

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	05-0153
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER, VCB
Allegation 1:	Excessive or Unnecessary Force
Complaint Examiner:	Jeffrey S. Gutman
Merits Determination Date:	December 6, 2010

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC), 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. 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 as provided by § 5-1111(e).

I. SUMMARY OF COMPLAINT ALLEGATIONS

COMPLAINANT alleges that he was observing police activity during the late morning of February 12, 2005 outside his parents' house at LOCATION. He alleges that several police officers emerged running from a nearby house. According to COMPLAINANT, one of the officers, SUBJECT OFFICER, punched him in the face and injured his left foot without justification. He claims that, as he was defending himself, three officers punched him in the back and pelvis and kicked him in the buttocks. COMPLAINANT asserts that officers dragged him on the ground and handcuffed him.

COMPLAINANT alleges that SUBJECT OFFICER engaged in police misconduct by using unnecessary and excessive force against him.

II. EVIDENTIARY HEARING

An evidentiary hearing was conducted regarding this Complaint on October 22, 2010. I heard the testimony of WITNESS #1, WITNESS #2, WITNESS #3, WITNESS OFFICER #1, WITNESS OFFICER #2, WITNESS OFFICER #3, WITNESS OFFICER #4 and SUBJECT OFFICER.

The following exhibits were entered into evidence:

Exhibits 1-17, which comprised OPC's administrative record.

Exhibit 18, the statement of WITNESS OFFICER #2.

Exhibit 19, the statement of WITNESS OFFICER #5

Exhibit 20, the statement of WITNESS OFFICER #6

Exhibit 21, the statement of WITNESS OFFICER #7

Exhibit 22, COMPLAINANT's Criminal History Request

Exhibit 23, medical record of April 20, 2007 from Unity Health Care

Exhibits 24-32, photographs of the vicinity of the incident

Exhibit 33-40, photographs of COMPLAINANT

The parties submitted both pre-hearing and post-hearing briefs.

III. FINDINGS OF FACT

1. SUBJECT OFFICER was assigned to the Focus Mission Unit in the Seventh District of the Metropolitan Police Department.

2. As a member of the Unit, SUBJECT OFFICER and his colleagues were tasked with executing a search warrant in the 2700 block of Langston Place, S.E. in the late morning of February 12, 2005.

3. At the time, this neighborhood experienced a considerable amount of drug and weapons activity.

4. During the course of executing the search warrant, Sergeant (now Lt.) WITNESS OFFICER #1 informed SUBJECT OFFICER and other officers by radio that he observed individuals in a neighboring courtyard who may have been involved in drug-related activities.

5. SUBJECT OFFICER and several other officers went to the courtyard, located adjacent to LOCATION.

6. Complainant was visiting his parents at their home at LOCATION on the morning of February 12, 2005.

7. COMPLAINANT left his parents' house when he heard some commotion outside, which he soon learned was the result of police activity.

8. COMPLAINANT was present with three other bystanders near the courtyard watching the police activity when SUBJECT OFFICER and other officers emerged from the house being searched.

9. While other officers approached the three other bystanders, SUBJECT OFFICER approached COMPLAINANT, whom he believed was one of the individuals WITNESS OFFICER #1 saw engaged in possible drug activity.

10. After COMPLAINANT appeared to SUBJECT OFFICER to be uncooperative, SUBJECT OFFICER grabbed COMPLAINANT's arm.

11. After COMPLAINANT moved his arm, SUBJECT OFFICER punched COMPLAINANT in the face and simultaneously executed a "take down" maneuver.

12. SUBJECT OFFICER did not drag COMPLAINANT along the ground, hit him in the back or pelvis or kick him in the buttocks.

13. COMPLAINANT was handcuffed and disclosed his identity orally to police officers

14. After consulting with other police authorities, the officers determined that COMPLAINANT was wanted on an outstanding warrant for assault with intent to kill. COMPLAINANT was therefore arrested and transported to the Seventh District police station.

15. COMPLAINANT was not arrested on any drug-related charges.

16. At the Seventh District police station, police officers determined that COMPLAINANT was not the individual wanted by the police in the outstanding warrant and they released COMPLAINANT from custody.

17. On February 13, 2005, COMPLAINANT visited Greater Southeast Community Hospital. COMPLAINANT complained of an injury to his foot. An x-ray revealed a chip fracture to the medial aspect of the distal phalanx on his second toe of the left foot.

18. COMPLAINANT has a highly visible lump in the center of his forehead, roughly the size of a half of a golf ball. This wound was not visible shortly after the incident and was not treated at the hospital.

19. COMPLAINANT's fractured toe and wound to the forehead resulted from SUBJECT OFFICER's punch and "take down."

20. A Use of Force Incident Report (UFIR) of this incident was not completed.

IV. DISCUSSION AND ANALYSIS

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

This case involves allegations of unnecessary or excessive force. OPC implementing regulations define “unnecessary or excessive force” as:

Unreasonable use of power, violence, or pressure under the particular circumstances. Factors to be considered when determining the "reasonableness" of a use of force include the following: 1) the severity of the crime at issue; 2) whether the suspect posed an immediate threat to the safety of officer or others; 3) whether the subject was actively resisting arrest or attempting to evade arrest by flight; 4) the fact that officers are often required to make split second decisions regarding the use of force in a particular circumstance; 5) whether the officer adhered to the general orders, policies, procedures, practices and training of the MPD or the covered law enforcement agency; and 6) the extent to which the officer attempted to use only the minimum level of force necessary to accomplish the objective.

D.C. Mun. Reg. tit. 6A, § 2199. The Complainant has the burden of showing that the alleged misconduct occurred by a preponderance of the evidence. *Id.*, § 2118.5(a).

As discussed in more detail below, the MPD has issued a General Order governing the use of force by officers. General Order 901.07 (Oct. 7, 2002). That Order requires officers to 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.” General Order 901.07(II). It also promulgated a General Order governing the conduct of officers when engaged in contacts, stops and frisks. General Order 304-10 (rev. Sept. 24, 1985).

FACTUAL SUMMARY

On February 12, 2005, a number of officers from the Focus Mission Unit of the MPD’s Seventh District executed a search warrant at a house in the 2700 block of Langston Place, S.E. SUBJECT OFFICER was one of those officers. SUBJECT OFFICER explained at the hearing that drug transactions and associated police activity are fairly common in the neighborhood surrounding Langston Place, S.E.

During the search, Sgt. (now Lieutenant) WITNESS OFFICER #1, the officer in charge of the team executing the warrant, looked out of the second floor window and

observed four individuals in a neighboring courtyard engaging in an apparent drug transaction. WITNESS OFFICER #1 explained at the hearing that it was highly unusual to interrupt an ongoing search and divert personnel to such an incident in progress. Nonetheless, he dispatched several officers, including SUBJECT OFFICER, to investigate the matter and to stop the individuals suspected of engaging in drug activity. Each of the officers approached an individual of interest. SUBJECT OFFICER approached COMPLAINANT.

SUBJECT OFFICER testified that he initially asked COMPLAINANT for his identification. While SUBJECT OFFICER did not recall COMPLAINANT's precise response, its tenor was akin to "what for?" SUBJECT OFFICER regarded that response as uncooperative, hostile and disrespectful. SUBJECT OFFICER testified that he then told COMPLAINANT to place his hands on a fence. His intent was to execute a *Terry* stop and to pat COMPLAINANT down to determine whether he had a gun.

SUBJECT OFFICER testified both that COMPLAINANT said "no," indicating a refusal to put his hands on the fence, and that COMPLAINANT silently looked at him, an action that SUBJECT OFFICER apparently interpreted as a refusal. In either event, SUBJECT OFFICER then grabbed COMPLAINANT's arm to turn him toward the fence, but stated that COMPLAINANT attempted to snatch his arm away by raising his elbow. WITNESS OFFICER #1 confirmed that he saw the individual engaged with SUBJECT OFFICER trying to shrug him away. WITNESS OFFICER #5's written statement corroborates that observation.

Officer (now Sergeant) WITNESS OFFICER #2 also responded to WITNESS OFFICER #1's radio call to investigate the apparent drug transaction in the courtyard. WITNESS OFFICER #2 testified that, while SUBJECT OFFICER was engaged with COMPLAINANT, he had simultaneously stopped and frisked suspect WITNESS #4. They were within several feet of each other. WITNESS OFFICER #2 recalled hearing SUBJECT OFFICER issue an order to COMPLAINANT to put his hands up and noticing some movement from COMPLAINANT's direction. He did not testify that COMPLAINANT tried to shrug off SUBJECT OFFICER, saying only that there was a "brief struggle." Rather, he viewed the movement using only his peripheral vision while interacting with WITNESS #4. WITNESS OFFICER #2 testified that he did not see SUBJECT OFFICER punch or drag COMPLAINANT, but that believed he would have seen a "fight" or "scuffle" given his position.

After COMPLAINANT moved his arm away, SUBJECT OFFICER testified that he grabbed COMPLAINANT at chest level and pushed his back against a fence. WITNESS OFFICER #8 then assisted SUBJECT OFFICER in handcuffing COMPLAINANT. They then seated COMPLAINANT near a curb. COMPLAINANT was later guided to a police car. SUBJECT OFFICER denied using any other physical force on COMPLAINANT.

COMPLAINANT offered a very different narrative. He testified that he left his parents house located at LOCATION when he heard a commotion resulting from the police search. He said that he waited, with hands in his pockets, with others to watch the

police activity. COMPLAINANT testified that he was watching from a location beyond the courtyard opposite the house being searched and that two police cars were parked in the courtyard.

He testified that four officers emerged from the house they were searching and ran towards him and the other bystanders. COMPLAINANT testified that SUBJECT OFFICER then said, “You know what you’re supposed to do when you see an officer?” According to COMPLAINANT, SUBJECT OFFICER began punching him in the left side of the face, near the bridge of the nose. COMPLAINANT then testified that SUBJECT OFFICER slammed him to the ground and dragged him from a clothesline toward the fence. COMPLAINANT’s statement to OPC included allegations of officers punching him in the back and pelvis and kicking him in the buttocks, but these allegations were not repeated at the hearing.

From her vantage point looking out a window on the second floor of her house at LOCATION, WITNESS #2, COMPLAINANT’s sister, saw a white officer, whom she could not identify as SUBJECT OFFICER, slam COMPLAINANT to the ground near the clothesline. She did not recall seeing a punch, but testified that her neighbor WITNESS #3 told her that the police hit COMPLAINANT. From the backdoor of her house at LOCATION #2, WITNESS #3 testified that she saw one officer hit COMPLAINANT and that three or four dragged COMPLAINANT from the clothesline to the fence.

Lieutenant (now Captain) WITNESS OFFICER #3 testified that SUBJECT OFFICER punched COMPLAINANT while simultaneously executing a “take down.” He had little independent recollection of the event apart from that documented in his May 15, 2007 OPC statement. The OPC statement suggests that WITNESS OFFICER #3 was inside the searched residence when he first observed a “struggle” between SUBJECT OFFICER and COMPLAINANT, and then saw the punch and “take down.” He did not see SUBJECT OFFICER drag COMPLAINANT along the ground. WITNESS OFFICER #3 testified that he discussed the incident afterwards with SUBJECT OFFICER, but did not recall the substance of that conversation.

During these events, COMPLAINANT recalled screaming his name, social security number and date of birth repeatedly. At the fence, COMPLAINANT said that SUBJECT OFFICER told him that he would be one of his snitches, like other snitches that he had. He testified that he was then handcuffed by SUBJECT OFFICER and a female officer.

COMPLAINANT testified that SUBJECT OFFICER accompanied him to a police car and encountered his sister WITNESS #2. WITNESS #2 asked why her brother was in custody and, according to COMPLAINANT, SUBJECT OFFICER threatened to shoot her if she did not withdraw. WITNESS #2, however, testified only that an officer told her to “shut up” and get back or face arrest. Thereafter, COMPLAINANT stated that SUBJECT OFFICER told him that he planned to make his life and the lives of his children miserable. When they arrived at the police car, COMPLAINANT was frisked. WITNESS #2 testified that she saw police slam COMPLAINANT against the back of the police car, but COMPLAINANT said nothing about such physical contact.

COMPLAINANT was arrested on an outstanding warrant for assault with intent to kill. He was therefore transported to the Seventh District police station. Apparently, COMPLAINANT was confused with another individual with the same name. After a short stay at the police station, after which he was released with a written note of apology, COMPLAINANT testified that he was experiencing pain and went to buy Motrin IV to relieve the pain. When they did not work, COMPLAINANT went to Greater Southeast Community Hospital the next afternoon. X-rays revealed that he had a fracture of the second toe of the left foot. COMPLAINANT further complained that he has continued pain from blood clots in the big toe of the left foot. He believes that the injury to the toes occurred when he tried to catch his balance before being slammed to the ground. COMPLAINANT testified that he told the two officers who transported him to the police station of the pain in his toes, but did not complain to SUBJECT OFFICER.

COMPLAINANT has a highly visible bump in the center of his forehead, roughly the size of a half of a golf ball. COMPLAINANT testified that his daughter first noticed a growing lump about two weeks after the incident. He said that he visited a doctor, who believed it was a bruise and would go away. COMPLAINANT stated that doctors at Greater Southeast did not examine his forehead the day after the incident. WITNESS #2 testified that she did not notice any bruising on COMPLAINANT's face after the incident, but saw a "little" knot on his forehead a couple of days later.

ANALYSIS

In trying to ascertain what occurred on February 12, 2005, one must acknowledge first that these events occurred almost six years ago. Memories fade, evidence is lost and perceptions may change over time as participants reflect on the events. It is unfortunate that this matter was heard so long after the events in question. Even so, the record demonstrates that it is more likely than not that SUBJECT OFFICER engaged in unnecessary and excessive force during his interaction with COMPLAINANT.

COMPLAINANT's testimony that SUBJECT OFFICER hit him in the face and forced him to the ground finds considerable support in the record. First, with respect to whether he was struck in the face and dropped to the ground, I find COMPLAINANT's testimony to have been consistent, credible and corroborated elsewhere in the record. It was also made well after the statute of limitations ran on any civil action that could have been brought against SUBJECT OFFICER. *Lewis v. District of Columbia*, 643 F.Supp.2d 119, 121 (D.D.C. 2009) (statute of limitations in § 1983 actions is no longer than three years).

That said, there are aspects of COMPLAINANT's narrative that are more difficult to credit. COMPLAINANT's testimony that SUBJECT OFFICER threatened to shoot his sister WITNESS #2, and reached toward his gun, was not supported by WITNESS #2. She testified that an officer told her that if she did not step back, she risked arrest. More important, COMPLAINANT's testimony that he was punched elsewhere on his body, kicked and dragged on the ground some distance from the clothesline to the fence finds

no other credible support in the record. WITNESS #2 testified, for example, that she saw her brother “slammed” to the ground, but not dragged from where he landed.

Indeed, given his close proximity, the time it would take to drag a man several feet along the ground, and the intensely physical nature of such an action, I credit WITNESS OFFICER #2’s testimony that, had such dragging occurred, he would have seen it. Nor did WITNESS OFFICER #3 see SUBJECT OFFICER dragging COMPLAINANT. The only witness apart from COMPLAINANT who claimed to have seen him being dragged was WITNESS #3. She, however, testified that she was not wearing needed glasses and, from seventy-five feet, she saw multiple officers dragging COMPLAINANT. COMPLAINANT, however, did not testify that several officers dragged him on the ground. I did not find WITNESS #3’s testimony credible and therefore find that SUBJECT OFFICER did not drag COMPLAINANT along the ground. COMPLAINANT did not testify that SUBJECT OFFICER struck him in the back or pelvis or kicked him.

Given these findings, it logically follows that COMPLAINANT somewhat exaggerated his physical interaction with SUBJECT OFFICER. I do not believe, however, as explained below, that any such exaggeration renders all of his testimony incredible because there is ample support for the narrower findings that SUBJECT OFFICER punched COMPLAINANT and pushed him to the ground.

Second, COMPLAINANT’s testimony regarding the punch and “take down” is consistent with his complaints of contemporaneous physical injuries. SUBJECT OFFICER’s version of events simply cannot be squared with objective medical evidence in the record showing that COMPLAINANT suffered a fractured toe. SUBJECT OFFICER did not argue, much less demonstrate, that the toe injury pre-dated their encounter. To the contrary, COMPLAINANT credibly testified that he experienced a painful toe injury during the incident, an injury that brought him to the emergency room the next day when pain relievers were ineffective. Their encounter must have involved a level of violence sufficient to fracture a toe; notably, COMPLAINANT testified that he was wearing ordinarily durable Timberland boots.

It is similarly hard to ignore the very large and visible lump on COMPLAINANT’s forehead. With respect to the punch to the head, SUBJECT OFFICER correctly notes that the Greater Southeast Community Hospital records contain a mark indicating that COMPLAINANT’s head was “a traumatic.” I do not find that mark to be significant. The medical record can more logically be explained by the fact that it is captioned an “Emergency Physician Record – Foot or Ankle Injury.” It indicates that the chief complaint was injury to the left foot as a result of a direct blow with moderate pain. COMPLAINANT testified that the doctor did not examine his head and it appears that COMPLAINANT did not complain about it. There are, further, a substantial number of check marks suggesting that other aspects of COMPLAINANT’s body systems and anatomy were normal, but it appears that such checks were a product of a perfunctory effort to complete the form rather than the result of a detailed medical evaluation of each of them.

Rather, it seems that COMPLAINANT did not then seek treatment for the injury to his forehead. One might have expected him to do so if it were visible or painful. However, he testified credibly that the growing knot on his forehead drew his attention two weeks after the incident when his daughter mentioned it and that he sought medical attention thereafter. SUBJECT OFFICER further argues that a swollen area in the center of COMPLAINANT's forehead is inconsistent with his testimony that he was hit on the left side of his face. COMPLAINANT, however, also testified that he was hit near the bridge of his eyes. SUBJECT OFFICER did not offer testimony that he is left-handed, so a right-handed blow would have come from the victim's left. At bottom, SUBJECT OFFICER offered no alternative explanation for how such a large knot on COMPLAINANT's forehead could have been created. In the absence of such an explanation, I conclude that it is more likely than not that the knot was caused by a punch from SUBJECT OFFICER.

Third, WITNESS #2 testified that, from her second floor bedroom, she saw a white officer slam COMPLAINANT to the ground. She did not see the punch, but the "slam" is consistent with evidence of a "take down." I find WITNESS #2's testimony credible. Her observation prompted her to leave her bedroom, come downstairs and enter the courtyard. Doing so seems to have been difficult for WITNESS #2. Apparently because of a serious illness, she required her mother in law's assistance in doing so. Had WITNESS #2 not seen something quite serious and disturbing with respect to her brother, it seems quite unlikely that she would have hurried downstairs given her condition.

Last, WITNESS OFFICER #3 credibly testified that he saw SUBJECT OFFICER simultaneously punch COMPLAINANT in the face and execute a "take down." As an experienced law enforcement officer, WITNESS OFFICER #3's powers of observation merit particular deference. Because his testimony stands contrary to the interests of a fellow officer, its credibility is further enhanced. Thus, WITNESS OFFICER #3's testimony and statement provide significant support to COMPLAINANT's allegations.

SUBJECT OFFICER offered two reasons why WITNESS OFFICER #3's testimony should be discounted. Neither is persuasive. First, he has suggested that there was a personal animosity between the two men and that his testimony might have been intended to facilitate a transfer of SUBJECT OFFICER to another unit. WITNESS OFFICER #3 denied the animosity, but more importantly, then-WITNESS OFFICER #3 was promoted to captain in 2006. After the promotion, WITNESS OFFICER #3 was no longer SUBJECT OFFICER's commanding officer. WITNESS OFFICER #3's statement to the OPC was made in May, 2007. There would have been no reason for WITNESS OFFICER #3 to lie or to exaggerate his testimony to advance the motive ascribed to him.

Second, SUBJECT OFFICER argued that WITNESS OFFICER #3's testimony was intended to mask his failure to complete a use of force incident report and to conduct an investigation into the use of force. If WITNESS OFFICER #3, as the senior officer on the scene, indeed ignored his obligation to conduct an investigation and to complete the form, it would have been in his interest to deny that the use of force occurred. That would have absolved him of any duty that SUBJECT OFFICER argues police orders assigned to him. If, as SUBJECT OFFICER argues, WITNESS OFFICER #3 neglected

his duties that day, such failure does not explain why WITNESS OFFICER #3 would lie under oath in a manner that would make his oversight so clear.

SUBJECT OFFICER correctly argues that several other officers did not see the punch and “take down.” The most likely explanation is that their attention was not trained on SUBJECT OFFICER and COMPLAINANT during the very short time required for a punch and “take down.” Various officers were engaged in executing a search warrant while several others were apprehending the four alleged suspects. There was clearly a fair amount of activity occurring at the same time, making it more difficult to observe one portion of those events.

WITNESS OFFICER #2 was the officer closest to SUBJECT OFFICER and, perhaps, in the best position to see what happened. However, he testified that he was simultaneously engaged in the arrest of WITNESS #4 and was only able to observe SUBJECT OFFICER peripherally. Of course, it could be argued that it was odd that the flurry of events somehow did not similarly distract the attentions of WITNESS #2 and WITNESS OFFICER #3. Because of the consistency of their testimonies with COMPLAINANT’s, it can only be concluded that, for whatever reason, they maintained their attention on the COMPLAINANT – SUBJECT OFFICER interaction.

Having concluded that it is more likely than not that SUBJECT OFFICER punched COMPLAINANT and executed a “take down,” the remaining question is whether doing so was justified and consistent with OPC and MPD use of force principles. Viewing the onset of the incident from SUBJECT OFFICER’s perspective, he may have reasonably viewed COMPLAINANT as uncooperative in three respects. According to SUBJECT OFFICER, COMPLAINANT failed to produce identification upon request, he did not quickly submit to a *Terry* stop and he shrugged his arm away from the Detective’s grasp. As to the latter point, SUBJECT OFFICER and WITNESS OFFICER #1 testified, and WITNESS OFFICER #5 wrote, that COMPLAINANT attempted to shrug off the Detective’s attempt to grab his arm. This testimony can be reconciled with COMPLAINANT’s testimony that he moved his arm, in self-defense, but there is support for the notion that the arm movement could have been viewed as an act of resistance.

COMPLAINANT argues that, as a threshold matter, SUBJECT OFFICER had no reasonable suspicion to stop COMPLAINANT in the first instance, thereby rendering unreasonable any subsequent use of force. I disagree. Here, SUBJECT OFFICER’s commanding officer, WITNESS OFFICER #1, directed him and several other officers to investigate apparent drug activity involving four individuals around the courtyard. Subjectively, WITNESS OFFICER #1 was quite certain of his observations that prompted his instructions because, in his experience, interrupting the execution of a search warrant under these circumstances was unprecedented. SUBJECT OFFICER responded and testified that he saw four individuals in that area, matching what WITNESS OFFICER #1 told the responding officers.

Given the instruction by WITNESS OFFICER #1 and finding the circumstances to coincide with WITNESS OFFICER #1’s observation of four individuals, the information from WITNESS OFFICER #1 constituted reasonable suspicion for a stop of

any of the four persons even if SUBJECT OFFICER was not provided with precise physical descriptions of the four individuals or COMPLAINANT in particular. MPD General Order 304.10, Part I(B)(1), (2)(h). SUBJECT OFFICER had a legitimate basis for stopping COMPLAINANT – to determine whether probable cause existed to arrest COMPLAINANT on possible drug charges. *Id.* Part I(B).

According to SUBJECT OFFICER, he next asked COMPLAINANT for his identification. According to General Order 304.10, a stop is not to last for more than ten minutes and may include a request for identification. *Id.*, Part I(B)(4)(a)(2). The request was therefore entirely appropriate, as was COMPLAINANT’s refusal, *id.*, Part I(B)(4)(c)(2), if SUBJECT OFFICER was indeed correct in concluding that COMPLAINANT declined to respond.

SUBJECT OFFICER next testified that he asked COMPLAINANT to place his hands on the fence in order to make a protective *Terry* stop. As the Supreme Court recently explained, “to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.” *Arizona v. Johnson*, 129 S.Ct. 781, 784 (2009). A refusal to produce requested identification is not, alone, a basis for a *Terry* frisk. *See* General Order 304.10, Part I(C) (refusal to produce identification is not a listed factor supporting reasonable suspicion for a *Terry* frisk). SUBJECT OFFICER explained that a *Terry* frisk was justified because, “most drug dealers carry guns. Well, I shouldn’t say most, but a lot. And I have locked up plenty of people in this neighborhood who both have been selling drugs and have been armed with a gun.”

The D.C. Court of Appeals has made it clear, however, that the frequent connection between drugs and guns is not, alone, sufficient to support a belief that a stopped individual under suspicion for drug possession may be armed and dangerous. *Upshur v. United States*, 716 A.2d 981, 984 (D.C. 1998); *see Watley v. United States*, 918 A.2d 1198, 1200-01 (D.C. 2007) (suspicion that suspect was carrying drugs does not establish a particularized articulable belief that the suspect is armed and dangerous warranting a *Terry* frisk). Here, SUBJECT OFFICER offered no facts from which a particularized and reasonable suspicion that COMPLAINANT was possibly armed could be drawn. *Compare Stanley v. United States*, 2010 D.C. App. LEXIS 599 at *11-12 (D.C. Oct. 21, 2010) (*Terry* search justified when officers were in private home executing a search warrant, the affidavit for which noted probable cause for finding weapons, in the presence of three individuals).

Thus, there was no lawful justification for SUBJECT OFFICER to grab COMPLAINANT’s arm after COMPLAINANT’s perceived refusal to place his hands on the fence. The grabbing of the arm led to the perceived effort by COMPLAINANT to shrug his arm away and thereby resist the *Terry* stop. At that point, General Order 901.07 obligated SUBJECT OFFICER to employ the least amount of force necessary to accomplish his mission. The General Order further required SUBJECT OFFICER, if possible, to defuse a situation where a possibility of violence or resistance to arrest existed through advice, warning and verbal persuasion. General Order 901.07(V)(B). Beyond those steps, the use of force continuum, authorized by the General Order, offers officers options including cooperative control and contact controls. *Id.*, §

901.07(V)(B)(1). Officers are required to modify their use of force “in relation to the amount of resistance offered by a subject.” *Id.*, § 901.07(V)(B)(3).

Each of the factors in the OPC’s definition of unnecessary and excessive force in D.C. Mun Regs. tit. 6A § 2199, quoted above, weigh against the further use of force, much less a punch and “take down.” The severity of the crime at issue was modest – a drug transaction. Knowledge of the erroneous warrant for arrest for assault with intent to kill was obtained later. SUBJECT OFFICER offered no evidence that COMPLAINANT posed an immediate threat to his safety or that of others; to the contrary, SUBJECT OFFICER acknowledged that the arm shrug was not intended to injure him. SUBJECT OFFICER testified that COMPLAINANT was not attempting to flee. Nor was he resisting arrest because COMPLAINANT was not warned that an arrest was imminent. While split second decisions are often required, here the lack of urgency did not require them. Rather, MPD orders required SUBJECT OFFICER to attempt to defuse the situation by issuing verbal commands or, at most, exercising a control hold pending assistance from one of the several nearby officers. Thus, SUBJECT OFFICER’s actions ran afoul of General Order 901.07 because he did not attempt to use only the minimum level of force necessary to accomplish the objective of frisking COMPLAINANT, an objective which, itself, was unjustified under the circumstances.

SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation 1:	Sustained
----------------------	-----------

Submitted on December 6, 2010

Jeffrey S. Gutman
Complaint Examiner