

REPORT

In the matter of the December 29, 2021 police-involved shooting in Silver Spring, Maryland.

Pursuant to Md. Code, State Gov't § 6-106.2(c), (d), the Office of the Attorney General Independent Investigations Division conducted an investigation relating to the December 29, 2021 police-involved shooting. The attached report was written by the Office of the Attorney General Independent Investigations Division and any redactions were made by the Office of the Attorney General in preparation for public release. Pursuant to an agreement between the Montgomery County State's Attorney's Office and the Howard County State's Attorney's Office, based upon a thorough review of the report it is the opinion of the Howard County State's Attorney's Office that the actions of the shooting officers on December 29, 2021 were reasonable under the circumstances. Accordingly, the Office of the State's Attorney for Howard County declines to file charges against the involved officers.



INDEPENDENT INVESTIGATIONS DIVISION

Report Concerning the Police-Involved Fatal Incident in
Montgomery County, Maryland on December 29, 2021

May 19, 2022

**Report of the Independent Investigations Division of the Maryland Office of the
Attorney General Concerning the Police-Involved Shooting Death of
Osman Sesay on December 29, 2021**

Pursuant to Md. Code, State Gov't § 6-106.2, the Office of the Attorney General's Independent Investigations Division (the "IID") provides this report to Howard County State's Attorney Rich H. Gibson, Jr. regarding the police-involved shooting death of Osman Sesay.¹

The IID is charged with "investigat[ing] all alleged or potential police-involved deaths of civilians" and "[w]ithin 15 days after completing an investigation ... transmit[ting] a report containing detailed investigative findings to the State's Attorney of the county that has jurisdiction to prosecute the matter." Md. Code, State Gov't § 6-106.2(c), (d). The IID completed its investigation on May 16, 2022. This report is being provided to Howard County State's Attorney Rich H. Gibson, Jr. on May 19, 2022.

I. Introduction

On December 29, 2021 at approximately 4:25 a.m., an off-duty Montgomery County Police Department ("MCPD") officer was alerted to a shooting in front of a restaurant at 904 Bonifant Street in Silver Spring, Maryland. The off-duty officer relayed a description of the shooting suspect's car, which he received from bystanders, to on-duty MCPD officers who were responding to the scene. At 4:29 a.m., officers observed a car matching that description driving in the area of Wayne Avenue and Dartmouth Avenue, about a half mile away from the shooting scene. Officer Nathan Lenhart conducted a traffic stop as additional officers responded. During the traffic stop, a man later identified as Osman Sesay got out of the rear passenger-side of the car, against officers' orders, and pointed a handgun at officers. Four officers fired their guns at Mr. Sesay, who was struck. He was pronounced dead at the scene.

This report details the IID's investigative findings based on a review of body-worn camera ("BWC") footage, officer and civilian interviews, DNA and firearm analysis, the autopsy report, and personnel records for the officers involved. All materials reviewed in this investigation are being provided to the Howard County State's Attorney's Office with this report and are listed in Appendix A.

This report also includes an analysis of Maryland statutes that may be relevant in a police-involved shooting death of this nature. The IID considered the elements of each possible charge, MCPD departmental policies, and Maryland case law to assess whether any charge could be supported by the facts of this incident. Because the Howard County State's Attorney's Office—not the Attorney General's Office—retains prosecution authority in this case, this report does not make any recommendations as to whether any individual should or should not be charged.

¹ This report is provided to the Howard County State's Attorney pursuant to an agreement between the Montgomery County State's Attorney and the Howard County State's Attorney wherein they review fatal shootings by police in each other's jurisdictions.

II. Factual Findings

On Wednesday, December 29, 2021, in the early morning hours, Mr. Sesay and two friends, [REDACTED] and [REDACTED], went to Sweet Sweet Kitchen at 904 Bonifant Street in Silver Spring. According to witness interviews, the three were coming from an earlier party at a location on Georgia Avenue. Interior video surveillance from Sweet Sweet Kitchen shows Mr. [REDACTED] and Ms. [REDACTED] entered the restaurant at 4:07 a.m. and Mr. Sesay entered at 4:15 a.m. A minute after Mr. Sesay entered the restaurant, another individual, [REDACTED] entered the restaurant and walked behind the counter. Mr. Sesay and Mr. [REDACTED] are seen arguing at 4:16 a.m. and again at 4:20 a.m. At 4:21 a.m., restaurant security removed Mr. [REDACTED] from the restaurant. One minute later, Mr. Sesay and his friends, Mr. [REDACTED] and Ms. [REDACTED] all exit the restaurant together.

Around this time, off-duty MCPD Detective Artemis Goode arrived at Sweet Sweet Kitchen to pick up something to eat. In a subsequent interview with the IID, Detective Goode reported seeing a large commotion upon his arrival at the restaurant. He put on an outer vest covering identifying him as police, walked up to the crowd, and began to advise people to back away. At 4:25 a.m., he radioed for additional units, as two men were continuing to fight.

In his interview, Detective Goode noted there was a SUV parked in front of where he was standing, and he suddenly heard a single gunshot from the opposite side of the SUV.² At that time, an individual, later identified as Mr. [REDACTED] came from behind the SUV, holding his left side, and walked up to Detective Goode.³ Detective Goode sat Mr. [REDACTED] on the ground in front of him and began to scan the crowd. Detective Goode reported that the scene was chaotic, and people continued to fight following the gunshot.

Detective Goode had observed a black Camry quickly leave the scene, traveling the wrong way on a one-way street. He initially believed it may have been involved in the shooting, so he broadcast the vehicle description to other officers. Immediately after this, however, witnesses said the shooter was in a white Mercedes. At this time, Detective Goode observed a white Mercedes driving around patrol vehicles that had responded to the scene. At 4:28 a.m., Detective Goode radioed the description of the white Mercedes to responding units.

At the same time, MCPD Officer Nathan Lenhart had stopped a black Camry that matched the initial vehicle description from Detective Goode. Officer Lenhart's BWC footage shows that he then saw a white Mercedes drive by the location of the black Camry traffic stop. Officer Lenhart left the black Camry and pursued the white Mercedes. At approximately 4:29 a.m., Officer Lenhart stopped the white Mercedes at Wayne Avenue and Dartmouth Avenue, which is approximately a half mile from Sweet Sweet Kitchen.

² MCPD recovered a single fired cartridge casing in front of Sweet Sweet Kitchen, which was transferred to MSP for analysis. For additional discussion of this casing, see Section III., E., *infra*.

³ Mr. [REDACTED] was transported to a local hospital and remained in critical condition for several weeks after the incident. He was subsequently released from the hospital.

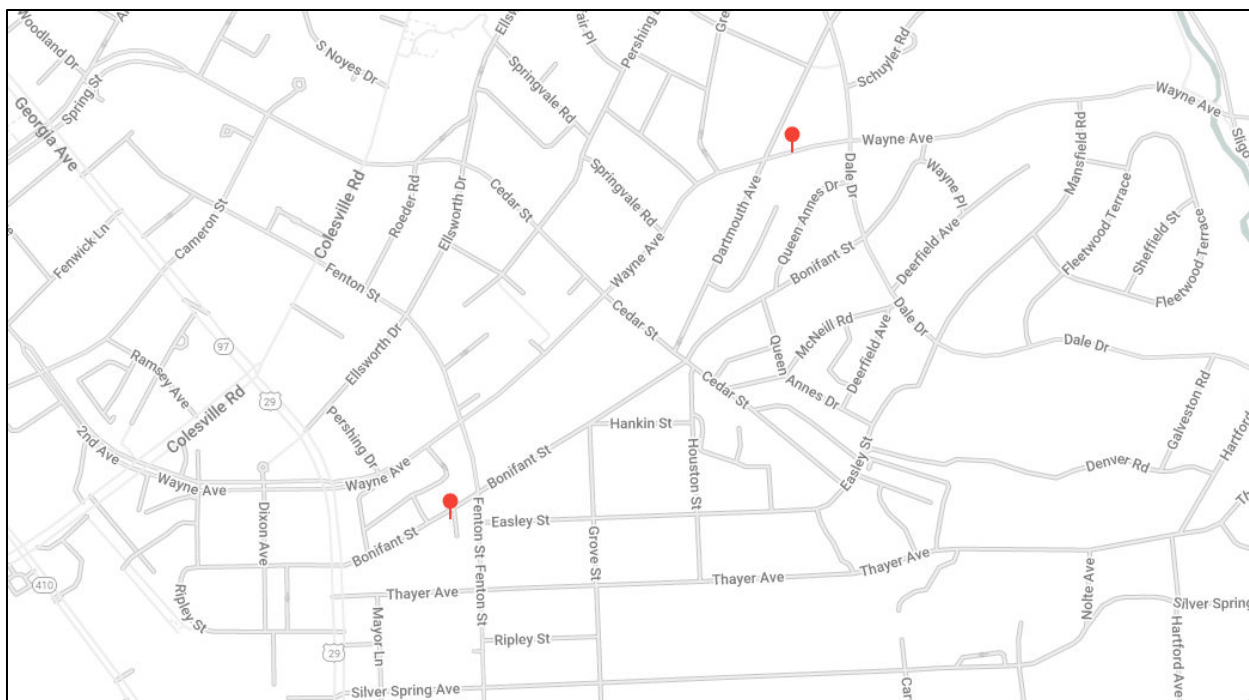


Image 1. Marker on left depicts the approximate location of the shooting in front of Sweet Sweet Kitchen. Marker on right depicts the approximate location of the traffic stop of the white Mercedes, where the officer-involved shooting occurred.

Officer Lenhart can be seen on body-camera footage getting out of his patrol car and telling the driver of the white Mercedes to roll down his window. It is unknown if the driver complied with this command. Approximately one minute later, MCPD Officer Eric Kessler arrived at the scene, along with additional back-up units from MCPD. Officer Lenhart got on his car's public address system and again instructed the driver of the vehicle, later identified as Mr. [REDACTED] to roll down the window, turn off the engine, and keep his hands visible to officers. Officers then instructed the driver to put both hands outside of the window and to reach from the outside to open the car door. Officer Lenhart's patrol car camera shows that Mr. [REDACTED] and the front seat passenger, later identified as Ms. [REDACTED], both placed their hands outside the car windows.

At that moment, at approximately 4:32 a.m., the rear passenger, later identified as Mr. Sesay, opened the rear passenger-side door and stepped out of the car. He is visible on the camera footage standing up and aiming a firearm in the direction of officers who were standing by the patrol cars that were parked to the rear of the white Mercedes. It is not possible to determine from the camera footage whether Mr. Sesay fired the gun.

For the next several seconds, four of the officers—Officers Lenhart, Kessler, Karli Dorsey, and Dennis Tejada—fired their service weapons at Mr. Sesay. Officer Lenhart, who was determined to have fired two shots that struck Mr. Sesay, was in front of the other officers and positioned just to the right of the front passenger-side door of his patrol car, which was the closest vehicle to the white Mercedes. Officer Kessler was standing to the left of the front driver-side door of that same patrol car, and Officers Dorsey and Tejada appeared to be standing behind and to the right of Officer Lenhart on a grassy area in front of a residence on Wayne Avenue.

Two additional MCPD officers—Officers Cecil Williams and Avery Wood—were also present at the time of the shooting but did not fire their service weapons.

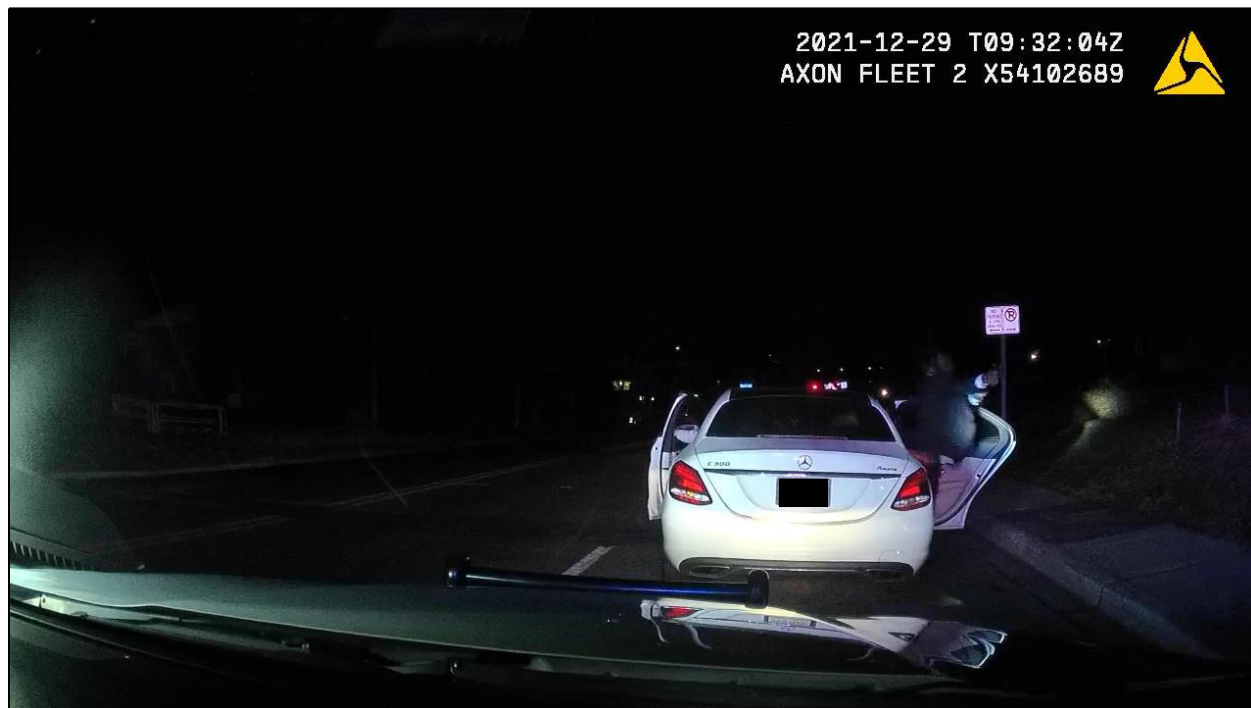


Image 2. Still frame from Officer Lenhart's patrol car camera showing Mr. Sesay exiting the rear passenger-side door of the white Mercedes and pointing a firearm at officers.

Body-worn camera footage from officers on scene shows that when officers stopped shooting, Officer Lenhart screamed for nobody to move. Officer Kessler stated that the suspect, Mr. Sesay, was “down the street,” and another officer indicated that the Mr. Sesay was “on the ground.” Officers confirmed that no officers were hit by gunfire. Officers then called out for officers with long guns and officers with shields to come to the scene to assist in getting out the other occupants of the car. Officers also called for fire and rescue services. Officers did not yet approach Mr. Sesay, who was lying on the ground in front of the white Mercedes.

At approximately 4:34 a.m., officers yelled for the remaining occupants of the vehicle to listen to instructions. Officers decided to get the driver, Mr. [REDACTED] out of the car first. He was instructed to open the driver-side door from the outside. Mr. [REDACTED] indicated to officers that the driver-side door was stuck, and officers instructed him to climb out of the driver-side window hands first. Mr. [REDACTED] complied with this order. He was then instructed to walk backwards toward MCPD officers, and he again complied. He was then placed in handcuffs. While officers were dealing with Mr. [REDACTED] an officer noted that Mr. Sesay “is moving, his hand is moving” and noted that “he still has the gun with him.” Ms. [REDACTED], the front-seat passenger, was removed from the car and taken into custody in the same manner as Mr. [REDACTED], and they were transported to police headquarters to be interviewed.

[REDACTED]

Immediately after getting Ms. [REDACTED] out of the car, at approximately 4:39 a.m., camera footage shows that Officers Lenhart and Kessler approached Mr. Sesay, who was lying face-down in front of the white Mercedes. Blood had pooled near his body. An officer said, “gun is on the ground, you all see it? Gun is right there on the ground.” Upon approaching Mr. Sesay, the officers placed him in handcuffs and noted he was unresponsive. An officer then checked Mr. Sesay for a pulse and indicated, “I got nothing.” Officers did not attempt any medical interventions, and they again called for fire and rescue services.

[REDACTED]

[REDACTED]

[REDACTED]

III. Investigation

A. Initial Response

On December 29, 2021, at approximately 5:16 a.m., pursuant to Md. Code, State Gov’t § 6-106.2 and IID protocols, MCPD notified MSP there had been an officer-involved fatality in Silver Spring. MSP immediately notified IID Chief Investigator Anthony Schartner, who, along with other IID and MSP personnel, responded to the scene and assumed control of the investigation.

B. Crime Scene

The crime scene at Wayne Avenue and Dartmouth Avenue contained three MCPD vehicles parked behind a white Mercedes. The white Mercedes had a bullet hole in the rear windshield and the right rear passenger door. Mr. Sesay was lying on the sidewalk and in the roadway approximately 5 to 10 yards in front of the white Mercedes.

MSP crime scene technicians recovered a Glock model 37 .45 GAP caliber pistol lying in the roadway approximately two feet from the right front tire of the white Mercedes. According to Detective Sergeant Frank Lopez of MSP, the firearm was fitted with an after-market auto sear, which turns a semi-automatic firearm into a fully automatic firearm. D/Sgt. Lopez also observed a live round of .45 caliber ammunition jammed between the frame and slide of the gun. In the observed condition, D/Sgt. Lopez noted the firearm would not fire without first clearing this malfunction. There were eight rounds in the magazine.



Image 3. Photograph of the Glock model 37 .45 GAP caliber pistol recovered from the crime scene, showing a live round of ammunition jammed between the frame and slide of the gun.

MSP crime scene technicians also recovered 34 fired 9mm cartridge casings from the scene.

Mr. Sesay suffered a second gunshot wound to the left buttock. This gunshot caused injury to the left femur and the left external iliac artery and vein. The bullet was recovered from the soft tissues of the anterior left pelvis. The direction of the wound path was back to front, left to right, and upward.

Finally, Mr. Sesay had a through-and-through gunshot wound to the right arm. This third gunshot wound did not injure any vital structures but contributed to overall blood loss.

There was no evidence of close-range discharge of a firearm on the skin surrounding any of the gunshot entrance wounds. Mr. Sesay also had abrasions to the right side of his forehead and right ring finger, which did not significantly contribute to the cause of death.

Postmortem toxicology testing for drugs was positive for amphetamine in the urine, indicating recent use, and the testing for the presence and quantity of ethanol indicated Mr. Sesay had been drinking alcoholic beverages prior to his death.

D. DNA Analysis

According to DNA analysis by the Forensic Services Division of MSP, DNA from Mr. Sesay was found on the Glock model 37 .45 GAP caliber pistol recovered at the scene. Additionally, Mr. Sesay could not be excluded as a significant contributor from the DNA profile obtained on the gun magazine. The probability of selecting an unrelated individual at random who cannot be excluded as the significant contributor to this DNA profile are approximately 1 in 1.3 quadrillion in the African-American population. Finally, the MSP lab could not make any conclusions about the DNA profile obtained from the nine rounds of live ammunition associated with the firearm.

E. Firearms Analysis

According to the firearms analysis performed by the Forensic Services Division of MSP, the two fired bullets recovered from Mr. Sesay's body during autopsy were fired from Officer Lenhart's service weapon. As noted above, Officer Lenhart was standing by the front passenger-side of one of the patrol cars that was parked to the rear of the white Mercedes during the shooting.

Fired cartridge casings and fired bullets at the scene were identified as having been fired from four MCPD officers' service weapons: one fired casing from Officer Dorsey's firearm; 12 fired casings and one fired bullet from Officer Kessler's firearm; nine fired casings from Officer Lenhart's firearm; 13 fired casings and three fired bullets from Officer Tejada's firearm; and five fired bullets or bullet fragments that were inconclusive or unsuitable for comparison.

Finally, the fired cartridge casing recovered by MCPD from the shooting of Mr. [REDACTED] in front of Sweet Sweet Kitchen was identified as having been fired from the firearm recovered near Mr. Sesay's body and containing his DNA. No other casings or bullets recovered and examined were linked to Mr. Sesay's firearm. Because none of the recovered shell casings or bullets were fired from the gun linked to Mr. Sesay, as well as the jammed condition of the gun

when it was recovered, it is unlikely Mr. Sesay fired his gun at officers. It remains theoretically possible, however, that Mr. Sesay did fire one or more rounds at officers and his gun jammed after that firing and the associated casings were not located on scene.

F. Civilian Witnesses

1. [REDACTED]

In an interview with MCPD⁶, Ms. [REDACTED] said she and Mr. [REDACTED] were at Sweet Sweet Kitchen following a party that took place earlier in the day. After she got food, people in the restaurant started arguing and pushing each other. Ms. [REDACTED] indicated that she heard Mr. [REDACTED] disrespect another patron's girlfriend. Ms. [REDACTED] said she turned her back to this argument and heard a gunshot. When she turned around, Mr. [REDACTED] was on the ground. She did not see who shot Mr. [REDACTED]

Ms. [REDACTED] said that, at this point, Mr. [REDACTED] wanted to leave, so the two walked to their car, the white Mercedes, and Mr. Sesay (who she called "Los") was in the backseat. She did not indicate in the interview how Mr. Sesay came to be in the car. Ms. [REDACTED] said she did not want to leave Mr. [REDACTED] to die, so they went back to the restaurant, where another person was tending to Mr. [REDACTED]. The two then returned to the white Mercedes.

Ms. [REDACTED] said that when she and Mr. [REDACTED] returned to the car, Mr. Sesay was still in the backseat. She indicated that a short time after they left the scene, they were pulled over by police. She said Mr. Sesay wanted them to drive away from the police, but Mr. [REDACTED] said they could not do that. Ms. [REDACTED] said Mr. Sesay said multiple times that he could not go back to jail and that she believed he was on probation. She said Mr. Sesay then indicated he was carrying a gun. Ms. [REDACTED] told Mr. Sesay to calm down, as she felt he meant he was going to die. Mr. Sesay then said, "I love you guys" and got out of the car. Ms. [REDACTED] said she and Mr. [REDACTED] put their heads down and heard gunshots.

2. [REDACTED]

In his interview with MCPD, Mr. [REDACTED] said he was at Sweet Sweet Kitchen when fighting broke out. He said he did not know what started the fighting, but he saw [REDACTED] Ms. [REDACTED], get pushed to the ground, so he broke up the fight around her by restraining someone. At this point, Mr. [REDACTED] said he heard a gunshot from "across the street." He did not see who fired the gun or who was shot, but he heard other people mentioning Mr. [REDACTED] first name.

After the gunshot, Mr. [REDACTED] said he got into the car, the white Mercedes. Mr. [REDACTED] said he did not know when Mr. Sesay (who he called "Los") got into the car. Later in the interview, Mr. [REDACTED] said he did not know Mr. Sesay was in the car until police pulled him over, and that Mr. Sesay was sitting low in the back seat. He said Mr. Sesay said "I can't go back to jail" and "I

⁶ MCPD Detectives conducted the interviews of Ms. [REDACTED] and Mr. [REDACTED] because it was determined the two witnesses would have more information related to MCPD's criminal investigation of the shooting of Mr. [REDACTED] than to the IID's investigation of the shooting of Mr. Sesay. IID and MSP personnel, however, monitored the interviews via closed-circuit television and consulted with the interviewing detectives during breaks.

love you guys” before opening the right rear passenger door. According to Mr. [REDACTED] Mr. Sesay then reached toward his waist. Mr. [REDACTED] thought he was getting a gun but could not see a firearm.

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

G. Police Witnesses

1. Involved Officers

The four involved officers—Officers Dorsey, Kessler, Lenhart and Tejada—declined to be interviewed by the IID.⁸

2. Detective Goode

In an interview with IID and MSP personnel, MCPD Detective Artemis Goode gave an account of the scene at Sweet Sweet Kitchen and the shooting of Mr. [REDACTED], which is discussed in Section II, *supra*. During his interview, he reported that he did not arrive at the scene of the traffic stop on the white Mercedes until after the police-involved shooting had already occurred. He stated that he had a police shield, so he assisted in removing Mr. [REDACTED] and Ms. [REDACTED] from the vehicle. Once the two occupants were secured, Detective Goode said he saw Mr. Sesay lying on the curb toward the front of the white Mercedes with a handgun lying nearby.

3. Officer Jonathan Johnson

In an interview with the IID, Officer Johnson indicated he heard a call over the radio for shots fired in front of Sweet Sweet Kitchen. He was close by and responded. Upon his arrival, he saw Detective Goode with the shooting victim, later identified as Mr. [REDACTED]. Officer Johnson then heard over the radio that shots were fired at the Wayne Avenue and Dartmouth Avenue location and heard a call for officers with long guns. He returned to his patrol car and drove to the scene.

Officer Johnson said that when he arrived at the scene, he took out his shotgun. He estimated five other officers were also present on scene. He was able to ascertain that the suspect was down on the ground and two more subjects were in the vehicle. He indicated that the focus

⁸ These officers, like the subject of any criminal investigation, have the right under the Fifth Amendment to not make any statements.

on scene was getting the driver out of the car and then the front-seat passenger. He also indicated that none of the officers on scene told him what happened with regard to the shooting.

Officer Johnson said that after the driver and passenger were removed from the car and secured, he approached the rear passenger-side of the car and noticed the door was open and that about two feet in front of the door was a black handgun lying on the ground of the roadway. He observed Mr. Sesay was five or six feet in front of the handgun. He approached the body and noted it was “apparent he was deceased.” He indicated another officer checked for his pulse, but no further medical treatment was provided. He also noted that fire and rescue did not arrive immediately because there was some confusion over which scene they were needed at. He estimated it took 10 minutes for fire and rescue to respond.

4. Officer Cecil Williams

In an interview with MSP personnel, Officer Williams summarized the radio communications he heard from Detective Goode. He indicated that officers had the black Camry stopped and that he then saw a patrol car pursuing and ultimately stopping the white Mercedes. Once the car was stopped, Officer Williams said he exited his car with his canine.

He noted that as officers on scene were giving the driver directions, the rear passenger-side door opened, and an individual got out of the car. Officer Williams heard officers yell and then heard shots fired. He indicated that it was more than one shot and that he saw a muzzle flash from the suspect’s gun, indicating that the suspect fired, before Officer Williams ducked for cover behind a police car.⁹ Officer Williams said his gun was not out of his holster because he was holding his dog’s leash, and he would not have had a clear shot.

Officer Williams then said he noted the suspect was down on the ground and not moving. He indicated the suspect had dropped the gun and collapsed. He said he was likely the most senior officer at the scene, so he instructed officers to first deal with the individuals in the car. He explained that the driver was instructed to climb through the window and walk backward toward officers at which point he was placed in handcuffs. After that, the front-seat passenger exited the car and was handcuffed. Once officers arrived with long guns and shields, officers approached the suspect who was lying on the ground. They were giving him commands, but he was not responding. Officer Williams said an officer handcuffed the suspect, but they noted immediately he was deceased. He was lying in a big pool of blood and not moving. Another officer checked the suspect for a pulse, and they waited for fire and rescue to respond. Officer Williams noted that there was a gun on the ground by the car.

After that, Officer Williams indicated he was trying to console Ms. [REDACTED] when she indicated that the suspect was a friend. He did not ask any additional questions of her.

5. Officer Avery Wood

In an interview with IID and MSP personnel, Officer Wood explained he was working patrol in downtown Silver Spring and heard a radio call-out for a black Camry. He assisted on

⁹ It is possible but unlikely that Mr. Sesay fired his gun. *See* Section III., E., *supra*.

the stop of the black Camry and, as he was assisting, he saw a white Mercedes drive by and then heard the call-out for a white Mercedes. He said another officer pursued the white Mercedes.

Officer Wood indicated that when he pulled up to the traffic stop of the white Mercedes the occupants were still in the car. He heard officers giving commands to the driver when the rear passenger-side door opened, and an individual got out and pointed a handgun at police. He said he heard three or four shots coming from that individual.¹⁰ He ducked for cover and did not see anything else. He next heard the suspect was down. Officer Wood said he helped hold the scene until additional units arrived and officers were trying to find out who had long guns.

He said officers continued to hold their firearms pointed on the car. He explained how the driver and front-seat passenger exited the car and were handcuffed. He also indicated that he heard Mr. [REDACTED] say he did not know the suspect and that Mr. [REDACTED] started crying.

IV. Involved Parties' Backgrounds

As part of its standard investigative practice, the IID obtained information regarding Mr. Sesay and the involved officers' criminal histories, as well as the involved officers' departmental internal affairs records and relevant training. In this case, this information did not affect the analysis of potential criminal charges.

To the extent it exists, any criminal history of any involved party is being provided to the Howard County State's Attorney's Office with this report.

A. Mr. Osman Sesay

Mr. Sesay was a 27-year-old Black man who lived with his mother and uncle in Silver Spring, Maryland.

B. Officer Karli Dorsey

Officer Dorsey was hired by MCPD in 2020 and is currently assigned to 3rd District midnight shift. She is a 23-year-old white woman. [REDACTED]
[REDACTED]
[REDACTED]

C. Officer Eric Kessler

Officer Kessler was hired by MCPD in 2014 and is currently assigned to 3rd District midnight shift. He is a 36-year-old white man. [REDACTED]
[REDACTED]
[REDACTED]

¹⁰ It is possible but unlikely that Mr. Sesay fired his gun. See Section III., E., *supra*.

D. Officer Nathan Lenhart

Officer Lenhart was hired by MCPD in 2013 and is currently assigned to 3rd District midnight shift. He is a 30-year-old white man. [REDACTED]
[REDACTED]
[REDACTED]

E. Officer Dennis Tejada

Officer Tejada was hired by MCPD in 2006 and is currently assigned to 3rd District midnight shift. He is a 37-year-old white man. [REDACTED]
[REDACTED]

V. Applicable General Orders

MCPD has the following policy concerning officers' use of deadly force and responsibility to provide medical treatment. The complete policy, Response to Resistance and Use of Force (FC No. 131), is attached as Appendix B.

Authorized Use of Deadly Force (FC No. 131, III., D., 1.)

"Officers may use deadly force if such force is necessary, as a last resort due to a lack of reasonable and safe alternatives, to defend themselves or another person from what they reasonably believe is an imminent threat of death or serious physical injury. Such force must not create substantial unnecessary risk of injury to a third person. The United States Supreme Court has ruled that any use of deadly force must be objectively reasonable."

Medical Treatment (FC No. 131, VII., D.)

"Officers and supervisors shall provide and obtain medical treatment consistent with their training as soon as it is safe and practical for individuals . . . [w]ho show signs of injury as a result of any use of force."

VI. Applicable Laws and Analysis

The IID analyzed Maryland statutes that could be relevant in a shooting of this nature. This section presents the elements of each possible criminal charge and analyzes these elements considering the findings discussed above.

A. Intentional Second-Degree Murder¹¹

¹¹ This report will not separately analyze the charge of first-degree assault because that offense merges with intentional second-degree murder; the elements vary only in that the latter requires proof of the death of the victim. *Sifrit v. State*, 383 Md. 116, 137 (2004).

Criminal Law § 2-204 states: “A murder that is not in the first degree under § 2-201 of this subtitle is in the second degree.” Intentional second-degree murder differs from first-degree murder in that it is not “willful, deliberate, and premeditated.” MPJI-Cr 4:17.2 Homicide—First Degree Premeditated Murder, Second Degree Specific Intent Murder and Voluntary Manslaughter (Perfect/Imperfect Self-Defense and Perfect/Imperfect Defense of Habitation), MPJI-Cr 4:17.2 (2d Ed. 2021). It is, however, a killing conducted with “either the intent to kill or the intent to inflict such serious bodily harm that death would be the likely result.” *Id.*

To prove intentional second-degree murder, the State must establish: “(1) that the defendant caused the death of [Mr. Sesay]; (2) that the defendant engaged in the deadly conduct either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result; (3) that the killing was not justified; and (4) that there were no mitigating circumstances.” *Id.* “If a man voluntarily and wil[l]fully does an act, the natural consequences of which is to cause another’s death, an intent to kill may be inferred from the doing of the act.” *Lindsay v. State*, 8 Md. App. 100, 105 (1969).¹²

Self-defense is one possible justification or mitigating circumstance. Complete self-defense exists where: “(1) the defendant was not the aggressor”; “(2) the defendant actually believed that [they were] in immediate or imminent danger of death or serious bodily harm; (3) the defendant’s belief was reasonable; and (4) the defendant used no more force than was reasonably necessary to defend [themselves] in light of the threatened or actual force.” MPJI-Cr 4:17.2; *see also Porter v. State*, 455 Md. 220, 234-36 (2017). Partial self-defense exists where the first two of these elements are present, but the defendant either unreasonably believed danger to be imminent or unreasonably believed the amount of force they used was necessary. MPJI-Cr 4:17.2. If the defendant acted in complete self-defense, no charge is appropriate. *Id.* If the defendant acted in partial self-defense, the appropriate charge is voluntary manslaughter rather than second-degree murder. *Id.*

Law-enforcement justification is another possible defense. This defense provides that an officer may use “that force necessary to discharge his official duties” and “[i]n so doing, he is not liable civilly or criminally for the assault or battery that may result, including, if necessary, the use of deadly force.” *Wilson v. State*, 87 Md. App. 512, 519-20 (1991). The rationale for this justification is that officers’ duties are “markedly different” from those of ordinary citizens, requiring that they “threaten deadly force on a regular basis.” *Koushall v. State*, 249 Md. App. 717, 728-29 (2021), *aff’d*, No. 13, Sept. Term, 2021 (Md. Feb. 3, 2022). To use deadly force, an officer must have “probable cause to believe that the suspect poses a threat of serious physical harm.” *Estate of Blair by Blair v. Austin*, 469 Md. 1, 23-24 (2020) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

For either defense—self-defense or law-enforcement justification—the reasonableness of the officers’ actions “must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated.” *State v. Albrecht*, 336 Md. 475, 501 (1994). A court will consider “the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—

¹² Because there is no dispute that the involved officers intended to fire their weapons at Mr. Sesay, this report will not analyze unintentional (“depraved heart”) second-degree murder.

about the amount of force that is necessary in a particular situation.” *State v. Pagotto*, 361 Md. 528, 555 (2000) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). However, “an objectively reasonable officer would use deadly force *only* when threatened with serious physical harm.” *Estate of Blair by Blair*, 469 Md. at 24 (emphasis in original).

Violations of departmental policy are one “factor to be considered in determining the reasonableness of police conduct.” *Pagotto*, 361 Md. at 557 (citations omitted). As noted above, MCPD policy states, “[o]fficers may use deadly force if such force is necessary, as a last resort due to a lack of reasonable and safe alternatives, to defend themselves or another person from what they reasonably believe is an imminent threat of death or serious physical injury.”

In this case, based on the available evidence, it would be difficult for the State to prove that the involved officers did not act in self-defense or pursuant to law-enforcement justification. The available evidence shows that Mr. Sesay refused to comply with officer instructions during the traffic stop by exiting the car, and that he raised and aimed a firearm directly at officers. Mr. Sesay’s actions are visible on BWC, and the loaded firearm found near his body had Mr. Sesay’s DNA on it. Even if Mr. Sesay did not actually fire his firearm, as the evidence would suggest given that none of the recovered shell casings or bullets were fired from the gun linked to Mr. Sesay, and the fact that his gun was jammed when it was recovered, the very act of pointing the gun at officers threatened them with serious bodily harm. Mr. Sesay was the initial aggressor, and officers had no lesser level of force available that would have been appropriate.

B. Voluntary Manslaughter

As discussed above, the State may pursue voluntary manslaughter charges where the defendant acted in partial, but not complete, self-defense. MPJI-Cr 4:17.2. To prove voluntary manslaughter, the State must establish that the defendant had a specific intent to kill. *Selby v. State*, 361 Md. 319, 335 (2000). Such intent may be inferred by circumstances such as “the use of a deadly weapon directed at a vital part of the human anatomy.” *Chisum v. State*, 227 Md. App. 118, 136 (2016) (distinguishing *Selby* based on the *Selby* court’s “express finding ... that the defendant did not have an intent to kill his victim”).

To prove voluntary manslaughter, the State would need to prove that the officers’ belief that they were in imminent danger was unreasonable or that they used an unreasonable level of force. For the reasons discussed above, the available evidence suggests that it would be difficult for the State to prove either.

C. Misconduct in Office

The crime of misconduct in office requires that the State prove: (1) that the defendant was a public officer; (2) that the defendant acted in their official capacity or took advantage of their public office; and (3) that the defendant corruptly did an unlawful act (malfeasance), corruptly failed to do an act required by the duties of their office (nonfeasance), or corruptly did a lawful act (misfeasance). MPJI-Cr 4:23 Misconduct in Office (Malfeasance, Misfeasance, and Nonfeasance), MPJI-Cr 4:23 (2d ed. 2021). “[T]he conduct must be a willful abuse of authority

and not merely an error in judgment.” Comment to *id.* (citing Hyman Ginsberg and Isidore Ginsberg, *Criminal Law & Procedure in Maryland* 152 (1940)).

The State could potentially pursue a charge for misconduct in office under a theory of misfeasance if it could establish that any of the four involved officers acted unreasonably or used an unreasonable amount of force. *See Riley v. State*, 227 Md. App. 249, 264 (2016). For the reasons stated above, such unreasonableness would be difficult to prove here.

The State could also potentially pursue a charge for misconduct in office under a theory of nonfeasance if it could establish that officers did not provide Mr. Sesay with necessary or appropriate medical care. MCPD policy would require officers to provide medical care to an individual suffering from gunshot wounds when “safe and practical,” and the available evidence suggests that officers requested fire and rescue services immediately after the shooting. Further, any delay in officers physically getting to Mr. Sesay was reasonable as officers had to remove the other occupants from the car and otherwise secure the scene in order to ensure the safety of officers and the surrounding community. Once officers did approach Mr. Sesay, the evidence suggests he was already deceased [REDACTED]

D. Other Charges

There are several other charges for which full analysis was not warranted given the facts of this incident. Those charges are addressed briefly here.

The crime of first-degree murder requires the State to prove that the killing was “willful, deliberate, and premeditated.” MPJI-Cr 4:17.2. Said another way, the State must prove “the actual intent, the fully formed purpose to kill, with so much time for deliberation and premeditation as to convince [the jury] that this purpose is not the immediate offspring of rashness and impetuous temper and that the mind has become fully conscious of its own design.” *Ferrell v. State*, 304 Md. 679, 687 n. 2 (1985) (citations omitted). There is no evidence here that any of the four involved officers came to a considered decision to kill Mr. Sesay; the evidence suggests they were reacting to a quickly evolving situation.

Criminal Law § 4-204(b) states: “A person may not use a firearm in the commission of a crime of violence, as defined in § 5-101 of the Public Safety Article, or any felony” Second-degree murder and voluntary manslaughter are both crimes of violence. Pub. Safety § 5-101(c). Second-degree murder, voluntary manslaughter, and involuntary manslaughter are all felonies. Crim. Law §§ 2-204, 2-207. The State could pursue a charge for use of a firearm in the commission of a crime of violence if it could prove one of the predicate offenses. However, for the reasons stated above, proving such a charge would be difficult based on the available evidence.

Involuntary manslaughter is an “unintentional killing done without malice, by doing some unlawful act endangering life, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.” *Cox v. State*, 311 Md. 326, 331-32 (1988) (citations

omitted). The defendant's negligence "must be gross, that is, criminally culpable." *Cox v. State*, 69 Md. App. 396, 401 (1986).

To prove involuntary manslaughter under a theory of gross negligence, the State must establish: "(1) that the defendant acted in a grossly negligent manner; and (2) that this grossly negligent conduct caused the death of [Mr. Sesay]." MPJI-Cr 4:17.9 Homicide—Involuntary Manslaughter (Grossly Negligent Act and Unlawful Act), MPJI-Cr 4:17.9 (2d Ed. 2021). "'Grossly negligent' means that the defendant, while aware of the risk, acted in a manner that created a high degree of risk to, and showed a reckless disregard for, human life." *Id.*

In this incident, the available evidence does not indicate officers acted in a grossly negligent manner. As discussed above, the available evidence suggests that the involved officers' use of lethal force was consistent with departmental policy and otherwise reasonable under the circumstances.

Criminal Law § 3-204(a) states: "A person may not recklessly [] engage in conduct that creates a substantial risk of death or serious physical injury to another."

To prove reckless endangerment, the State must establish: "(1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; (2) that a reasonable person would not have engaged in that conduct; and (3) that the defendant acted recklessly." MPJI-Cr 4:26B Reckless Endangerment, MJPI-Cr 4:26B (2d Ed. 2021).

As discussed above, the available evidence does not support a contention that the officers acted unreasonably or recklessly. Further, self-defense applies to the crime of reckless endangerment, *Jones v. State*, 357 Md. 408, 430 (2000), so the previous analysis of self-defense applies here as well.

VII. Conclusion

This report has presented factual findings and legal analysis relevant to the police-involved shooting death of Osman Sesay that occurred December 29, 2021, in Silver Spring, Maryland. Please contact the IID if you would like us to supplement this report through further investigation or analysis.

Appendices

Appendix A – Materials Reviewed

Autopsy (1 document)
Body-Worn Camera (9 videos)
CAD Reports (2 documents)
Civilian Witness Interviews (2 videos)
Dash Camera Footage (3 videos)
Diagrams (2 documents)
IID Investigative Reports (7 documents)
Internal Affairs and Training Records (35 documents; 15 recordings)
Involved Parties' Criminal Histories (24 documents)
Involved-Officer Interviews (1 video)
Lab Reports and Related Documents (11 documents, 2 photographs)
Medical Records (5 documents)
MSP Reports (19 documents)
Non-Fatal Shooting Investigation Material
Other Video (43 videos)
Photographs
Search Warrant of Car (2 documents)
Witness Officer Interviews (4 videos)

Appendix B – Relevant MCPD Policy

See attached.

Appendix B

Relevant MCPD Policy



RESPONSE TO RESISTANCE AND USE OF FORCE

FC No.: 131

Date: 05-17-21

If a provision of a regulation, departmental directive, rule, or procedure conflicts with a provision of the contract, the contract prevails except where the contract provision conflicts with State law or the Police Collective Bargaining Law. (FOP Contract, Article 61)

Contents:

- I. Policy
 - II. Definitions
 - III. Force Options
 - IV. Firearms
 - V. Electronic Control *Weapons*
 - VI. *Less Lethal Devices*
 - VII. Custody and Transport Responsibilities
 - VIII. Use of Force Reporting Requirements
 - IX. Use of Force and Weapons Review Committee
 - X. Training/Certification Requirements
 - XI. CALEA Standards
 - XII. Proponent Unit
 - XIII. Cancellation
 - XIV. Disclaimer
- Appendix A: Use of Force Report – *MCP 37* Criteria for Use

I. Policy

- A. The need to use force, whether deadly or non-deadly *in response to resistance*, is one of the most demanding and critical decisions that a law enforcement officer must make. The department respects the sanctity *and dignity* of every human life. *The department is committed to accomplishing this mission with respect and a minimal reliance on the use of force, and by using, whenever possible, de-escalation to safely resolve a situation without needing to resort to the use of force.* There are situations when an officer is forced to make the irreversible decision of whether or not to use force. Such a decision can have a powerful and possibly harmful effect on the officer, the department, and the community. The purpose of this policy is to provide guidance to aid officers in the exercise of that decision. *This policy recognizes that in certain situations, the use of force is unavoidable and there is no way to specify the exact amount or type of force to be applied in every possible situation. However, this policy serves as a guideline to all department personnel who respond every day to dynamic situations that are tense, uncertain and rapidly evolving.*
- B. Officers may only use force *in response to resistance* which is objectively reasonable *and necessary* to make an arrest, an investigatory stop/detention or other seizure, or in the performance of their lawful duties, to protect themselves or others from personal attack, physical resistance, harm, or death. The decision to exercise force must be based upon the circumstances that the officer reasonably believes to exist. In determining the appropriate level of force to be used by an officer, the nature of the threat or resistance faced or perceived by the officer as compared to the force employed should be considered. Factors to be considered in assessing the level of force to be used include, but are not limited to the following:

1. the severity of the crime at issue,
 2. whether the subject poses an imminent threat to the safety of the officers or others, and
 3. whether the subject is actively resisting arrest, or the subject is attempting to evade arrest by flight.
- The reasonableness *and necessity* of force used by an officer will be analyzed based on the totality of the circumstances at the time the force was used.

- C. *The decision to employ any force, including the use of firearms, may be considered excessive by law and agency policy or both, if it knowingly exceeds a degree of force that reasonably was necessary based on the specific situation. Use of force in response to resistance decisions are made under exceedingly varied scenarios and often on a split-second basis. It is important to note that in Graham v. Connor, the U.S. Supreme Court recognized that law enforcement officers do not need to use the minimum amount of force in any given situation; rather, the officer must use a force option that is reasonable based upon the totality of the circumstances known to the officer at the time the force was used.*
- D. All officers have a number of force options available to use in those situations where force is objectively reasonable *and necessary*. Examples may include but are not limited to:
1. Subduing or arresting a physically assaultive person
 2. Instances that reasonably threaten the safety of an officer or other person
 3. Stopping a person who is attempting to flee or escape a lawful detention or arrest
 4. When directing, controlling, or escorting resistive or physically uncooperative persons
 5. Other situations where persons who are being placed into custody are non-compliant or resistant to lawful orders
 6. *To overcome resistance directed at the officer or others*
 7. *To prevent physical harm to the officer or to another person*
- E. *Officers may not use, or threaten to use, force for the following reasons:*
1. *To resolve a situation more quickly, unless the extended delay would risk the safety of the person involved, officers, or others, or would significantly interfere with other legitimate law enforcement objectives;*
 2. *To punish a person or to retaliate against them or to impose punishment;*
 3. *Based on bias against a person's race, ethnicity, nationality, religion, disability, gender, gender identity, sexual orientation, or any other protected classification.*

II. Definitions

- A. **Active Resistance:** *Refers to any action or evasive movements a subject takes to avoid or physically counteract an officer's attempts to detain or place them in custody, and/or take control. Active resistance may include but is not limited to pushing away, tensing arm muscles to avoid handcuffing, or pulling away from an officer who is using force in response to resistance in the lawful performance of their duties.*
- B. **Alternatives:** *tactics and methods used by a law enforcement officer to effectuate an arrest that do not unreasonably increase the risk posed to the law enforcement officer or another person, including verbal communication, distance, warnings, de-escalation tactics and techniques, tactical repositioning, and other tactics and techniques intended to stabilize the situation and reduce the immediacy of the risk so that more time, options, and resources can be called upon to resolve the situation with reduced, or without the, use of force. With respect to the use of deadly force, such term includes the use of less lethal force.*
- C. **Carotid Restraint:** *a technique applied in an effort to control or disable a subject by applying pressure to the carotid artery, the jugular vein, or the neck with the purpose or effect of controlling a subject's movement or rendering a subject unconscious by constricting the flow of blood to and from the brain.*

- D. De-escalation tactics and techniques: *proactive actions and approaches used by a law enforcement officer to stabilize the situation so that more time, options, and resources are available to gain a person's voluntary compliance and reduce or eliminate the need to use force, including verbal persuasion, warnings, tactical techniques, slowing down the pace of an incident, waiting out a subject, creating distance between the officer and the threat, and requesting additional resources to resolve the incident.*
- E. Deadly Force: *Force that creates a substantial risk of causing death or serious bodily injury, including the discharge of a firearm, a carotid restraint, or a neck restraint.*
- F. Less Lethal Force: *Any degree of force that is not likely to have a lethal effect.*
- G. Medical Treatment: *A minimum of an on-scene response by a medically trained professional.*
- H. Necessary: *That another reasonable law enforcement officer would objectively conclude, under the totality of the circumstances, that there was no alternative to the use of force.*
- I. Neck restraint: *A technique involving the use of an arm, leg, or other firm object to attempt to control or disable a subject by applying pressure against the windpipe or the neck with the purpose or effect of controlling a subject's movement or rendering a subject unconscious by blocking the passage of air through the windpipe.*
- J. Objectively Reasonable Force: *That level of force which is appropriate when analyzed from the perspective of a reasonable officer on the scene possessing the same information and faced with the same circumstances as the officer who actually utilized the force. The objective reasonableness of a particular use of force is not analyzed with hindsight, but will take into account the fact that officers must make rapid decisions regarding the amount of force to use in tense, uncertain, and rapidly evolving situations.*
- K. Passive Resistance: *A refusal by an unarmed person to comply with an officer's verbal command or physical control techniques by **non-active means**. Examples include, but are not limited to, ignoring verbal instructions by failing to respond or move, linking arms, or going limp.*
- L. Probable Cause: *Facts and circumstances that would lead a reasonable person to believe that a crime has been committed and a particular individual has committed that crime.*
- M. Proportional: *The level of force applied must reflect the totality of circumstances surrounding the situation at hand, including the nature and immediacy of any threats posed to officers and others. Officers must rely on training, experience, and assessment of the situation to decide an appropriate level of force to be applied. Proportional force does not require officers to use the same type or amount of force as the subject. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be proportional, objectively reasonable, and necessary to counter it.*
- N. Protective Instruments: *Devices or tools authorized by the department that are intended to protect the officer or others or to affect an arrest, investigative stop/detention, or seizure.*
- O. Response to Resistance: *Any action other than compliant hand-cuffing or unresisted escorting, that an officer is required to use to compel compliance to arrest an individual suspected of committing a crime, temporarily detain an individual to complete an investigation, or to address an immediate threat to the safety of the public, law enforcement officers, or persons as a result of non-compliance with a legitimate law enforcement purpose.*

- P. Restrained individual: means an individual who is under control and is not actively resisting arrest by use of intentional force that threatens serious bodily injury.**
- Q. Scene: The location(s) where force was utilized during an event.**
- R. Serious Bodily Injury: Bodily injury that creates a substantial risk of death, causes a serious, permanent disfigurement, or results in long term loss or impairment of any bodily member or organ.**
- S. Striking: Hitting forcibly and deliberately with: a weapon; a body part such as a hand, elbow, knee, or foot; or any other implement.**
- T. Totality of the circumstances: All credible facts known to the law enforcement officer leading up to and at the time of the use of force, including the actions of the person against whom the law enforcement officer uses such force and the actions of the law enforcement officer.**
- U. Under control: In custody and in restraints, to include hand-cuffs, and/or is calm and non-combative that it is clear and unambiguous that the subject is compliant.**

III. Force Options

- A.** An officer may encounter situations that require not only the officer's presence, but some form of verbal or non-verbal communication. This communication may take the form of providing information, giving commands, physical gestures, or directions, asking or answering questions, conducting interviews, etc. It may also take the form of issuing specific instructions to individuals or groups, dealing with arguments, verbal assaults, or threats, handling disputes, disagreements, etc. The department recognizes that some situations require the application of force.
- B.** A person need not strike or attempt to strike an officer to be considered a physical threat as long as an officer has an objectively reasonable belief (verbal threats, verbal defiance, physical stance, etc.) that the person is physically threatening and has the present ability to harm the officer or another. Examples of actions or observations that may lead an officer to believe that a person is a threat include, but are not limited to, clenched fists, displayed hostility or anger, verbal threats, aggressive stance, non-compliance, and furtive movements, among other things. Under the law, officers are not obligated to retreat when confronted with a threat. The department relies on the officer's judgment and discretion to employ objectively reasonable *and necessary* force under each unique circumstance.
- C. Authorized Use of Less Lethal Force**
1. Less Lethal force, as defined herein, may be used *if necessary and proportional in order to affect the constitutionally permissible detention of an individual. Examples of such constitutional detentions include, but are not limited to:*
 - a. When the officer has probable cause to believe the individual has committed a criminal offense;*
 - b. To effect an investigative detention, or;*
 - c. To effect service of an Emergency Evaluation Petition, Extreme Risk Protective Order, or other similar civil order.*
 2. Less Lethal force may involve the use of defensive tactics (hands/body) and/or protective instruments.
 3. Although the department issues authorized protective instruments, in exigent circumstances, officers are not prohibited from using another object or instrument in order to protect themselves or others as long as the object is used in accordance with the limitations on *response to resistance/use of force* contained in this policy.

D. Authorized Use of Deadly Force

1. Officers may use deadly force *if such force is necessary, as a last resort due to a lack of reasonable and safe alternatives*, to defend themselves or another person from what they reasonably believe is an imminent threat of death or serious physical injury. *Such force must not create substantial unnecessary risk of injury to a third person.* The United States Supreme Court has ruled that any use of deadly force must be objectively reasonable.
2. *Officers may only use deadly force against a fleeing person if:*
 - A. *Such force is necessary, as a last resort due to a lack of reasonable and safe alternatives, to prevent imminent and serious bodily injury or death to the officer or another person;*
 - B. *the use of such force creates no substantial unnecessary risk of injury to a third person; and*
 - C. *reasonable suspicion exists that the fleeing person committed a felony that threatened or resulted in death or serious bodily injury;*

E. Unauthorized Use of Force:

Officers are prohibited from the following:

1. *Utilizing a neck or carotid restraint against an individual unless the use of deadly force would be authorized;*
2. *Shooting at a moving vehicle unless the vehicle is being used as a weapon and/or the circumstances would authorize the use of deadly force. Officers are prohibited from intentionally placing themselves in the path of a moving vehicle where an officer's use of deadly force would be the probable outcome. When confronted by an oncoming vehicle, officers will move out of its path, if possible, rather than fire at the vehicle.;*
3. *Shooting from a moving vehicle unless circumstances would authorize the use of deadly force,*
4. *Striking a restrained individual, or;*
5. *Firing warning shots.*

F. Factors to Consider when Employing Force in Response to Resistance:

Factors to be considered in determining the necessary level of force include the "Graham Factors" as listed below:

1. *The seriousness of the crime or suspected offense;*
2. *The level of threat or resistance presented by the subject;*
3. *Whether the subject was posing an immediate threat to officers or a danger to the community;*

And the following non-exhaustive list of factors should also be considered when evaluating the totality of the circumstances:

4. *The potential for injury to bystanders, officers or subjects;*
5. *The risk or apparent attempt by the subject to escape;*
6. *Pre-assault indicators -- The subject's actions and statements (as reasonably perceived by the officer at the time);*
7. *The time available to an officer to make a decision;*
8. *The training and experience of the officer;*
9. *The availability of and proximity or access to weapons by the subject;*

10. *Officer versus subject factors such as age, size, relative strength, skill level, injury/exhaustion and the number of officers available versus number of subjects;*
11. *Environmental factors such as night, day, snow, ice, terrain, etc.*
12. *Known or perceived physical disability and/or perceived abilities of the subject (e.g., known police fighter);*
13. *Previous violent or mental history of the subject known to the officer at the time;*
14. *Perception of the use of alcohol and/or drugs by the subject;*
15. *Officer on the ground or other unfavorable position that could compromise the officer's safety and their ability to defend themselves and the safety of bystanders; and*
16. *Any other exigent circumstances.*

G. Destruction of Animals

1. Humane Destruction of Injured Animals

Officers may discharge their firearms to destroy injured animals when no other reasonable alternative exists. Factors taken into account must include backstop, location, bystanders, etc. When an animal is destroyed, officers must complete the MCP 37, "Use of Force Report," in accordance with Appendix A. An incident report will be completed for the destruction of injured domestic animals (cats, dogs, cattle, horses, etc.). An incident report is not required for the humane destruction of non-domestic animals (deer, raccoons, and other wildlife). Officers will attempt to locate the owner of a destroyed domestic animal.

2. Destruction of Dangerous or Vicious Animals

If an officer destroys a dangerous or vicious animal (domestic or non-domestic) that presents a threat to the safety of the officer or another, an incident report documenting the incident shall be completed in addition to the MCP 37. This includes attempted destruction by firearm. Officers who are confronted by dangerous animals are encouraged to consider the use of non-firearm alternatives, to include an ECW. An MCP 37 is required in cases where an officer uses a protective instrument against a dangerous or vicious domestic animal.

IV. Firearms

A. Drawing a Firearm

Firearms may be drawn whenever officers reasonably fear for their safety or the safety of others.

B. Consideration of Backstop

When discharging a firearm for any reason, officers must exercise reasonable caution in order to avoid unnecessarily endangering the lives of bystanders. When possible, officers should give consideration to background, bystanders, and location.

V. Electronic Control Weapons

- A. An electronic control weapon (ECW) is a less lethal weapon, the deployment of which is a serious use of force. A ECW may only be deployed when an officer is confronted with circumstances that present a risk of immediate danger to the officer or others that is likely to be mitigated by use of the ECW. Use of the ECW will be in accordance with the guidance set forth in the *department's* Electronic Control Weapons Policy (FC 133).

VI. Less Lethal Devices

- A. *Less Lethal Devices* are intended to provide a less-lethal use of force option with greater standoff distance than other protective instruments. *Officers using these devices will be trained in their use, shall maintain any certifications as required, and shall utilize these devices consistent with the training provided.*

- B. All officers who use *these devices* must ensure that any person struck with *a* projectile and in custody receives a prompt medical evaluation *by emergency medical services and, if necessary, treatment* at a hospital. Officers will request that *the appropriate emergency medical service provider* transport the person. If *emergency medical services* refuses to transport the person an on-scene supervisor will ensure the person is transported to the hospital by an officer, *and the refusal is documented in an incident report*. Photos of all injuries will be taken.

VII. Custody and Transport Responsibilities

A. Important Considerations

Officers must be mindful of certain indicators and/or conditions when detaining or arresting a person. The following conditions and/or indicators may potentially contribute to sudden unexpected death following extreme physical exertion and/or restraint;

1. Excited Delirium: State of extreme mental and physiological excitement, characterized by extreme agitation, hyperthermia, *epiphora*, hostility, exceptional strength, and endurance without fatigue.
2. Alcohol or drug use/abuse
3. Obesity
4. Display of erratic/psychotic behavior
5. Incoherent speech
6. State of agitation
7. Subject intentionally injuring themselves
8. Subject disrobing or naked

Officers must recognize these factors and closely monitor a subject in custody in the aftermath of a struggle when one or more of the above indicators are present and the scene is secure, *and the safety of the officers and bystanders is no longer at risk*.

- B. Officers must take appropriate measures so that the individual being transported is able to breathe without restriction and if possible should lay the subject on their side or seated in an upright position. Officers must avoid transporting subjects in a face-down position whenever possible.

C. Medical Emergencies

1. Officers must immediately summon emergency medical assistance if the subject exhibits or complains of trouble breathing, becomes unresponsive, exhibits reduced levels of consciousness, or if in the officer's opinion the subject requires evaluation or medical treatment.
2. Officers shall render medical aid, consistent with their training, as soon as practical and safe to do so.

D. Medical Treatment

Officers and supervisors shall *provide and* obtain medical treatment *consistent with their training* as soon as *it is safe and* practical for individuals:

1. Who show signs of injury as a result of any use of force.
2. *Who request* medical attention.
3. When the officer or supervisor reasonably believes an individual is in need of medical attention as a result of any use of force.
4. Who show obvious signs that chemical restraint may be necessary.
 - a. Officers must specifically request an Advanced Life Support Unit (ALS). ALS units carry medication which can assist in treating individuals suffering from excited or agitated delirium.
5. Who have been exposed to an ECW (*emergency medical services providers are* an appropriate level of care; hospital/emergency medical center visit may not be required.)

E. Tactical Medics

1. Tactical Medics of the Emergency Services Unit (ESU) will meet the requirement of on-scene medical treatment, when deployed with the Tactical Section on high risk incidents such as raids, Emergency

Response Team (ERT) incidents, and other Tactical Section Operations. During the course of these operations, Tactical Medics may perform initial treatment and evaluation of injured or ill persons in accordance with Maryland Medical Protocols established by the Maryland Institute for Emergency Medical Services Systems (MIEMSS). Tactical Medics will also document any refusal of medical treatment and/or transport according to Maryland Medical Protocols. If a higher level of medical care or transport to a medical facility is required, the Tactical Medic will facilitate requesting any additional medical resources.

2. Decentralized Tactical Medics working in their primary duty assignment (not supporting the Tactical Section) will summons on-scene medical assistance for individuals who require medical treatment as the result of any use of force.

- F. Medical treatment will not be refused for any individual who requests it.
- G. If safety circumstances reasonably dictate moving the subject to another location, officers may have emergency medical *services* personnel meet the officers at a nearby location to assess the subject and render aid.

VIII. Use of Force Reporting Requirements

All uses of force must be submitted on an MCP37 and be documented on an incident report. If multiple officers use force on an event, each officer's use of force must be articulable on its own merits. Each officer who uses force is ordered to accurately and completely report the use of force on an incident or supplemental report by the end of their tour of duty.

Exception: An officer who uses

- 1. deadly force,*
- 2. force that causes death or serious injury, or*
- 3. discharges their firearm in any other incident (other than destroying seriously injured or aggressive wildlife or in training), will not complete an incident report. Another officer will complete the incident report in these cases.*

A. When to Report Use of Force or Firearms Discharge

The MCP 37 will be completed in the following circumstances (refer to Appendix A):

1. Anytime force is used to counteract a physical struggle.
2. Following the use of any force which results in an injury to an individual.
3. When an individual claims to have been injured as a result of use of force.
4. Whenever force is applied using a protective instrument.
5. Whenever a firearm is discharged other than authorized target practice.
6. Whenever a department canine inflicts injury on any subject or suspect in conjunction with a canine deployment.
7. Anytime an officer is assaulted or ambushed.

B. One Subject - One MCP 37

When multiple officers are involved in a *response to resistance*/use of force incident with one subject, it will be considered a single event for reporting purposes. Only one MCP 37 is needed unless more officers are involved than can be *documented* on a single MCP 37; in that case, additional MCP 37s must be completed. *However, each officer involved in using force, and the force used by each officer, must be documented on the MCP37.*

C. Multiple Subjects - Multiple MCP 37s

When *response to resistance*/force is used against more than one subject in an incident, *a separate* MCP 37 must be completed for each subject.

- D. In those instances, where SERT tactics are used for crowd/riot control during mass disturbances/protests that involve a ***response to resistance***/use of force against multiple subjects whose identities cannot be established, a single MCP 37 will be completed that includes basic known information (e.g., date, time, CR number, location, type of force used, reason, etc.). Additional details related to the incident, including the circumstances and nature of the force used, will be documented in the incident report.
- E. The MCP 37 will be completed prior to the end of the tour of duty ***and submitted to a supervisor, along with the required incident report and/or supplements***. The report will be forwarded, via the chain of command, to the bureau chief who, after review, will forward it to the Policy and Planning Division. No copies of the MCP 37 will be maintained other than those kept by the Policy and Planning Division.
- F. The MCP 37 will be used administratively to evaluate ***response to resistance***/use of force department-wide and will not be used by the Internal Affairs Division (IAD) in any subsequent investigation. An annual report summarizing the data from these forms will be made to the Use of Force and Weapons Review Committee, which, after review, will report its analysis and any recommendations to the Chief of Police.
- G. Officer's Responsibilities
In every circumstance described in section VIII.A. above, officers are required to adhere to the following:
1. On-duty officers must immediately report the incident to their on-duty supervisor. Off-duty officers must immediately report the incident to an on-duty supervisor in the district of occurrence.
 2. Officers will complete or provide information for the completion of an incident report(s), charging document(s), and/or the MCP 37. If the officer involved in the use of force does not complete some or all of the required documentation, then the reporting officer must ensure the information is accurately recorded. The reporting officer will identify the source of the information in the required documentation. If it is investigatively necessary to keep the source out of the required documentation, then the identity of the source will be maintained on notes in the officer's and/or detective's case file.
- H. Supervisor's Responsibilities
An ***Emergency Communications Center*** (ECC) supervisor will immediately notify an on-duty patrol supervisor of, and the on-duty supervisor will respond to, all ECW deployments, firearm discharges (except for the humane destruction of non-domestic animals), ***less lethal device deployment***, and any use of force that results in ***any injury that requires first aid, medical treatment, or transportation to a medical facility***, or in-custody death. Supervisors are required to notify the Duty Commander, or a ***District Executive*** of the district of occurrence during daytime hours Monday-Friday, of any of the above incidents.
1. Notifications: Supervisors are required to make the below notifications in the circumstances described regardless of whether the involved employee is on or off-duty.
 - a. Homicide Section: Immediately notify a Homicide Section supervisor in the following instances:
 - i. All intentional firearm discharges by an employee, whether injuries occur or not, with the exception of authorized range practice or the destruction of dangerous or injured animals.
 - ii. All ***unintentional*** firearm discharges by an employee that result in an injury to anyone, including the involved officer.
 - iii. All incidents where an individual sustains life-threatening injury as a result of police action.
 - b. Internal Affairs Division (IAD): Immediately notify IAD in the following instances:
 - i. All firearm discharges involving departmental firearms and authorized off-duty firearms, regardless of injury (except range practice or the humane destruction of non-domestic animals).
 - ii. Any range practice or destruction of an animal incident resulting in injury.
 - iii. Any use of force incident resulting in death or serious injury requiring the immediate hospitalization of a person in police custody.

- iv. Any other event or situation as may be deemed necessary after consultation with an executive officer.
- c. Training and Education Division (TED): Notify the TED to provide a replacement firearm, as appropriate.
2. Complete the MCP 37 if the officer is unable to complete it.
3. Review the submitted MCP 37 *and any required supplements* for accuracy and completeness.
4. Review *any* BWCS recordings when officers *are* involved in a reportable *response to resistance*/use of force incident. *Supervisors shall report potential violations of law or policy through their chain of command in accordance with departmental procedures.*
5. Ensure that an incident report and any additional reports are completed and submitted if required.
6. In incidents involving firearms discharges (except for authorized range practice or for the purpose of destroying animals), the supervisor will complete the MCP 37. In the section for supervisor's comments, the supervisor will indicate that the incident is under investigation and not provide any judgment about the circumstances.
7. Forward the MCP 37 *and any required supplement reports* to the bureau chief via the chain of command prior to the end of the tour of duty.
8. In instances where force was used to destroy a dangerous animal (domestic or non-domestic) that presented a threat to the safety of the officer or anyone else, supervisors will forward a copy of the incident report through the chain of command to their respective bureau chief. The bureau chief will, in turn, forward copies of the incident report to IAD for review.
9. Remove any officer from line duty who has been involved in any use of force that results in death or serious physical injury and refer them to the department's Traumatic Incident Program in accordance with that program's guidelines. (See FC 310, "Administrative Leave" and Appendix O of the FOP Collective Bargaining Agreement)
10. On-duty supervisors in the district of occurrence will ensure that off-duty officers involved in reportable use of force events fulfill the requirements of this directive. The on-duty supervisor will complete the supervisor's section of the MCP 37 and forward it, along with a copy, to the officer's assigned supervisor.

I. Executive Responsibilities:

Executives shall review all response to resistance/use of force incidents that occur under the executives' chain of command. This will include a review by the respective employee's bureau chief or designee. Executives who observe a potential violation of law or policy shall report such violation to the Director, Internal Affairs Division.

This review will include:

1. *A review of all submitted MCP 37 and associated incident reports, to include any supplement reports.*
2. *A review of all BWCS and MVS footage of the incident.*

J. Intervention:

Every officer has an obligation to ensure compliance, by themselves and others, with department directives and regulations, as well as all applicable laws. Officers must comply with the duty to intervene requirements of Function Code 300, Rule 6 – Use of Force. Officers who intervene with another's actual force must report such intervention with their supervisor as soon as practical. Any officer who makes such a report is protected from retaliation consistent with department policy.

K. Unknown Cause Weapons Discharge

Whenever a weapons system, such as a firearm, ECW, or Less-Lethal Device, discharges by unknown cause, officers are to notify their supervisor immediately. Supervisors are to:

1. *Ensure medical treatment is provided to any injured parties as provided for by department policy,*
2. *Document any damage to department or civilian property.*

3. *Secure, and treat as evidence, the weapon system and accessories (to include holster) if applicable. Supervisors shall utilize the Crime Scene Unit if necessary.*
4. *Notify a district executive or Duty Commander and the Internal Affairs Division.*
5. *Contact the Director, Training and Education Division (TED). The Director, TED, or designee, will ensure that:*
 - a. *A replacement weapon system is provided for an officer.*
 - b. *The affected weapon system and its' related accessories are seized, treated as evidence, and examined by internal and, if necessary, external subject matter experts.*
 - c. *A thorough investigation is conducted, and report issued, highlighting the suspected cause of the unknown weapon discharge and, if necessary, recommendations to prevent a future occurrence.*
 - i. *The investigation shall be separate but cooperative and concurrent to any investigation conducted by the Internal Affairs Division.*
 - ii. *Such report shall be provided to the Chief of Police no later than 90 days after the unknown cause weapon discharge.*

IX. Use of Force and Weapons Review Committee

- A. The Use of Force and Weapons Review Committee will review use of force incidents referred by a bureau chief, as well as all in custody deaths and intentional discharge of firearms by department personnel, and report the results of this review, along with any conclusions or recommendations, to the Chief of Police, as requested. The committee will focus on overall operations and procedures and not on individuals. In addition, the committee will periodically evaluate the list of authorized departmental firearms and protective instruments and, in coordination with the Joint Health and Safety Committee, make recommendations concerning approval, adoption, and required training/certification.
- B. The committee will be comprised of at least two executive officers from the Patrol Services Bureau (one will be the administrative lieutenant of PSB), one executive officer from the Investigative Services Bureau, one executive officer from *the Internal Affairs Division (IAD)*, *one executive officer from the Field Services Bureau (FSB)*, *the Executive Officer to the Chief of Police*, the Director, Policy and Planning Division, *a representative from the Office of the County Attorney*, and the Director, Training and Education Division, who will serve as the chair *of the committee*. *Bureau representatives will be appointed by their respective Bureau Chief's*. The committee will meet *at least quarterly*. *The chair of the committee may create subcommittees as necessary*.
- C. The Policy and Planning Division will be the repository for the MCP 37 and will provide annual reports to the committee and the FOP. Information for the committee will be provided by the Policy and Planning Division. Recommendations from the committee will be forwarded to the Labor-Management Relations Committee.
- D. The Policy and Planning Division will conduct an annual analysis of use of force activities, policies, and practices *consistent with MCPD internal requirements and applicable CALEA standards*. *The department shall provide all external reports as required by law*.

X. Training/Certification Requirements

- A. Authorization
Only officers who have successfully completed specified training courses and any required recertification courses as determined by the department are authorized to carry and/or use any defensive tactic, protective instrument, *less lethal device*, or firearm.

B. Annual Certification

Each officer must certify annually with all approved firearms, *less lethal devices*, and protective instruments that the officer is authorized to use. Annual firearms certification must meet the standards of the Maryland Police and Corrections Training Commission and department training standards. ***Officers who attend, but fail to pass, handgun qualification shall receive remediation training as soon as possible and be provided an opportunity for additional qualification attempts. The Director, TED, shall notify the employee's respective Division Director of the failure and the need for additional remediation.*** Failure to recertify annually on any firearm, *less lethal device*, or protective instrument will withdraw from the officer the authorization to carry or utilize that force option. In the case of *the* department-issued *handgun*, the *weapon* will be immediately turned over to range staff, ***and the officers' police powers suspended***, until recertification is completed. In the case of *all other* department issued *weapons (to include rifles, shotguns, protective instruments, or less lethal devices)*, such equipment will be immediately turned in to a sworn academy staff member until recertification is completed. ***Officers who fail to qualify with their off-duty handgun or personal purchase rifles are prohibited from carrying that weapon until qualified.***

C. Use of Force Policies

Officers will be provided a copy of, and instruction in, the department's *response to resistance*/use of force policy prior to being authorized to carry any firearm or protective instrument.

D. Documentation/Administration

The Director, TED, is responsible for the maintenance of certification records, approval lists for protective instruments and defensive tactics, training materials, and approved lesson plans.

E. Defensive Tactics

Original training in defensive tactics occurs during Entry Level Training. Retraining occurs during In-Service Training every year. The number of hours of training dedicated to defensive tactics will be determined by the Director, TED, who will maintain course descriptions and a list of approved defensive tactics.

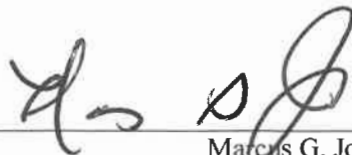
XI. **CALEA Standards: 6th Edition, 1.2.10, 4.1.1 – 4.1.7**

XII. **Proponent Unit:** Office of the Chief

XIII. **Cancellation:** This directive cancels Function Code 131, effective date **09-21-16** and Headquarters Memoranda **20-02**.

XIV. **Disclaimer**

This directive is for department use only and does not apply in any criminal or civil proceeding. This department policy should not be construed as the creation of a higher legal standard of safety or care in a legal proceeding relating to third party claims. ***Nothing in this directive should be construed to create a private cause of action.*** Violations of this directive will only form the basis for departmental administrative sanctions.



Marcus G. Jones
Chief of Police

**Use of Force Report – MCP 37
Criteria for Use**

**Appendix A
FC 131**

Incident	Instructions/Notifications	Reports Required
<ul style="list-style-type: none"> • Force used to counteract a physical struggle • When injury occurs from use of force • When injury is claimed to have occurred from use of force • Use of a protective instrument 	<ul style="list-style-type: none"> • MCP 37 <i>and supplement(s)</i> forwarded via chain 	<ul style="list-style-type: none"> • Police report <i>and supplement(s)</i> related to incident as required (MCP 37 referenced) • MCP 37
Intentional discharge of firearm – other than authorized target practice and destruction of animals	<ul style="list-style-type: none"> • MCP 37 forwarded via chain • Immediate notification of IAD and Homicide Section 	<ul style="list-style-type: none"> • Police report related to incident as required (firearm discharge referenced) • MCP 37
Accidental <i>Unintentional</i> discharge of firearm <u>with</u> injuries	<ul style="list-style-type: none"> • MCP 37 forwarded via chain • Immediate notification of IAD and Homicide Section 	<ul style="list-style-type: none"> • Police report related to incident as required (firearm discharge referenced) • MCP 37
Accidental <i>Unintentional</i> discharge of firearm <u>without</u> injuries	<ul style="list-style-type: none"> • MCP 37 forwarded via chain • Immediate notification of IAD 	<ul style="list-style-type: none"> • Police report related to incident as required (firearm discharge referenced) • MCP 37
Incident resulting in death or serious injury	<ul style="list-style-type: none"> • MCP 37 <i>and supplement(s)</i> forwarded via chain • Immediate notification of IAD and Homicide Section 	<ul style="list-style-type: none"> • Police report <i>and supplement(s)</i> related to incident as required (firearm discharge referenced) • MCP 37
Use of force against a police officer (police officer assaulted/ambushed)	<ul style="list-style-type: none"> • MCP 37 <i>and supplement(s)</i> forwarded via chain 	<ul style="list-style-type: none"> • Police report <i>and supplement(s)</i> related to incident as required (MCP 37 referenced) • MCP 37
Destruction of a non-domestic animal	MCP 37 forwarded to Policy and Planning Division (direct from supervisor via unit commander)	<ul style="list-style-type: none"> • No police report • No CR # (event # required) • MCP 37 only
Destruction of a domestic animal (including attempted destruction by firearm)	<ul style="list-style-type: none"> • MCP 37 forwarded via chain 	<ul style="list-style-type: none"> • Police report related to incident as required (MCP 37 referenced) • MCP 37
Destruction of a dangerous/vicious animal (including attempted destruction by firearm)	<ul style="list-style-type: none"> • MCP 37 forwarded via chain 	<ul style="list-style-type: none"> • Police report related to incident as required (MCP 37 referenced) • MCP 37
Canine (K-9) infliction of injury	<ul style="list-style-type: none"> • MCP 37 forwarded via chain 	<ul style="list-style-type: none"> • Police report related to incident as required (MCP 37 referenced) • MCP 37 • MCP 741