan Police Academy shall ensure:
1. Use of force training is provided to all sworn members on a semi-annual basis.
  2. Use of force training is provided to cell block technicians, to include hand controls and defensive tactics, no less than once every two years.
- D. The Director of the MPD Office of the Chief Information Officer shall ensure that all computer related communications (e.g., MDC terminals) concerning a serious use-of-force incident are immediately provided to IAD.
- E. The Commanding Official of IAD shall:
1. Ensure a transmittal document is prepared for the Mayor describing the circumstances of any negligent or performance-of-duty firearm discharge.
  2. Maintain a repository of completed preliminary and final investigative reports in accordance with the Department's records retention schedule.
- F. The Assistant Chief of IAB shall:
1. Ensure IS numbers are disseminated for all reported incidents.

2. Ensure that the relevant data for use of force incidents is entered into PPMS.
  3. In instances of a negligent or performance of duty firearm discharge, serious use of force, or any use of force indicating potential criminal conduct by a member, forward the preliminary report to the Chief of Police, within 24 hours of occurrence.
- G. The Chief of Police shall, in instances involving a negligent or performance of duty firearm discharge, serious uses of force, or any use of force indicating potential criminal conduct by a member, forward a transmittal to the Mayor of the District of Columbia.
- H. The DFS/CSID will forward immediately a duplicate copy of all reports, communications, diagrams, lab results, and other related information of a serious use of force incident to IAD.
- I. The Director of the OUC will ensure that duplicates of all related radio communication tapes of a serious use-of-force incident are provided to IAD.

## VII. CROSS REFERENCES

- A. GO-PER-302.13 (Body-Worn Camera Program)
- B. GO-PCA-502.07 (Medical Treatment and Hospitalization of Prisoners)
- D. GO-RAR-901.07 (Use of Force)
- E. GO-RAR-901.09 (Use of Force Review Board)
- F. GO-RAR-901.11 (Force-Related Duty Status Determination)
- G. SO-06-06 (Instructions for Completing the Reportable Incident Form)
- H. SO-10-14 (Instructions for Completing the Use of Force Incident Report)
- I. SO-12-18 (Preliminary Reports)
- J. H.R. 218 [Law Enforcement Officers Safety Act (Title 18 U.S. Code, Section 926)]



Peter Newsham  
Chief of Police

# APPENDIX C

# GENERAL ORDER



DISTRICT OF COLUMBIA

<b>Title</b> <b>Use of Force Review Board</b>		
<b>Topic</b>	<b>Series</b>	<b>Number</b>
<b>RAR</b>	<b>901</b>	<b>09</b>
<b>Effective Date</b> <b>March 30, 2016</b>		
<b>Replaces:</b> GO-RAR-901.09 (Use of Force Review Board), Effective Date October 2, 2015		
<b>Related to:</b> GO-PER-120.21 (Disciplinary Procedures and Process) GO-PER-120.23 (Serious Misconduct Investigations) GO-RAR-901.01 (Handling of Service Weapons) GO-RAR-901.07 (Use of Force) GO-RAR-901-08 (Use of Force Investigations)		
<b>Rescinds:</b> TT-05-033-07 (Use of Force Board Membership)		

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## I. BACKGROUND

The purpose of this general order is to establish the Use of Force Review Board. The Use of Force Review Board focuses primarily on serious use of force investigations. All other use of force investigations are reviewed by chain of command officials and conclude at the Assistant Chief or equivalent level. The Internal Affairs Division, Internal Affairs Bureau, conducts a quality control review of all chain of command investigations involving the use of force and may recommend to the Assistant Chief, Internal Affairs Bureau, that a chain of command case be reviewed by the Use of Force Review Board.

## II. POLICY

It is the policy of the Metropolitan Police Department to conduct fair and accurate investigations of use of force incidents in a timely manner. The Use of Force Review Board shall review all use of force investigations completed by the Internal Affairs Division, all chain of command use of force investigations forwarded to the Board by the Assistant Chief, Internal Affairs Bureau, and all vehicle pursuits resulting in a fatality.

### III. DEFINITIONS

When used in this directive, the following terms shall have the meaning designated:

1. Board – Use of Force Review Board.
2. Member – sworn or civilian employee of the Metropolitan Police Department or Reserve Corps member.
3. Serious Use of Force – lethal and less-lethal actions by Metropolitan Police Department (MPD) members, including:
  - a. All firearm discharges by an MPD member with the exception of range and training incidents and discharges at animals;
  - b. All uses of force by an MPD member resulting in a broken bone or an injury requiring hospitalization;
  - c. All head strikes with an impact weapon;
  - d. All uses of force by an MPD member resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, or disability or impairment of the functioning of any body part or organ;
  - e. All other uses of force by an MPD member resulting in a death; and
  - f. All incidents where a person receives a bite from an MPD canine.
4. Use of Force – physical contact used to effect, influence, or persuade an individual to comply with an order from an MPD member. The term shall not include un-resisted handcuffing or hand control procedures that do not result in injury or complaint of pain.

### IV. REGULATIONS

- A. The Use of Force Review Board shall review all use of force investigations completed by the Internal Affairs Division; all firearm discharges at animals; all chain of command investigations forwarded to the Board by the Assistant Chief, Internal Affairs Bureau; and all vehicle pursuits resulting in a fatality.
- B. The Use of Force Review Board is authorized to compel the appearance of members for questioning and to obtain MPD documents necessary for the discharge of the duties of the Board.
- C. The Use of Force Review Board is authorized to recommend commendations

for members who have acted with distinction in use of force incidents.

- D. The Use of Force Review Board is authorized to recommend corrective or adverse action and may also recommend non-disciplinary action for any case reviewed by the Board.
- E. The Internal Affairs Division shall conduct a quality control review of all use of force incidents investigated by the chain of command, and may recommend to the Assistant Chief, Internal Affairs Bureau, that a chain of command case be reviewed by the Use of Force Review Board.
- F. The Internal Affairs Bureau shall be responsible for the administration of the Use of Force Review Board.
- G. The Assistant Chief, Internal Affairs Bureau, shall:
  - 1. Ensure all use of force investigations are assigned deadlines and completed in accordance with GO-PER-201.22 (Fire and Police Disciplinary Action Procedure Act of 2004).
  - 2. Forward cases to the Use of Force Review Board at his or her discretion.

## V. PROCEDURES

- A. Organization
  - 1. The Use of Force Review Board shall consist of the following voting members:
    - a. One Assistant Chief selected by the Chief of Police, who shall serve as the Chairperson of the Board;
    - b. Commanding Official, Special Operations Division, Homeland Security Bureau.
    - c. Commanding Official, Criminal Investigations Division, Investigative Services Bureau;
    - d. Commanding Official, Metropolitan Police Academy;
    - e. One Commander or Inspector– who is assigned to the Patrol Services Bureau (PSB);
      - (1) The Assistant Chief, PSB, shall determine the rotation schedule for commanders and inspectors to serve on the Board;

- (2) Each commander/inspector shall serve on the Board for at least one (1) year;
        - f. Commanding Official, Recruiting Division; and
        - g. Commanding Official, Court Liaison Division.
      2. The Use of Force Review Board shall also include the following non-voting members:
        - a. The Executive Director, Office of Police Complaints; and
        - b. One member selected by the Fraternal Order of Police consistent with the current Labor Agreement between the Government of the District of Columbia, Metropolitan Police Department and the Fraternal Order of Police, MPD Labor Committee.
- B. Operation
  1. Absent special circumstances, the Use of Force Review Board shall meet twice monthly to review use of force incidents.
  2. The Chairperson shall determine the date, time, and location of meetings.
  3. A member of the Internal Affairs Bureau shall serve as the Use of Force Review Board Administrator.
  4. The quorum for each Use of Force Review Board proceeding shall be four (4) members.
  5. Use of Force Review Board members shall not be permitted to send a representative in their place to a Use of Force Review Board proceeding.
  6. Use of Force Review Board members shall be excused from a Board proceeding only by the Chief of Police.
  7. The Use of Force Review Board Administrator shall document Board member attendance as part of the record. Absences, both excused and unexcused, shall be formally noted in the meeting summary.
  8. The Use of Force Review Board shall complete, to the extent practicable, its review of each incident within the timeline established in the Fire and Police Disciplinary Procedure Act of 2004 [GO-PER-201.22 (Fire and Police Disciplinary Action Procedure Act of 2004)].

9. The Chairperson shall be responsible for conducting an orientation for any newly appointed Board members. The orientation shall consist of topics including, but not limited to, a review of the MPD policies governing the Use of Force Review Board, the roles of responsibilities of Board members and IAD, and a general overview of Board operations.

#### C. Review Process

1. The Use of Force Review Board shall review the actions of all members involved in the use of force incident, not just the actions of the member(s) who used force. The actions of the member(s) leading up to and following the use of force shall be reviewed to identify commendable action(s) and/or conduct warranting corrective intervention by the MPD and, as appropriate, recommend training.
2. The Use of Force Review Board shall review use of force incidents with respect to the following:
  - a. Compliance with MPD policies, procedures, directives, and training;
  - b. Whether proper tactics were used by the involved member(s);
  - c. Risk management issue(s);
  - d. Adequacy of related MPD training; and
  - e. Whether the level of force used was appropriate for the incident.
3. As part of the review process, the Use of Force Review Board shall prepare a "Decision Point Matrix Analysis". This analysis shall be incorporated into the record.
4. The Use of Force Review Board may recommend to the Chief of Police use of force investigative protocols, standards for use of force investigations, training enhancements, and policy and procedure amendments.

#### D. Findings and Recommendations

1. After evaluating each case, the Use of Force Review Board shall provide its findings and recommendations. The Board's determination shall either affirm or reject the investigative recommendation.
2. The Use of Force Review Board shall determine the findings for use of force incidents in accordance with GO-RAR-901.08 (Use of Force Investigations) and as:

- a. Justified, Within Departmental Policy – disposition reflects a finding in which a use of force is determined to be justified, and during the course of the incident the subject member did not violate an MPD policy;
  - b. Justified, Policy Violation – disposition reflects a finding in which a use of force is determined to be justified, but during the course of the incident the subject member violated an MPD policy;
  - c. Justified, Tactical Improvement Opportunity – disposition reflects a finding in which a use of force is determined to be justified; during the course of the incident no MPD policy violations occurred; and the investigation revealed tactical error(s) that could be addressed through non-disciplinary and tactical improvement endeavor(s); or
  - d. Not Justified, Not Within Departmental Policy – disposition reflects a finding in which a use of force is determined to be not justified, and during the course of the incident the subject member violated an MPD policy;
3. The Use of Force Review Board shall determine the findings of excessive force allegations and other misconduct in accordance with GO-RAR-901.08 (Use of Force Investigations) and as:
- a. Unfounded – investigation determined there are no facts to support the incident complained of actually occurred;
  - b. Sustained – investigation determined the person's allegation is supported by a preponderance of the evidence to determine that the incident occurred and the actions of the member were improper;
  - c. Insufficient Facts – investigation determined there are insufficient facts to decide whether the alleged misconduct occurred; or
  - d. Exonerated – investigation determined a preponderance of the evidence showed that the alleged conduct did occur, but did not violate MPD policies, procedures, or training.
4. The UFRB shall determine the findings for vehicle pursuits as defined below.
- a. Justified – classification reflects a finding in which a vehicle pursuit is determined to be within Department policy.

- b. Not Justified – classification reflects a finding in which a vehicle pursuit is determined to be not within Department policy.
  5. When the Use of Force Review Board has additional questions or determines that an investigation is incomplete, the Board may compel the appearance before the Board of member(s) of the Internal Affairs Division, reassign the case to the Internal Affairs Division for investigation, return the case to the Internal Affairs Division for follow up, or return the case to the investigating unit for appropriate action.
  6. Any case returned to the Internal Affairs Division or an investigative unit for completion or correction of an investigation shall be returned to the Chairperson of the Use of Force Review Board within five business days of receipt for a re-evaluation by the Board.
  7. Dissenting or non-concurring members of a Use of Force Review Board finding or recommendation may submit a minority report.
- E. Referral of Findings and Recommendations
1. When the Use of Force Review Board determines there has been an act that merits recognition, the Board shall forward appropriate commendation recommendations to the appropriate element's commanding official or to the Chairperson, MPD Awards Committee.
  2. When appropriate, the Chairperson, Use of Force Review Board, shall submit training recommendations for specific members, as well as the entire MPD, to the commanding official, Metropolitan Police Academy.
  3. When the Use of Force Review Board determines that a violation of MPD policy has occurred, the Board shall forward the case to the Director, Disciplinary Review Division (DRD), Corporate Support Bureau to determine the appropriate level of discipline.
  4. When the DRD receives notice of recommended discipline from the Use of Force Review Board, the Director, DRD, shall report back to the UFRB, in a written memorandum, within fifteen (15) business days of receipt of the notice from the Board, of the action(s) taken. Copies of any forms executed in conjunction with the action(s) taken shall be attached to the memorandum.
  5. The Use of Force Review Board, assisted by the Internal Affairs Bureau, shall conduct an annual analysis of all use of force incidents to detect any pattern, problem and/or issue and submit no later than February 15 of each calendar year a report to the Chief of Police of findings and recommendations.
  6. If, at any time during the review process, the Board determines an IAD

use of force investigation to be inadequate or lacking in quality or timeliness, the Chairperson shall notify the commanding official, IAD and Assistant Chief, Internal Affairs Bureau.

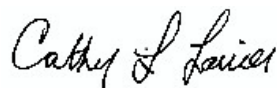
F. Internal Affairs Bureau

1. The Assistant Chief, Internal Affairs Bureau, shall designate a member to serve as the Use of Force Review Board Administrator.
2. The Use of Force Review Board Administrator shall:
  - a. Coordinate with the Internal Affairs Bureau staff to identify completed investigations that are ready for review by the Board.
  - b. Track the progress of investigations conducted by the Internal Affairs Division and notify the Assistant Chief, Internal Affairs Bureau, regarding any cases that are at risk of missing the 90-day deadline outlined in GO-PER-201.22 (Fire and Police Disciplinary Action Procedure Act of 2004).
  - c. Prepare proposed agendas for review and approval by the Chairperson of the Board.
  - d. Notify members of the Board as to the date, time, and location of Board meetings.
  - e. Provide all pertinent reports, records, and evidence to be considered.
  - f. Ensure that relevant and appropriate historical information about subject members and supervisors are available for consideration by the Board in connection with recommendations of appropriate discipline.
  - g. Ensure that relevant and appropriate MPD directives and/or lesson plans are available for review by Board members at the Board hearings.
  - h. Prepare a summary of the Board proceedings including documenting conclusions that outline findings and recommendations.
  - i. Prepare memoranda for MPD units as appropriate to transmit Board findings and recommendations.
  - j. Notify the subject members and their supervisors and commanding officials of Board decisions.

- k. Maintain records reflecting the adverse and corrective actions taken by the Board in response to Board decisions and recommendations.
  - l. Assist with the preparation of the annual reports of the Board.
  - m. Maintain complete historical records of Board actions including agendas, decision point matrices, meeting summaries, correspondence, and annual reports.
  - n. Complete other Board administrative duties as assigned by the Assistant Chief, Internal Affairs Bureau.
3. The Internal Affairs Bureau shall ensure that statistical information concerning all use of force cases is available to the Board.
- G. Office of Risk Management (ORM)
- 1. The Office of Risk Management shall conduct periodic audits to review the timeliness of cases pending submission to the Use of Force Review Board.
  - 2. The primary purpose of these periodic audits shall be to identify and document cases at risk of missing the 90-day deadline outlined in GO-PER-201.22 (Fire and Police Disciplinary Action Procedure Act of 2004).

## V. CROSS REFERENCES

- A. GO-PER-201.22 (Fire and Police Disciplinary Procedure Act of 2004)
- B. GO RAR-901.08 (Use of Force Investigations)



Cathy L. Lanier  
Chief of Police

# APPENDIX D

# EXECUTIVE ORDER



Subject:	<b>BWC Standby Mode</b>
Number	<b>EO-18-014</b>
Effective Date	<b>September 21, 2018</b>
Related to:	GO-302.13 (Body-Worn Camera Program)
Rescinds:	EO-18-013 (BWC Standby Mode), Effective Date August 20, 2018

## DISTRICT OF COLUMBIA

Body worn camera (BWC)-equipped members shall ensure that their BWC is turned on and in standby mode at all times when it is not activated so that the pre-recording buffer captures all activity that occurs in the two minutes prior to activation. Members may deactivate standby mode when briefly engaging in personal matters (e.g., restroom or lactation breaks, entering a locker room where other members may be undressed, or employment-related conversations with a union representative).

Peter Newsham  
Chief of Police

PN:KDO:MOC:SMM

## About ODCA

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The mission of the Office of the District of Columbia Auditor (ODCA) is to support the Council of the District of Columbia by making sound recommendations that improve the effectiveness, efficiency, and accountability of the District government.

To fulfill our mission, we conduct performance audits, non-audit reviews, and revenue certifications. The residents of the District of Columbia are one of our primary customers and we strive to keep the residents of the District of Columbia informed on how their government is operating and how their tax money is being spent.

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