

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF POLICE COMPLAINTS**

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint Nos.:</b>	14-0312, 14-0313, & 14-0314
<b>Complainants:</b>	COMPLAINANT #1 COMPLAINANT #2 COMPLAINANT #3
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER #1 SUBJECT OFFICER #2 SUBJECT OFFICER #3 SUBJECT OFFICER #4 SUBJECT OFFICER #5
<b>Allegation 1 as to SUBJECT OFFICER #1 and SUBJECT OFFICER #3:</b>	Harassment (Search)
<b>Allegation 2 as to SUBJECT OFFICER #3</b>	Harassment (blocking video recording device)
<b>Allegation 3 as to SUBJECT OFFICER #2</b>	Harassment (ticket)
<b>Allegation 4 as to SUBJECT OFFICERS #2 and #4</b>	Harassment (arrest)
<b>Allegation 5 as to SUBJECT OFFICER #5</b>	Language and Conduct
<b>Allegation 6 as to SUBJECT OFFICER #5</b>	Failure to Identify
<b>Complaint Examiner:</b>	Jennifer A. Fischer, Esq.
<b>Merits Determination Date:</b>	April 29, 2016

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC), formerly the Office of Citizen Complaint Review (OCCR), has the authority to adjudicate citizen complaints against members of the Metropolitan Police Department (MPD) that allege abuse or misuse of police powers by such members, as provided by that section. This complaint was timely filed in the proper form as required by § 5-1107, and the complaint has been referred to this Complaint Examiner to determine the merits of the complaint as provided by § 5-1111(e).

## **I. SUMMARY OF COMPLAINT ALLEGATIONS**

The Complainants, COMPLAINANT #1, COMPLAINANT #2, and COMPLAINANT #3, filed separate complaints with the Office of Police Complaints (OPC) on July 16, 2014. Complainants #1, #2, AND #3 alleged that on June 24, 2014

- SUBJECT OFFICER #1 and SUBJECT OFFICER #3 unlawfully searched an unoccupied vehicle, which belonged to COMPLAINANT #2'S father, WITNESS #1, resulting in the harassment of WITNESS #1;
- SUBJECT OFFICER #3 harassed COMPLAINANT #3 when SUBJECT OFFICER #3 intentionally blocked and obstructed COMPLAINANT #3's video recording device;
- SUBJECT OFFICER #4 and SUBJECT OFFICER #2 harassed COMPLAINANT #2 by unlawfully arresting him for noise at night;
- SUBJECT OFFICER #5 failed to provide his identification when requested to do so and used language or engaged in conduct that was insulting, demeaning, or humiliating when interacting with COMPLAINANT #3 and his wife, WITNESS #2, at the Fourth District station.<sup>1</sup>

Additionally, COMPLAINANT #3 alleged that SUBJECT OFFICER #2 harassed the owner of the impounded vehicle, WITNESS #1, by issuing an unlawful citation for excessive idling.

Specifically, the complainants alleged that on June 24, 2014, they were passengers in a vehicle owned by COMPLAINANT #2's father, WITNESS #1. The driver of the vehicle left WITNESS #1's vehicle idling near the intersection IN NORTHWEST DC with complainants inside the vehicle. While the driver of the vehicle visited his girlfriend, the complainants got out of the vehicle while they waited for the driver to return. Shortly thereafter, MPD officers arrived at the scene in response to a lookout for an alleged suspect involved in an assault with a deadly weapon. MPD officers stopped and frisked the complainants, but no weapon was recovered. After being patted down, COMPLAINANT #3 began video recording the incident with his cell phone. SUBJECT OFFICER #3 approached COMPLAINANT #3, made physical contact with the cell phone and obstructed the recording.

Prior to the arrival of a Spanish speaking MPD interpreter, SUBJECT OFFICER #1 and SUBJECT OFFICER #3 entered and searched WITNESS #1's vehicle without the consent of the

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<sup>1</sup> COMPLAINANTS #1, #2, and #3 also alleged that SUBJECT OFFICERS #1 and #2 harassed them when the officers conducted an unlawful stop and frisk and used unnecessary or excessive force against the Complainants by pushing them against a fence during the stop and frisk. The Complainants further alleged that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 discriminated against them based on their national origin, Hispanic. Moreover, the Complainants alleged that SUBJECT OFFICER #4 harassed COMPLAINANT #2 when he threatened to arrest COMPLAINANT #2 solely for requesting to retrieve his cell phone, which was located inside an unoccupied vehicle which belonged to COMPLAINANT #2's father. COMPLAINANT #2 further alleged that MPD officers mishandled his cell phone, which was inside the impounded vehicle. Finally, COMPLAINANT #3 also alleged that SUBJECT OFFICER #2 issued an unwarranted traffic citation for parking in a bus zone. Pursuant to D.C. Code § 5-1108(1), on September 29, 2015, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's Executive Director. Thus, these allegations are not addressed here.

complainants, owner, or operator of the vehicle, but the complainants denied owning or driving the vehicle. The complainants repeatedly told the officers that the driver was visiting his girlfriend. SUBJECT OFFICER #2 later issued a citation to the owner of the vehicle for excessive idling. COMPLAINANT #2 requested to retrieve his cell phone located inside the vehicle, but the officers prohibited him from doing so. When COMPLAINANT #2 protested, he was ultimately arrested and charged with a Noise Act violation.

COMPLAINANT #2 was transported to the Fourth District police station for processing. WITNESS #1's vehicle was impounded for safekeeping. Complainants #1 and #3 waited for COMPLAINANT #3's wife, WITNESS #2, to arrive and transport them to the Fourth District station where COMPLAINANT #2 was located. Upon arriving at the Fourth District police station WITNESS #2 asked SUBJECT OFFICER #5 whether COMPLAINANT #2 was given "his right to a phone call." SUBJECT OFFICER #5 countered that COMPLAINANT #2 did not have a "right to a phone call." WITNESS #2 insisted that COMPLAINANT #2 had a right to a phone call. As she walked away from SUBJECT OFFICER #5, he raised his voice and repeatedly stated that there was no right to a phone call. SUBJECT OFFICER #5 also stated that "[he] work[ed] there, not [her]."

COMPLAINANT #3 then requested SUBJECT OFFICER #5's name, which SUBJECT OFFICER #5 refused to provide.

## **II. EVIDENTIARY HEARING**

This case has an unusual procedural history preceding the evidentiary hearing that bears explaining here. OPC notified the Subject Officers via the OPC liaison at the MPD of OPC's Report of Investigation ("ROI") regarding these complaints on November 3, 2015. The Subject Officers did not respond to the OPC's Report of Investigation. OPC appointed the Complaint Examiner on January 5, 2016 and after review of the ROI and exhibits, the Complaint Examiner notified OPC that an evidentiary hearing would be necessary to resolve certain questions of material fact on January 19, 2016. OPC communicated to the Subject Officers via the OPC liaison to provide information regarding their representation to schedule a pre-hearing conference. OPC gave the Subject Officers until January 29 to respond. OPC did not receive responses from the Subject Officers. OPC then contacted UNION REPRESENTATIVE #1, the Subject Officers' union representative, regarding representation for the Subject Officers in this matter on February 1, 2016 and did not receive a response. OPC also attempted to locate Complainants to provide them with counsel and schedule the pre-hearing conference. OPC was only able to find one of the complainants, COMPLAINANT #1, and arranged counsel for COMPLAINANT #1. Thus, in consultation with counsel for COMPLAINANT #1, the Complaint Examiner scheduled the pre-hearing conference for February 4, 2016.

At the pre-hearing conference, the counsel that had been arranged for COMPLAINANT #1 informed OPC and the Complaint Examiner that he had not been able to reach COMPLAINANT #1 and might not be able to proceed as counsel as a result. Following the pre-hearing conference, counsel informed the Complaint Examiner and OPC that he continued to be unable to reach COMPLAINANT #1 and that he would not be able to proceed without an engagement letter from the Complainant.

At the pre-hearing conference, the Complaint Examiner set the evidentiary hearing for March 1, 2016. The Complaint Examiner explained that there were three genuine issues of material fact in dispute to be addressed at the hearing:

- Whether SUBJECT OFFICER #2's issuing an invalid ticket was knowing or reckless, thus rising to the level of harassment;
- Whether the search of Complainants' vehicle was unauthorized by the law, regulations, and police orders and, if so, whether it constituted harassment.
- Clarification on the events leading to the arrest of COMPLAINANT #2 and whether his arrest constituted harassment.

The Complaint Examiner concluded that the remaining allegations did not involve any genuine issues of material fact in dispute based on a review of the OPC's Report of Investigation and, therefore, did not warrant an evidentiary hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

Based on the three issues to be addressed at the evidentiary hearing, the Complaint Examiner requested the following to appear as witnesses at the hearing: Complainants #1, #2 and #3, subject officers #2, #1, #4 and #3, and WITNESS OFFICER #1. Because neither the Complainants and Subject Officers nor their counsel appeared at the pre-hearing conference, the Complaint Examiner requested that subpoenas be issued to those witnesses. SUBJECT OFFICER #5 was not requested to attend because the complaints involving his conduct were not to be addressed at the evidentiary hearing as discussed above.

OPC issued notices to appear to the above mentioned Subject Officers, which were delivered via the OPC liaison at MPD on February 8, 2016, 21 days prior to the date of the evidentiary hearing. SUBJECT OFFICER #4 communicated with the Complaint Examiner via OPC on February 13, 2016, regarding the scheduling of the hearing. On February 29, 2016 counsel for the Subject Officers contacted OPC requesting a continuance of the evidentiary hearing because the FOP only informed his office that day regarding representation. Because the Subject Officers had received ample notification of the ROI, the pre-hearing conference, and the evidentiary hearing the Executive Director of OPC denied the request.

At the evidentiary hearing on March 1, 2016, counsel for the Subject Officers objected to the hearing on the grounds that the Subject Officers did not receive sufficient service. He did not provide details, however, to dispute that the Subject Officers had received the legally required notification. Because the Executive Director of OPC had already decided regarding the extension and it was the Complaint Examiner's understanding that the Subject Officers had received the notice of the hearing within the statutorily required deadlines through the mechanisms that coordinated between OPC and MPD, the Complaint Examiner proceeded with the evidentiary hearing.

At the evidentiary hearing, the Complaint Examiner heard the testimony of Complainant #3; Subject Officers #3, #1, #4, and #2, and WITNESS OFFICER #1. The following exhibits were introduced at the hearing by the Complaint Examiner:

MPD Circular 04-06 effective May 28, 2004 (Excessive Idling of Vehicles).  
Exhibit 37, videos 1 and 2 of the incident recorded on June 24, 2014

No objections were raised as to these exhibits.

At the hearing, the Complaint Examiner directed counsel for Subject Officers and COMPLAINANT #3 to provide post-hearing briefs regarding the issues to be decided at the evidentiary hearing. OPC arranged for counsel for COMPLAINANT #3. The parties submitted their post-hearing briefs on March 30, 2016, and these were considered by the Complaint Examiner in the determination here.

Although the Report of Investigation and attached exhibits (other than exhibit 37) were not formally introduced into the record at the evidentiary hearing, no objections to these exhibits were raised by the parties and they have been considered in the determination here. The exhibits include:

- Exhibit 1: OPC Formal Complaint of COMPLAINANT #1, dated and received on July 16, 2014
- Exhibit 2: OPC Formal Complaint of COMPLAINANT #2, dated and received on July 16, 2014
- Exhibit 3: OPC Formal Complaint of COMPLAINANT #3, dated and received on July 16, 2014
- Exhibit 4: OPC Dismissal, dated October 1, 2015
- Exhibit 5: Signed Statement of COMPLAINANT #1, dated August 1, 2014
- Exhibit 6: Translation of Signed Statement of COMPLAINANT #1
- Exhibit 7: Signed Statement of COMPLAINANT #2, dated July 29, 2014
- Exhibit 8: Translation of Signed Statement of COMPLAINANT #2
- Exhibit 9: Signed Statement of COMPLAINANT #3, dated July 30, 2014
- Exhibit 10: Translation of Signed Statement of COMPLAINANT #3
- Exhibit 11: Memorandum of Interview of COMPLAINANT #3
- Exhibit 12: Signed Statement of WITNESS #2, dated September 17, 2014
- Exhibit 13: Signed Statement of WITNESS #3, dated September 11, 2014

- Exhibit 14: Signed Statement of WITNESS #4, dated September 11, 2014
- Exhibit 15: Signed Statement of SUBJECT OFFICER #1, dated March 4, 2015
- Exhibit 16: Signed Statement of SUBJECT OFFICER #2, dated March 18, 2015
- Exhibit 17: Signed Statement of SUBJECT OFFICER #3, dated March 10, 2015
- Exhibit 18: Signed Statement of SUBJECT OFFICER #4, dated April 7, 2015
- Exhibit 19: Signed Statement of SUBJECT OFFICER #5, dated April 15, 2015
- Exhibit 20: Signed Statement of WITNESS OFFICER #1, dated February 12, 2015
- Exhibit 21: Signed Statement of WITNESS OFFICER #2, dated February 26, 2015
- Exhibit 22: Signed Statement of WITNESS OFFICER #3, dated March 19, 2015
- Exhibit 23: Signed Statement of WITNESS OFFICER #4, dated March 11, 2015
- Exhibit 24: Signed Statement of WITNESS OFFICER #5, dated May 6, 2015
- Exhibit 25: Signed Statement of WITNESS OFFICER #6, dated May 13, 2015
- Exhibit 26: Incident/Investigation Report of Arrest of COMPLAINANT #2, dated June 25, 2014
- Exhibit 27: Incident/Investigation Report of stop and frisk of Complainants and impoundment for safekeeping of vehicle registered to WITNESS #1, dated June 25, 2014
- Exhibit 28: Arrest Report for Arrest of COMPLAINANT #2, dated June 25, 2014
- Exhibit 29: Notice of Infraction issued to WITNESS #1's vehicle for Excessive Idling dated June 25, 2014
- Exhibit 30: Event Chronology
- Exhibit 31: Audio file of POLICE DISTRICT Radio communications on June 24, 2014
- Exhibit 32: Transcript of Audio file of POLICE DISTRICT Radio communications
- Exhibit 33: Audio file of radio run of the POLICE DISTRICT on the TAC Communications dated June 24, 2014
- Exhibit 34: Transcript of Audio file of POLICE DISTRICT TAC Communications

- Exhibit 35: Audio file of 911 call dated June 24, 2014
- Exhibit 36: Transcript of audio file of 911 call
- Exhibit 37: Five videos made on June 24, 2014 relating to incidents in the complaints:  
Video 1: recording of incident IN NORTHWEST DC  
Video 2: recording of incident IN NORTHWEST DC  
Video 3: recording of damaged identification cards  
Video 4: recording of appearance of Complainants  
Video 5: recording of interaction at POLICE DISTRICT Police Station
- Exhibit 38: Transcript of the five videos
- Exhibit 39: Translation of the transcript of the five videos

Because COMPLAINANTS #1 and #2 did not appear at the evidentiary hearing and were not available for cross-examination, the Complaint Examiner has not relied upon their complaint statements and witness statements for evidence except to the extent that they are corroborated by other reliable evidence.

### **III. FINDINGS OF FACT**

Based on a review of OPC's Report of Investigation including exhibits, and an evidentiary hearing conducted on March 1, 2016, the Complaint Examiner finds the material facts regarding this complaint to be:

1. COMPLAINANT #2's father, WITNESS #1, permitted his son, COMPLAINANT #2 to borrow his car the evening of June 24, 2014, with a friend of COMPLAINANT #2 as the driver.
2. At some point in the evening, the driver of WITNESS #1's vehicle parked the car in front of a bus stop IN NORTHWEST DC near the intersection with A STREET IN NW DC. He left the engine running with the three Complainants in the car while he went to his girlfriend's house nearby. Shortly thereafter, the three Complainants exited the car and stood on the sidewalk while they waited for the driver to return.
3. The three Complainants are Hispanic and appear to be in their twenties.
4. Around that time, a caller to 911 reported "a guy with a knife to another guy at . . . AN INTERSECTION IN NORTHWEST DC [Northwest]." He reported that both men looked Hispanic. He "couldn't see the knife very clearly, but [he] had something up long and shiny up to his throat." The guy with the knife "had on [] a white, [] short sleeve shirt . . . and ha[d] kinda longish hair. Maybe down to his shoulders" and looked as if he was in his twenties. The one with the knife to his throat had "short hair with a mustache and [] a black shirt on." The caller then corrected and said there were two men against the one, but that he didn't get a look at the third man. He said that they were up against a trashcan or on the sidewalk. He also reported that he thought they had returned

- to their car and were driving behind the caller. The description of the car was vague, a “Japanese, two or four door, . . . kinda smallish car, maybe slight blue or grey.”<sup>2</sup>
5. The dispatcher then sent out a call for an assault with a deadly weapon, knife, IN NORTHWEST DC. The dispatcher described the suspect as a “Hispanic male wearing a . . . white . . . sleeveless shirt” with “long hair to his shoulders” and “in his twenties.” The dispatcher said there was also “another suspect on the scene” described as “short, mustache, black shirt.” The dispatcher explained that the caller said that suspect one “was putting a knife to the subject” and had “him pinned down against the trash can.” A minute later, the dispatcher then said that the caller stated that “one of the suspects may be trying to leave the scene in a two door blue or green or grey Honda.”<sup>3</sup>
  6. Some minutes later, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 arrived first on the scene at approximately 23:56 IN NORTHWEST DC. WITNESS OFFICER #4, SUBJECT OFFICER #3, and WITNESS OFFICER #3 arrived approximately a minute and a half later within seconds of each other.
  7. Shortly after his arrival, WITNESS OFFICER #3 asked the dispatcher to send a Spanish speaking officer.
  8. SUBJECT OFFICER #1 then asked the dispatcher to check on the caller to see if they wanted to be interviewed to know exactly what they saw. He said “Can you have him call back? Make sure that the individuals he saw are the ones we have stopped. They were beside a trashcan.” The dispatcher reiterated that the main suspect with the knife had a white button down shirt with long hair to his shoulders and was in his twenties. The dispatcher also says that the “caller said he left the scene in his vehicle” and that they have nothing further.<sup>4</sup>
  9. Shortly thereafter, WITNESS OFFICER #3 tells the dispatcher “being as he did not want to be interviewed by us, right now we have nothing” and the dispatcher says again, “[h]e left the scene in his vehicle.”<sup>5</sup>
  10. The officers saw Complainants near a trash can within a half block from the reported site of the incident. SUBJECT OFFICER #1, #2, and an unidentified Officer stopped and frisked the Complainants.
  11. Once the officers finished the frisk of the Complainants and searching for the knife, they turned their attention to the vehicle parked in the bus stop with the engine running near to where the Complainants had been standing.
  12. Around this time, COMPLAINANT #3 began videotaping the incident.
  13. While the officers and Complainants were talking, SUBJECT OFFICER #3 approached COMPLAINANT #3 and, unprovoked, covered COMPLAINANT #3’s phone, which he was using to videotape the incident.

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<sup>2</sup> Exh. 35.

<sup>3</sup> Exh. 31. There are some discrepancies between the report of the 911 caller and the information transmitted by the dispatcher. The two most notable are communicating the description of the victim given by the caller as a description of the second suspect. The second error is that the caller said that the men had left the scene in a car, but the dispatcher only reported that one of the suspects may be trying to leave the scene in a car. These are important differences and it is recommended that efforts be taken to ensure that communications are more accurately transmitted to ensure Officers have the most accurate information possible to conduct their investigations. Confusions such as these can lead to the wrong people being stopped, and, had the suspects truly been fleeing, a failure to pursue the actual suspects.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* See *infra* note 3.



14. WITNESS OFFICER #1, the Spanish speaking Officer, arrived after COMPLAINANT #3 was recording.
15. The officers asked the Complainants if they owned or were driving the car. The Complainants responded that they did not own nor were they operating the vehicle. The Complainants explained their friend was driving and that he went to his girlfriend's and they were waiting for him to return. COMPLAINANT #3 explained the situation to the officers in broken English prior to WITNESS OFFICER #1's arrival and then he and COMPLAINANT #2 explained it in Spanish to WITNESS OFFICER #1 when he arrived.
16. The officers at the scene determined that since none of the Complainants owned the car, the officers should take the car into custody for safekeeping.
17. During the time attention was focused on the vehicle, at least three officers leaned inside the vehicle. Two of the officers that went inside the vehicle were SUBJECT OFFICER #1 and SUBJECT OFFICER #3.
18. Approximately five to six minutes from the time the dispatcher first dispatched officers to the scene, WITNESS OFFICER #2 asks the Dispatcher to run the tag of the vehicle. The Dispatcher responds that the owner's name is "WITNESS #1'S NAME SPELLED IN THE PHONETIC APLHABET." This spells WITNESS #1'S NAME.<sup>6</sup>
19. SUBJECT OFFICER #4 then requests that a unit go to the address to which it is registered to "see if the owner of the vehicle is on the scene."<sup>7</sup> After some confusion in the transmission, WITNESS OFFICER #7 goes to the address to which the car is registered. Approximately 8 to 9 minutes from the time the dispatcher first dispatched officers to the scene, WITNESS OFFICER #7 arrives at the address of the car registration and within 23 minutes into the event WITNESS OFFICER #7 reports that he's knocked on the door of the registered address numerous times and there is no response and asks to be cleared from the location due to no response.
20. Approximately 16 minutes from the time officers arrive, WITNESS OFFICER #4 requested a crane to pick up the car IN NORTHWEST DC.
21. WITNESS OFFICER #1 explained to the Complainants that the officers were going to tow the car and take it into custody unless the owner appeared before the tow truck and demonstrated ownership.
22. This explanation led COMPLAINANT #2 to request to retrieve his phone from the car to be able to call the driver.
23. After some discussion, SUBJECT OFFICER #4 directs COMPLAINANT #2 to give his number to COMPLAINANT #1 to call his phone, which COMPLAINANT #2 does. COMPLAINANT #1 calls the number COMPLAINANT #2 gives him. Although the phone in the car does not ring because the GPS on the phone is connected to the car, the screen of the phone lights up. Nonetheless, SUBJECT OFFICER #4 decides not to allow COMPLAINANT #2 to retrieve his phone. As a result, COMPLAINANT #2 became heated.
24. COMPLAINANT #2 was warned several times to lower his voice. He was warned that if he did not comply, that he would be arrested for a noise violation.

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<sup>6</sup> *Id.* The dispatcher mispronounced WITNESS #1's name. It is WITNESS #1'S NAME, not AN INCORRECT NAME. The dispatcher also said ANOTHER INCORRECT NAME instead of THE CORRECT NAME. Where the dispatcher spelled the name, however, it was correct.

<sup>7</sup> *Id.*

25. Two nearby residents came out on their porch around this time, which was witnessed by SUBJECT OFFICER #2 and SUBJECT OFFICER #3.
26. COMPLAINANT #2 did not lower his voice and SUBJECT OFFICER #4 directed SUBJECT OFFICER #2 to arrest him, which SUBJECT OFFICER #2 did.
27. At some point during the incident, SUBJECT OFFICER #2 issued a Notice of Infraction to WITNESS #1's car for "Excessive Idling."
28. COMPLAINANT #2 was transported to the POLICE DISTRICT police station for processing.
29. WITNESS #1's vehicle was impounded for safekeeping.
30. COMPLAINANT #3's wife, WITNESS #2 picked up Complainants #1 and #3 who then transported them to the POLICE DISTRICT station to retrieve COMPLAINANT #2.
31. Upon arriving at the POLICE DISTRICT police station, WITNESS #2 asked SUBJECT OFFICER #5 whether COMPLAINANT #2 was given "his right to a phone call." SUBJECT OFFICER #5 that COMPLAINANT #2 did not have a "right to a phone call." WITNESS #2 insisted that COMPLAINANT #2 had a right to a phone call. As she walked away from SUBJECT OFFICER #5, he raised his voice and repeatedly stated that there was no right to a phone call. SUBJECT OFFICER #5 also stated that "[he] work[ed] there, not [her]."
32. COMPLAINANT #3 then requested SUBJECT OFFICER #5's name, which SUBJECT OFFICER #5 did not provide.

#### **IV. DISCUSSION**

Pursuant to D.C. Official Code § 5-1107(a), "The Office [of Police Complaints] shall have the authority to receive and to ... adjudicate a citizen complaint against a member or members of the MPD ... that alleges abuse or misuse of police powers by such member or members, including: (1) harassment; (2) use of unnecessary or excessive force; (3) use of language or conduct that is insulting, demeaning, or humiliating; (4) discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business; (5) retaliation against a person for filing a complaint pursuant to [the Act]; or (6) failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public."

##### **A. Harassment Allegations**

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 as "words, conduct, gestures, or other actions directed at a person that are purposefully, knowingly, or recklessly in violation of the law, or internal guidelines of the MPD, so as to: (a) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (b) deny or impede the person in the exercise or enjoyment of any right, privilege, power, or immunity."

The regulations governing OPC define harassment as "[w]ords, conduct, gestures or other actions directed at a person that are purposefully, knowingly, or recklessly in violation of the law

or internal guidelines of the MPD ... so as to (1) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (2) deny or impede the person in the exercise or enjoyment of any right, privilege, power or immunity. In determining whether conduct constitutes harassment, [OPC] will look to the totality of the circumstances surrounding the alleged incident, including, where appropriate, whether the officer adhered to applicable orders, policies, procedures, practices, and training of the MPD ... the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating.” D.C. Mun. Regs. tit. 6A, § 2199.1.

**1. Allegations of Harassment Against Officers #1 and SUBJECT OFFICER #3 Based on Their Search of the Vehicle**

Complainants allege that SUBJECT OFFICER #1 and SUBJECT OFFICER #3 unlawfully searched WITNESS #1’s vehicle. Based on the definition of harassment, to establish harassment by SUBJECT OFFICER #1 and SUBJECT OFFICER #3 for searching the vehicle, there must have been 1) a search of the vehicle directed at Complainants or another by SUBJECT OFFICER #1 and SUBJECT OFFICER #3; 2) that was purposeful, knowing, or reckless; 3) in violation of the law or internal guidelines of the MPD.

**a) SUBJECT OFFICER #1 and SUBJECT OFFICER #3 conducted searches directed at WITNESS #1**

There is no question that SUBJECT OFFICER #1 and SUBJECT OFFICER #3 searched WITNESS #1’s vehicle. Both Subject Officers admit to the searches and the search by SUBJECT OFFICER #3 is visible in the video evidence:

- In SUBJECT OFFICER #1’s witness statement, which he gave approximately eight months after the incident he says “After I turned my attention to the vehicle, I think that I opened the door and looked under the seat to see if there were any weapons or alcohol. I do not remember who ran the tag of the vehicle.” Exh. 15, at 2. Over a year later, at the evidentiary hearing, SUBJECT OFFICER #1 testified that he went into the car, “while we were on the scene. . . . Certainly you make observations. You’re taking a vehicle into custody. . . . technically if there were valuables, you would have done an inventory of the vehicle . . . you know we were looking for a registration to get a name, anything like that.” Tr. 84:2-9. When asked why he searched the car without permission, he stated “[w]hose permission would I have gotten? . . . That was abandoned property.” Tr. 89:19-90:8.
- SUBJECT OFFICER #3 initially stated in his witness statement approximately eight months after the incident that he “never touched the vehicle that was parked near the intersection IN NORTHWEST DC. No officer went inside that vehicle. I only stood near the vehicle, but never went inside.” Exh. 17, at 3. After being shown the video at the evidentiary hearing a year later, however, he stated “[w]e went and searched the car . . . I was in the car. We were looking for the registration to the car at the time. . . . which was in the glove compartment. . . .

Searching the car, I didn't see – in the truck [sic] like that, we didn't do none of that. That's what you call a search. We did not search, no, ever towards a search, not like that. . . . If I'm not mistaken, I think . . . I did have the registration in my hand.” Tr. 64:18-65:11.

- While the recording of the incident does not constantly show the car, during the periods in which the vehicle is visible, at least five officers can be seen looking into the car. Exh. 37, video 1 at 0:03, at 4:20, at 4:29, and at 8:30. At 0:03 of video 1, three officers can be seen next to the passenger door of the vehicle. Exh. 37. Two officers are shining their flashlights into the car, while a third is bent over and his head and body is inside the vehicle. *Id.* The identity of these officers is not visible. *Id.* At 4:20 an officer can be seen shining a flashlight into the driver's window. At 4:29 of video 1, SUBJECT OFFICER #3 is visible opening the passenger side door, leaning inside, and shining his flashlight around the interior. *Id.* The entire search is not visible in the video, but during the visible portion, it does not appear that he is opening the glove compartment, although he may have opened it during the portions of the video when his search was not visible. *Id.* Regardless, his search was more extensive than simply opening the glove compartment to retrieve the driver's registration. *Id.* The video does not show SUBJECT OFFICER #3 removing himself from the car, but when the camera returns to show the car, the passenger door is still sitting open. *Id.* At 8:30 another officer is seen looking into the driver's side window.

The searches are considered to have been “directed at” WITNESS #1 for the purposes of the harassment allegation even though he was not present nor specifically known by the Subject Officers. The Supreme Court discussed in *Jones v. United States* who is an “aggrieved party” of an unlawful search and seizure for purposes of Rule 41(g) of the Federal Rules of Criminal Procedure for the United States District Courts. 362 U.S. 257, 261 (1960) overruled on other grounds *U.S. v. Salvucci*, 448 U.S. 83 (1980). The court defined “aggrieved party” as the “victim of a search or seizure,” which it equated with “the one against whom the search was directed.” *Id.* Because WITNESS #1 was the aggrieved party or the purported victim of the search as the owner of the car, he is deemed to be the one against whom the search was directed.

**b) The searches violated the law and internal guidelines of the MPD**

*i. Consent or Search Warrant*

The search here was in violation of the law and internal guidelines of the MPD. In the absence of consent, a search warrant is typically required to search persons and property under the Fourth Amendment. *See Katz v. United States*, 389 U.S. 347 (1967). Here, there is no contention that there was consent or a search warrant. Rather, the justification for the searches seems to be that SUBJECT OFFICER #1 and SUBJECT OFFICER #3 understood the vehicle as being abandoned. WITNESS #1 was not asked to consent and thus, could not consent.

In WITNESS #1's absence, COMPLAINANT #2 may have had the right to exercise consent as his father had authorized him to borrow the car. See *United States v. Scott*, 987 A.2d 1180, 1189 (D.C. 2010) (“Although Scott was not the owner of the Lexus, he presumably had a reasonable expectation of privacy in it at the time of his arrest because he had been borrowing and had the use of the car with its owner’s express permission.”). In video 1 at minute 9:32, COMPLAINANT #2 says to WITNESS OFFICER #1 in Spanish “Search the car. Check it.” His statement is made after SUBJECT OFFICER #3 is seen in the video searching the car, however, and thus does not provide consent for his search.

It is unclear from the testimony or video when SUBJECT OFFICER #1 conducted his search, but he states that he conducted the search “after it was determined nobody knew whose car it was.” Tr. 82:22-83:10. His testimony indicates that his search took place prior to COMPLAINANT #2's consent to search. According to the video evidence, COMPLAINANT #2's consent came after the Complainants denied ownership of the car and several minutes after the officers concluded that none of the Complainants owned the car so they were going to take it into custody. Exh. 37, video 1, minute 3:57. Thus, it appears that SUBJECT OFFICER #1's search would have been conducted prior to COMPLAINANT #2's consent to the search.

Regardless, there is no indication that WITNESS OFFICER #1 conveyed the consent to the officers and none of the officers contend that COMPLAINANT #2 provided consent to search the car or that they understood the Complainants as having a right to exercise consent to search the car. Thus, the searches by SUBJECT OFFICER #1 and SUBJECT OFFICER #3 were made without consent or a search warrant.

ii) *Probable Cause*

There are exceptions to requiring consent or a search warrant for an automobile search, “[i]f a car is readily mobile and probable cause exists to believe it contains contraband.” *U.S. v. Scott*, 987 A.2d 1180, 1191 (D.C. 2010) quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) citing *California v. Carney*, 471 U.S. 386, 393, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). Here, there is no question about the mobility of the vehicle so the question is whether there was probable cause to conduct a search. “Probable cause to search a particular place exists ‘where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found’ there.” *Id.* quoting *Omelas v. United States*, 517 U.S. 690, 696 (1996).

Here, the officers do not articulate any probable cause to conduct a search of the vehicle in their initial witness statements, which were taken closest in time to the event at issue. SUBJECT OFFICER #3 doesn't even try to articulate probable cause for his search in his initial witness statement as he completely denies conducting any search. SUBJECT OFFICER #1, in his initial witness statement, said that “he looked under the seat to see if there were any weapons or alcohol,” but he did not articulate any basis for probable cause to conduct such a search. He provides no reason to believe that the alleged knife would be in the car. The caller only claimed to have seen one man holding a knife to another man's neck next to a trash can. Although the caller reports seeing “them”<sup>8</sup> drive away from the scene, this is not clearly conveyed to the

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<sup>8</sup> Who “them” are in the call is not clarified as to whether it is the perpetrators and the victim or one or the other.

officers so they have no reason to believe that the person with the knife ever entered a car, nor that he entered the car at issue here. The officers did not witness the alleged activity and never saw any of the Complainants or anyone else entering the vehicle. Moreover, early into the stop, SUBJECT OFFICER #1 admits that the caller was mistaken in what he saw, Exh. 38, video 1, at 1:45 (“obviously whatever they think they saw, they didn’t see”), or at the very least, as stated by WITNESS OFFICER #3 to the dispatcher, the officers had nothing to go on. Exh. 31, between 4:51 to 7:08 (“being as he did not want to be interviewed by us, right now we have nothing.”). Moreover, the officers do not articulate probable cause to believe that some other crime had, the evidence of which would be located in the vehicle.

At the evidentiary hearing, over a year after providing their initial witness statements and a year and eight months after the incident, SUBJECT OFFICER #1 and SUBJECT OFFICER #3 change their testimony as to the searches raising questions of credibility about their testimony. Nonetheless, their new testimony also fails to provide any articulable probable cause to conduct a search. Rather, SUBJECT OFFICER #1 said he was not searching the vehicle, but conducting an inventory for valuables and looking for a vehicle registration to get a name, presumably of the owner. He also indicated a belief that when an officer believes a car is abandoned, consent to conduct a search is unnecessary. SUBJECT OFFICER #3 similarly testified that he was not searching the car, which would involve searching the trunk, but only looking for the registration, which he allegedly found in the glove compartment. Even if their testimony is true, to the extent they claim that their searches were not searches, but an “inventory” or that they were only searching for a vehicle registration, their claims do not meet the required standards to avoid violating WITNESS #1’s reasonable expectation of privacy under the Fourth Amendment.

### *iii) Exigent Circumstances*

Another exception to the Fourth Amendment warrant requirement is for exigent circumstances “when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” *Kentucky v. King*, 563 U.S. 452, 460 (2011) (internal quotation marks and alteration omitted). Exigent circumstances can include, for example, hot pursuit, imminent destruction of evidence, and protection of the police or the public. *Hawkins v. United States*, 113 A.3d 216, 220 (D.C. 2015) (citing *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970)). Here, the officers make no argument or provide any basis for believing that there was an exigent circumstance. There was no hot pursuit, no one was in danger, and there was no imminent threat of evidence being destroyed. There is no reason to believe that the Complainants were a threat to the public or police or that they might have been about to destroy evidence found in the car. Moreover, at the time of the searches of the vehicle, the Complainants are being kept safely away from the vehicle so anything inside could not have been used by them. In the video, the Complainants are surrounded by at least 5 officers with approximately an additional 7 – 10 officers on the scene. Exh. 38, video 1. The Complainants appear to be standing approximately 10-15 feet away from the vehicle. Exh. 38, video 1. This is consistent with SUBJECT OFFICER #1’s testimony that the Complainants were “not within 10 feet of the car, not even within spitting distance of the car.” Tr. 82:8-83:1. Thus, the searches were not justified by exigent circumstances.

### *iv) Inventory*

It is not necessary to determine whether the officers reasonably believed the car was abandoned. The fact that the officers were unable to locate the owner of the car, gave them authority to impound the vehicle for protective safekeeping. *Madison v. U.S.*, 512 A.2d 279, 281 (D.C. 1986) (holding the impoundment of a car when the officers could not determine if the arrested driver was an authorized user of the car or who owned the car a legitimate exercise of the officers' community caretaking function); MPD General Order Topic OPS, Series 303, No. 03, Part IV.C.5.d.(3) ("MPD may take custody of a vehicle for safekeeping in situations where an officer believes it is necessary to safeguard the property of the owner."). The Complainants denied ownership of the car and the driver did not return. Exh. 38, video 1, at 2:04 and 9:15. The officers made efforts to locate the owner by asking the dispatcher to run the tags of the vehicle and then sending an officer to the address to which the vehicle was registered, but they were unable to locate the owner. Exh. 31 and 32, Radio Run transcript, between 4:51 and 11:21. Thus, the impoundment of the vehicle was proper.

Nonetheless, an inventory of a vehicle impounded for protective safekeeping is allowed under MPD internal guidelines only when the vehicle has been brought to a police facility. MPD General Order Topic OPS, Series 303, No. 03, Part IV.C.5.e.(2) ("All MPD-impounded vehicles shall be inventoried in accordance with General Order 602.01 (Automobile Searches and Seizures)"); MPD General Order, Series 602, Part I(B)(4) ("If a vehicle is not placed on police department property or near a police facility, it is not a traffic impoundment and shall not be inventoried or searched in any way") and Part I(B)(5) ("An officer who impounds a vehicle as a non-criminal impoundment shall completely inventory the vehicle immediately upon its arrival at a police facility."). In the circumstance of deciding to impound a vehicle because of an unknown owner, the most that the officers could have done pursuant to police policy prior to the vehicle arriving at or near police department property is to look through the windows of the vehicle, including by means of a flashlight, as this would be considered "plain and open view." MPD General Order, Series 602, Part I(A)(4). SUBJECT OFFICER #1 and SUBJECT OFFICER #3 here admit to entering the vehicle, however, which is more than looking at what is visible in plain view. Moreover, the vehicle was not on police department property or near a police facility. Thus, neither officer conducted a lawful inventory.

v) *Community caretaking function*

Subject Officers' counsel contends that SUBJECT OFFICER #1's and SUBJECT OFFICER #3's alleged search for the vehicle registration is allowed under the "community caretaking doctrine." The "community caretaking" justification for a warrantless entry into private property is premised on the 'ambulatory character' of vehicles, the reality that 'enforcement of the traffic laws and supervision of vehicle traffic may be a large part of a police officer's job [,]' and the fact that police officers have 'extensive, and often noncriminal contact with automobiles[.]'" *Davis v. U.S.*, 110 A.3d 590, 595 (D.C. 2015) *citing Cady v. Dombrowski*, 413 U.S. 433, 442-43 (1973).

In *Hawkins v. United States*, the D.C. Court of Appeals outlined a four part test for the community caretaking exception to apply: "the government must show: 1) by specific and articulable facts that the government's conduct was totally divorced from the detection,

investigation, or acquisition of evidence relating to the violation of the criminal statute; 2) the government's conduct was reasonable considering the availability, feasibility, and effectiveness of alternatives to the officer's action; 3) the officer's action ended when the citizen or community was no longer in need of assistance; 4) the government's interests outweigh the citizen's interest in being free from minor government interference." 113 A.3d at 222 quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) and *U.S. v. Gaskin*, 368 A.2d 1138, 1139 (D.C. 1977).

In *Hawkins*, the court held that the Marshall's entering the appellant's car to turn off the engine after the officer had told the appellant driver to walk toward the front of the vehicle and sit on the ground met the community caretaking function. *Id.* at 222. In *Davis v. United States*, the D.C. Court of Appeals found that where the driver of the vehicle had been removed from it, the Officer's moving the vehicle when it had been left running and was parked in the middle of a parking lot and blocking other vehicles also met the community caretaking function. 110 A.3d at 592, 597-98 (D.C. 2015). In *Davis*, the court cites other jurisdictions in which the community caretaking function was found to have been exercised in regards to unattended, running vehicles. *Id.* at 596. These cases generally involved turning off engines and locking doors,<sup>9</sup> moving improperly parked vehicles,<sup>10</sup> protecting the public from the danger of an unattended running vehicle and preventing theft of the car,<sup>11</sup> and protecting "themselves and the public from the danger created by the manner in which the car was left unattended."<sup>12</sup> *Id.*

Here, it is notable that no Subject Officer or Witness Officer mentions turning off the engine, which the officers said was running, or moving the car so that it was not blocking the bus stop. A search for a vehicle registration could qualify under the community caretaking function in the search for the owner, but the officers' assertions that they were entering the car simply to look for the registration is not credible given they only provided this reason at the evidentiary hearing and not in their initial witness statements. In fact, SUBJECT OFFICER #1 initially stated in his witness statement that the objective of his search was for weapons and alcohol and he specifically referenced one of the officers running the tag of the vehicle. One would expect that if he had been looking for the vehicle registration that he would have mentioned it when first interviewed. In SUBJECT OFFICER #3's case, he said in his witness statement that he "never went inside" the vehicle. Moreover, even if SUBJECT OFFICER #1's and SUBJECT OFFICER #3's statements at the evidentiary hearing that they were searching for the registration were credible, at least three officers looked inside the vehicle, which is excessive to look for a registration in a glovebox. One officer conducting such a search would have been sufficient. Finally, in the case of SUBJECT OFFICER #1, he states several objectives of his searches: for weapons and alcohol, to look for valuables as part of an inventory incident to custody, and only at the end, as a search for the registration of the vehicle. Thus, even if his search for the registration is true and a valid application of the community caretaking doctrine, the other bases

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<sup>9</sup> *State v. Carroway*, No. A-1966-11T3, 2013 WL 3329453, at \*2 (N.J.Super.Ct.App.Div. July 3, 2013); *People v. Lockhart*, No. 4-09-0671, 2011 WL 10481431, at \*2, \*4 (Ill.App.Ct. Mar. 10, 2011); *State v. Jones*, No. A-5614-07T4, 2010 WL 4119661, at \*6 (N.J.Super.Ct.App.Div. May 6, 2010); *Commonwealth v. Lyons*, 257 Pa.Super. 142, 390 A.2d 752, 753-54 (1978).

<sup>10</sup> *Jones*, 2010 WL 4119661, at \*6.

<sup>11</sup> *U.S. v. Bell*, 2002 WL 171742, at \*3 (E.D.Pa. Jan. 31, 2002).

<sup>12</sup> *Smith v. Thornburg*, 136 F.3d 1070,1075 (6<sup>th</sup> Cir. 1998); *United States ex rel. Labelle v. Lavallee*, 517 F.2d 750, 755 (2d Cir.1975).



for his search were not “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of the criminal statute” and thus violated WITNESS #1’s Fourth Amendment Rights.

Even if the officers were only looking for the registration, however, searching the vehicle for the registration does not seem “reasonable considering the availability, feasibility and effectiveness of alternatives to the officer’s action.” Here, WITNESS OFFICER #2 radioed the dispatcher and asked to whom the car was registered at around 12:01 a.m. – roughly five minutes after the officers arrived at the scene. Exh. 31, recording of radio run, between 4:51 and 7:08. In response, the dispatcher told him that the she “might be pronouncing it wrong, but WITNESS #1’S NAME SPELLED IN THE PHONETIC APLHABET. First name AN INCORRECT FIRST NAME<sup>13</sup> WITNESS #1’S LAST NAME SPELLED IN THE PHONETIC ALPHABET.” *Id.* Spelled out, the name was WITNESS #1’S NAME. The name and address provided by the dispatcher was then used by one of the officers to go to the registered owner’s home to search for the owner. *Id.* SUBJECT OFFICER #3 was aware that the tags to the car had been run and WITNESS OFFICER #7 had gone to the address to look for the owner. Tr. 61:7-13. Entering the vehicle to search for the registration was thus unnecessary and their action cannot be deemed reasonable, particularly in light of the other problems with SUBJECT OFFICER #1’s and SUBJECT OFFICER #3’s testimony. Thus, the alleged search for the vehicle’s registration does not fall under the community caretaking exception.

**c) The unlawful searches were knowingly committed**

Having determined that the searches of COMPLAINANT #2’s car by SUBJECT OFFICER #1 and SUBJECT OFFICER #3 was a violation of the law and internal guidelines of the MPD, the remaining question is whether the unlawful searches were knowing, purposeful, or reckless. While an officer may not understand every traffic regulation, an officer’s investigative function is integral to his activities as an officer and it is incomprehensible that the officers did not know on what basis they could conduct a search of the vehicle. Particularly since an unlawful search could result in the suppression of discovered evidence and hurt or destroy an otherwise valid case. That the officers understood that their searches were unlawful is highlighted by their inconsistent testimony on the subject of the bases for their searches indicating their attempts to justify their searches after the fact. Thus, the evidence demonstrates by a preponderance of the evidence that the unlawful searches were knowing.

Because SUBJECT OFFICER #1 and SUBJECT OFFICER #3 knowingly searched WITNESS #1’s vehicle in violation of the law and internal guidelines of the MPD, the allegation of harassment on the basis of an unlawful search against these two officers is sustained.

**2. Allegations of Harassment Against SUBJECT OFFICER #3 Based on Blocking COMPLAINANT #3’s Video Recording Device**

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<sup>13</sup> The transcript showed this as “AN INCORRECT NAME” rather than “ANOTHER SPELLING OF THE INCORRECT NAME” but the name of WITNESS #1 is WITNESS #1. The dispatcher pronounced the name wrong, but the rest she spelled.

The Complainants also alleged that SUBJECT OFFICER #3 intentionally blocked and obstructed COMPLAINANT #3'S video recording device. To establish harassment by SUBJECT OFFICER #3 for blocking COMPLAINANT #3's video recording device, there must have been 1) blocking of the device directed at COMPLAINANT #3 by SUBJECT OFFICER #3; 2) that was purposeful, knowing, or reckless; 3) in violation of the law or internal guidelines of the MPD; 4) so as to subject COMPLAINANT #3 to mistreatment or other infringement of personal or property rights or to deny or impede COMPLAINANT #3 in the exercise or enjoyment of personal or property rights.

Here, Complainants #2 and #3 stated in their witness statements that an Officer blocked COMPLAINANT #3's telephone camera as he was recording the incident. Exh. 7, Witness Statement of COMPLAINANT #2, at 2; Exh. 9, Witness Statement of COMPLAINANT #3, at 2. The Complainants' testimony is corroborated by the video evidence. The video of the scene shows the car parked close to an intersection, blocked in by at least nine police cars with lights flashing. Exhibit 37, video 1. The three Complainants, one of whom is COMPLAINANT #3, are standing approximately 10-15 feet from the car on the sidewalk. *Id.* As discussed above, this visual estimate of distance is corroborated by SUBJECT OFFICER #1's testimony. They are surrounded by approximately ten officers, at least five of which are in immediate proximity to Complainants and COMPLAINANT #3, who is videotaping. *Id.* As they stand talking and COMPLAINANT #3 is videotaping, COMPLAINANT #3 is not moving closer to or further from the vehicle. *Id.* While Complainants are talking to the officers surrounding them, SUBJECT OFFICER #3 walks from the direction of the car toward the video camera, raises his hand, and puts his hand briefly over the camera. *Id.* at minute 1:12. There is also a noise indicating that someone was touching the camera or causing it to move. *Id.* After removing his hand, he continues to stand in front of the men, looking down as if he is reading or writing something. *Id.* He cannot be heard saying anything. *Id.*

This video evidence, which no one has challenged, directly contradicts SUBJECT OFFICER #3's witness statement made on March 10, 2015 in which he says on page 1, "I did not see any MPD police officer touch cell phone or obstruct the recording" and on page 2, "[w]hen I approached these men, I noticed that one of the Latino males was still holding a cell phone up in the air. I did not touch the cell phone or obstruct the recording in any way. In fact, I stood on the sidewalk approximately three or four feet away from the Latino men who were standing near the fence. I had no reason to obstruct any recording of the incident." Exh. 17, at 2.

SUBJECT OFFICER #3's testimony during the evidentiary hearing made on March 1, 2016, almost a year later, contradicts his earlier witness statement, but is also contradicted by the video evidence. The testimonial contradiction of the video evidence is all the more troubling because it was given after SUBJECT OFFICER #3 watched the video. At the hearing SUBJECT OFFICER #3 testified that the Complainants were told that they were free to go at which point they walked down the block from the intersection IN NORTHWEST DC to the intersection IN NORTHWEST DC. Tr. 59:8-62:13. He said that the one doing the videotaping, who has been identified as COMPLAINANT #3, walked up to SUBJECT OFFICER #3, "one of them had a cell phone in his hand and start walking up towards me. I mean, steady walking up towards me." Tr. 62:17-19. SUBJECT OFFICER #3 claims that he "told him, no, get the phone out of my face." Tr. 62:19-21. Later in his testimony, SUBJECT OFFICER #3 said of COMPLAINANT

#3, “[he] had the phone in the hand, but he’s walking, steadily towards me. There was no issue about recording. The point is that I kind of felt threatened as he’s walking towards me with an object in the hand, no matter if a phone, no matter what it is . . . he was walking into my space. . . I never touched him.” Tr. 66:4-22.

SUBJECT OFFICER #3’s obstruction of the video camera, which was done without provocation from COMPLAINANT #3 was in violation of internal MPD guidelines. According to MPD General Order, Series 304, Number 19, Part II(C)(5) (May 26, 1972) , titled “Video Recording, Photographing, and Audio Recording of Metropolitan Police Department Members by the Public,” members shall not “intentionally block or obstruct cameras or recording devices.” Here, SUBJECT OFFICER #3 approached COMPLAINANT #3 and covered the camera with his hand, which is prohibited conduct.

Moreover, SUBJECT OFFICER #3’s unlawful conduct of blocking the video recording is clearly purposeful and knowing. Not only does the video evidence document that his blocking of the recording was unprovoked, but his first claiming that it didn’t occur in his witness statement, and then attempting to justify it after seeing the video indicates that he knew that it was a violation of MPD guidelines. Thus, the preponderance of the evidence proves that his actions were purposefully and knowingly done in violation of the internal guidelines of the MPD. Because his actions subjected COMPLAINANT #3 to mistreatment and an infringement of his rights under the First Amendment to observe and record officers in the public discharge of their duties,<sup>14</sup> the complaint against SUBJECT OFFICER #3 for harassment in relation to his actions of blocking COMPLAINANT #3’s recording of the incident is sustained.

### **3. Allegations of Harassment Against SUBJECT OFFICER #2 for Issuing a Ticket to COMPLAINANT #2’s Father’s Car for Excessive Idling**

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<sup>14</sup> Although a right to videotape police carrying out their duties in public under the First Amendment has not yet been specifically adopted by the Supreme Court or the United States Court of Appeals for the District of Columbia or the District of Columbia Court of Appeals, the Circuit Courts that have considered the issue have concluded that there is such a right subject to reasonable time, place and manner restrictions. *See, e.g., Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 608 (7<sup>th</sup> Cir. 2012) (invalidating a state eavesdropping statute as applied to the recording of police officers in the performance of their duties in public); *Glik v. Cunniffe*, 655 F.3d 78, 83-84 (1st Cir. 2011) (holding that there is “a constitutionally protected right to videotape police carrying out their duties in public” and that the right was clearly established); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.2000) (recognizing a First Amendment right to photograph or videotape police conduct); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir.1995) (recognizing a “First Amendment right to film matters of public interest” in a case in which the plaintiff was filming activities of police officers at a protest). District courts in other Circuits have reached the same conclusion. *See Garcia v. Montgomery County, Maryland*, 2015 WL 6773715, \*7-8 (D.M.D. November 5, 2015) (holding that journalists and citizens have a right under the First Amendment to video record police officers in the routine public performance of their duties); *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015) (recognizing a right to record police activity in public subject to certain limits); *Pomykacz v. Borough of West Wildwood*, 438 F. Supp. 2d 504, 512-13 (D.N.J. 2006) (denying summary judgment in a First Amendment retaliation claim involving a plaintiff who was arrested for repeatedly photographing a police officer); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D.Pa. 2005) (holding that the plaintiff’s “recording the activities of Pennsylvania state troopers as they went about their duties on a public highway” was protected by the First Amendment); *Alliance to End Repression v. City of Chicago*, No. 74 C 3268, 2000 WL 562480, at \*21 (N.D.Ill. May 8, 2000) (holding that the police’s interest in securing an accident scene did not outweigh the plaintiff’s right to photograph the scene);

Complainants allege that SUBJECT OFFICER #2 harassed WITNESS #1, when SUBJECT OFFICER #2 issued a ticket for excessive idling to WITNESS #1's car, which COMPLAINANT #2 had been borrowing. Here, to establish harassment, 1) the ticket for excessive idling issued by SUBJECT OFFICER #2 must have been directed at Complainants or another; and 2) it must have been purposeful, knowing, or reckless; 3) in violation of the law or internal guidelines of the MPD; 4) so as to subject Complainants or another to mistreatment or infringement of their personal or property rights or deny or impede Complainants or another in the exercise or enjoyment of personal or property rights.

There is no dispute as to elements one, four, and three. As to element one, SUBJECT OFFICER #2 issued an NOI to WITNESS #1's car for excessive idling and thus SUBJECT OFFICER #2's conduct was directed at WITNESS #1. Exh. 29. As to element four, the issuance of the NOI resulted WITNESS #1 having to take time to contest the NOI or pay a fine of \$500, an infringement of WITNESS #1's personal and property rights. Regarding element three, the NOI was issued in violation of the law as the prohibition against excessive idling does not apply to private passenger vehicles such as the two-door sedan Mazda RXE owned by WITNESS #1 for his personal use. Title 18, Section 2418.3 of the District of Columbia Municipal Regulations states,

No person owning, operating, or having control over the engine of a gasoline or diesel powered motor vehicle on public or private space, including the engine of public vehicles for hire, buses with a seating capacity of twelve (12) or more persons, and school buses or any vehicle transporting students, shall allow the engine to idle for more than three (3) minutes while the motor vehicle is parked, stopped, or standing, including for the purposes of operating air conditioning equipment in those vehicles, except as follows: (a) to operate private passenger vehicles.

Thus, the question in dispute relates to element two: whether SUBJECT OFFICER #2 issued the unlawful NOI "purposefully, knowingly, or recklessly" so as to subject WITNESS #1 to mistreatment or an infringement of his personal or property rights. On the night SUBJECT OFFICER #2 issued the ticket, he was an officer in training, accompanying SUBJECT OFFICER #1. When asked if he knew that a private passenger vehicle is not subject to an excessive idling violation, he said that he had not known it. Tr. 156:13-17. While his lack of knowledge might remove his actions from being purposeful or knowing, they may still be reckless, particularly considering that General Order 201.26 effective April 5, 2011 (Duties, Responsibilities, and General Conduct of Members of Department) V.B.1 requires that Sworn Members shall "[f]amiliarize themselves with the laws and regulations they are required to enforce." The Police Department has even issued a circular reminding officers of the law relating to excessive idling and which identifies the exclusion of private passenger vehicles. Circular 04-06 effective May 28, 2004 (Excessive Idling of Vehicles). Thus, his issuance of the NOI is at a minimum negligent.

Here, SUBJECT OFFICER #2's conduct rises to the level of recklessness, however. SUBJECT OFFICER #2 stated in his witness statement and testified at the evidentiary hearing, that he issued the citation for excessive idling and that no officer instructed him to issue the citation. Exh. 16, at 2; Tr. 155:6-17. He explained that he issued it "because the vehicle was

running the whole time we were there and nobody claimed ownership to the vehicle. If somebody would have claimed ownership of the vehicle, the citation would have never been issued.” Tr. 149:9-18. When asked specifically if he had consulted with other officers who might be more knowledgeable about traffic law, rather than provide a concrete yes or no, his answer was vague “[o]ther officers on the scene were also saying that it’s – the vehicle was idling so – and also . . . I saw the vehicle idling for – the length that . . . we were out there for . . . so I issued a citation for it.” Tr. 156:1-12. SUBJECT OFFICER #4 testified that an officer in training can issue a ticket without another officer reviewing it. Tr. 134:18-135:6. When asked if he would ask someone before issuing a ticket if he didn’t fully understand the law, SUBJECT OFFICER #4 said “yes, I would. . . I would ask. And I would still ask today. I would ask a seasoned traffic officer as well, because I don’t know all the traffic regs, you know, by the book. And I would have to look them up or ask a seasoned officer. Yes, I would still.” Tr. 135:14-136:4. Thus, SUBJECT OFFICER #2’s not only issued a ticket without being fully informed regarding the violation, but he didn’t even attempt to look up the law or obtain advice from a more experienced officer regarding whether there had been a violation, which even an experienced officer like SUBJECT OFFICER #4 would do.

Moreover, the testimony supports that, regardless of his belief about the lawfulness of the NOI, SUBJECT OFFICER #2 issued the NOI, not because of its idling excessively, but because Complainants did not claim ownership of the vehicle. In particular, he stated “[i]f somebody would have claimed ownership of the vehicle, the citation would never have been issued.” Tr. 149:16-18. But an excessive idling violation, if lawful, would be a violation even if the owner of the vehicle was known. Moreover, if SUBJECT OFFICER #2 had been so concerned about idling, he or another Officer could have turned off the engine pursuant to their community caretaker function, which they did not do. Finally, it is disconcerting to this Complaint Examiner that there was a valid NOI that could have been issued – 18 DCMR § 2418.1 – which requires that “No persons driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key, and effectively setting the brake.” The penalty for 18 DCMR § 2418.1, however, was only \$50, significantly less than the \$500 penalty for an excessive idling violation under 18 DCMR § 2418.3. *See* 18 DCMR § 2601.2. While SUBJECT OFFICER #2 may disclaim knowledge that an excessive idling violation does not apply to private passenger vehicles, he apparently knew enough to know that it was subject to a \$500 fine because he wrote it on the ticket.

The evidence here tends to indicate that SUBJECT OFFICER #2’s actions may have been purposeful, but it is not conclusive by the preponderance of the evidence as he was an officer in training and it is unclear how much influence other officers had on his determination that there was an excessive idling violation. Nonetheless, the evidence is conclusive that SUBJECT OFFICER #2’s unlawful issuance of the NOI for excessive idling was reckless, “Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do.”<sup>15</sup> Not only did SUBJECT OFFICER #2 issue an NOI without being fully apprised about the law, but he made no effort to verify that it was a proper violation before issuing the ticket, something that even an experienced officer like SUBJECT OFFICER #4 would have done. Moreover, his testimony indicates that he issued it, not because of the excessive idling, but because the Complainants failed to claim ownership of the car. The

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<sup>15</sup> BLACK’S LAW DICTIONARY 712 (2d Pocket Ed. 2001).

consequence of his actions was to cause WITNESS #1 to have to pay an exorbitant \$500 fine or take time and effort to challenge the ticket. These are significant consequences. One would expect some additional precautions before issuing such an expensive ticket. SUBJECT OFFICER #2's failure to consider the serious consequences when he issued a ticket for a violation of which he was not entirely knowledgeable is reckless. For these reasons, the allegation of harassment against SUBJECT OFFICER #2 for the issuing of the NOI for excessive idling is sustained.

#### **4. Allegations of Harassment Against SUBJECT OFFICERS #4 and #2 Based on the Arrest of COMPLAINANT #2**

The Complainants further alleged that SUBJECT OFFICER #4 and SUBJECT OFFICER #2 harassed COMPLAINANT #2 by unlawfully arresting him for a Noise Act violation. For the arrest of COMPLAINANT #2 to amount to harassment, it must have been purposeful, knowing, or reckless in violation of the law or internal guidelines of the MPD.

##### **(a) The arrest was in violation of the law.**

The arrest report lists 20 DCMR 2800.2 as the violation for which COMPLAINANT #2 was arrested.<sup>16</sup> Section 2800.2 provides that “[i]t shall be unlawful for any person to make, continue, or cause to be continued any noise disturbance by . . . unamplified voice, for the production . . . of sound on private property or public space.” 20 DCMR 2799 defines “noise disturbance” as “any sound which is loud and raucous or loud and unseemly and unreasonably disturbs the peace and quiet of a reasonable person of ordinary sensibilities in the vicinity thereof, unless the making and continuing of the noise is necessary for the protection or preservation of the health, safety, life, or limb of some person.”

##### *i. Loud and Raucous or Loud and Unseemly*

The first question is whether COMPLAINANT #2 was being “loud and raucous” or “loud and unseemly.” Merriam-Webster defines “raucous” as “disagreeably harsh or strident” and “boisterously disorderly.”<sup>17</sup> It defines “unseemly” as “not according with established standards of good form or taste” or “not suitable for time or place.”<sup>18</sup> The evidence demonstrates that COMPLAINANT #2 was loud, but the officers’ testimony does not show that he was “raucous” or “unseemly.”

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<sup>16</sup> There seems to be some confusion around the statute intended to apply to the arrest. SUBJECT OFFICER #4 testified that the arrest was for disorderly conduct, presumably under 22 DCMR 1321(d) as this section corresponds with his description of the basis for his decision to arrest COMPLAINANT #2. 22 DCMR 1321(d) defines disorderly conduct as “[i]t is unlawful for a person to make an unreasonably loud noise between 10 pm and 7 am that is likely to annoy or disturb one or more other persons in their residences.” Since the citation was for Section 2800.2, however, the analysis will focus on that section. As the violations are similar, however, the analysis would be very similar and the outcome the same.

<sup>17</sup> Merriam Webster Dictionary (Online Ed. 2016) available at <http://www.merriam-webster.com/dictionary/raucous>.

<sup>18</sup> Merriam Webster Dictionary (Online Ed. 2016) available at <http://www.merriam-webster.com/dictionary/unseemly>.

- SUBJECT OFFICER #1 stated in his initial witness statement that “one of them was the loudest and most boisterous. When the situation was calm, he would fuel it all up again.” Exh. 15, at 2. SUBJECT OFFICER #1 stated that despite numerous warnings to be quiet, the loud one did not comply and “continued yelling and raising his voice.” *Id.*, at 2-3. Later in his statement he said “[t]he man was being loud.” *Id.* at 3. In his testimony at the evidentiary hearing, however, SUBJECT OFFICER #1 described the person arrested as “very much heated like he was in the second video.” Tr. 98:22-99:2.
- SUBJECT OFFICER #4, who made the decision to arrest COMPLAINANT #2<sup>19</sup> did not explain in his witness statement how loud COMPLAINANT #2 was except to say that “one or two of the men were extremely upset and loud.” Exh. 18, at 2. Rather, his statement focused on the officers advising complainants “to lower their voices,” that “[t]he men did not want to listen to the officers. They were argumentative and did not comply,” and that “one of the men was not as loud as the one who got arrested.” *Id.* In his initial witness statement taken closest in time to the incident, SUBJECT OFFICER #4 could not remember if the man who requested to retrieve the cell phone was the man who was arrested. *Id.* At the evidentiary hearing, however, he stated that he made a determination not to give COMPLAINANT #2 the phone which “angered the individual; I forget his name, that was eventually placed under arrest who continued to want to get the phone out of the car. And I said – he was told no and they’re . . . good to go, however, they refused and he continued to get loud and worked up about the phone. And I told them they were going to get placed under arrest if they didn’t quiet down.” Tr. 128:13-21.
- SUBJECT OFFICER #2 in his initial statement said that “[t]he man who requested permission to retrieve his cell phone was eventually arrested for noise at night. Officers did not allow this man to retrieve his cell phone because, at the time, he denied ownership of the vehicle and denied involvement with the vehicle. This man became upset. His tone of voice started to escalate. He did not scream or yell, but his tone of voice was louder than that used in a normal conversation.” Exh. 16, at 2-3. At the evidentiary hearing, he testified that “he was starting to become a nuisance, . . . sergeant told him lower your voice or you’re going to be arrested for noise at night. . . . he didn’t comply. He just keep on raising his voice.” Tr. 150:10-151:6.
- Finally, WITNESS OFFICER #1 said in his initial witness statement “[a]s we neared the conclusion of the investigation, COMPLAINANT #2 raised the tone of his voice and became loud. I do not remember what he said, but SUBJECT OFFICER #4 instructed me to explain to him the noise at night act . . . I did so . . . [but] COMPLAINANT #2 did not comply with my request to lower his voice. . . . In response to my explanation, COMPLAINANT #2 stated something to the effect of, ‘[b]ut this is the tone of my voice!’ He made this statement in the same

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<sup>19</sup> See *supra* page 35.

loud tone of voice and SUBJECT OFFICER #4 ordered that COMPLAINANT #2 be arrested for noise at night. . . . Approximately one or two minutes elapsed from the moment that I first explained the noise at night act until COMPLAINANT #2 was arrested.” Exh. 20, at 2-3. When asked at the evidentiary hearing what happened after the video ended to when COMPLAINANT #2 was arrested, WITNESS OFFICER #1 said “[h]e was talking loud and the sergeant told me that explain to him reference to the Disorderly Conduct Act. Explained to him several times that people call for those blocks that they’re talking loud . . . . So he’s still talking loud. I told him that based on the general behavior have we need to give you a warning and explained reference to the warning. . . . It was explained again to calm down, lower his voice. He was still talking loud. And technically he was disobeying his order, so sergeant decided to lock him up for the trouble, and that’s it.” Tr. 165:18-166:19.

Thus, the officers uniformly state that COMPLAINANT #2 was loud. But beyond saying he was loud, only SUBJECT OFFICER #1 ever describes COMPLAINANT #2 as yelling in his witness statement. SUBJECT OFFICER #1’s testimony at the evidentiary hearing, however, was that he “was very much heated like in the second video.” In the second video, Complainant #2 appears heated at times and calm at others, but at no point could he be described as yelling. Exh. 37, video 2. SUBJECT OFFICER #2’s description of COMPLAINANT #2’s tone of voice in his witness statement is consistent with SUBJECT OFFICER #1’s description that COMPLAINANT #2 was heated like in the second video when he says “[h]e did not scream or yell, but his tone of voice was louder than that used in a normal conversation.” Thus, COMPLAINANT #2 was loud, but the officers testimony does not establish that it was also “raucous” or “unseemly.”

COMPLAINANT #3 testified similarly to SUBJECT OFFICER #1 that COMPLAINANT #2 was not being louder than in the video. Tr. 48:9-48:11 COMPLAINANT #3 also testified that he was even louder than COMPLAINANT #2 at the time COMPLAINANT #2 was arrested. Tr. 48:12-21. COMPLAINANT #3’s testimony is corroborated by one of the residents who witnessed the arrest who stated, “I remember that a Hispanic man with a camera phone was speaking in a loud voice. However, I was not disturbed or bothered by the noise from the incident. The man with the camera phone was louder than the man who was arrested.” Exh. 14.

Thus, the preponderance of the evidence indicates that COMPLAINANT #2 was not loud and raucous or loud and unseemly at the time he was arrested.

ii. *Disturbed the Peace and Quiet of a Reasonable Person of Ordinary Sensibilities in the Vicinity Thereof*

A noise disturbance under 20 DCMR 2800.2 requires that the sound “disturb[] the peace and quiet of a reasonable person of ordinary sensibilities in the vicinity thereof.” The phrasing indicates that there must actually be a disturbance, not just a belief of a disturbance or the possibility of a disturbance. In the arrest report, it states that COMPLAINANT #2’s refusal to lower his voice caused residents from two houses on A STREET IN NORTHWEST D.C. to



come out of their houses “wondering why [COMPLAINANT #2] was being loud.” Exh. 26, at 3. The evidence does not support this conclusion, however.

SUBJECT OFFICER #3 and #2 both state that they saw the residents come out onto their porches and they interpreted it as a response to the noise made by COMPLAINANT #2. Exh. 17, Witness Statement of SUBJECT OFFICER #3, at 3; Tr. 63:14-18, Testimony of SUBJECT OFFICER #3; Exh. 16, Witness Statement of SUBJECT OFFICER #2, at 3; Tr. 150:5-17, Testimony of SUBJECT OFFICER #2. SUBJECT OFFICER #4 who made the decision to arrest COMPLAINANT #2,<sup>20</sup> did not see any civilians step out of their residences, however, Exh. 18, Witness Statement of SUBJECT OFFICER #4, at 2. There is no evidence that the residents at the addresses cited in the arrest report complained about the noise to the officers, or that any officers spoke to the residents. Exh. 17, Witness Statement of SUBJECT OFFICER #3, at 3; Tr. 72:2-4, testimony of SUBJECT OFFICER #3; Exh. 16, Witness Statement of SUBJECT OFFICER #2, at 3. Moreover, there is no evidence that anyone called 911 to complain about the noise. So the basis for SUBJECT OFFICER #3’s and #2’s conclusion regarding the neighbors being disturbed was only speculative.

According to WITNESS #3, a resident of one of the addresses noted in the arrest report, “I first noticed the flashing lights of the police vehicles and went outside onto my porch. I stepped outside because I thought a traffic accident happened at AN intersection IN NORTHWEST DC. Accidents often happen at this intersection.” Exh. 13. Later in her witness statement WITNESS #3 stated that “I was bothered by the noise once I stepped out of my house, but I can’t remember whether I initially stepped outside my house because I heard noise or because I saw the flashing lights emitted by the police officers.” *Id.*

The second resident referenced in the arrest report, WITNESS #4, stated in his witness statement that “I was in my bedroom when I noticed the flashing lights from police cars parked near the intersection IN NORTHWEST DC. I was curious about the flashing lights and went out onto my porch to get a better view. . . .It was hard to decipher what was being said. I remember that a Hispanic man with a camera phone was speaking in a loud voice. However, I was not disturbed or bothered by the noise from the incident.” Exh. 14.

Thus, the preponderance of the evidence shows that COMPLAINANT #2 did not “disturb the peace and quiet of a reasonable person of ordinary sensibilities in the vicinity thereof.” If anything, the residents appear to have been more disturbed by the lights of the significant number of police cars on the scene.

*iii) Reasonableness*

The preponderance of the evidence also shows that COMPLAINANT #2’s volume and behavior was not unreasonable under the circumstances. One interpretation of the officers frequently inconsistent and incorrect testimony is that they have poor memories of the event due to their initial statements occurring eight to nine months after the arrest and the evidentiary hearing occurring over a year after their initial statements. Even giving them the benefit of the doubt, however, their testimony and watching the videos indicate that there was a lot of

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<sup>20</sup> See *supra*. p. 35.

unnecessary confusion on the part of the officers that escalated COMPLAINANT #2's frustration and that they could have avoided it and his arrest.

The Complainants had been standing and waiting for a friend to return when all of a sudden several police cars arrived, police emerged from the cars, and stopped and frisked them. By any objective measure most of us would find this surprising and scary. While the officers were doing their job to conduct an investigation of a 911 call, they disregarded the description of the men described by the caller as it was conveyed to them by the dispatcher – which was that there were three Hispanic men in their twenties: the one holding the knife to the victim had on a white, short sleeve shirt and long hair to his shoulders, the purported victim had short hair, a mustache, and a black shirt, and no description of the third man. Exh. 32 between 1:07 and 4:08. None of the three Complainants matched the descriptions except that they were Hispanic, in their twenties and standing near a trashcan at least half a block from the reported incident. Exh. 15, Witness Statement of SUBJECT OFFICER #1, at 1; Exh. 16, Witness Statement of SUBJECT OFFICER #2, at 1; Exh. 31, Radio Run Transmission, between 1:07 to 4:18. Exh. 37, video 4. While there is enough of an overlap to justify reasonable suspicion in the stop and frisk as determined by the OPC, the officers did not find any knife and SUBJECT OFFICER #1 even admits in the video to the men that the caller clearly had it wrong. Exh. 37, video 1, at 1:44 (SUBJECT OFFICER #1 says to the Complainants “Obviously. Whatever they think they saw, they didn’t see. You don’t have a knife with you.”) Similarly, WITNESS OFFICER #3 tells the dispatcher “being as [the caller] did not want to be interviewed by us, right now we have nothing.” Radio Run Transmission, between 4:51 to 7:08.

Nonetheless, once the officers determined that there was no knife, they turned their attention to the car, which was parked in a bus stop with the engine running and no one inside. As discussed above, the officers made the decision to take the vehicle into custody for safekeeping because they could not determine ownership. At the point at which COMPLAINANT #2 understood that the car was to be towed, he requested to retrieve his phone. The officers denied his request at which point, as discussed above, COMPLAINANT #2 became heated. The evidence shows that the officers warned COMPLAINANT #2 to lower his voice, but that he did not comply, and the officers then arrested him for a noise violation.

Both SUBJECT OFFICER #4 and SUBJECT OFFICER #1 testify that the decision to not allow COMPLAINANT #2 to retrieve his phone stemmed from the Complainants denying any involvement with the vehicle until the time when he requested to retrieve his phone.

- When SUBJECT OFFICER #1 was asked why the officers did not allow COMPLAINANT #2 to retrieve his phone from the car, rather than give a straight answer, SUBJECT OFFICER #1 kept repeating that the Complainants denied having anything to do with the car and so at the point where the Complainants admitted that they were in the car, which he says was almost an hour into the event, that they were now concerned with where the fourth guy was. Tr. 107:15-113:1. When the Complaint Examiner told SUBJECT OFFICER #1 that he was not answering the question he said “Well, I don’t know how to answer it.” Tr. 113:2-5. Only after the Complaint Examiner asked specifically if the phone was necessary to the investigation and SUBJECT OFFICER #4 interjecting that “he was ordered not to” did SUBJECT OFFICER #1 finally say that it was because

“[w]e had an ongoing investigation . . . [and we] could not give it back to him at that point in time. . . . A few more things needed to be verified or possibly ruled out before that became an issue, or a topic of discussion.” Tr. 113:6-115:16.

- SUBJECT OFFICER #4 claimed at the evidentiary hearing that he made the decision to not allow COMPLAINANT #2 to retrieve his phone because the Complainants “denied all knowledge of the vehicle, they weren’t in the vehicle, didn’t drive the vehicle and didn’t know whose vehicle it was at first. . . . They eventually came and told us that they wanted to get a phone out of the car. And at that point in time there was no link to them to the vehicle and the vehicle was already going with us for safekeeping. So we told them, no, they can’t get anything out of the car.” Tr. 119:6-120:15.

The evidence does not support SUBJECT OFFICER #4’s and SUBJECT OFFICER #1’s statements that the Complainants denied all involvement with the vehicle, however. Rather, the evidence shows that while Complainants denied owning or driving the vehicle, they did not deny involvement with the vehicle, but explained to the officers that they had been in the car, but the driver had left to visit his girlfriend and they were waiting for him to return.

SUBJECT OFFICER #1’s testimony regarding the Complainants denial of involvement with the vehicle is consistent with his witness statement, Exh. 15, at 2 (“The three men denied any involvement with the vehicle whatsoever until our investigation led to us taking the vehicle for safekeeping, at which time one of the individuals stated that his phone was inside the car.”), and SUBJECT OFFICER #2’s witness statement, Exh. 16, at 2 (“[o]ther officers asked the Hispanic men whether they knew who the vehicle belonged to. The Hispanic men denied owning it and stated that they did not know anything about the vehicle.”). His testimony is inconsistent, however, with SUBJECT OFFICER #3’s testimony and witness statement, WITNESS OFFICER #1’s witness statement, COMPLAINANT #3’s testimony, and the video evidence, which will be discussed below.

SUBJECT OFFICER #4’s testimony that the Complainants denied all involvement with the vehicle is inconsistent with his initial witness statement in which he noted only their denial of ownership and operation of the vehicle, but stopped short of saying that they denied all knowledge of the vehicle. Exh. 18, at 2 (“I believe that the men did not claim ownership of the vehicle or claim that they were driving the vehicle.”). As will be discussed below, it is notable that SUBJECT OFFICER #4’s witness statement is consistent with SUBJECT OFFICER #3’s testimony and witness statement, WITNESS OFFICER #1’s witness statement, COMPLAINANT #3’s testimony, and the video evidence. His embellished testimony came only after he heard SUBJECT OFFICER #1’s testimony and calls the credibility of his statement into question. SUBJECT OFFICER #4’s credibility is further strained given that his recollection in his witness statement was that “the officers allowed the man to retrieve the cell phone.” Exh. 18, at 2.

SUBJECT OFFICER #3 testified prior to SUBJECT OFFICER #1, and he, notably, only stated that the Complainants denied ownership of the vehicle, but did not state that they denied all knowledge of the vehicle. Tr. 61:13-15 (“everybody said it wasn’t their car. They don’t know who the car belongs to. . .”). His testimony is consistent with his witness statement and

his witness statement testimony reflects what is heard in video 1: the Complainants explaining that they did not own the vehicle, but that their friend was driving and they were waiting for him to come back. “[SUBJECT OFFICER #1 and WITNESS OFFICER #2] proceeded to ask the Latino male standing near the vehicle, ‘[w]ho is the owner of the car?’ The Latino male who was standing near the vehicle stated that it was his friend’s car and that he would be right back. SUBJECT OFFICER #1 instructed me to approach the other Latino men standing near the intersection IN NORTHWEST DC to find out who the car belonged to. WITNESS OFFICER #2 ran the tags, and I approached the Latino men who were standing near the intersection IN NORTHWEST DC. These men stated that the car belonged to a friend who would be right back. I told SUBJECT OFFICER #1 and WITNESS OFFICER #2 what the Latino men told me.” Exh. 17, Witness Statement of SUBJECT OFFICER #3 at 2.

Similarly, WITNESS OFFICER #1’s statement about the Complainants involvement with the car is also inconsistent with SUBJECT OFFICER #1’s and SUBJECT OFFICER #4’s testimony, but consistent with the video, “When I translated for WITNESS OFFICER #3 in reference to finding the owner of the vehicle, . . . [t]he complainants stated that the owner of the vehicle was visiting someone two blocks away from the incident location. Exh. 20, at 2

Perhaps the most reliable evidence here is the video evidence, which shows that Complainants denied owning or driving the vehicle, but did not deny involvement with the vehicle and explained to the officers that the driver had left to visit his girlfriend and they were waiting for him to return. Exh. 38, Video 1.

- At minute 2:01: “O2: Whose car is this?, COMPLAINANT #3: This my friend. O2: This is your friend’s car? COMPLAINANT #3: No, he just went to like some . . . O2: Whose car? COMPLAINANT #3: My friend.”
- At minute 2:25: “O2: Where is your friend at? COMPLAINANT #3: He went to his girlfriend house. O4: Whose? Whose car is this? COMPLAINANT #3: Oh. That’s the. That’s the mistake right there. O3: Sir, were you driving the car? No. I am waiting for my friend.”;
- At minute 4:13: “O5: Were all you four in the car together? COMPLAINANT #3: I was in the car, but we are waiting for the friend.”;
- At minute 9:14 (translated from Spanish): “O7: . . . do you know the owner of the vehicle? COMPLAINANT #3: Yes, it belongs to a friend, he went to go visit his girlfriend. COMPLAINANT #2: Yeah, he went to go visit his girlfriend right now. O7: Ok, ok. Where is the girlfriend right now? COMPLAINANT #3: Sir, to be honest I can’t tell you, I don’t know. He went towards that way. We’re waiting for him. We’re all waiting for him. . . . O7: So then your friend went to go see a lady friend? Yeah, we’re waiting here. COMPLAINANT #2: Yeah, a girlfriend here on the block.”

Thus, from the time videotaping started, the officers should have understood that the Complainants knew who the owner and driver was and that they had been in the vehicle.

SUBJECT OFFICER #1 and to a lesser extent, SUBJECT OFFICER #4, explain this discrepancy with the video evidence by testifying that Complainants denial of involvement with the vehicle occurred prior to the video recording. Moreover, SUBJECT OFFICER #1 claims that

the video evidence is irrelevant because prior to the recording the officers told the Complainants that they were free to leave, and that it was only upon realization that the car was to be towed that the Complainants returned and claimed association with the car because COMPLAINANT #2 wanted to retrieve his phone. SUBJECT OFFICER #1 also claimed that all explanations, questions, and answers had been interpreted in Spanish prior to the recording so there was no question of misunderstanding about the Complainants involvement with the vehicle or that they understood that they were free to go. According to SUBJECT OFFICER #1,

- “We were on the scene for 10 to 15 minutes at least before he started videotaping . . . During that period of time we learned that nobody knew whose vehicle that was. . . . I asked whose car is this . . . I don’t know. You all weren’t in this vehicle? No. They denied knowing whose car it was. They denied ever being in the car or anything like that. . . . They were told numerous times in English and Spanish, however they wanted it. They knew what was going on. . . . At the point in time after so long that we could not locate the Complainant, they were free to go. We were taking the vehicle at that time.” Tr. 78:1-79:2.
- “Any information that you may have heard that was relayed to us [in the video] was never relayed to us on the scene at the time we were investigating. . . . It all came after the fact when all three – when . . . they were all free to go. Then they came back because they realized the phone was in the car.” Tr.84:9-19.
- “[E]verything you see on video is after the fact.” Tr. 97:3-4.
- “The three individuals we stopped denied having anything to do with the vehicle. They denied ownership, denied knowing whose car it was, and denied even being in it. . . .” Tr.95:3-7. “They were denying ever having anything to do with the vehicle.” Tr. 103:1-2. Complaint Examiner Fischer asked, “But at some point they stopped denying that they had anything to do with the vehicle.?” Tr. 103:3-5. To which SUBJECT OFFICER #1 responded “Once they realized their buddy left a phone in the car . . . and they had to . . . say something, yes.” Tr. 103:11-16.
- When asked further whether he told them that they were free to go, SUBJECT OFFICER #1 said “[t]hey knew exactly what was going on. At that point in time I guess that’s when the individual here, . . . started recording. . . . At some point in time during that conversation – I guess even before the videotaping started he admitted that when they found out we were taking the car, that one of his friends had left property in the car. At that point in time again – and like I said, off tape, if your friend’s phone is in the car, that means you were in the car. Who was driving the car? My friend. He walked away.” Tr. 79:3-22. “When it became apparent that we were not going to find the Complainant and that these guys had nothing to do with that vehicle, they were free to go. We’re taking this vehicle, running unoccupied. It’s in our custody now. At that point in time, within moments of making that determination and the witnesses/Complainants realizing we were taking the vehicle, one of their phones was left in the car.” Tr. 96:3-12.
- He also repeatedly stated that everything had been explained to and asked of the Complainants in Spanish – prior to the videotaping. In response to a question whether WITNESS OFFICER #1 (the interpreter) arrived and explained everything to the Complainants prior to the recording starting or if he arrived only at the time of video, “[h]e was there pretty quick. He was there before the tape

had started.” Tr. 105:1-10. When asked if WITNESS OFFICER #1 was explaining before the video, he stated “I believe so, yes.” Tr. 105:11-14.

SUBJECT OFFICER #4’s testimony regarding the sequence of events is similar, but, as noted above, questionable given its inconsistency with his witness statement and that his testimony came only after hearing SUBJECT OFFICER #1’s testimony: “I remember that they denied all knowledge of the vehicle: they weren’t in the vehicle, didn’t drive the vehicle and didn’t know whose vehicle it was at first. It was made sure that they were told in Spanish several times why they were originally stopped . . . I believe WITNESS OFFICER #1 was the only Spanish speaker working with us, but he was supposed to translate to them that they were free to go. They were not handcuffed. They were released. One of the individuals began videotaping us with a cell phone. They eventually came and told us that they wanted to get a phone out of the car. And at that point in time there was no link to them to the vehicle and the vehicle was already going with us for safekeeping. So we told them, no, they can’t get anything out of the car. The individuals were free to go.” Tr. 119: 6-120:6.

The evidence contradicts SUBJECT OFFICER #1’s and SUBJECT OFFICER #4’s testimony on the sequence of events, however. First, the evidence shows that WITNESS OFFICER #1 did not arrive until after the videotaping started and did not start interpreting the explanations and questions about the vehicle until over six minutes into the videotaping. WITNESS OFFICER #1 testified that COMPLAINANT #3 was already videotaping when he arrived. Tr. 162:18-163:16. His testimony is consistent with his initial witness statement, “[w]hen I arrived at the scene . . . [e]ither COMPLAINANT #3 or COMPLAINANT #1 was holding a phone and putting it in front of my face.” Exh. 20, at 1. His testimony is consistent with the video evidence. In evidence are two videos of the event. Exh. 37, videos 1 and 2. The video taken first in time according to the metadata<sup>21</sup> shows the Complainants talking to the officers in English, albeit somewhat confusedly, prior to WITNESS OFFICER #1 arriving, WITNESS OFFICER #1 arriving and speaking with SUBJECT OFFICER #1 at about minute 5:35, and then WITNESS OFFICER #1 speaking in Spanish to the Complainants at about minute 6:22. Exh. 37, video 1. Thus, even if SUBJECT OFFICER #1 is correct that the Complainants denied all involvement with the vehicle prior to the videotaping, it is not correct that the questions had been asked and answered in Spanish prior to the videotaping.

Second, SUBJECT OFFICER #1’s claims that the Complainants denied all involvement with the vehicle, that the officers had told them they were free to go, and that Complainants only came back and claimed knowledge of the car because they wanted a phone from the car prior to the video recording is contradicted by the evidence. Rather, the evidence shows that questions about the car occurred only after video recording started, that Complainants did not deny all involvement with the vehicle, and that Complainants were not told they were free to leave prior to the video recording. COMPLAINANT #3 testified that the officers did not ask him about the car before he started videotaping and that the first time he was asked was while he was videotaping. Tr: 45:4-47:14. Video 1 supports COMPLAINANT #3’s testimony. At the beginning of video 1, one of the Complainants can be seen providing identification to the officers, then SUBJECT OFFICER #4 asks if the Complainants speak English and tries to

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<sup>21</sup> Exhibit 37, video 1 shows that it was last modified at 11:10 pm on June 24, 2014. Video 2 shows that it was last modified at 11:18 p.m.

explain the investigation. Initially the Complainants – predominantly COMPLAINANT #3 - are protesting that they're being mistreated and discriminated against so SUBJECT OFFICER #4 gives up trying to explain. Shortly after SUBJECT OFFICER #4 gives up, SUBJECT OFFICER #1 asks Complainants if they called the police and he explains why they are investigating. He concludes by saying “[w]hatever they think they saw, they didn’t see. You don’t have a knife with you.” After, COMPLAINANT #2 says that the Complainants are friends and SUBJECT OFFICER #1 responds “Ok. That’s understandable.” An Officer that is not visible, but sounds like SUBJECT OFFICER #4 then asks where the Complainants live, which only COMPLAINANT #3 answers and only two minutes into the video does an Officer (that sounds like SUBJECT OFFICER #4) ask whose car it is. To which COMPLAINANT #3 says “This is my friend.” SUBJECT OFFICER #4 then asks “This is your friend’s car?” and COMPLAINANT #3 says “No, he just went to like some . . .” and SUBJECT OFFICER #4 interrupts and says “whose car” to which COMPLAINANT #3 says “my friend.” The conversation continues with a discussion about where the friend is – at his girlfriend’s - and an explanation that the car is parked illegally, and that a ticket will be put on the vehicle. At minute 4:13 an Officer asks “[w]ere you all four in the car together” and COMPLAINANT #3 responds “I was in the car, but we are waiting for the friend.” Exh. 37, video 1.

Based on the confusion of the questions and answers heard in the video, neither side had a clear understanding of the conversation. Almost all of the talking on the part of the Complainants is done by COMPLAINANT #3 and it appears from some later questions that neither COMPLAINANT #2 or COMPLAINANT #1 understood what was happening. It is only at minute three, when COMPLAINANT #2 is again asking SUBJECT OFFICER #1 why they were stopped, despite SUBJECT OFFICER #1’s repeated explanations, that SUBJECT OFFICER #1 says a Spanish speaker is coming. Exh. 37, video 1.

The provision of identification and explanations of the reason for the stop at the beginning of the video, the questions regarding the car starting two minutes into the video, and then SUBJECT OFFICER #1 stating that a Spanish speaker is coming three minutes into the video indicate that the conversations about the car started after the recording of the video and that Complainants did not deny all involvement with the vehicle. Rather, the video corroborates COMPLAINANT #3’s witness statement and testimony that Complainants told the officers that they did not own or operate the vehicle, but that they had been in the car, which was owned by the friend who had been driving who had gone to see his girlfriend. Exh. 9, at 2; Tr. 33:18-34:3, 40:21-41:4. While COMPLAINANT #3 incorrectly stated that the friend was the owner of the car, the consistency of his witness statement, his testimony at the evidentiary hearing, and his statements in the video indicate that he believed that it was true and was not intentionally trying to mislead the police. Exh. 9, at 2; Tr. 33:18-34:3, 40:21-41:4, Exh. 37, video 1. The only other Complainant to make a statement about the car prior to the arrival of WITNESS OFFICER #1 was COMPLAINANT #1 saying “no” when an Officer asked if any of them had been driving the car. Exh. 37, video 1, minute 3:56.

In addition, COMPLAINANT #3 testified that they were not told they were free to go prior to the videotaping. Tr. 41:5-17. Rather, he said in his witness statement that only after COMPLAINANT #2 was arrested were he and COMPLAINANT #1 told they could leave. Exh. 11, at 2. His testimony is supported by the videos 1 and 2 in which the officers are never heard

telling Complainants that they could leave. Exh. 37. Moreover, that at least one of the Complainants is seen in the video providing identification to the officers and identification is returned to a Complainant, it seems unlikely that they were told they could leave prior to that time. Exh. 37, video 1, min. 0:15 (COMPLAINANT #2 seen providing identification to an Officer) and min. 5:22 (an Officer is seen returning identification to a Complainant who is not visible).

Finally, at no time during video 1 is COMPLAINANT #2 heard to ask for his phone. Exh. 37. If indeed the recording only started after the Complainants returned to request the return of COMPLAINANT #2's phone, it is unlikely that he would not ask for the phone once in the eleven minutes of the video. The first time COMPLAINANT #2 can be heard even referencing his phone is toward the end of the video 1 at minute 11. Exh. 37. It is at that time that Complainants visibly and audibly begin to understand the car is to be towed. COMPLAINANT #2 asks if he runs to get the driver whether the officers will still tow the vehicle. Exh. 37, video 1, at 10:35. COMPLAINANT #3 then asks COMPLAINANT #2 if he has the number of the driver to call him to come back to the car and COMPLAINANT #2 says that he has the number. *Id.* 10:54. At this point the first video ends.

Thus, the preponderance of the evidence is that the officers did not begin asking Complainants about the car until after the video started, that the Complainants told the officers that they did not own or operate the car, but that it was owned and driven by their friend who had gone to see his girlfriend. The evidence also shows that the Complainants had not been told they could leave prior to the end of video 1, except to the extent that WITNESS OFFICER #1 told COMPLAINANT #2 that he could run to retrieve his friend, or that COMPLAINANT #2 had asked for his phone prior to this time. Moreover, as has been noted above, the evidence shows that the Complainants did not fully understand the English conversation – at best COMPLAINANT #3 might have - but COMPLAINANT #2 did not get involved in any discussion regarding the car until after WITNESS OFFICER #1 arrived at which point both COMPLAINANT #3 and COMPLAINANT #2 reiterated to WITNESS OFFICER #1 in Spanish that the owner went to visit his girlfriend and that they were waiting for him. Exh. 37, video 1, at 9:14. Thus, because of the communication difficulties, the most relevant communications with the Complainants came after WITNESS OFFICER #1 arrived, which was after the recording started. *See* MPD General Order (Language Access Program), Series 304, Number 18, October 6, 2015, Part IV. J.1. (“In circumstances where a member, without communicating with an individual, has reasonable suspicion that would justify a Terry patdown, the member may conduct a Terry patdown of an LEP/NEP individual on the same basis as if the individual were not LEP/NEP. If, following the Terry patdown, the individual indicates a desire to communicate further with the member, the member involved shall obtain an MPD certified interviewer, telephonic interpreter, or other qualified interpreter utilizing the procedures set forth in this order.”), and K (“In circumstances where a suspect who speaks English very well would be subject to a stop for questioning, a suspect who is LEP/NEP may also be stopped. If, following the stop, the member wishes to question the suspect, and it becomes apparent that the suspect is LEP/NEP, the member shall obtain an MPD certified interviewer, telephonic interpreter or other qualified interpreter without delay.”).



While the officers' lack of understanding about Complainants explanations about their involvement with the car does not seem credible in light of the contrary evidence, it is possible that it was simply confusion due to the language difference and poor communication among the officers. In the second video in which COMPLAINANT #2 attempts to retrieve his phone, SUBJECT OFFICER #4 sounds surprised to find out that the Complainants had been in the car. Exh. 37, video 2, minute 0:43.

Even giving the officers the benefit of the doubt that they understood the Complainants to have denied involvement with the vehicle prior to COMPLAINANT #2 wanting to retrieve his phone, they gave him hope that it would be returned to him when they told the Complainants to call his phone. In video 2, SUBJECT OFFICER #4 asks COMPLAINANT #2 how the officers know it is his phone. *Id.* at 0:53. After listening to Complainants #2 and #3 discuss how COMPLAINANT #2 can prove it is his phone, SUBJECT OFFICER #1 can be seen and heard saying to SUBJECT OFFICER #4 that he is not going to call the Complainant's phone. *Id.* at 1:04. SUBJECT OFFICER #1 then asks, while SUBJECT OFFICER #4 is watching, if either of the other two Complainants know COMPLAINANT #2's number. *Id.* at 1:13. SUBJECT OFFICER #4 directs COMPLAINANT #2 to give his number to COMPLAINANT #1 to call his phone. *Id.* at 1:28. They then saw COMPLAINANT #2 calmly give the number to COMPLAINANT #1 and COMPLAINANT #1 call the phone. *Id.* at 1:30. An officer is heard saying "see if it rings." *Id.* at 1:34. The officers saw the screen on the phone light up and they asked COMPLAINANT #1 for his number, presumably to check if it was his number appearing on the screen of the phone in the car. *Id.* at 2:11. The video ends at this point and testimony as to what happens next is unclear.

Nonetheless, statements by the officers, including SUBJECT OFFICER #4, indicate that the officers believed COMPLAINANT #2 had verified ownership of his phone at that point:

- SUBJECT OFFICER #4 stated in his witness statement, "[t]here was at least one cell phone inside the vehicle. One of the men claimed that the cell phone belonged to him. He wanted to retrieve the cell phone. Officers advised him that he could not go inside the car to retrieve the cell phone. At some point, one of the individuals gave an officer a cell phone, which the officer dialed. The cell phone inside the vehicle rang, and I believe that the officers allowed the man to retrieve the cell phone. Exh. 18, at 2.
- SUBJECT OFFICER #1 stated in his witness statement, "[w]e then conducted a brief investigation to determine whether that individual was the owner of the phone within the vehicle. Within moments, ownership appeared to be verified because the individual knew the number of the phone." Exh. 15, at 2.
- SUBJECT OFFICER #1 testified at the evidentiary hearing that "[the officers asked COMPLAINANT #2 to provide his phone number to prove that it was his phone and] more than likely or from what I understand, ownership was confirmed. He did give the correct phone number." Tr. 80:19-81:5.

Contrary to his understanding in his witness statement, however, SUBJECT OFFICER #4 testified a year later at the evidentiary hearing that "just because they knew the number to call, I didn't feel that was enough information to give a phone to somebody to verify ownership." Tr: 121:1-12. Given that his testimony occurred after hearing SUBJECT OFFICER #1 struggling to

answer the question as to why COMPLAINANT #2 was not allowed to retrieve his phone, his testimony sounds as if it is a justification after the fact.

Even if SUBJECT OFFICER #4's testimony was correct, however, there were numerous additional ways that the officers could have verified that it was COMPLAINANT #2's phone. For example, they could have let him retrieve the phone from the car and if it required a pin, he could have shown them that he knew the pin. If there were pictures of himself on the phone he could have showed them. Moreover, had they allowed COMPLAINANT #2 to retrieve his phone, he could have called the friend, or possibly his father, which could have resolved the mystery of the ownership of the vehicle. COMPLAINANT #2 was surrounded by at least five or more officers during the entire event. There was no chance he could have escaped with the phone. Moreover, there was a Spanish speaker standing right there so there was no chance COMPLAINANT #2 could communicate something nefarious while talking on the phone.

Here, three men were stopped and frisked for something that they did not do, are told that their ride home is about to be taken away, and the only one that knows how to reach the driver and owner is not allowed to retrieve his phone. In addition, the officers gave COMPLAINANT #2 hope that his phone would be returned to him, but it was then denied, despite his calmly doing what the officers asked. Thus, that COMPLAINANT #2 became riled up after the officers denied him his phone, is not unreasonable.

For the above reasons, the arrest of COMPLAINANT #2 for the noise violation was unlawful.

**b) The unlawful arrest of COMPLAINANT #2 was reckless**

Having determined that the arrest for the noise violation was unlawful, the question is whether SUBJECT OFFICER #4 and SUBJECT OFFICER #2's unlawful action was purposeful, knowing or reckless.

Counsel for the Subject Officers contends that even if the officers were incorrect in concluding that COMPLAINANT #2's actions and volume were disturbing the peace of nearby residents, the determination was based on a reasonable belief based on the residents exiting their houses when COMPLAINANT #2 started being loud. He cites no legal basis for this argument, however, and whether the officers had a reasonable belief is questionable given that the evidence shows that COMPLAINANT #2 was not loud and raucous or loud and unseemly, that SUBJECT OFFICER #4, who made the decision to arrest COMPLAINANT #2,<sup>22</sup> did not notice the residents come out on their porches, and that COMPLAINANT #3 was louder than COMPLAINANT #2. Moreover, given the number of police vehicles with lights on, and the number of officers moving around and standing in groups talking, it was a stretch to attribute the residents coming onto their porches solely because of COMPLAINANT #2's loudness, particularly when the evidence indicates only that he was "heated." Finally, while a reasonable belief might mitigate their unlawful conduct from being purposeful or knowing, it may still be reckless.

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<sup>22</sup> See *supra* page 34-35.

The casual statements made by the officers when discussing COMPLAINANT #2's arrest indicate that it likely was not because he was too loud, but because he was annoying them. SUBJECT OFFICER #1 stated "[a]t that point in time I was pretty burnt out by the whole scene. We're trying to get the vehicle and go. Why are they still hanging around, you know? They were free to go a long time ago. They were hanging out there. [n]o one would . . . have got locked up if they would have just let us handle our business and go." Tr. 102:11-18. SUBJECT OFFICER #2 stated that "[COMPLAINANT #2] was starting to become a nuisance." Tr. 149:20-151:6. WITNESS OFFICER #1 stated that COMPLAINANT #2 was "disobeying [SUBJECT OFFICER #4's] order" causing the "[POLICE RANK]<sup>23</sup> to lock him up for the trouble." Tr. 165:18-166:19.

Moreover, the officers themselves contributed to COMPLAINANT #2's behavior. They should not have been confused about Complainants denial of involvement with the car as they, and especially WITNESS OFFICER #1, were told well before COMPLAINANT #2 tried to retrieve his phone that the Complainants had been in the car. The evidence also shows that the officers' conduct regarding returning COMPLAINANT #2's phone by giving him hope about its return and then denying it exacerbated whatever frustration the Complainants were already feeling about the stop.

Not only did the officers unnecessarily rile up COMPLAINANT #2 by refusing to allow him to retrieve his phone, the officers had the information in front of them to determine that the owner of the car was related to COMPLAINANT #2 even without COMPLAINANT #2 admitting it – they had the name of the Complainant, COMPLAINANT #2, and they had the name of the owner of the vehicle, WITNESS #1. Had the officers been paying attention, they would have seen that the owner and COMPLAINANT #2 shared the same name:

- The officers had asked for and received the Complainants' identification so they had their names, including COMPLAINANT #2's name. Exh. 15, SUBJECT OFFICER #1's Witness Statement, at 2 ("At some point in time, all three men were identified.")
- WITNESS OFFICER #2 asked the Dispatcher to run a DC tag. Exh. 32, counter 4:51 to 7:08. The Dispatcher responds that the owner's name is "WITNESS #1'S NAME SPELLED OUT IN THE PHONETIC ALPHABET. First name WITNESS #1'S FIRST NAME SPELLED OUT IN THE PHONETIC ALPHABET." *Id.* This spells WITNESS #1'S NAME.

The oversight is not understandable since SUBJECT OFFICER #4 stated in his witness statement that "the Officers ran the tags of the vehicle, and the tags did not match the information that we received from any of the three men." Exh. 18, at 2. If anything, SUBJECT OFFICER #4's statement lends further credence to the unlawful arrest being purposeful since it would indicate that he ignored evidence showing COMPLAINANT #2's relation to the owner of the vehicle. Even if SUBJECT OFFICER #4's memory was incorrect, however, one would have expected SUBJECT OFFICER #1 to make the comparison because SUBJECT OFFICER #1 stated that when he arrived at the scene he assumed the Complainants had gotten out of the

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<sup>23</sup> The Complaint Examiner understands that references to the "[POLICE RANK]" in witness statements are references to SUBJECT OFFICER #4.

vehicle, Exh. 15, at 2, and that he suspected that there was not really a fourth person that had been driving. Tr. 104:19-20. One would expect SUBJECT OFFICER #1 to check his suspicions. The oversight is even more egregious if SUBJECT OFFICER #3's claim that he had obtained the car registration out of the glovebox is true and he had the name written in front of him. Had the officers noticed that the car was registered to a person with a name that clearly appeared related to COMPLAINANT #2, there would have been no question regarding who the owner of the car was or about COMPLAINANT #2's phone.

The officers' statements surrounding the decision to arrest COMPLAINANT #2 accompanied by the lack of credibility of their testimony surrounding the arrest indicates that the unlawful arrest of COMPLAINANT #2 was purposeful. But even if it was not, the evidence of the officers' contributing to the situation that resulted in COMPLAINANT #2's arrest propels the officers conduct at the very least into recklessness. Here, the officers contributed to a situation resulting in the arrest of a man whose only real misconduct was to not admit his father owned the vehicle that was parked, unoccupied with its engine running in a bus stop. This conduct was sufficiently punished by towing the vehicle and ticketing it for being parked in a bus stop. It should not have led to COMPLAINANT #2's arrest in this case.

Although SUBJECT OFFICER #2 authored the arrest report, Exh. 26, Officer testimony, including that of SUBJECT OFFICER #4 is that SUBJECT OFFICER #4 made the decision to arrest COMPLAINANT #2 for a noise violation.

- According to SUBJECT OFFICER #4, "I probably made the decision to arrest him." Exh. 18, Witness Statement of SUBJECT OFFICER #4, at 2.
- According to SUBJECT OFFICER #2, "SUBJECT OFFICER #4 issued warnings over the radio and then decided to arrest the man for noise at night." Exh. 16, at 3, Witness Statement of SUBJECT OFFICER #2;
- According to WITNESS OFFICER #1's witness statement, "SUBJECT OFFICER #4 ordered that COMPLAINANT #2 be arrested for noise at night." Exh. 20, Witness Statement of WITNESS OFFICER #1, at 2. WITNESS OFFICER #1 reiterated that it was SUBJECT OFFICER #4 who made the decision to arrest COMPLAINANT #2 during the evidentiary hearing, "Sergeant decided to lock him up for the trouble." Tr. 166:18-19.

Because SUBJECT OFFICER #4 was the Officer who made the decision to arrest COMPLAINANT #2 the allegation of harassment against him is sustained. Because SUBJECT OFFICER #2 was an officer in training and only carrying out the decision of SUBJECT OFFICER #4, he is exonerated.

## **B. Allegations of Language and Conduct Against SUBJECT OFFICER #5**

Complainants also alleged that SUBJECT OFFICER #5 used language or engaged in conduct that was insulting demeaning, or humiliating when interacting with COMPLAINANT #3 and his wife, WITNESS #2, at the POLICE DISTRICT Station.

According to MPD General Order 201.26, Part V, Section C, "All members of the department shall be courteous and orderly in their dealings with the public. They shall perform

their duties quietly, remaining calm regardless of provocation to do otherwise. . . . Members shall refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name calling which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person.”

Moreover, The MPD General Order, Customer Service Standards and Testing, Topic/Number GO-PER-201.35, March 25, 2001, Part IV, Section A.3. provides that all members shall “[i]n a customer-friendly manner, ensure that the information or service requested is provided or is appropriately referred.”

The MPD Standard Operating Procedures, Customer Service Standards and Testing, Topic Customer Service, September 12, 2005, Part IV.B.1. provides that “[a]ll Metropolitan Police Department employees shall: c. Maintain a cordial demeanor and tone throughout the in-person interaction. d. [o]ffer name if appropriate. e. [b]e accountable for every information and service request, even if it is misdirected.”

Because the Complaint Examiner agrees with the conclusion and reasoning of the Office of Police Complaint’s Report of Investigation as to the allegation against SUBJECT OFFICER #5 for language and conduct, it reproduces that analysis, with some modifications, here.

According to COMPLAINANT #3 and his wife, WITNESS #2, SUBJECT OFFICER #5 rudely interacted with WITNESS #2 at the POLICE DISTRICT station front counter. Exh. 9, Witness Statement of COMPLAINANT #2, at 3; Exh. 12, Witness Statement of WITNESS #2, at 2. WITNESS #2 asked SUBJECT OFFICER #5 whether COMPLAINANT #2, who had been arrested earlier in the evening, was given a “right to a phone call,” to which SUBJECT OFFICER #5 responded that there was no such right. Exh. 9, Witness Statement of COMPLAINANT #2, at 3; Exh. 12, Witness Statement of WITNESS #2, at 2. WITNESS #2 stated that she believed SUBJECT OFFICER #5 was mistaken, at which point SUBJECT OFFICER #5 responded in a hostile manner, informed her that she was incorrect, and repeatedly stated that there was no right to a phone call. Exh. 9, Witness Statement of COMPLAINANT #2, at 3; Exh. 12, Witness Statement of WITNESS #2, at 2. WITNESS #2 further described SUBJECT OFFICER #5 as loud, curt, aggressive, and discourteous. Exh. 12, Witness Statement of WITNESS #2, at 2. COMPLAINANT #3 #5, who witnessed and video recorded the interaction between WITNESS #2 and SUBJECT OFFICER #5, described SUBJECT OFFICER #5 as rude and unprofessional. Exh. 9, Witness Statement of COMPLAINANT #2, at 3.

SUBJECT OFFICER #5 did not recall the incident. Exh. 19, Witness Statement of SUBJECT OFFICER #5, at 1. However, video footage captured at the POLICE DISTRICT station generally corroborates WITNESS #2 and COMPLAINANT #3’s accounts. In the video footage, SUBJECT OFFICER #5 is captured raising his voice and arguing with WITNESS #2 who walks away as SUBJECT OFFICER #5 continues to repeatedly state, “that’s a negative,” and “I work here! You don’t!” Exh. 37, video 5.

Based on the video evidence and the consistent witness and complainant accounts, SUBJECT OFFICER #5 failed to remain courteous, calm, and professional in the performance of his duties. He did not provide information in a customer-friendly manner or maintain a cordial

demeanor and tone throughout the in-person interaction. SUBJECT OFFICER #5 raised his voice and used insolent language with WITNESS #2 to highlight that he knew what he was talking about and she did not, which was disrespectful. Consequently, the allegation that SUBJECT OFFICER #5 engaged in conduct or used language toward WITNESS #2 that was insulting, demeaning or humiliating, in violation of D.C. Code § 5-1107(a) and MPD General Order 201.26 is sustained.

### **C. Allegation of Failure to Identify Against SUBJECT OFFICER #5**

Finally, Complainants also alleged that SUBJECT OFFICER #5 failed to provide his identification when requested to do so.

MPD General Order 201.26 C.1.e. requires MPD officers to “give their first and last name and badge numbers in a respectful and polite manner” when requested to do so by a member of the public. MPD officers are also required to identify themselves by displaying their badge or identification folder before taking police action, “except when impractical, unfeasible, or where their identity is obvious.”

Because the Complaint Examiner agrees with the conclusion and reasoning of the Office of Police Complaints’ Report of Investigation as to the allegation against SUBJECT OFFICER #5 for failure to identify, it reproduces that analysis, with some modifications, here.

According to COMPLAINANT #3, SUBJECT OFFICER #5 refused to provide his name, Exh. 9, Witness Statement of COMPLAINANT #3, at 3, and WITNESS #2 stated that SUBJECT OFFICER #5 refused to provide his name and badge number when requested at POLICE DISTRICT station. Exh. 12, Witness Statement of WITNESS #2, at 2. Although SUBJECT OFFICER #5 stated that he did not recall the incident, he stated that, if a civilian ever asked for his name and badge number, he would provide the requested information. Exh. 19, Witness Statement of SUBJECT OFFICER #5, at 2. SUBJECT OFFICER #5 also noted that his nameplate and badge number are affixed to his uniform. *Id.* at at 1.

Video footage captures COMPLAINANT #3 requesting the name and position of SUBJECT OFFICER #5. Exh. 37, video 5. SUBJECT OFFICER #5 responds to the request by stating, “Negative.” *Id.* COMPLAINANT #3 incredulously asks, “Negative?” *Id.* And SUBJECT OFFICER #5 states, “Yeah.” *Id.* SUBJECT OFFICER #5 then pauses and follows up by stating, “I am telling her negative in reference to that.” *Id.* SUBJECT OFFICER #5 simultaneously faces a computer screen facing away from COMPLAINANT #3. *Id.* COMPLAINANT #3 calmly insists, “we come here because we all need your help . . .” *Id.* SUBJECT OFFICER #5 interrupts and retorts, “she’s talking to the Sergeant right?” *Id.* SUBJECT OFFICER #5 further states, “The Sergeant is taking care of that matter.” *Id.* SUBJECT OFFICER #5 then twice states that the sergeant was notified, at which point a dejected COMPLAINANT #3 states, “Cool. That’s all we need to know. That’s so disrespectful and unhelpful.” *Id.* SUBJECT OFFICER #5 continues facing a computer screen, and at no point during the video footage does SUBJECT OFFICER #5 provide his name as requested. *Id.*

Based on the video evidence and the consistent and credible witness and complainant accounts, the allegation that SUBJECT OFFICER #5 failed to provide his name in a respectful and polite manner when requested to do so in violation of D.C. Code § 5-1107(a) and MPD General Order 201.26 is sustained.

**V. SUMMARY OF MERITS DETERMINATION**

<b>Allegation 1 as to SUBJECT OFFICER #1 and SUBJECT OFFICER #3:</b>	Harassment (Search)	Sustained as to both SUBJECT OFFICER #1 and SUBJECT OFFICER #3
<b>Allegation 2 as to SUBJECT OFFICER #3</b>	Harassment (blocking video recording device)	Sustained as to SUBJECT OFFICER #3.
<b>Allegation 3 as to SUBJECT OFFICER #2</b>	Harassment (ticket)	Sustained as to SUBJECT OFFICER #2.
<b>Allegation 4 as to SUBJECT OFFICER #2 and SUBJECT OFFICER #4</b>	Harassment (arrest)	Sustained as to SUBJECT OFFICER #4; Exonerated as to SUBJECT OFFICER #2.
<b>Allegation 5 as to SUBJECT OFFICER #5</b>	Language and Conduct	Sustained
<b>Allegation 6 as to SUBJECT OFFICER #5</b>	Failure to Identify	Sustained

Submitted on April 29, 2016.

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Jennifer A. Fischer, Esq.  
Complaint Examiner