

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

**FINDINGS OF FACT AND MERITS DETERMINATION**

<b>Complaint No.:</b>	04-0132
<b>Complainant:</b>	COMPLAINANT
<b>Subject Officer(s), Badge No., District:</b>	SUBJECT OFFICER #1, Fifth District SUBJECT OFFICER #2, Fifth District
<b>Allegation 1:</b>	Harassment
<b>Allegation 2:</b>	Unnecessary or excessive force
<b>Allegation 3:</b>	Language or Conduct
<b>Complaint Examiner:</b>	Eleanor Nace
<b>Merits Determination Date:</b>	June 24, 2006

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). (The Complaint Examiner notes that in their Objections to the Report of Investigation, filed by SUBJECT OFFICER #2 and SUBJECT OFFICER #1 on June 7, 2006, the officers object to the form of the complaint (**Exhibit No. 1**). However, as noted in footnote 2 of the Report of Investigation (“ROI”), the complainant went in person to OPC and was interviewed by an investigator at that time. Therefore, **Exhibit No. 2** (Memorandum of Interview) and **Exhibit No. 1** (Complaint signed by Mr. COMPLAINANT) must be read together.)

**I. SUMMARY OF COMPLAINT ALLEGATIONS**

COMPLAINANT filed a complaint with the Office of Police Complaints (OPC), formerly the Office of Citizen Complaint Review (OCCR), on February 3, 2004. COMPLAINANT alleged that earlier on that same date, February 3, 2004, two subject officers, Metropolitan Police Department (MPD) SUBJECT OFFICER #1, Fifth District, and MPD SUBJECT OFFICER #2, Fifth District (1) harassed him by stopping and frisking him at gunpoint without legal justification and by detaining him for an extended period while they threatened and intimidated him, (2) used unnecessary or excessive force against him by stopping him at gunpoint and by holding a gun to his head while taunting and threatening to kill him, and

(3) used language or engaged in conduct toward him that was insulting, demeaning, or humiliating by calling him derogatory names, mocking him, and threatening to kill him.<sup>1</sup>

Specifically, COMPLAINANT alleged that on February 3, 2004, while walking in the vicinity of 17th and M Streets, N.E., at approximately an hour past midnight, he noticed an MPD police cruiser following him. Moments later, two or three police cars cornered the complainant. The officers reportedly jumped out of their cars with their guns drawn, and they ordered the complainant to put up his hands. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 assumed the lead role while WITNESS OFFICER #1, Fifth District, and an unidentified fourth officer watched from a distance. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 frisked the complainant at gunpoint while allegedly referring to him as a “nigger” and threatening to plant evidence of illegal activity on him in order to force him to talk. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 then ordered the complainant to kneel down and place his hands behind his head, after which SUBJECT OFFICER #1 allegedly placed a gun to the complainant’s head. While the complainant was on his knees with his hands behind his head, crying and praying to God, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 allegedly threatened to shoot the complainant, place him in the trunk of one of the police cars, and transport him to North Capitol Street, N.W., where they would make it appear as if he had been killed by citizens from that community. The subject officers allegedly ended the encounter in an equally abusive manner by ordering the complainant to run away and then chasing after him in their police cars, causing the complainant to narrowly miss being hit by a truck and a car. The complainant was not found in possession of any evidence of illegal activity nor was he arrested or cited for any crime. A copy of the complaint, which was timely submitted, is attached to the Report of Investigation (“ROI”) as **Exhibit 1**. It must read in conjunction with **Exhibit 2**, the report of his interview at the time he filed the complaint.

## II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC’s Report of Investigation, including all of its Exhibits, as well as the Objections to the ROI from the Office of Police Complaints, filed by Officers SUBJECT OFFICER #2 and SUBJECT OFFICER #1, 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., title 6A, § 2116.3. In those instances where the Complainant and the Officers offered

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<sup>1</sup> The complainant alleged that a total of four MPD officers were present during the stop. He was unable to provide their names or badge numbers when he filed the complaint. OPC determined during its investigation that, in addition to SUBJECT OFFICER #1 and SUBJECT OFFICER #2, WITNESS OFFICER #1, Fifth District, also was present. OPC determined based on the complainant’s allegations and the evidence gathered during its investigation that WITNESS OFFICER #1 is a witness officer rather than a subject officer. OPC was unable to identify the fourth officer who was present but determined that the fourth officer would also be a witness officer rather than a subject officer.

different versions of events, the Complaint Examiner credited the Complainant's version on the basis of credibility and plausibility.

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

Based on a review of OPC's Report of Investigation, including all of its Exhibits, and the Objections to the Report of Investigation from the Office of Police Complaints, filed by SUBJECT OFFICER #2 and SUBJECT OFFICER #1 on June 7, 2006, the Complaint Examiner finds the material facts regarding this complaint to be the following:

1. COMPLAINANT, a 26-year old landscaper, was at M Street, N.E. and 18th Street, in the District of Columbia, at approximately 1 a.m. on February 3, 2004.
2. Twelve hours later, at approximately 1:10 pm on the same date, COMPLAINANT signed a complaint at the OPC and was interviewed by Investigator Rowan.
3. At the time of his visit to OPC to file a complaint, COMPLAINANT could not provide the names or badge numbers of any officers involved in the incident that prompted his complaint.
4. In order to identify the officers allegedly involved, OPC compared information supplied by complainant with information obtained from Fifth District police radio communications, roll call attendance logs, and MPD photographs of officers who fit the physical descriptions provided by COMPLAINANT.
5. At approximately 1:05 a.m. on February 3, 2004, SUBJECT OFFICER #1 requested assistance by police radio in stopping a man dressed in the same distinctive clothing that COMPLAINANT said he had been wearing.
6. The police radio transcript and roll call attendance logs led the OPC to an identification of a second officer as SUBJECT OFFICER #2.
7. WITNESS OFFICER #1 and WITNESS OFFICER #2 were tentatively identified as officers who were on the scene but only as witnesses.
8. Assisted by MPD's Office of Professional Responsibility, OPC developed a series of photo arrays. These are included in the Exhibits attached to the ROI.
9. COMPLAINANT was shown the photo arrays on April 20, 2005, fourteen months after the alleged incident. COMPLAINANT identified SUBJECT OFFICER #1 as the first subject officer and SUBJECT OFFICER #2 as the second. COMPLAINANT thought that WITNESS OFFICER #1 was there also, but was hesitant to identify him positively, because he said that the Hispanic officer on the scene looked older and had more hair than the photo array picture of WITNESS OFFICER #1. COMPLAINANT could not identify the fourth officer.

10. SUBJECT OFFICER #1, SUBJECT OFFICER #2 and WITNESS OFFICER #1 acknowledged that they had participated in or been present at the stop of complainant. WITNESS OFFICER #2 asserted that he did not recall participating in the stop of complainant.
11. The U.S. Attorney's Office declined to prosecute the matter on April 5, 2004.
12. COMPLAINANT was dropped off at M Street, N.E. and 18th at approximately 1 a.m. on February 3, 2004.
13. COMPLAINANT noticed perhaps four other people on M Street, all separate. Within seconds, they began to scatter.
14. COMPLAINANT noticed a police car driving down the street. He began walking toward 17th Street, N.E.
15. COMPLAINANT turned a corner onto Lyman Street, N.E. The police car followed him.
16. The police car pulled up directly in front of COMPLAINANT, and additional police cars pulled up behind him.
17. It is undisputed that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 were the principal actors in the events that followed.
18. COMPLAINANT was greeted by officers with drawn guns.
19. COMPLAINANT was stopped and frisked.
20. The police officers took no steps to check COMPLAINANT's identification, although he responded to their request for identifying information.
21. The police officers made no record of the stop, other than the radio run.
22. The radio run suggests that the stop lasted 12 minutes.
23. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 ordered COMPLAINANT to his knees, with hands behind his back. COMPLAINANT complied.
24. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 threatened COMPLAINANT, verbally and physically.
25. SUBJECT OFFICER #1 held a gun to COMPLAINANT's head while he was on his knees.
26. SUBJECT OFFICER #1 opened the trunk of a police car and told COMPLAINANT to get in. He refused.

27. SUBJECT OFFICER #2 told COMPLAINANT to run. COMPLAINANT hesitated, but then took off, running towards Bladensburg Road.
28. Two of the police cars followed him.
29. COMPLAINANT finally ran into an old friend who drove him to the home of WITNESS #1, the mother of his daughter.
30. COMPLAINANT appeared upset and angry, according to WITNESS #1. He told her he had had an encounter with police, including having a gun put at his head, but he was generally unwilling to describe the incident. She suggested he file a complaint.
31. Less than twelve hours after reaching WITNESS #1's home in Maryland, COMPLAINANT appeared at OPC to file the instant complaint against unknown and unidentified police officers.

#### **IV. RESULTS OF OPC'S INVESTIGATION**

##### ***COMPLAINANT***

The COMPLAINANT, a 26-year-old landscaper at the time of the incident, went to OPC in person to file a complaint on the same day the incident allegedly occurred, February 3, 2004. OPC interviewed COMPLAINANT at that time. COMPLAINANT told OPC that at approximately 1:10 a.m., a friend of his known as "WITNESS #2" gave him a ride to 18th and M streets, N.E., a neighborhood where one of the complainant's girlfriends known as "WITNESS 3" resided. The complainant planned to meet WITNESS #3 and some other female friends. WITNESS #2 dropped off the complainant on M Street, N.E.

After being dropped off, COMPLAINANT noticed approximately four other people scattered along M Street. Within less than a minute, the people on M Street began to disperse. According to COMPLAINANT, an older woman walked by him and said words to the effect, "Here they come again. Always harassing us." Just then, COMPLAINANT noticed a police car driving down the street. COMPLAINANT began walking toward 17th Street, N.E. The police car followed the complainant and stayed with him even when he turned a corner to go onto Lyman Street, N.E. Once on Lyman Street, the police car pulled up horizontally, directly in front of COMPLAINANT. At that moment, two additional police cars pulled up behind the complainant. According to COMPLAINANT, unidentified officers, whom COMPLAINANT later identified as SUBJECT OFFICER #1 and SUBJECT OFFICER #2, jumped out of their cars with their guns drawn, pointed their guns at him, and yelled at him to put up his hands. After the complainant put up his hands, he was ordered to place his hands on a parked car.

COMPLAINANT said that the two subject officers, later identified as Officers SUBJECT OFFICER #2 and SUBJECT OFFICER #1, approached him and conducted a pat-down frisk. COMPLAINANT recalled that the officer whom OPC later identified as SUBJECT OFFICER #2 told him that his legs were not spread apart wide enough and kicked his legs farther apart.

COMPLAINANT also recalled that SUBJECT OFFICER #2 demanded to know where Mr. COMPLAINANT's gun was and told him that they knew what he was up to. COMPLAINANT did not have a gun. The officers asked COMPLAINANT to tell them his name, social security number, and date of birth. COMPLAINANT said that he complied, but he did not see any of the subject officers write down the information or relay it over a police radio.

COMPLAINANT reported that subject officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 grabbed his pants and moved him away from the parked car and towards one of the police cars. SUBJECT OFFICER #1 said, "We've got ways to make niggers talk. We can put something on you." At that point, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 told COMPLAINANT to get on his knees and put his hands behind his head. COMPLAINANT complied. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 then stood directly behind COMPLAINANT. SUBJECT OFFICER #1 allegedly held a gun a few inches from the back of COMPLAINANT's head while SUBJECT OFFICER #2 held COMPLAINANT's hands in place behind his head and told him not to turn around. COMPLAINANT said that he knew the gun remained pointed at the back of his head even though he had been ordered not to turn around because at one point, he felt the barrel of the gun against his hands. While he was on his knees, COMPLAINANT said that one of the officers placed a metal object in COMPLAINANT's hands and quickly removed the object. SUBJECT OFFICER #2 then informed COMPLAINANT that they had taken his fingerprints. COMPLAINANT said that he asked, "Why are you doing this to me, dogs?" SUBJECT OFFICER #1 responded, "Do we look like your mother fucking dogs? Call us officers."

WITNESS OFFICER #1, who along with the unidentified fourth officer had been watching from several feet away, then walked in front of COMPLAINANT and allegedly asked the complainant what he was doing there. COMPLAINANT did not respond. SUBJECT OFFICER #1 then allegedly stated, "We should shoot this nigger and make it look like someone else did it." SUBJECT OFFICER #2 allegedly added, "That's how we deal with niggers." The complainant said that he heard one of the officers say, "Just go ahead and shoot him." COMPLAINANT recalled that he started crying and praying, asking God to forgive his sins. COMPLAINANT also recalled telling SUBJECT OFFICER #2 that God was going to get him. SUBJECT OFFICER #2 allegedly responded, "By the time he gets to me he'll have used all of his punishment up on people like you."

While COMPLAINANT was still on his knees, SUBJECT OFFICER #1 opened the trunk of his police car and told COMPLAINANT to get in the trunk. COMPLAINANT refused and said that he would not fit. SUBJECT OFFICER #1 allegedly said that they would make the complainant fit in the trunk. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 then allegedly made statements about taking the complainant to North Capitol Street in northwest Washington where everyone was getting killed. The officers mused that people who lived around North Capitol Street would not like the complainant because he was from southwest Washington. One of the officers allegedly said "We'll make it look like someone else shot him. Niggers in Northwest don't like niggers from Southwest."

At that juncture, either WITNESS OFFICER #1 or the unidentified fourth officer told SUBJECT OFFICER #1 and SUBJECT OFFICER #2 to stop threatening to harm the complainant because residents were beginning to come outside. SUBJECT OFFICER #2 then allegedly told the complainant to run. COMPLAINANT initially refused because he did not want it to appear as if he was running from the police. According to COMPLAINANT, SUBJECT OFFICER #2 started counting, so he got up and ran toward Bladensburg Road, N.E. COMPLAINANT said that two of the police cars sped up behind him and forced him into an intersection where he was almost hit by a truck and a car. COMPLAINANT ran to a gas station at Bladensburg Road and 17th Street, N.E., but two of the police cars pulled into the gas station. COMPLAINANT then ran toward Mt. Olivet Road, N.E. to a pay phone. At that moment, a friend of COMPLAINANT's from high school drove by and stopped because he recognized the complainant. COMPLAINANT's high school friend then drove him to the home of WITNESS #1 in Maryland. During the ride, the complainant said that his high school friend asked him what was wrong, but he did not tell his friend because he was not comfortable confiding in someone he had not seen for many years.

In addition to relating what happened during the incident, COMPLAINANT told OPC what he had been wearing, and he provided a physical description of the officers involved. COMPLAINANT told OPC that at the time of the incident he was wearing two long-sleeved long-john shirts, a T-shirt, a bright blue Seahawks football jersey, black sweat pants, and a black winter hat, but no coat.

Regarding the officers who were present, COMPLAINANT said that he did not know or recognize any of the officers because he did not frequent the area where the incident occurred, and he has never had any encounters with Fifth District police officers or any other police. COMPLAINANT described the officers as: (1) dark black skin, heavy set/chunky with black hair; (2) dark black skin, bald, heavy-set, muscular, and SUBJECT OFFICER #2 than the first officer; (3) Hispanic, light-skinned, approximately 5'8" tall; (4) light-brown skin, slim and tall. (See **Exhibit 2** of the ROI).

COMPLAINANT responded to OPC's request for contact information regarding his friend WITNESS #2, girlfriend WITNESS #3, friend WITNESS #1, and high school friend WITNESS #4. COMPLAINANT related that neither WITNESS #2 nor WITNESS #3 was willing to serve as a witness in a police misconduct complaint because they feared retribution from the police. COMPLAINANT explained that he lacked contact information for his high school friend, WITNESS #4, because he had not seen him since the date of the incident, and prior to that he had not seen his friend since they were in high school together. COMPLAINANT said that WITNESS #1 was willing to be interviewed, and he provided OPC with contact information for WITNESS #1. See **Exhibit 3**.

On April 20, 2005, COMPLAINANT reviewed photo arrays that included pictures of officers whom OPC's investigation indicated might have been present during the incident. The photo arrays were prepared with the assistance of MPD's Office of Professional Responsibility. COMPLAINANT immediately identified SUBJECT OFFICER #1 and SUBJECT OFFICER #2. However, COMPLAINANT was unable to positively identify the Hispanic officer. He said that

the photograph of WITNESS OFFICER #1 looked like the Hispanic officer who was present; however, he noted that the Hispanic officer he remembered from the incident had more hair on his head and was older than the photograph of WITNESS OFFICER #1. Even though COMPLAINANT did not select WITNESS OFFICER #1 from the photo array, WITNESS OFFICER #1 subsequently confirmed that he was present during the stop of the complainant. COMPLAINANT was unable to identify the fourth officer who was present during the incident. See **Exhibit 4**.

### ***WITNESS #1***

OPC interviewed WITNESS #1. WITNESS #1 is the mother of the complainant's daughter. WITNESS #1 told OPC that on the morning of February 3, 2004, COMPLAINANT came to her house and said that he had had an encounter with the police. COMPLAINANT appeared to be upset and angry, but he was also quiet and unwilling to talk about the specific details of what had happened. WITNESS #1 recalled that COMPLAINANT mentioned something about police officers putting a gun to his head. WITNESS #1 said that she suggested to COMPLAINANT that he file a complaint, but she did not push him to do so because it appeared to her that he was very hesitant and nervous about the whole situation. See **Exhibit 5**.

### ***SUBJECT OFFICER #1, Fifth District***

OPC interviewed SUBJECT OFFICER #1. SUBJECT OFFICER #1 told OPC that in February 2004, he was assigned to a special patrol whose purpose was to break up a phencyclidine (PCP) drug trafficking ring. SUBJECT OFFICER #1 explained that the United States Attorney's Office for the District of Columbia (USAO) was part of a task force that sought to eradicate a PCP distribution network that stretched from Philadelphia to the District of Columbia. According to SUBJECT OFFICER #1, the area around 18th and M streets, N.E. was known for heavy trafficking in PCP, and therefore MPD's Fifth District was called upon to assist USAO. SUBJECT OFFICER #1 said that his assignment was to stop individuals who looked suspicious and to run their names to determine if they were on the USAO's "wanted" list.

SUBJECT OFFICER #1 said that on February 3, 2004, at approximately 1 a.m., he was on patrol alone in his police car when he saw the complainant standing on the corner of 19th and M streets, N.E. According to SUBJECT OFFICER #1, the complainant noticed the subject officer in his police car and began walking away at a fast pace. SUBJECT OFFICER #1 said this caused him to follow the complainant, and as he did so, he used his police radio to request assistance in stopping the complainant. SUBJECT OFFICER #1 recalled that SUBJECT OFFICER #2 responded to his call for backup assistance, and he and SUBJECT OFFICER #2 followed the complainant to Lyman Street N.E. and pulled up their cars next to the complainant.

SUBJECT OFFICER #1 stated that he got out of his car and instructed the complainant to come to him. According to SUBJECT OFFICER #1, COMPLAINANT complied. SUBJECT OFFICER #1 recalled that he then frisked the complainant for weapons. SUBJECT OFFICER #1 said that he obtained identifying information from the complainant and ran a check of that information. However, he could not recall whether he checked the information through the



computer in his police car or by police radio. SUBJECT OFFICER #1 stated that if the tape of the police radio communications made during the stop did not reflect a check of the complainant's identifying information, then he likely used the computer in his police car. SUBJECT OFFICER #1 said that the ID check revealed that COMPLAINANT did not have any outstanding warrants and was not on the U.S. Attorney's "wanted" list. SUBJECT OFFICER #1 said that he told COMPLAINANT he was free to go, and COMPLAINANT walked away toward Bladensburg Road, N.E.

SUBJECT OFFICER #1 acknowledged that in addition to SUBJECT OFFICER #2, other officers came to assist him during the stop, but he said that he could not recall the number of additional officers or their identities. SUBJECT OFFICER #1 said that the complainant obeyed the officers' commands and did not resist. According to SUBJECT OFFICER #1, none of the officers drew his gun at any point during the stop. SUBJECT OFFICER #1 said that he did not recall the complainant being instructed to get down on his knees by any of the officers, but it is possible this occurred. SUBJECT OFFICER #1 told OPC that he would instruct a suspect to get on his knees only if he believed the person was a threat. He explained that ordering a suspect to get on his knees is done in order to give officers more control of a situation.

SUBJECT OFFICER #1 maintained that his encounter with the complainant was a typical stop. SUBJECT OFFICER #1 denied that he or any of the other officers (1) held a gun to the complainant's head, (2) threatened to kill the complainant, (3) fingerprinted the complainant, (4) opened the trunk of one of the police cruisers and ordered the complainant to get in (5) verbally abused the complainant, or (6) engaged in any of the other scare tactics alleged by the complainant.

OPC informed SUBJECT OFFICER #1 during his interview that, according to a transcript of police radio communications made during the incident, the stop lasted 12 minutes. SUBJECT OFFICER #1 said that 12 minutes was not a long time for a stop. SUBJECT OFFICER #1 suggested that the stop may have ended sooner than 12 minutes, but he may have talked with the other officers before telling the dispatcher to clear the stop.

SUBJECT OFFICER #1 did not document the stop on any police department forms or in his police notebook. During his interview, SUBJECT OFFICER #1 told OPC that although he did not complete an MPD Form PD 251 (Incident Report) or an MPD Form PD 76 (Stop or Contact Report), he probably documented the stop in his police notebook. However, SUBJECT OFFICER #1 did not bring his police notebook to the interview, even though OPC had previously requested that he bring the notebook to the interview, and he said that he did not review the notebook before the interview. After the interview, OPC submitted to MPD a formal document request for the police notebook that SUBJECT OFFICER #1 used on February 3, 2004. Approximately one month later, SUBJECT OFFICER #1 notified OPC that he had reviewed his notebook and determined that it contained no notes relating to the stop of the complainant on February 3, 2004. See **Exhibit 6** and **Exhibit 7** of the ROI.

***SUBJECT OFFICER #2, Fifth District***

OPC interviewed and obtained a signed statement from SUBJECT OFFICER #2. SUBJECT OFFICER #2 told OPC that on February 3, 2004, he was on patrol alone in Police Service Area 509 within MPD's Fifth District. SUBJECT OFFICER #2 said that at approximately 1 a.m., he heard a police radio communication from SUBJECT OFFICER #1 requesting assistance in conducting the stop of a pedestrian in the vicinity of 18 and M streets, N.E. SUBJECT OFFICER #2 stated that at the time he heard SUBJECT OFFICER #1's call, he was near Maryland Avenue and 21st Street, N.E., and he recalled that he drove north on 21st Street and west on M Street until he reached SUBJECT OFFICER #1. According to SUBJECT OFFICER #2, both he and SUBJECT OFFICER #1 were in full uniform in MPD patrol cars. SUBJECT OFFICER #2 noted that the area where the stop took place was a high-crime area known for illegal PCP distribution.

With respect to the stop of the complainant, SUBJECT OFFICER #2 told OPC that he did not recall how the stop was initiated or whether SUBJECT OFFICER #1 had already stopped the complainant before he arrived. SUBJECT OFFICER #2 noted that typically when he conducts a stop, he gets out of his police car, asks the person stopped whether he is concealing any weapons, and conducts a pat-down frisk for weapons in the interest of safety. SUBJECT OFFICER #2 did not indicate whether he participated in a frisk of the complainant. He stated that he believed they checked the complainant's identification, determined that the complainant did not have any outstanding warrants, and left the scene. Regarding the ID check, SUBJECT OFFICER #2 said that he believed SUBJECT OFFICER #1 performed the check either through the computer in his car or by calling the central communications dispatcher over his police radio. SUBJECT OFFICER #2 stated that he believed the stop lasted no longer than five minutes. He stated that the reason the transcript of the police radio communications shows that the stop took longer than five minutes is that the officers may have patrolled the area before notifying the dispatcher to clear the stop.

SUBJECT OFFICER #2 stated that he did not recall if any other officers were present during the stop. SUBJECT OFFICER #2 asserted that neither he nor SUBJECT OFFICER #1 drew his gun on the complainant. SUBJECT OFFICER #2 said that he was not certain whether they ordered the complainant to get down on his knees. He claimed that if they did, it would have been because they perceived the complainant to be a threat. SUBJECT OFFICER #2 explained that for safety reasons, he would typically order a person under the influence of PCP to get on his knees for a pat-down frisk. He further stated that based on his experience, it appeared to him that the complainant was under the influence of PCP because he heard the complainant mumble incomprehensibly.

SUBJECT OFFICER #2 denied that he and SUBJECT OFFICER #1 used scare tactics against the complainant. Specifically, SUBJECT OFFICER #2 said that neither he nor SUBJECT OFFICER #1 (1) drew a gun on the complainant, (2) opened the trunk of one of the police cars and threatened to put the complainant in, (3) placed an object in the complainant's hands to make him think they had taken his fingerprints, or (4) said anything insulting, derogatory, or threatening to the complainant.

SUBJECT OFFICER #2 said that he did not fill out any police forms to document the stop and that he did not have any notes in his police notebook regarding this incident. *See Exhibit 8 and Exhibit 9.*

***WITNESS OFFICER #1, Fifth District***

OPC interviewed and obtained a signed statement from witness officer WITNESS OFFICER #1. WITNESS OFFICER #1 said that on February 3, 2004, he worked on the Fifth District's "power shift," a 7 p.m. to 4 a.m. shift that supplies additional patrol officers during peak periods of criminal activity. He added that he was accompanied by another officer but said that he did not recall who his partner was on that date. WITNESS OFFICER #1 stated that at approximately 1:25 a.m., he heard a call over his police radio regarding a suspicious person in the vicinity of 17th and Lyman streets, N.E. Moments later he heard a related message over the police radio saying that a person matching the description of the alleged suspicious person had been stopped on Lyman Street. WITNESS OFFICER #1 then drove to Lyman Street. When he arrived, he saw a patrol car and two officers standing at the back of a police car interviewing a black male, later identified as the complainant. One of the officers he saw was SUBJECT OFFICER #1. WITNESS OFFICER #1 said that he did not recall the identity of the officer who was with SUBJECT OFFICER #1.

WITNESS OFFICER #1 got out of his car, but he and his MPD partner stood approximately five to ten feet away from the other officers and the complainant. He explained that the reason he stood at a distance was to secure the area and provide cover to the officers who were interviewing the complainant. WITNESS OFFICER #1 said that he could not hear the conversation between the officers and the complainant. However, he said that no voices were raised, and the situation appeared calm. According to WITNESS OFFICER #1, the conversation between the complainant and the officers who interviewed him was finished within a few minutes, and the complainant walked away from the officers toward 17th Street, N.E. WITNESS OFFICER #1 said that he and the other officers then got in their patrol cars and left the area. When asked whether the officers followed the complainant, WITNESS OFFICER #1 asserted that if their cars followed COMPLAINANT, it was not intentional, but rather resulted from the fact that Lyman is a one-way street. *See Exhibit 10.*

According to WITNESS OFFICER #1, he did not have any verbal or physical contact with COMPLAINANT. WITNESS OFFICER #1 said that at no time did he or any of the other officers draw a gun. WITNESS OFFICER #1 also stated that he never saw the complainant on his knees, and he never saw any of the officers make physical contact with COMPLAINANT. WITNESS OFFICER #1 said that he did not recall the trunk of one of the patrol cars being opened during the stop. WITNESS OFFICER #1 maintained that nothing occurred during the stop that was out of the norm. *See Exhibit 11.*

***WITNESS OFFICER #2***

OPC interviewed and obtained a signed statement from MPD WITNESS OFFICER #2, because he was among the officers whom OPC's investigation indicated could have been present

during the stop, and he generally matched the complainant's description of the fourth subject officer.<sup>2</sup> WITNESS OFFICER #2 told OPC that on February 3, 2004, he worked on the Fifth District's power shift.

WITNESS OFFICER #2 said that he has assisted SUBJECT OFFICER #1 and SUBJECT OFFICER #2 with a few pedestrian stops but that he did not recall any of these stops in particular. COMPLAINANT did not deny that he has assisted subject officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 with a stop that involved officers drawing their guns, ordering the citizen to his knees, or popping the trunk of a squad car. However, WITNESS OFFICER #2's union representative, who was present during his interview, advised Officer WITNESS OFFICER #2 to refrain from allowing anything to be included in his official signed statement other than, "I do not recall the alleged incident." Accordingly, WITNESS OFFICER #2's signed statement includes only the assertion that he does not recall assisting subject officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 with a pedestrian stop on February 3, 2004. See **Exhibit 12** and **Exhibit 13**.

### ***USAO PCP Investigation***

OPC interviewed Assistant United States Attorney (AUSA) WITNESS #5. WITNESS #5 was one of the lead AUSAs working on the PCP investigation referred to by SUBJECT OFFICER #1. WITNESS #5 stated that the PCP investigation had a national scope and focused on over 30 target areas. She stated that MPD did not have a special PCP task force but that the Fifth District's officers all assisted in the investigation. WITNESS #5 said that the first indictments relating to the PCP investigation were handed down in late March 2004.

OPC asked whether USAO maintained a list of persons wanted in connection with the PCP investigation that Fifth District officers were instructed to use in checking the identities of persons they stopped. AUSA WITNESS #5 stated that there were suspects who had been identified through video surveillance, and officers were instructed to look for those suspects, but in most cases USAO did not have the names of the suspects. AUSA WITNESS #5 also stated that in order to maintain the secrecy of the investigation, officers might not reveal to OPC their actual basis for stopping a suspect. See **Exhibit 14**.

### ***MPD Recording of Police Radio Transmissions***

OPC obtained and transcribed an audiotape of police radio communications made by MPD Fifth District police officers on February 3, 2004, between 12 a.m. and 2:29 a.m. The transcript reflects that at 1:05 a.m., Unit 5092, which OPC determined corresponded to SUBJECT OFFICER #1, asked for assistance in stopping an individual at 19th and M streets,

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<sup>2</sup> WITNESS OFFICER #2 is currently assigned to MPD's First District. However, he was assigned to the Fifth District in February 2004 when the incident under review in this case occurred.

N.E. Unit 5082, which OPC determined corresponded to SUBJECT OFFICER #2, stated that he would assist and he asked for a description of the individual. SUBJECT OFFICER #1 replied that the person to be stopped was a black male, wearing a blue Seahawks football jersey with the number 24 on the front, black pants, and a black stocking cap. SUBJECT OFFICER #1 then clarified that the suspect had walked to the 1700 block of Lyman Street. SUBJECT OFFICER #2 indicated that he was on M Street, preparing to head south on 19th Street. SUBJECT OFFICER #1 replied that SUBJECT OFFICER #2 would then be in a position to come up right behind him.

At 1:08 a.m., the dispatcher asked the officers to confirm whether they had succeeded in stopping the individual. At 1:09 a.m., one of the officers confirmed that they had made the stop. There were no communications from the subject officers between 1:09 a.m. and 1:20 a.m. At 1:20 a.m., SUBJECT OFFICER #1 notified the dispatcher to clear the stop.

The transcript revealed that other Fifth District officers investigating unrelated incidents “called in” the identify of suspects they had stopped and asked for the identifying information to be checked against computerized criminal justice databases. However, the transcript indicates that none of the subject officers in this case requested the dispatcher to conduct a computer check of complainant COMPLAINANT’s identification. The transcript also clarified that no lookout was ever broadcast for a suspicious person wearing clothing that matched the clothing worn by the complainant. Rather, the radio communications regarding the complainant were generated by SUBJECT OFFICER #1, and SUBJECT OFFICER #1 did not describe the complainant as suspicious. He merely asked for assistance stopping an individual, and he described the complainant’s location and clothing. *See Exhibit 15.*

### ***Mobile Data Computer Activity Report***

OPC obtained and reviewed MPD’s Mobile Data Computer (MDC) activity report from February 3, 2004, between 12:51 a.m. and 2:44 a.m. This a report of computer activity initiated by MPD officers from mobile computers inside their police cars. The report indicates that at 1:08 a.m., SUBJECT OFFICER #1 checked a Virginia vehicle license plate number in the National Crime Information Center (NCIC) database. The NCIC database is a computerized criminal justice directory containing information about crimes, suspects, and convicted criminals, among other things. The MDC activity report further revealed that at 1:25 a.m., SUBJECT OFFICER #1 checked a D.C. vehicle license plate number against the information in the NCIC database.

The MDC activity report indicates that there were no other computer checks initiated by SUBJECT OFFICER #1 between 12:51 a.m. and 2:44 a.m. Specifically, there was no record that SUBJECT OFFICER #1 checked any information relating to the complainant. Moreover, there are no entries on the MDC activity report showing that any officer present during the stop checked identifying information about COMPLAINANT, such as his name, date of birth, social security number, or driver’s license number. *See Exhibit 16.*

### ***PD Form 775s, Daily Vehicle Inspection and Activity Reports***

OPC requested from MPD all PD 775 Daily Vehicle Inspection and Activity Reports for Fifth District officers who worked the midnight or power shifts on February 3, 2004.

A PD 775 is a handwritten log of each incident an MPD officer responds to while patrolling in an MPD vehicle. MPD officers are required to complete and submit a PD 775 for each shift worked. In response to OPC's request, MPD provided several Fifth District vehicle logs. However, those documents did not contain the vehicle logs for subject officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2, WITNESS OFFICER #1 or Officer WITNESS OFFICER #2. MPD told OPC that it could not locate the vehicle logs for several officers who were on patrol on February 3, 2004. None of the vehicle logs that were submitted to OPC were from officers who reported having assisted with a pedestrian stop around 17th and Lyman streets N.E. at approximately 1 a.m. See **Exhibit 17**.

### ***Identifying the Officers Present During the Incident***

In order to identify the four officers who allegedly were present during the incident, OPC compared information provided by the complainant during his interview with information obtained by reviewing Fifth District police radio communications, Fifth District roll call attendance logs, and MPD photographs of officers who fit the physical descriptions supplied by the complainant.

Specifically, in reviewing the transcript of Fifth District police radio communications, OPC saw that an officer requested assistance stopping a man dressed in clothing that matched the distinctive clothing that the complainant had told OPC he was wearing. The transcript identified the officers who conducted the stop as unit 5092 and unit 5082. See **Exhibit 15**. OPC learned in reviewing the roll call attendance logs that unit 5092 referred to SUBJECT OFFICER #1 and that unit 5082 referred to SUBJECT OFFICER #2. See **Exhibit 18**. In order to identify the other two officers who allegedly were present, OPC reviewed the roll call logs and developed a list of officers who, based on the locations of their respective assignments, had the greatest likelihood of having been present during the stop. The only Hispanic officer on the list was WITNESS OFFICER #1. The only officer on the list who generally matched the complainant's description of the fourth officer was Officer WITNESS OFFICER #2.

With assistance from MPD's Office of Professional Responsibility, OPC developed a series of photo arrays. The arrays contained photographs of SUBJECT OFFICER #1, SUBJECT OFFICER #2, WITNESS OFFICER #1, and WITNESS OFFICER #2, surrounded by photographs of other officers whose physical characteristics matched those provided by the complainant during his interview. See **Exhibit 4**. The complainant was shown the photo arrays on April 20, 2005. COMPLAINANT identified SUBJECT OFFICER #1 as the first subject officer and SUBJECT OFFICER #2 as the second subject officer. COMPLAINANT thought that WITNESS OFFICER #1 could have been the Hispanic officer, but he was hesitant to positively identify him because the Hispanic officer he recalled looked older and had more hair

than the photograph of WITNESS OFFICER #1. COMPLAINANT could not positively identify the fourth officer.

Thereafter, OPC interviewed SUBJECT OFFICER #1, SUBJECT OFFICER #2, WITNESS OFFICER #1, and WITNESS OFFICER #2. During the course of the interviews, Officers SUBJECT OFFICER #1, SUBJECT OFFICER #2, and WITNESS OFFICER #1 acknowledged that they had participated in or been present during the stop of the complainant. Officer WITNESS OFFICER #2 asserted that he did not recall participating in the stop of the complainant.

## V. DISCUSSION

Pursuant to D.C. Official Code Section 5-1107 (a), “The Office [of Police Complaints] shall have the authority to receive and to dismiss, conciliate, mediate, or 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,” harassment, the use of unnecessary or excessive force, and language or conduct that is insulting, demeaning or humiliating.

### *Harassment*

Harassment is defined in MPD Special Order 01-01, Part III, Section G: “Harassment – includes, but is not limited to acts that are intended to bother, annoy, or otherwise interfere with a citizen’s ability to go about lawful business normally, in the absence of a specific law enforcement purpose.” See **Exhibit 20**. Harassment also is defined in OPC’s regulations 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 or the covered law enforcement agency, 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, the Office 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 or the covered law enforcement agency, the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating. D.C. Mun. Regs., Title 6A, § 2199.1. See **Exhibit 21**.

The COMPLAINANT alleged that the subject officers harassed him by stopping and frisking him at gunpoint and by detaining him while they threatened and intimidated him. SUBJECT OFFICER #1 acknowledged stopping and frisking the complainant. SUBJECT

OFFICER #2 acknowledged closely assisting SUBJECT OFFICER #1, although he did not recall specifically how the stop was initiated or the extent to which he participated in the frisk. WITNESS OFFICER #1 recalled that the stop was in progress when he arrived, but he acknowledged that he facilitated the stop by being present, securing the scene and providing cover for SUBJECT OFFICER #1 and SUBJECT OFFICER #2 while they interacted with the complainant.

SUBJECT OFFICER #1 contended that the stop was justified because he was under orders to stop persons who looked suspicious in the vicinity of 18th and M streets, N.E. and to determine if they were involved in PCP trafficking. SUBJECT OFFICER #1 further stated that he stopped the complainant because he saw the complainant standing on the corner of 19th and M streets at 1 a.m., and when the complainant noticed the subject officer in his police car, the complainant began to walk away at a fast pace.

Despite SUBJECT OFFICER #1's belief that he was authorized to stop people who looked suspicious in the area around 18th and M streets, N.E. in connection with USAO's PCP crackdown, his authority to conduct stops was circumscribed by MPD General Order 304.10 and the Fourth Amendment to the U.S. Constitution, on which the general order is based.

MPD General Order 304.10 governs police-citizen contacts, stops and frisks. *See Exhibit 22.* The order defines a stop as the temporary detention of a person for the purpose of determining whether probable cause exists to arrest the person. Consistent with well-established Fourth Amendment law, *see, e.g., Terry v. Ohio*, 392 U.S. 1 (1968), General Order 304.10 authorizes an officer to stop a citizen only if the officer "reasonably suspects that a person has committed, is committing, or, is about to commit any crime." Also consistent with Fourth Amendment law, General Order 304.10 authorizes an officer to conduct a protective pat-down frisk of a suspect's outer clothing only if the officer "reasonably suspects that the person is carrying a concealed weapon or dangerous instrument and that a frisk is necessary to protect himself/herself or others." *See also Terry v. Ohio*, 392 U.S. at 27.

In addition to establishing parameters for when stops and frisks are authorized, General Order 304.10 requires that all officers must document, on a PD 251 (Incident Report) or PD 76 (Contact or Stop Report), the particular factors relied upon in making a stop as well as the specific factors relied upon in conducting a protective frisk. General Order 304.10 lists factors which may be considered in determining whether "reasonable suspicion" exists, including the person's appearance, the person's actions, the area of the stop, time of day, police training and experience, and information obtained from law enforcement sources about the person.

General Order 304.10 further provides that at some point during the stop the officer shall, in every case, give the person an explanation of the purpose of the stop. Furthermore, the record of the stop, PD 251 or PD 76, "shall briefly note the fact that the officer gave the person an explanation for the stop, and the nature of that explanation."

Although the subject officers failed to comply with their obligation under General Order 304.10 to document the basis for the stop and frisk of the complainant, SUBJECT OFFICER



#1's statement indicates that he stopped the complainant because he was walking in a high-crime area at 1 a.m., and the complainant quickened his pace when he saw the subject officer driving a police cruiser down the street. SUBJECT OFFICER #1's statement further reveals that he immediately frisked the complainant as soon as he stopped him.

Even though the complainant was in a high-crime area not long after midnight, his mere act of walking at a quickened pace when he noticed SUBJECT OFFICER #1 was not sufficient to justify a *Terry* stop. First, it is well established that a person's presence in a high-crime area, standing alone, does not meet the Fourth Amendment requirement of particularized suspicion that the person has committed, is committing, or is about to commit a crime. *See, e.g., Jones v. United States*, 374 F. Supp. 2d 143, 151 (D.D.C. 2005); *see also Jackson v. United States*, 805 A.2d 979, 990 (D.C. 2002). Second, although the Supreme Court in *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), held that a person's unprovoked flight upon seeing police can under certain circumstances – most notably where a person engages in immediate, headlong flight – constitute adequate justification for a *Terry* stop, the Court did not hold that every attempt to avoid contact with police provides adequate justification for a stop. Moreover, the D.C. Court of Appeals, in considering the reach of the Supreme Court's decision in *Wardlow*, expressly declined to decide whether increasing one's pace upon seeing police, as distinct from running, is alone sufficient to justify a *Terry* stop. 802 A.2d. at 370. Furthermore, in *Wilson*, the D.C. Court of Appeals declined to conclude that the Supreme Court's decision in *Wardlow* abrogated the D.C. Court of Appeals' observation in *Smith v. United States*, 558 A.2d 312 (D.C. 1989), that the manner in which a person attempts to evade police can, based on the circumstances, be construed as an innocent desire to avoid police rather than as consciousness of criminal activity.<sup>3</sup>

In this case, the evidence taken from the statements of the complainant and SUBJECT OFFICER #1 indicates that COMPLAINANT had just been dropped off in the area, and as he began walking down the street a police car appeared and other persons in the area began dispersing. The complainant was alone, had not been observed conversing or interacting with others suspected of illegal narcotics activity, was not the subject of a report of crime, did not engage in any furtive movements, such as stuffing or putting away suspected contraband, and in no other way was associated with criminal activity at the time SUBJECT OFFICER #1 drove by.<sup>4</sup> Moreover, the complainant did not engage in headlong flight upon seeing SUBJECT

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<sup>3</sup> The decision in *Smith* was partially abrogated on other grounds by the Supreme Court's decision in *California v. Hodari D.*, 499 U.S. 621 (1991); however, that modification does not affect the aspect of the *Smith* decision relied upon in this matter. *See, e.g., Green v. United States*, 662 A.2d 1388 (D.C. 1995), noting effect of *California v. Hodari D.* upon the holding in *Smith*.

<sup>4</sup> Neither the hearing examiner nor OPC drew a negative inference from the complainant's alleged inability to obtain contact information for his friends WITNESS #2 and WITNESS #3. These witnesses would not have been able to provide relevant information since, according to the complainant, WITNESS #2 was gone by the time the other persons on M Street began dispersing and SUBJECT OFFICER #1 began following the complainant.

OFFICER #1. Rather, he merely quickened his pace and turned onto a different street, in the apparent hope of avoiding contact with SUBJECT OFFICER #1. Because it was the complainant's right to avoid contact with the police, *see Smith v. United States*, 558 A.2d at 316, and because there were no other signs that he had been or would become involved in criminal activity, the subject officers lacked reasonable suspicion to stop him. Accordingly, he was subjected to seizure without adequate legal justification.

Even if the subject officers had possessed reasonable suspicion to stop COMPLAINANT, which they did not, they nevertheless lacked adequate justification to frisk him. According to SUBJECT OFFICER #1's statement, when he got out of his police car, he told the complainant to come to him, which the complainant did, and he immediately frisked the complainant for weapons. However, a valid stop does not automatically authorize a frisk. As the D.C. Court of Appeals has stated: " 'Even assuming the validity of an investigatory stop, the police are not at liberty to conduct a protective search every time they make an investigatory stop.' " *Prince v. United States*, 825 F.2d 928, 931 (D.C. 2003) (*quoting Upshur v. United States*, 716 A.2d 981, 983 (D.C. 1998)). "To justify a protective search, the police officer 'must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.' " *Id* (*quoting Sibron v. New York*, 392 U.S. 40, 64 (1968)).

There were no factors present to suggest that COMPLAINANT was armed and dangerous. First, he had not been observed participating in any crime, and SUBJECT OFFICER #1 did not report seeing any bulges on the complainant's clothing that suggested he might have a weapon. SUBJECT OFFICER #1 also did not report seeing the complainant engage in any furtive moments with his hands or clothing suggesting an attempt to hide a weapon. SUBJECT OFFICER #1 frisked the complainant for no reason other than that he was in a high-crime area. However, under the Fourth Amendment, and under General Order 304.10, that was not a valid basis for frisking the complainant.

After being stopped and frisked in violation of the law, COMPLAINANT was subjected to an investigatory detention that exceeded in duration and scope that which was necessary to determine that he was not involved in criminal activity, and the evidence supports a finding that he was mistreated by the subject officers during the process. General Order 304.10 aptly defines a stop as a "temporary" detention. The order clarifies, moreover, that the duration of a stop must be limited to the time necessary to establish whether probable cause to arrest exists. The order states: "Officers shall detain a person only for the length of time (not to exceed 10 minutes) necessary to obtain or verify the person's identification; to obtain an account of the person's presence or conduct, or otherwise determine if the person should be arrested." As with other provisions of General Order 304.10, the order's insistence upon a limited intrusion in the case of a stop is consistent with well-established Fourth Amendment law. *See, e.g., Florida v. Royer*, 460 U.S. 491, 498 (1983), in which the Supreme Court stated, "An investigative stop must be temporary and must last no longer than is necessary to effect the purpose of the stop. Similarly

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Similarly, since the complainant never made it to WITNESS #3 house before being stopped by the police, she did not witness the incident.

the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."

The subject officers contend that the stop lasted no more than five minutes and that during the stop, they did nothing more than frisk the complainant, obtain identifying information, and verify that the complainant had no outstanding warrants and was not on any list of "wanted" criminals. However, the subject officers' assertions that they merely checked whether the complainant was "wanted" and submitted his identification for verification are not credible. First, the complainant told OPC that he did not see any of the officers write down or take any steps to verify his name, date of birth, or social security number after he complied with their request to provide this information. Second, it does not appear, based on OPC's interview with AUSA WITNESS #5, that there existed a list of suspects in the USAO's PCP investigation against which to check the complainant's name. Third, although SUBJECT OFFICER #1 and SUBJECT OFFICER #2 both claimed that SUBJECT OFFICER #1 checked the complainant's identifying information either through a request placed with the dispatcher via his police radio or on the mobile computer in his car, OPC's investigation revealed that neither subject officers SUBJECT OFFICER #1 or SUBJECT OFFICER #2, or any officer present during the stop of the complainant, verified the complainant's ID using either their police radios or the computers in their cars. The subject officers' credibility about what they did during the stop is further undermined by the fact that neither of them documented the stop by completing a PD 251 or PD 76, as required by General Order 304.10, and neither recorded the stop in his police notebook.

WITNESS OFFICER #1 told OPC that it appeared to him that the subject officers conducted a routine stop in which nothing out of the ordinary occurred, but he also explained that he arrived on the scene after the subject officers and he stood several feet away during the encounter, so he may not have been in a position to see what took place. Because WITNESS OFFICER #1 either did not see what the subject officers did while they had the complainant in their custody or is unwilling to admit having seen it, the Hearing Examiner finds that his assertions that nothing out of the ordinary happened do not undermine the complainant's credibility with regard to what happened.

The Hearing Examiner credits the complainant's assertion that the subject officers used the time that they detained him not to verify that he was not a criminal, but to intimidate him through abusive scare tactics. Specifically, the Hearing Examiner credits the complainant's allegations that the subject officers stopped and frisked him at gunpoint, threatened to plant illegal evidence on him to get him to talk, ordered him to get on his knees and put his hands behind his head, held a gun to the back of his head, placed an object in his hand that made it appear as if they had obtained his fingerprints, threatened to put him in the trunk of one of the police cars, threatened to kill him and make it appear as if persons around North Capitol street, N.W. had killed him, chased him with their police cars, and called him profane and derogatory names.

OPC found COMPLAINANT to be credible because he appeared to be truthful during his interview, he has no history of contact with the subject officers, and he was not arrested as a result of his encounter and thus did not have reason to get back at the officers. Furthermore, and

perhaps most significant, when COMPLAINANT submitted his complaint form, he was unable to identify the subject officers. Neither OPC nor the Hearing Examiner can establish any reasonable motivation for COMPLAINANT to make false allegations against officers whose identity he did not know. Moreover, COMPLAINANT's credibility was enhanced during the photo identification process. When shown the photo arrays, COMPLAINANT declined to positively identify WITNESS OFFICER #1, even though he had a basis to believe that WITNESS OFFICER #1 was the Hispanic officer who had been present during the stop. However, because there were small discrepancies between what he remembered seeing and the photograph, he erred on the side of saying he could not identify the officer rather than falsely single out an officer who had not been present. COMPLAINANT's credibility is further buttressed by the statement of WITNESS #1, who said that the complainant came to her home immediately after the alleged incident and told her that a police officer had held a gun to his head. WITNESS #1 further recalled that the complainant was upset, nervous, reticent, and obviously disturbed about what had happened to him.

The Hearing Examiner finds it significant that both Officers SUBJECT OFFICER #2 and SUBJECT OFFICER #1 acknowledged that they might have ordered COMPLAINANT to his knees. Moreover, WITNESS OFFICER #2 could not deny that he had assisted SUBJECT OFFICER #2 and SUBJECT OFFICER #1 with a stop during which police officers drew their guns, ordered the citizen to his knees, and popped the trunk of a squad car. (*See Exhibit 13* of the ROI)

An MPD officer commits harassment by engaging in conduct that bothers, annoys, or otherwise interferes with a person's ability to go about his or her lawful business normally, in the absence of a legitimate law enforcement purpose. *See* MPD Special Order 01-01 (**Exhibit 20**). An officer lacks a legitimate law enforcement purpose when he or she engages in conduct that violates MPD orders or other applicable laws. OPC's regulations further clarify that harassment occurs when an officer purposefully, knowingly or recklessly violates MPD orders and other applicable laws and in doing so subjects a person to arrest, detention, search, seizure, mistreatment, humiliation, or the denial or infringement of any personal or property rights. *See* D.C. Mun. Regs., Title 6A, § 2199.1 (**Exhibit 21**).

In stopping and frisking the complainant without reasonable suspicion that he was involved in criminal activity or that he was armed and dangerous, the subject officers violated MPD General Order 304.10 and the Fourth Amendment to the U.S. Constitution. Furthermore, by detaining the complainant longer than was necessary to verify his identity and to determine that there was no basis to arrest him, the subject officers again violated General Order 304.10 and the Fourth Amendment. Finally, by subjecting the complainant to abusive scare tactics while they had him in custody, the subject officers violated the Fourth Amendment's prohibition against unreasonable seizures. Not only did the subject officers violate MPD's rules and federal law, but they bothered and annoyed the complainant and prevented him from going about his lawful business normally, and their deliberate or reckless violations of MPD procedure and Fourth Amendment law subjected the complainant to detention, search, seizure, mistreatment, humiliation, and infringement of his civil rights. Therefore, the Hearing Examiner concludes

that Officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 harassed the complainant in violation of MPD General Order 01-01.

### *Unnecessary or Excessive Force*

MPD General Order 901.07, Part II states, “[T]he policy of the Metropolitan Police Department is to preserve human life when using lawful authority to use force. Therefore, officers of the Metropolitan Police Department shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others.” General Order 901.07 IV.B. states: “No member shall draw and point a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that the situation may escalate to the point when lethal force would be permitted.” See **Exhibit 23** at p 4. Use of unnecessary or excessive force, as defined by MPD Special Order 01-01, Part III, Section N, includes “the use of force that is improper in the context of the incident giving rise to the use of force.” The regulations governing OPC define excessive or unnecessary force as “[u]nreasonable use of power, violence, or pressure under the particular circumstances.”

COMPLAINANT did not specifically allege that he was subjected to the use of unnecessary or excessive force. However, because MPD considers the act of drawing or pointing a gun at a person for the purpose of obtaining the person’s compliance with the police as a use of force, and because the complainant alleged that the subject officers initiated the stop with their guns drawn and pointed at him, and further alleged that SUBJECT OFFICER #1 pointed a gun at his head during the stop, OPC construed the complaint as containing allegations of unnecessary or excessive force.

The subject officers deny that they drew their guns at any point during the stop of the complainant. For the reasons discussed in the analysis of the complainant’s harassment allegation, the Hearing Examiner credits the complainant’s account. Moreover, the complainant’s allegation that SUBJECT OFFICER #1 placed a gun to his head is corroborated by the statement of WITNESS #1 who specifically recalled that the complainant told her that a gun had been held to his head at one point during the encounter. The two subject officers have a heavy incentive not to be truthful about what happened, and their credibility on certain points is undermined by the evidence, as discussed above. WITNESS OFFICER #1 may not have been in a position to see what the subject officers did because he arrived on the scene after the subject officers and stood several feet away in order to provide cover. In the event that WITNESS OFFICER #1 may have seen the subject officers engage in the conduct complained of, he apparently is unwilling to admit this. Accordingly, the Hearing Examiner concludes that SUBJECT OFFICER #1 and SUBJECT OFFICER #2 did draw their guns in initiating the stop, and that SUBJECT OFFICER #1 held his gun near the complainant’s head later during the encounter.

Because the subject officers were in a high-crime area participating in a special PCP investigation, they may have believed it proper to use their guns in initiating the stop. Therefore, the Hearing Officer cannot conclude that the officers used unnecessary or excessive force by

having their guns out when they first ordered the complainant to halt. However, there was no legitimate reason for SUBJECT OFFICER #1 to point his gun at the complainant's head while the complainant was on his knees. First, the officers had already determined when they frisked the complainant that he did not have a weapon. Second, the subject officers concede that the complainant cooperated with their orders throughout the stop. Thus, the complainant did not pose a threat warranting that a gun be pointed at him while he was detained. Although SUBJECT OFFICER #2 claimed that it appeared to him the complainant was high on PCP, based on hearing him mumble incomprehensively, this assertion is not supported by the statements of the other officers. Moreover, it is significant that the complainant was not arrested. Accordingly, the Hearing Examiner finds that SUBJECT OFFICER #1 used unnecessary or excessive force against COMPLAINANT, in violation of MPD General Order 901.07, by holding a gun to COMPLAINANT's head while COMPLAINANT was on his knees pursuant to the officers' order.

### *Language or Conduct*

MPD General Order 201.26, Part I, Section C, No. 1 and 3 states, "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." See **Exhibit 24**.

The complainant alleged that during the stop subject officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 repeatedly referred to him as a 'nigger,' used profanity in addressing him, and repeatedly threatened to kill him. The complainant further alleged that these two officers ordered him to get on his knees and both taunted him while SUBJECT OFFICER #1 pointed a gun at his head. Specifically, the subject officers allegedly acted as if they fingerprinted the complainant, placed him in fear of being put in the trunk of one of the police cars, and made him fear that they would kill him and dump him in a place where it would appear that others had killed him.

Subject officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 denied using any of the profane, derogatory, or threatening language alleged by the complainant. WITNESS OFFICER #1 said that he could not hear the conversation between the complainant and the officers but maintained that no voices were raised and that nothing took place out of the norm. COMPLAINANT's account is accepted as more credible and feasible. As noted previously, the complainant did not appear to have a reason to fabricate the allegations, and at the time he filed his complaint he did not know the identity of the subject officers nor did he know whether or not the officers' identity might eventually be determined. WITNESS #1's statement also corroborates that the complainant experienced an upsetting and humiliating event. Therefore, the Hearing Examiner finds that there is sufficient evidence to sustain the charges that Officers SUBJECT OFFICER #1 and SUBJECT OFFICER #2 used language or engaged in conduct toward the complainant that was insulting, demeaning or humiliating, in violation of MPD General Order 201.26.

**VI. SUMMARY OF MERITS DETERMINATION**

SUBJECT OFFICER #1

SUBJECT OFFICER #2

<b>Allegation 1:</b>	Sustained
<b>Allegation 2:</b>	Sustained as to SUBJECT OFFICER #1 Unfounded as to SUBJECT OFFICER #2
<b>Allegation 3:</b>	Sustained

Dated June 24, 2006.

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Eleanor Nace  
Complaint Examiner