

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	17-0276 and 17-0359
Complainants:	COMPLAINANT 1 and COMPLAINANT 2
Subject Officer(s), Badge No., District:	SUBJECT OFFICER 1 SUBJECT OFFICER 2 SUBJECT OFFICER 3 SUBJECT OFFICER 4 SUBJECT OFFICER 5 SUBJECT OFFICER 6 SUBJECT OFFICER 7
Allegation 1:	Harassment by Threat (SUBJECT OFFICER 1).
Allegation 2:	Harassment by Intimidation (SUBJECT OFFICER 1 and SUBJECT OFFICER 2).
Allegation 3:	Harassment by Unlawful Entry of Home (SUBJECT OFFICER 1 and SUBJECT OFFICER 2, SUBJECT OFFICER 3, SUBJECT OFFICER 4 and SUBJECT OFFICER 7).
Allegation 4:	Harassment by Unlawful Search of Home (SUBJECT OFFICER 1 and SUBJECT OFFICER 2, SUBJECT OFFICER 3, SUBJECT OFFICER 4 and SUBJECT OFFICER 7).
Allegation 5:	Harassment by Unlawful Entry or Search of Vehicle (SUBJECT OFFICER 4, SUBJECT OFFICER 5 and SUBJECT OFFICER 6).
Complaint Examiner:	Meaghan Hannan Davant
Merits Determination Date:	April 2, 2018

Pursuant to D.C. Official Code § 5-1107(b-1), the Office of Police Complaints (OPC) has the sole 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 § 5-1107(a). 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 filed separate but related complaints with the OPC on March 23, 2017 and April 24, 2017, respectively. COMPLAINANT 1 made four separate allegations of harassment: first, that SUBJECT OFFICER 1 harassed him by threatening to tear his home to pieces. Second, that SUBJECT OFFICER 1 and SUBJECT OFFICER 2 harassed him by using intimidation tactics to gain consent to enter his home. Third, that SUBJECT OFFICER 1 and SUBJECT OFFICER 3 and SUBJECT OFFICER 7 unlawfully entered his home. And, fourth, that SUBJECT OFFICER 1, and SUBJECT OFFICER 2 and SUBJECT OFFICER 4 unlawfully searched his home. COMPLAINANT 2 alleged that SUBJECT OFFICER 4, SUBJECT OFFICER 6 and SUBJECT OFFICER 5 harassed him by unlawfully searching his car.¹

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER 1 and SUBJECT OFFICER 2, SUBJECT OFFICER 3, SUBJECT OFFICER 4, SUBJECT OFFICER 5, SUBJECT OFFICER 6 and SUBJECT OFFICER 7 (collectively the "Subject Officers") on January 18, 2018, and OPC's response to the objections, the Complaint Examiner determined that the Report of Investigation presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. tit. 6A, § 2116.3.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, the objections submitted by SUBJECT OFFICER 1 and the Subject Officers on January 18, 2018, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On March 8, 2017 at approximately 9:30 p.m. COMPLAINANT 1 and COMPLAINANT 2 (together "Complainants") were sitting in a car parked outside COMPLAINANT 1's residence IN SE, WASHINGTON, DC. COMPLAINANT 1 was sitting in the driver's seat of the car and COMPLAINANT 2 in the passenger seat. Complainants were

¹ Complainants also alleged that WITNESS OFFICER 1, WITNESS OFFICER 2 and SUBJECT OFFICER 4 and SUBJECT OFFICER 3 harassed them by unlawfully stopping them. COMPLAINANT 2 further alleged that: (1) SUBJECT OFFICER 3 used unnecessary or excessive force by grabbing him and pushing him into the side of a car; (2) WITNESS OFFICER 3 and SUBJECT OFFICER 4, SUBJECT OFFICER 3 and SUBJECT OFFICER 7 harassed him by placing him in handcuffs; (3) SUBJECT OFFICER 4 used unnecessary or excessive force against him by applying the handcuffs too tightly; and (4) SUBJECT OFFICER 6, SUBJECT OFFICER 2, SUBJECT OFFICER 4 and SUBJECT OFFICER 3 harassed his girlfriend by unlawfully searching her car. COMPLAINANT 1 further alleged that: (1) WITNESS OFFICER 1 used unnecessary or excessive force against him by kneeling him in the face three times while he was in handcuffs; and (2) WITNESS OFFICER 1 harassed him by intentionally falsifying the arrest report. Pursuant to D.C. Code § 5-1108(1), on December 16, 2017, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's executive director.

- watching YouTube videos and smoking. The car belonged to COMPLAINANT 1's girlfriend, WITNESS, who was in COMPLAINANT 1's apartment at the time, caring for their four-month old child.
2. Shortly thereafter, SUBJECT OFFICER 3, WITNESS OFFICER 2, SUBJECT OFFICER 4 and WITNESS OFFICER 1 drove up in an unmarked vehicle and flashed their lights at the parked vehicle.
 3. As the Officers' vehicle approached, Complainants opened their respective car doors and stepped out of the vehicle.
 4. SUBJECT OFFICER 3 and SUBJECT OFFICER 4 approached COMPLAINANT 2 on the passenger side, while WITNESS OFFICER 2 and WITNESS OFFICER 1 approached COMPLAINANT 1 on the driver's side.
 5. Upon the Officers' approach, COMPLAINANT 1 attempted to close the drivers' side door. WITNESS OFFICER 2 prevented him from doing so by placing both hands on top of the car door.
 6. The Subject Officers reported seeing smoke in the car, smelled marijuana, and observed behavior from both COMPLAINANT 1 and COMPLAINANT 2 consistent with marijuana use, including slowed response time.
 7. A struggle broke out between COMPLAINANT 1 and WITNESS OFFICER 2 and WITNESS OFFICER 1 and COMPLAINANT 1 was placed in handcuffs and was forced to the ground, lying face down near the driver's side of the car.
 8. During his detention by the Subject Officers, COMPLAINANT 1 admitted that he had been smoking marijuana in the car.
 9. At or about that time, SUBJECT OFFICER 4, with the assistance of SUBJECT OFFICER 3, placed COMPLAINANT 2 in handcuffs. After COMPLAINANT 2 was in handcuffs, SUBJECT OFFICER 4 lifted COMPLAINANT 2's sweatshirt at the waist and saw that COMPLAINANT 2 was wearing a duty belt on his waist band that included an empty gun holster.
 10. SUBJECT OFFICER 2 dragged COMPLAINANT 2 by his torso and placed him in a sitting position on the curb behind the trunk of the parked car.
 11. SUBJECT OFFICER 2 then asked COMPLAINANT 2, "where is the gun," in response to which COMPLAINANT 2 answered, "locked up in the house." COMPLAINANT 2 then told the Subject Officers that he was a Special Police Officer ("SPO") Officer.

12. In response to repeated questions as to where he lived, COMPLAINANT 2 stated that he lived in the apartment house behind him but was initially unable to give the street address.
13. WITNESS, COMPLAINANT 1's girlfriend, arrived on the scene. In conversations with SUBJECT OFFICER 2, SUBJECT OFFICER 3 and SUBJECT OFFICER 4, WITNESS repeatedly stated that COMPLAINANT 1 was "the leaseholder" of the apartment, and that she lived in PRINCE GEORGE'S COUNTY, MD, and was only visiting with her and COMPLAINANT 1's 4-month old child. WITNESS said that COMPLAINANT 2 lived in PRINCE GEORGE'S COUNTY, MD, and was visiting COMPLAINANT 1, and that the two men were cousins.
14. WITNESS also informed the officers that she had left her baby alone in the apartment. SUBJECT OFFICER 2 told WITNESS that, if she did not give consent to allow a search of the apartment for COMPLAINANT 2's service weapon, the police would need to wait 2 to 4 hours to obtain an emergency warrant and that she would not be allowed to reenter the apartment during that time.
15. WITNESS never gave any of the Subject Officers consent to search the apartment.
16. Following his conversation with WITNESS, SUBJECT OFFICER 2 approached COMPLAINANT 1, who remained on the ground in handcuffs, and told him that if he didn't give consent to have the apartment searched, "I'm kicking in your door."
17. SUBJECT OFFICER 1 then stated that, if COMPLAINANT 1 insisted that the police wait for a warrant to conduct the search, "we're gonna tear the whole house to pieces."
18. COMPLAINANT 1 again refused to give consent, repeating "no, no" to the officers' requests.
19. SUBJECT OFFICER 2 then told COMPLAINANT 1 that he "wouldn't get in trouble" for having COMPLAINANT 2's service weapon in his home if he gave consent for the search. Conversely, SUBJECT OFFICER 2 told COMPLAINANT 1 that, if the police were required to get a warrant "you'll take the gun charge."
20. COMPLAINANT 1 then said, "Alright man. Hurry up" and then stated that he was a "scared black man."
21. SUBJECT OFFICER 2, SUBJECT OFFICER 3, SUBJECT OFFICER 4 and SUBJECT OFFICER 7 then entered COMPLAINANT 1's home and searched at least the living room of the home. SUBJECT OFFICER 2 retrieved COMPLAINANT 2's service weapon from inside a bag sitting on the couch in the living room and brought it outside to SUBJECT OFFICER 1.

22. After the service weapon had been recovered, SUBJECT OFFICER 6 asked COMPLAINANT 2 for the keys to his vehicle, which was parked next to WITNESS'S vehicle, stating, "I need your keys. I'm gonna search your car for weapons." COMPLAINANT 2, who was still in handcuffs and being held by the officers, responded, "no."
23. At this time, the contents of COMPLAINANT 2's pockets had been emptied by the officers as part of a body search. SUBJECT OFFICER 3 told SUBJECT OFFICER 6 to get COMPLAINANT 2's keys and unlock the car. SUBJECT OFFICER 6 retrieved the keys and told COMPLAINANT 2, "We wanna look through this car and make sure there's no weapons. OK? Is that cool with you? Tell me you're an honest dude and you can prove there's no guns in this car." COMPLAINANT 2 responded, "Yes, I am."
24. SUBJECT OFFICER 6 began searching the interior of COMPLAINANT 2's car while SUBJECT OFFICER 4 and SUBJECT OFFICER 5 searched the trunk of the car.
25. After the search had begun, SUBJECT OFFICER 5 asked COMPLAINANT 2 where his glock box was located. COMPLAINANT 2 responded that it was inside his blue bag, in the apartment.

IV. DISCUSSION

Pursuant to D.C. Code § 5-1107(a), (b-1), OPC has the sole authority 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."

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.

A. Harassment by Threat or Intimidation.

“Ordinarily, the Fourth Amendment requires the police to obtain a warrant supported by probable cause before they lawfully may enter a home without proper consent to search for a suspect or make an arrest.” *In re K.H.*, 14 A.3d 1087, 1090 (D.C. 2011). Here, neither SUBJECT OFFICER 1, nor any of the subject officers, produced—or otherwise contend—that they had a warrant to enter or search the apartment.

Instead, SUBJECT OFFICER 1 and certain of the subject officers sought consent to perform their search. First, SUBJECT OFFICER 2 sought consent from WITNESS, COMPLAINANT 1’s girlfriend and the mother of his 4-month old child. While SUBJECT OFFICER 2 made numerous attempts to establish that WITNESS lived in the apartment, or was otherwise authorized to give consent, WITNESS repeatedly and consistently stated that she did not live in the apartment; that she in fact lived in PRINCE GEORGE’S, MD; that she was only visiting with the baby; and that COMPLAINANT 1 was “the leaseholder.” Upon hearing that there was a 4-month-old baby alone in the home, SUBJECT OFFICER 2 told WITNESS that, if consent for a search was not given, no one would be able to enter the home for a period of 2 to 4 hours, the time necessary to obtain an emergency warrant. SUBJECT OFFICER 2’s statement does not seem credible; that the police would jeopardize the health and welfare of a 4-month old child. Instead, the statement appears to have been offered as an ultimatum—to both WITNESS and COMPLAINANT 1, who was handcuffed and lying on the ground a short distance away, to either give consent for the search or risk their baby’s safety. Despite this ultimatum, WITNESS never gave consent to search the apartment.

Having failed to gain consent from WITNESS through these tactics, SUBJECT OFFICER 2 then approached COMPLAINANT 1, who remained on the ground in handcuffs, and told him that if he didn’t give consent to have the apartment searched, “I’m kicking in your door.” SUBJECT OFFICER 1 then stated that, if COMPLAINANT 1 insisted that the police wait for a warrant to conduct the search, “we’re gonna tear the whole house to pieces.” COMPLAINANT 1 again refused to give consent, repeating “no, no” to the officers’ requests.

SUBJECT OFFICER 2 then gave COMPLAINANT 1 a second ultimatum, stating that, if he provided consent for the search, COMPLAINANT 1 “wouldn’t get in trouble” for having COMPLAINANT 2’s service weapon in his home but that, if the police were required to get a

warrant “you’ll take the gun charge.” Only then did COMPLAINANT 1 consent, stating, “Alright man. Hurry up.” In the same breath, COMPLAINANT 1 said, as observed on BWC footage, that he was a “scared black man.”

As the Supreme Court stated in *Schneckloth v. Bustamonte*, a determination of whether consent was exacted through threat or coercion is a question of fact to be determined from the totality of the circumstances. The Court strongly emphasized that any such threat should be treated as a constitutional violation, no matter how credible the possibility that it be carried out, or how subtly suggested by the officer.

“[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, *by implied threat or covert force*. For no matter how subtly the coercion was applied, the resulting ‘consent’ would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.”

412 U.S. 218, 228 (1973) (emphasis added). Quoting *Boyd v. United States*, the Court continues:

“It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.”

In considering the totality of the circumstances, there can be no question that SUBJECT OFFICER 1 and SUBJECT OFFICER 2 made credible threats to COMPLAINANT 1’s 4-month old child, to the apartment that he rented and for which he was thereby financial responsible, as well as to his future employment and even his personal freedom, should he be faced with a gun charge. Moreover, these threats were carried out while COMPLAINANT 1 was high on marijuana—and thereby lacking full capacity to give consent—and in the vulnerable position of being handcuffed, on the ground, and in police custody. In fact, COMPLAINANT 1 spoke to his present feeling of vulnerability almost simultaneous to his consent, in the same breath stating that he was “scared black man.”

Based on the totality of the circumstances, SUBJECT OFFICER 1 harassed COMPLAINANT 1 in violation of D.C. Code § 5-1107 and MPD General Order 120.25 when he threatened to “tear the whole house to pieces.” SUBJECT OFFICER 1 and SUBJECT OFFICER 2 also harassed COMPLAINANT 1 in violation of D.C. Code § 5-1107 and MPD General Order 120.25 by threatening and intimidating him in order to gain consent to perform a search of his home.

B. Harassment by Entering and/or Searching COMPLAINANT 1's Home.

As above, the Fourth Amendment prohibits law enforcement from conducting “unreasonable searches and seizures.” *U.S. v. Williams*, 878 F. Supp. 2d 190, 196-197 (D.D.C. 2012). “[A]n unconsented police entry into a residential unit, be it a house or an apartment . . . constitutes a search” subject to the requirements of the Fourth Amendment. *In re K.H.*, 14 A.3d 1087, 1090 (D.C. 2011).

1. No Exigent Circumstances Existed to Justify a Warrantless Entry and/or Search of COMPLAINANT 1's Apartment.

When a person's home is subjected to a search without a warrant, the burden shifts to the government to justify the warrantless search. *United States v. Brown*, 334 F.3d 1161, 1182 (D.C. Cir. 2003) *see also United States v. Jones*, 374 F.Supp.2d 143, 147 (D.D.C. 2005). “The existence of exigent circumstances...may justify such an intrusion without an arrest or search warrant.” *In re K.H.*, 14 A.3d at 1090.

While “the Supreme Court has not attempted a comprehensive definition of the exigent circumstances exception to the warrant requirement,” District of Columbia courts have followed the approach laid out in the *en banc* opinion of the United States Court of Appeals for the District of Columbia Circuit in *Dorman v. United States*, 140 U.S. App. D.C. 313 (1970), later summarized in *United States v. Lindsay*, 165 U.S. App. D.C. 105, 110 (1974). *Dorman* sets forth seven factors to be considered in determining whether exigent circumstances exist for a search, including: (1) That a grave offense is involved, particularly a crime of violence; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) a strong reason to believe that the suspect is in the dwelling; (5) the likelihood of escape if not swiftly apprehended; (6) a peaceful entry as opposed to a “breaking;” and (7) the time of entry (night or day). Additionally, in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006), the Court held that exigent circumstances for a warrantless entry may exist “to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”

Nothing in any of the Subject Officers' testimony, the BWC footage, or any of the other materials reviewed supports a showing that exigent circumstances existed under the *Dorman* factors. While the officers likely had probable cause that COMPLAINANT 2 had violated DC regulations regarding special police officer's transportation and storage of firearms, such a violation would not rise to the level of exigent circumstances justifying a warrantless search. *See Brigham* at 403. Moreover, while the officers believed that the gun was in the apartment, no testimony was ever given to the effect that any violence had occurred or that violence might be imminent, particularly where there did not appear to be anyone in the apartment capable of accessing and/or using the weapon.

Similarly, the facts do not credibly support the need for a warrantless search to render emergency assistance or protect person(s) from injury. While COMPLAINANT 1's 4-month-old

baby was in the apartment and left unattended, neither SUBJECT OFFICER 1 nor any of the officers ever suggested that they entered the apartment for the purpose of protecting the unsupervised child. Nor could it be argued that the gun posed any immediate threat to a child of that age.

In fact, the only immediate and credible threat to the child was created by the officers themselves, by refusing to allow WITNESS to re-enter the apartment unless and until consent for the officers to enter was given.

For all of these reasons and based on all of the evidence reviewed, SUBJECT OFFICER 3, SUBJECT OFFICER 1 and SUBJECT OFFICER 7 harassed COMPLAINANT 1 by their warrantless entry into his home absent exigent circumstances. Further, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 and SUBJECT OFFICER 4 harassed COMPLAINANT 1 by their unlawful search of COMPLAINANT 1's home. Both actions were taken despite complainants' legitimate expectation of privacy, without consent or a warrant, and without reasonable suspicion of potentially violent or criminal conduct or immediate access to weapons, in violation of § 5-1107(a) and MPD General Orders 120.25 and 304.10.

2. SUBJECT OFFICER 1 and SUBJECT OFFICER 2, SUBJECT OFFICER 3, SUBJECT OFFICER 4 and SUBJECT OFFICER 7 Lacked Consent for Their Warrantless Entry and/or Search of COMPLAINANT 1's Apartment.

"Consent is an exception to both the warrant and probable cause requirements of the Fourth Amendment." *Jackson v. United States*, 404 A.2d 911, 920 (D.C. 1979). Thereby, if consent is "voluntarily given," it will "validate a search and seizure of property effectuated without a warrant and without probable cause." *Id. citing Schneckloth*, 412 U.S. at 219.

However, consent cannot be "voluntary" if coerced, and the Supreme Court has held that "the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation." *Schneckloth at 247 citing Miranda v. Arizona*, 384 U.S. 436, 508 (1966). "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Miranda at 458. See also United States v. Watson*, 423 U.S. 411, 424 (1976)).

Here, there can be no question that COMPLAINANT 1 was in police custody at the time he gave consent to search the apartment. Specifically, COMPLAINANT 1 was in handcuffs and had been forced to the ground, deprived of freedom of movement. COMPLAINANT 1 was also being watched over by police officers, with a total of 14 total officers on the scene. *See Miranda at 455* ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

Moreover, as discussed at length in Section A *supra*, COMPLAINANT 1 was under the influence of marijuana at the time consent was given and various threats had been made

concerning the safety of his 4-month old child, destruction of his home and a potential gun charge. Almost simultaneous to his consent, COMPLAINANT 1 stated that he was a “scared black man.”

Based on the totality of the circumstances, any consent exacted from COMPLAINANT 1 was the coerced, involuntary and, thereby, invalid.

SUBJECT OFFICER 1 and SUBJECT OFFICER 3 and SUBJECT OFFICER 7 harassed COMPLAINANT 1 in violation of D.C. Code § 5-1107 and MPD General Order 120.25 when they entered his home without a warrant or valid consent. Further, SUBJECT OFFICER 1 and SUBJECT OFFICER 2 and SUBJECT OFFICER 4 harassed COMPLAINANT 1 in violation of D.C. Code § 5-1107 and MPD General Order 120.25 when they searched his home without a warrant or valid consent.

C. Harassment by Searching COMPLAINANT 1’s Vehicle.

The Supreme Court has consistently held that warrantless searches of a vehicle “are *per se* unreasonable,” “subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967).

1. Subject SUBJECT OFFICER 4, SUBJECT OFFICER 5, SUBJECT OFFICER 6 and SUBJECT OFFICER 7 Lacked Probable Cause for Their Warrantless Search of the Vehicle.

An exception to the general prohibition against warrantless searches also exists where such search is incident to a lawful arrest. *Id.* This exception “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” *Id.* at 338, citing *United States v. Robinson*, 414 U.S. 218, 230–234 (1973); *Chimel v. California*, 395 U.S. 752, 763 (1969). The “search incident to arrest” exception was applied to automobile searches in *New York v. Belton*, 453 U.S. 454 (1981).

In *Arizona v. Gant*, 556 U.S. 332 (2009), however, the Supreme Court explicitly rejected a “broad reading of *Belton*” in the context of warrantless vehicle searches. Quoting *Chimel*, the Court emphasized that, particularly where the exception is premised on officer safety, any search thereunder must be strictly limited to “the space within an arrestee’s ‘immediate control.’” Thereby, under *Gant*, the Court narrowed to the scope of vehicle searches incident to arrest to only those circumstances where: (1) there is a “reasonable possibility” that the arrestee could access a weapon; or (2) “it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.” *Gant* at 338.

First, it is clear from both Complainants’ testimony, the Subject Officers’ interviews, and the body worn camera (“BWC”) footage that both of the Complainants were in handcuffs, and under the direct supervision of several officers, at the time of the search. There was, thereby no

“reasonable possibility” that either Complainant could access the vehicle or any weapon therein. *See id.*; *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983) (“[S]earch of the passenger compartment of [the] automobile, limited to those areas in which a weapon may be placed or hidden, is permissible” only where “the police officer possesses a ‘reasonable belief based on specific and articulable’ facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.”)

Second, *Gant* provides an exception to a warrantless search where “evidence of the offense of arrest” might be found within the vehicle. However, in their interviews with the OPC, not one of the officers performing the searches—SUBJECT OFFICER 4, SUBJECT OFFICER 5, SUBJECT OFFICER 6 and SUBJECT OFFICER 7—ever claimed that the search was premised on a lawful arrest. To the extent that the search might have been premised on a lawful arrest, the only possible charges would have been either COMPLAINANT 2’s mishandling of his service weapon or public consumption of marijuana. However, COMPLAINANT 2’s service weapon had already been recovered by the officers at the scene *prior to* the search of his car, thereby making any claim of “immediate access” to a weapon that much more unlikely. Similarly, COMPLAINANT 1 had already made an admission of marijuana use.

Third, even if the subject officers had a reasonable belief that the vehicle contained an *additional* weapon or illicit drugs. After the search had already begun, SUBJECT OFFICER 5 asked COMPLAINANT 2 where his glock box was located. COMPLAINANT 2 responded that it was inside his blue bag, in the apartment. Even if, however, the glock box had been in COMPLAINANT 2’s vehicle, such would pose no immediate threat. The exigent circumstances exception allows for warrantless searches only when “an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate.” *Dorman v. U.S.*, 435 F.2d 385, 391 (1970).

Where Complainants were handcuffed prior to the search, and the police were already in possession of the service weapon and the keys to the vehicle, there could have been no chance that either Complainant could access a weapon, nor that they could destroy evidence of a crime. Thereby no “immediate or major crisis” existed that would prevent the police from obtaining a proper warrant.

Therefore, SUBJECT OFFICER 4, SUBJECT OFFICER 5, SUBJECT OFFICER 6 and SUBJECT OFFICER 7 harassed complainant by searching COMPLAINANT 2’s vehicle without probable cause, or exigent circumstances to justify a warrantless search, in violation of § 5-1107(a) and MPD General Orders 120.25 and 304.1.

2. SUBJECT OFFICER 4, SUBJECT OFFICER 5, SUBJECT OFFICER 6 and SUBJECT OFFICER 7 Lacked Voluntary Consent for Their Warrantless Search of COMPLAINANT 2’s Vehicle.

First, based on a review of the record, including the BWC footage of the scene, COMPLAINANT 2 never gave verbal consent for the search of his vehicle. A review of the footage reveals that SUBJECT OFFICER 6 asked COMPLAINANT 2 for the keys to his vehicle, which was parked next to WITNESS'S vehicle, stating, "I need your keys. I'm gonna search your car for weapons." COMPLAINANT 2, who was still in handcuffs and being held by the officers, responded, "no." Following this exchange, SUBJECT OFFICER 3 told SUBJECT OFFICER 6 to get COMPLAINANT 2's keys and unlock the car. SUBJECT OFFICER 6 retrieved the keys and told COMPLAINANT 2, "We wanna look through this car and make sure there's no weapons. OK? Is that cool with you? *Tell me you're an honest dude and you can prove there's no guns in this car.*" COMPLAINANT 2 then responded, "Yes, I *am.*" Objectively, COMPLAINANT 2's statement can only be reviewed as a response to the question posed by SUBJECT OFFICER 6 as to whether he was an honest man. At no point did COMPLAINANT 2 give verbal consent for the search of his vehicle.

Second, as discussed at length in Section B.2. *supra*, consent is an exception to the constitutional prohibition against warrantless searches and seizures, but only where such consent is voluntarily given. Where a person is in police custody at the time consent to a search is given, such consent may not be voluntary. *See Miranda* at 455. Here, in addition to being in police custody, COMPLAINANT 2 was under the influence of marijuana at the time consent was purportedly given. Based on these circumstances, any alleged consent would have been involuntary.

Therefore, SUBJECT OFFICER 4, SUBJECT OFFICER 5, SUBJECT OFFICER 6 and SUBJECT OFFICER 7 harassed complainant by searching COMPLAINANT 2's vehicle without voluntary consent, in violation of § 5-1107(a) and MPD General Orders 120.25 and 304.1.

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V. SUMMARY OF MERITS DETERMINATION

1. SUBJECT OFFICER 1

Allegation 1: Harassment by Threat	Sustained.
Allegation 2: Harassment by Intimidation	Sustained.
Allegation 3: Harassment by Unlawful Entry of Home	Sustained.
Allegation 4: Harassment by Unlawful Search of Home	Sustained.

2. SUBJECT OFFICER 2

Allegation 1: Harassment by Intimidation	Sustained.
Allegation 2: Harassment by Unlawful Entry of Home	Sustained.
Allegation 3: Harassment by Unlawful Search of Home	Sustained.

3. SUBJECT OFFICER 3

Allegation 1: Harassment by Unlawful Entry of Home	Sustained.
Allegation 2: Harassment by Unlawful Search of Home	Sustained.

4. SUBJECT OFFICER 4

Allegation 1: Harassment by Unlawful Entry of Home	Sustained.
Allegation 2: Harassment by Search of Home	Sustained.
Allegation 3: Harassment by Unlawful Search of Vehicle	Sustained.

5. SUBJECT OFFICER 5

Allegation 1: Harassment by Unlawful Search of Vehicle	Sustained.
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6. SUBJECT OFFICER 6

Allegation 1: Harassment by Unlawful Search of Vehicle	Sustained.
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7. SUBJECT OFFICER 7

Allegation 1: Harassment by Unlawful Entry of Home	Sustained.
Allegation 2: Harassment by Unlawful Search of Home	Sustained.