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January 22, 2024

Hon. Phil Mendelson  
Chairman  
Council of the District of Columbia  
1350 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Re: **Bill 25-345, Secure D.C. Omnibus Amendment Act of 2024**

Dear Chairman Mendelson:

A year ago, the Council enacted the Comprehensive Policing and Justice Reform Amendment Act of 2022 (the “police reform act”), Law 24-0345 (Bill B24-320, as amended). As permanent legislation, it reflected the Council’s unanimous agreement on key details of the justice system District residents want. It was the result of years of work by the Committee on the Judiciary and Public Safety and the Police Reform Commission, and included transparency provisions the Council enacted and repeatedly renewed through emergency and temporary legislation, some dating back to 2019.

By enacting the police reform act without the mayor’s signature and over opposition from Congress, the Council did the right thing for all D.C. residents and, ultimately, for the Metropolitan Police Department (MPD). It concluded that, to restore public confidence in policing, it is necessary to set additional rules for police conduct, including uses of force, and grant D.C. residents access to information showing whether the rules are followed — facts about police disciplinary cases and body-worn camera (BWC) videos of officer-involved shootings and use-of-force incidents. Those important provisions are now under threat, and the D.C. Open Government Coalition (DCOGC) requests that the Council preserve them.

Making officer disciplinary records and BWC videos public will have benefits well beyond improving community trust. For example, the amendments provide invaluable investigative tools for criminal defense lawyers, who for decades have been forced to rely on prosecutors to disclose that potential MPD witnesses are on the U.S. Attorney’s so-called *Lewis* List of officers under disciplinary or criminal scrutiny, who the government would not put on the witness stand.<sup>1</sup>

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<sup>1</sup> “D.C.’s Bad Cop List Is Shrouded in Secrecy — and Could Be Impacting Criminal Cases,” VICE NEWS, June 24, 2020, <https://www.vice.com/en/article/k7qzma/dcs-bad-cops-list-is-shrouded-in-secrecyand-could-be-impacting-criminal-cases>.

In November, the mayor, supported by the MPD and the police union, proposed Bill 25-555, in part to undo the statute’s police accountability and transparency provisions.

The Coalition, Michael Tobin, Office of Police Complaints (OPC) director, and numerous other witnesses, including relatives of D.C. residents killed during interactions with police, testified against the mayor’s accountability and transparency amendments. Although the committee listened respectfully, it is apparent from the committee report accompanying Bill 25-345 that members did not comprehend the importance of public access to officer disciplinary records and BWC videos, or the detrimental impact of these amendments.

**THE ACCOUNTABILITY AND TRANSPARENCY AMENDMENTS SHOULD NOT BE IN THIS BILL**

Bill 25-345 aggregates a range of measures directly addressing criminal conduct, law enforcement, and how courts manage cases and defendants. If enacted, those provisions would directly impact public safety, and most discussion in recent weeks of the bill by Council members, the media and D.C. residents has focused on them.

But amendments to the police reform act’s accountability and transparency provisions in §§ 5,<sup>2</sup> 12<sup>3</sup> and 39<sup>4</sup> of the bill will further erode public trust in law enforcement and public safety. Enacting them only a year after passage of the statute, and before the relevant provisions take effect, will send a powerful message that the Council lacks the political will to repair what MPD has worked so long and hard to break — the collective understanding that police are a force working for the good of all D.C. residents, regardless of race, ethnicity, gender, socio-economic status or ward. Doing so will reinforce MPD’s belief that it can, in disregard of the D.C. Court of Appeals, the Council and the Office of Open Government, continue to flout the Freedom of Information Act (FOIA). D.C. Code § 2-531, *et seq.*

We understand why Council members have expressed urgency to pass Bill 25-345, and strong support for its public safety provisions. That said, we urge you to amend the bill by deleting §§ 5, 12 and 39, which have no direct relationship to public safety and, in fact, will make the District less safe. If the Council is inclined to revisit the police reform act accountability and transparency provisions, it should do so in a standalone bill that is fully vetted in a public hearing before a vote.

**NEARLY ALL DISCIPLINARY CASES, SUSTAINED OR NOT, SHOULD BE OPEN TO THE PUBLIC**

The police reform act explicitly prohibited the MPD from continuing its long-standing practice of invoking the FOI Act privacy exemption in response to requests seeking records of any past or current officer discipline investigations, and created a searchable database of all new disciplinary cases in which complaints against officers are sustained. In amending the privacy exemption, it adopted the Police Reform Commission’s (PRC) recommendation that,

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<sup>2</sup> Bill 25-345, Committee Print DRAFT (Jan. 17, 2024), Lines 420 – 453.

<sup>3</sup> *Id.*, Lines 605 – 628.

<sup>4</sup> *Id.*, Lines 2116 – 2149.

[t]he public should have access to records including, but not limited to: the officer’s name, the existence and status of open allegations and complaints; closed allegations and complaints; administrative investigation outcomes (including not sustained outcomes); investigative closing reports and the information and evidence upon which the closing reports are based; charges and specifications; transcripts or recordings of any disciplinary hearings and/or appeals, including exhibits; the dispositions of any disciplinary proceedings and/or appeals, final agency and/or appeal dispositions; final agency disciplinary or non-disciplinary (e.g., training) determinations; and the final written opinions or memoranda supporting these dispositions and disciplinary determinations.

DECENTERING POLICE TO IMPROVE PUBLIC SAFETY: *A REPORT OF THE D.C. POLICE REFORM COMMISSION* (“COMMISSION REPORT”), Recommendation 9(a), 176 (April 1, 2021). According to the commission,

It’s important that the public have access to information involving misconduct allegations that do not result in sustained findings.... [A] pattern of unsustained complaints may be an indicator of an officer’s performance problems. They may also reveal deficiencies in how allegations of misconduct are investigated.

*Id.*, at 178 (*footnotes and internal quotations omitted*). The police reform act adopted the commission’s recommendation almost *verbatim*.<sup>5</sup>

The commission recommended creating a searchable online database “enabling members of the public to easily access, for any officer, the status of open investigations, the outcome of administrative investigations, and the disciplinary action taken with respect to each act of misconduct.” *Id.*, Recommendation 9(d), at 177. In response to lobbying by MPD and the police union, the Council limited the scope of the database to sustained complaints occurring after the statute’s effective date. The committee said including only sustained complaints would make the database similar to disciplinary databases regarding licensed professionals, *i.e.*, lawyers and licensed health-care providers.<sup>6</sup>

The Council intended that “the public database serve as [a] low-barrier entry point for quickly examining an officer’s record of misconduct.” It deliberately made the FOIA amendments applicable to all disciplinary cases, past and present — not just records in sustained cases — as “a tool for gaining a more comprehensive understanding of complaints issued against an officer....”<sup>7</sup>

Police reform act provisions amending the FOI Act and establishing the database have not yet taken effect because the mayor did not request funding in her Fiscal Year 2024 budget, and the

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<sup>5</sup> Bill 24-320, COMMITTEE REPORT, 44 (Nov. 30, 2022).

<sup>6</sup> *Id.*, at 45.

<sup>7</sup> Bill 24-320, COMMITTEE REPORT, *supra*.

Council did not appropriate funds.<sup>8</sup> But they are having a positive impact already.<sup>9</sup>

The mayor's ongoing opposition is having an impact as well. A January 14, 2024, *Washington Post* story, "[D.C. police reports detailing use-of-force incidents no longer public](#)," provides a concrete example of why the Council should remove §§ 5, 12 and 39 from Bill 25-345. Over a year ago, when it became clear that the Council would increase transparency of internal police investigations, and in response to a D.C. Auditor report, MPD began posting on its website summaries of Use of Force Review Board investigation reports. Although the summaries did not identify officers investigated, an independent labor arbitrator, undoubtedly acting on a complaint from the union, recently ruled that posting the summaries "violated the District's personnel rules," *The Post* reported. The Council should fund the police reform act accountability and transparency provisions, which would, in effect, statutorily overturn the arbitrator's ruling that prompted MPD to remove the summaries from its website.

***Retain public FOIA access to all cases, unsustained and pending***

Bill 25-345 incorporates the mayor's proposals, rejected by the Council in 2022, to drastically narrow the scope of access under FOIA to cases in which complaints were sustained, and narrow the types of records not presumptively subject to the privacy exemption. In attempting to justify its departure from the police reform act, the committee adopted the administration's and MPD's long-held misinterpretation of the FOI Act, an interpretation the D.C. Court of Appeals has rejected.

According to the committee report accompanying Bill 25-345,

[t]he current Code defines a disciplinary record as "any record created in furtherance of a disciplinary proceeding... regardless of whether the matter was fully adjudicated or resulted in policy training." This definition was understood by OPC, MPD, and a former member of the Police Reform Commission as *not* including unsustained or pending investigations into officer discipline or misconduct. This understanding appears to align with other exemptions in the Code that allow records to be exempt from disclosure if they are investigatory records compiled for law enforcement purposes, including OPC investigations, that would interfere with ongoing investigations or enforcement proceedings.

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<sup>8</sup> Because the published version of the D.C. Code does not include unfunded provisions in the police reform act, we have attached a redline of sections discussed with the amendments proposed in Bill 25-345.

<sup>9</sup> Superior Court Judge Maurice Ross last September granted *The Washington Post* access to 600 pages of records, and attorneys' fees for the litigation. *WP Co. LLC v. District of Columbia*, Dkt. No. 2023-CAB-000951, *summary judgment granted* (D.C., Sept. 14, 2023). The judge overruled MPD's privacy arguments, saying "support for continuously greater transparency in police records specifically in D.C., as well as a strong nationwide desire for police accountability in the wake of [the] death of George Floyd, must be taken into account in the balancing test analysis and weigh in favor of the public interest." See *Post* account of the case, "[When government withholds records, the public pays the price](#)," Dec. 14, 2023.

*Id.*, at 59 (footnotes omitted, *emphasis in original*).

According to the committee, Bill 25-345 “codifies the relevant agencies’ understanding that FOIA requests are related to sustained allegations,” as opposed to unsustained allegations, and grants the public access to more cases than would have been available under the mayor’s bill.<sup>10</sup> *Id.*

There are several errors in the committee’s reasoning. The first and most obvious error is that neither the PRC nor the OPC understood the FOIA provisions in the police reform act as limited to sustained cases. It is beyond debate that the commission sought public access to all but the most minor disciplinary cases. *See above at 3*. When he testified against the mayor’s bill in November, OPC Director Tobin said, “[t]he provisions of this proposal that pertain to OPC and police oversight in general are detrimental to community trust and effective policing include: ... limiting public posting of disciplinary information, [and] preventing release of disciplinary records information through FOIA....” Bill 25-555, HEARING RECORD (unpaginated), 209 (Dec. 18, 2023).

Second, MPD’s interpretation of the law enforcement exemption, D.C. Code § 2-534(a)(3), is patently incorrect. “Investigatory records compiled for law enforcement purposes” must be disclosed under FOIA unless “the production of such records would” interfere with the investigation, deprive the subject of a fair adjudication, constitute an unwarranted invasion of privacy, identify confidential sources or investigative techniques, or jeopardize the safety of law enforcement personnel.

More importantly, once a formal criminal or administrative complaint has been filed, the law enforcement exemption does not permit an agency to deny access to the entire case. At most, it permits the agency to redact, or possibly withhold, specific records. Therefore, it would not justify depriving D.C. residents of access to all past disciplinary cases or to cases that are not sustained.

However, adopting this amendment undoubtedly would exacerbate distrust of MPD’s disciplinary process and reduce public cooperation with police. That would be especially true where residents have long viewed the MPD Gun Recovery Units (GRU) and Crime Suppression Teams (CST) as hostile, occupying forces in their neighborhoods.<sup>11</sup>

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<sup>10</sup> In effect, the committee is turning the legislative process on its head. A year ago, the Council, exercising its legislative power, clearly stated that § 2-534(d-1)(2) applies to cases “regardless of whether the matter was fully adjudicated....” Saying the mayor, MPD and the union did not understand that phrase to mean what it says, the committee proposes in Bill 25-345 to delete it and bend the law to what they want it to be.

<sup>11</sup> Mitch Ryals, “DC Court of Appeals Vacates Gun Conviction, Ruling MPD Conducted Illegal Stop and Search,” WASHINGTON CITY PAPER (April 19, 2021), <https://washingtoncitypaper.com/article/514777/dc-court-of-appeals-vacates-gun-conviction-ruling-mpd-conducted-illegal-stop-and-search/>.

*The police reform act struck the proper balance between  
privacy and transparency*

To put an end to MPD’s practice of citing the privacy exemption to deny virtually all FOIA requests for disciplinary records, the Council enacted D.C. Code § 2-534(d-1)(1), which states, “[n]otwithstanding any provision of this act, a request under this act for disciplinary records shall not be categorically denied or redacted on the basis that it constitutes an unwarranted invasion of personal privacy for officers....” It defines “disciplinary records” that cannot presumptively be withheld under the privacy exemption to include “any record created in furtherance of a disciplinary proceeding for, or an Office of Police Complaints [] investigation of, an MPD, HAPD, or OIG officer....” § 2-534(d-1)(2).

According to the committee:

[t]his information is immensely broad, ... these records could include handwritten notes and large amounts of information related to how the disciplinary investigation process works. In balancing the right of the public to certain information and the need of the government to protect information, particularly about investigative processes and potential leads that were later unsustainable, the Committee determined that this provision was too broad and undefined in scope.

Bill 25-345, COMMITTEE REPORT, 60.

The committee’s rationale for amending § 2-534(d-1)(2) demonstrates a failure to understand the plain meaning of the section and how the FOI Act operates generally. The police reform act provision addresses application of the privacy exemption only, and does not prevent invocation of that exemption where an agency can demonstrate that disclosure of a particular record would cause a “clearly unwarranted” invasion of privacy.<sup>12</sup> If a record includes “information related to how the disciplinary investigation process works,” that would “[d]isclose investigative techniques and procedures not generally known outside the government,” MPD could redact or withhold it under § 2-534(a)(3)(E).

For FOIA purposes, it makes no difference whether a “public record” is handwritten, printed or electronic. Unless a record contains exempt information, the statute requires an agency, MPD included, to disclose it. The bottom line is that the police reform act definition of a “disciplinary record” to which the privacy exemption does not presumptively apply is no broader than the definition of a “public record” which any agency must disclose in response to FOIA requests.<sup>13</sup>

Section 2-534(d-1)(3) identified several categories of disciplinary records law enforcement agencies, including MPD, could redact or withhold to protect officers’ privacy. In drafting those exclusions, the Council carefully circumscribed agencies’ discretion. The police reform act said the privacy exemption applies to “medical history” information unless it is “a material issue in the basis of the complaint”; and to “use of employee assistance programs, ... unless such use is

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<sup>12</sup> § 2-534(d-2) bars law enforcement agencies from categorically denying access under any other exemption, but allows application of exemptions to specific records where appropriate.

<sup>13</sup> See D.C. Code §§ 2-539(a)(10) and 2-502(18).

mandated by disciplinary proceedings that may be otherwise disclosed pursuant to this subsection.” §§ 2-534(d-1)(3)(ii) and (iii).

We fully understand and agree with the Council’s desire to protect the confidentiality of law enforcement officers’ medical and mental health records. Such records are exempt from disclosure because other statutes deem them confidential, not because disclosure would invade officers’ privacy. *See* § 2-534(2) and (6). We could agree that the public does not have a right to know about an officer’s voluntary participation in “an employee assistance program, including mental health treatment, substance abuse treatment, counseling, or therapy.” § 2-534(d-1)(3)(iii). That would preserve the incentive for officers to seek help when needed. Finally, we agree that records created or maintained by employee assistance programs, those not protected by privilege, should be exempt under the privacy exemption. But the Council concluded, and we strongly agree, that the public should be told if, as part of the final disposition of a disciplinary proceeding, an officer was required to undergo treatment, counseling or retraining. *See* COMMISSION REPORT, Recommendation 9(c), 176.

But bill 25-345 incorporates the mayor’s insistence on a blanket exemption from disclosure for “medical history” and information regarding participation, voluntary or mandatory, in employee assistance programs. The committee believes that, to satisfy the public’s need-to-know about an officer’s medical issues and mandatory treatment that are material to a disciplinary complaint, D.C. residents should have to read between the lines of redacted documents.

Placed in conjunction with the release of the final written order contained in the public database, the public will be able to glean if any relevant pre-existing conditions were important to the disciplinary decision, without needing the records themselves and maintaining the importance of privacy for government employees seeking physical or mental health treatment.

Bill 25-345, COMMITTEE REPORT, 60. It erroneously claims that the PRC recommended against disclosure of such information. *Id.* In fact, the PRC said “[t]he agency responding to the FOIA request ... must redact ... officer’s medical histories (not including records obtained during the course of an agency’s investigation of the officer’s misconduct that are relevant to the investigation’s disposition).” COMMISSION REPORT, 176.

By expanding the ability of MPD and other law enforcement agencies to invoke the privacy exemption, the bill will deprive the public of information highly relevant to the cause of the disciplinary proceeding and to its disposition. We are concerned because, contrary to the District’s clearly stated policy that “provisions of this subchapter [the FOI Act] shall be construed with the view toward expansion of public access,”<sup>14</sup> MPD historically, and we believe deliberately, has abused FOIA exemptions by applying them expansively to withhold all kinds of records. Some examples will help you understand what we anticipate will happen if you move forward with the wording in Bill 25-345.

Consider a disciplinary case, whether based on a complaint from a civilian or another officer, that the subject of the complaint was under the influence of drugs or alcohol while on duty. We

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<sup>14</sup> D.C. Code § 2-531.

would expect MPD to interpret the officer's substance abuse to be "medical history," and cite proposed § 2-534(d-1)(3)(B) to withhold most, if not all, of the records.

Next, consider a citizen complaint that an officer used excessive force, and as part of the sustained disposition the officer is ordered to undergo anger-management and psychological counseling. We would expect MPD, citing § 2-534(d-1)(3)(C), to withhold or heavily redact records, including the disposition, to prevent disclosure of the mandatory conditions, whether officers complied, and whether they successfully completed treatment.

Finally, consider a 15-year MPD veteran who has been the subject of several disciplinary complaints for substance abuse, excessive force, or both, but remains on duty. Every D.C. resident has a right to that information, and to question why MPD continues to employ the officer.

In each of those scenarios, the public does not need access to all records. But the fact that an officer was investigated for substance abuse, mental health or psychological deficiencies, and the fact that an officer was ordered in a sustained disposition to undergo treatment, counseling or other forms of therapy are of great public concern.

***Bill 25-345 would exclude important information from  
the OPC disciplinary database***

The police reform act says the OPC database including sustained disciplinary cases arising after the statute's effective date should provide each disciplined officer's name, badge number, rank, length of service, and current duty status. D.C. Code § 5-1116(a)(1). Bill 25-345 would amend that section to add officers' race and gender, but exclude their current duty statuses.

The committee said it added race and gender because "such information would be important for the public, press, and academics to monitor any racial or gender patterns that arise in sustained discipline. These groups could use this information to identify important patterns or point out concerning trends related to discipline within MPD. Bill 25-345, COMMITTEE REPORT, 58. It removed "current duty status" because "the information was not relevant to public transparency or public monitoring of police disciplinary matters, especially in light of the proposed additions to the database." *Id.* at 57.

It is hard to understand why race and gender are relevant, but current duty status is not, or how it is important for the public to be able to establish patterns based on those two criteria, but it is not important for the public to discern patterns based on race and current duty status, gender and current duty status, or all three criteria. For example, what if MPD imposes suspensions on male and female officers who commit similar violations, but reassigns only the female officers who have young children to the overnight shift, or transfers only LBGTQ officers to less desirable details?

Current duty status is no less relevant, and should be tracked in the database.



**DO NOT ALLOW MPD TO REDACT FACES AND BADGE NUMBERS OF OFFICERS  
FROM BWC VIDEOS**

The police reform act amended D.C. Code § 5-116.33 to state, “(f) When releasing body-worn camera recordings, the likeness of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, shall not be redacted or otherwise obscured.”

That provision addresses the PRC’s recommendation that “[p]roviding more statutory guidance to MPD would diminish public frustration with the FOIA process and help make MPD more transparent. Even if FOIA exemptions technically apply, ... the District [should] articulate a test, guiding MPD to release unredacted video when the public interest in release outweighs any personal privacy considerations.” COMMISSION REPORT, 183.

Bill 25-345 incorporates the mayor’s proposal to repeal the very guidance the PRC recommended, and the Council provided a year ago.<sup>15</sup>

As we stated at the hearing on Bill 25-555,<sup>16</sup> the D.C. Court of Appeals, the Judiciary Committee and the Office of Open Government (OOG) have firmly rejected the claim by the mayor, MPD and the union that officers’ faces and badges must be redacted from BWC videos because officers have a cognizable right of privacy when interacting with the public, and for officers’ safety. The committee’s report accompanying Bill 24-320 states that,

officers’ faces should not be redacted from BWC footage. Police officers have tremendous power over members of the public.... They can stop and search people, make arrests, and are authorized to carry firearms and, when justified, use deadly force. The unique powers and functions of police officers ... require a robust system of oversight to ensure they are not abused or misused.

Bill 24-320, COMMITTEE REPORT 19.<sup>17</sup>

If that is not a sufficient reason to retain § 5-116.33(f), there is a compelling practical reason to prohibit MPD from redacting officers’ faces and other identifying information. The primary goal of granting access to BWC videos is to foster public trust by allowing grieving families, journalists, public interest organizations, researchers and others to piece together and understand what transpired during officer-involved shootings and other uses of force. The underlying principle is that D.C. residents need to see for themselves that, despite the incident’s unfortunate

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<sup>15</sup> Bill 25-555, Line 114.

<sup>16</sup> Bill 25-555, HEARING RECORD, 231 – 251.

<sup>17</sup> See, also, *Fraternal Order of Police (FOP) v. District of Columbia*, 290 A.3<sup>d</sup> 29, 45 (D.C. 2023) (“We are not aware that any court has ever held that police officers have a fundamental right to the privacy of information about their involvement — while on duty and while in contact with the public they serve — in a shooting or other serious use of force”); [Metropolitan Police Department—Body-Worn Camera Footage Under the Freedom of Information Act of 1976, # OOG-2023-002\\_AO, Sept. 15, 2023](#); [MPD District of Columbia Freedom of Information Act Compliance, OOG-002-10.1.19-AO](#).

consequences, police did their jobs competently, in accordance with the law and regulations. Obliterating officers' identities will make it difficult, if not impossible, in many instances to achieve that goal.

Police interactions with civilians that turn violent are complex, often involving large numbers of officers and civilians. Frequently, they occur at night, in bad weather, or both, conditions that test the limits of BWC technology to produce clear images and audio of verbal interactions among officers, involved civilians and bystanders.

Analyzing videos from multiple officers to comprehend an incident is time-consuming under the best of circumstances — when the incident occurred in daylight, every officer's camera was activated in accordance with policy,<sup>18</sup> and every involved individual is clearly identifiable. The process becomes arduous if the incident occurred at night, the weather was bad, or some officers failed to activate their cameras.<sup>19</sup> Take away the ability to identify each participant, and the task becomes impossible because a viewer cannot place specific individuals in the scene or figure out who is speaking at critical moments.

If the Council repeals § 5-116.33(f), which it unanimously enacted a year ago, it will further erode the ability of D.C. residents to hold officers accountable, and any hope that public access to BWC videos will build public trust in the MPD.

According to the committee, the Council should repeal § 5-116,33(f) because,

during these interactions, which have significant importance in informing the public that a serious use of force occurred and a pending investigation will follow, the key component is notification. After this notification, an in-depth investigation will take place and the identities of the particular officers involved in the incident is not vital information for the public to have within five days after its occurrence.... The publication of officer identities could put the officers at risk of retaliation or other negative outcomes, prior to a full and proper investigation being conducted.

Bill 25-345, COMMITTEE REPORT, 54 – 55.

The committee appears to believe that the FOI Act allows MPD to redact officers' faces when responding to requests for BWC videos because the police reform act did not add a similar prohibition to § 2-534. It said, § 5-116.33(f) should be repealed because it would give the public

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<sup>18</sup> See MPD General Order 302.13(II)(B).

<sup>19</sup> To help you understand the difficulty, we have attached a memorandum filed by DCOGC board member Robert Becker in support of his client's Motion to Suppress Physical Evidence in *United States v. Bellamy*, Doc. 35, Dkt. No. 19-Cr.-15, filed (D.D.C., Aug. 26, 2019). In that case, a member of the Fifth District CST reported seeing defendant, from a long distance, through a light rain, holding an open container of alcohol at 10 p.m. New Year's Eve. At least eight members of the CST — five on foot and three in a cruiser — followed and eventually stopped defendant two blocks from the purported sighting. Officers recovered a handgun when they searched Bellamy, and the legal issue was whether they had probable cause for the seizure that preceded the search.

greater access than they have under the FOI Act.<sup>20</sup>

Once again, the committee’s rationale relies on a startling lack of understanding of how the FOI Act applies to requests for BWC videos, and about the Council’s reason for enacting § 5-116.33(f). This is another example of an attempt to bend the law to what the mayor and MPD want it to be, not what the Council intended.

BWC videos are public records subject to disclosure under the FOI Act and, as noted above at 9 and fn. 17, the Council, the Court of Appeals and the OOG have ruled that officers do not have a privacy right allowing redaction of their faces. Therefore, the absence of a FOIA amendment in the police reform act that parallels § 5-116.33(f) does not support repeal because releasing unredacted videos would not constitute a “clearly unwarranted” invasion of officers’ privacy.

Until recently, MPD routinely refused to release BWC videos, even those related to high-profile incidents, and even when requested by grieving families of individuals killed by police. Its intransigence was part of a years-long campaign by the mayor and the department, in violation of the FOI Act, to deny D.C. residents meaningful access to virtually all BWC videos.<sup>21</sup>

To force MPD’s compliance, as part of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, the Council mandated public release of BWC videos in officer-involved shootings and use-of-force incidents.<sup>22</sup> When MPD responded by releasing only short, heavily edited clips of such incidents, the Council, in the final version of the police reform act, ordered release of complete videos recorded by every officer on the scene, and barred MPD from redacting officers’ faces from them.

The Council intended release of the videos to allow D.C. residents to analyze them and hold police accountable, not, as the committee claims, merely to notify the public of the incident and an ensuing investigation. The goal was to allow the community to reach its own conclusion about the incident, not insist that the public await results of what the committee characterizes as a “full

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<sup>20</sup> An alternative interpretation of the committee’s explanation is that it erroneously believes anyone interested in the incident, after the investigation, can obtain unredacted videos under the FOI Act. Therefore, they should not be given access within five days of the incident.

<sup>21</sup> In 2015, before MPD implemented the BWC program department-wide, it and the mayor unsuccessfully sought an amendment declaring that BWC videos are not public records subject to FOIA. Ever since, MPD has tried a variety of tactics to avoid disclosing videos: attempting to charge requesters exorbitant fees for redaction; releasing videos that “have been redacted beyond recognition . . . , videos with all faces, all voices, all street names, badge numbers, every car tag in sight, and the like redacted. . . . footage that . . . is unrecognizable[,] has no value”; and denying requests in the hope that requesters would give up and go away. *See* COMMISSION REPORT, 183 (*quoting OOG Director Niquelle Allen*).

<sup>22</sup> Act A23-0336 (Bill 23-825). This was emergency legislation that expired in October 2020. Bill 24-320 permanently amended D.C. Code § 5-116.33, and made conforming changes to DCMR §§ 24-3900.10 and 24-3902.9. The fiscal impact statement accompanying Bill 24-320 doesn’t mention BWC tasks among those predicted by MPD to add costs. But the bill makes all of Section 103 (on BWC details) effective only subject to appropriations.

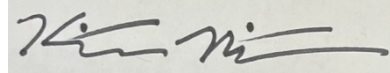
and proper investigation,” but many D.C. residents would view, reflexively, as a whitewash.

If the Council allows MPD to redact officers’ faces and badge numbers from BWC videos of officer-involved shootings and use-of-force incidents now, it will, in effect, codify the department’s legally unsupportable assertion that law enforcement officers have a right of privacy when they interact with the public. MPD and the mayor will view that decision as granting MPD and other government agencies a broad license to redact information D.C. residents need to make informed decisions about their government. It will send the message that protecting the government from criticism and embarrassment is more important than protecting D.C. residents from official misconduct and instilling in them trust in the people who are sworn to protect them.

As noted, the police accountability and transparency provisions in the police reform act have not taken effect because the mayor, who wants to torpedo them, did not include them in her budget. We urge the Council to be pro-active — that it demand evidence supporting MPD’s claim that implementing these provisions will cost millions of dollars, and that it allocate funds in the supplemental budget to cover the provable cost of doing so.

We look forward to working with this committee to ensure that the MPD and other public safety agencies operate transparently because public accountability is essential to improve public trust. If you have questions, please let us know.

Sincerely,



Kirsten Mitchell  
President

cc: Councilmember Charles Allen  
Councilmember Anita Bonds  
Councilmember Matthew Furman  
Councilmember Janeese Lewis George  
Councilmember Vincent C. Gray  
Councilmember Christina Henderson  
Councilmember Kenyan McDuffie  
Councilmember Brianne K. Nadeau  
Councilmember Zachary Parker  
Councilmember Brooke Pinto  
Councilmember Robert C. White  
Councilmember Trayon White, Sr.

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Formed in March 2009, the D.C. Open Government Coalition seeks to enhance public access to government information and transparency of government operations of the District. We believe transparency promotes civic engagement and is critical to a responsive and accountable government. We strive to improve the processes by which the public gains access to government

records and proceedings, and to educate the public and government officials about the principles and benefits of open government.

For additional information call Robert Becker, (202) 306-2276.

**Attachment**

D.C. Code § 2-534. Exemptions from disclosure

...

(d-1)(1) Notwithstanding any provision of this act, a request under this act for disciplinary records shall not be categorically denied or redacted on the basis that it constitutes an unwarranted invasion of a personal privacy for officers within the Metropolitan Police Department ("MPD"), the District of Columbia Housing Authority Police Department ("HAPD"), or the Office of the Inspector General ("OIG"), except as described in paragraph (3) of this subsection.

(2) For the purposes of this subsection, the term "disciplinary records" means any record created in furtherance of a disciplinary proceeding for, or an Office of Police Complaints ("OPC") investigation of, an MPD, HAPD, or OIG officer, sustained allegations that pertain to the officer's commission of a crime, the officer's interactions with members of the public, or the officer's receipt of a judicial officer's adverse credibility finding in a criminal proceeding, including: ~~regardless of whether the matter was fully adjudicated or resulted in policy training, including:~~

- (A) The the name and badge number of the officer ~~name of the officer~~ complained of, investigated, or charged;
- (B) The complaints, allegations, and charges against the officer;
- (C) The transcript of any disciplinary trial or hearing, including any exhibits introduced at the trial or hearing;
- (D) The disposition of any disciplinary proceeding; and;
- (E) The final written opinion or memorandum supporting the disposition and any discipline imposed, including the MPD's, HAPD's, or OIG's complete factual findings and its analysis of the conduct and appropriate discipline of the officer; and.
- (F) ~~Any other record or document created by OPC, MPD, HAPD, or OIG in anticipation of, or in preparation for, any disciplinary proceeding.~~

“(3) When providing records or information related to disciplinary records, the responding public body may redact: ~~(3) When providing records or information related to disciplinary records, the responding public body may redact:~~

“(A) Technical infractions solely pertaining to the enforcement of 438 administrative departmental rules that do not involve interactions with members of the public 439 and are not otherwise connected to the officer's investigative, enforcement, training, supervision, 440 or reporting responsibilities; ~~(A) With respect to the officer or the complainant, records or information related to:~~

~~(i) Technical infractions solely pertaining to the enforcement of administrative departmental rules that do not involve interactions with members of the public and are not otherwise connected to the officer's investigative, enforcement, training, supervision, or reporting responsibilities;~~

~~(ii) Their medical history, except in cases where the medical history is a material issue in the basis of the complaint; and~~

~~(iii) Their use of an employee assistance program, including mental health treatment, substance abuse treatment service, counseling, or therapy, unless such use is mandated by a disciplinary proceeding that may be otherwise disclosed pursuant to this subsection; and~~

~~“(B) Information regarding any individual’s medical history;(B) With respect to any person:~~

~~(i) Personal contact information, including home addresses, telephone numbers, and email addresses;~~

~~(ii) Any social security numbers;~~

~~(iii) Any records or information that preserves the anonymity of whistleblowers, complainants, victims, and witnesses; and~~

~~(iv) Any other records or information otherwise exempt from disclosure under this section other than subsection (a)(2) of this section.~~

~~“(C) Information regarding any individual’s use of an employee assistance program, including mental health treatment, substance abuse treatment service, counseling, or therapy;~~

~~(D) Personal contact information, including home addresses, telephone numbers, and email addresses;~~

~~(E) Any social security numbers or dates of birth;~~

~~(F) Any records or information that, if released, would disclose the identity of whistleblowers, complainants, victims, witnesses, undercover agents, or informants; and~~

~~(G) Any other records or information otherwise exempt from disclosure under this section other than subsection (a)(2) of this section.~~



(d-2) Notwithstanding any other provision of law, agencies shall not categorically treat law enforcement disciplinary records as falling within any exemption listed in this section.

**D.C. Code § 5-1031. Commencement of corrective or adverse action.**

...

(c)(1) MPD shall publish, on a publicly accessible website, a schedule of adverse action hearings for cases in which the proposed discipline is termination.

(2) The schedule shall include:

(A) The date, time, and location of the hearing;

~~(B) The name and badge number of the subject officer; and~~

~~(B)~~ (C) A summary of the alleged misconduct or charges against the subject officer.

**D.C. Code § 5-1104. Police Complaint Board**

...

(d-2)(1) The Board shall review, with respect to the MPD:

....

(2) The Executive Director, acting on behalf of the Board, shall have have unfettered access to all information and supporting documentation that is directly related to OPC's investigation into an officer's alleged misconduct or unfettered access to all information and supporting documentation specifically related to the Board's duties under paragraph (1) of this subsection.

(3) The Executive Director shall keep confidential the identity of any person named in any documents transferred from the MPD to the Office pursuant to paragraphs (1) and (2) of this subsection.

(4) The disclosure or transfer of any public record, document, or information from the MPD, the DCHAPD, or the OIG to the Office pursuant to paragraph (1) of this subsection shall not constitute a waiver of any privilege or exemption that otherwise could be asserted by the MPD, the DCHAPD, or the OIG to prevent disclosure to the general public or in a judicial or administrative proceeding.

(5) A Freedom of Information Act request for public records collected pursuant to paragraph (1) of this subsection may only be submitted to the MPD, the DCHAPD, or the OIG.

(6) Beginning on December 31, 2017, and by December 31 of each year thereafter, the Board shall deliver a report to the Mayor and the Council that analyzes the information evaluated by the Board under paragraph (1) of this subsection.

(7) In its review of in-custody deaths described in paragraph (1)(E) of this subsection, the Board shall issue findings related to, and recommendations in response to, each death.

D.C. Code § 5-1116 Officer disciplinary records database.

(a) Notwithstanding section 3105 of the District of Columbia Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-631.05), by December 31, 2024, the Office shall maintain a publicly accessible database that contains the following information related to sustained allegations of misconduct pertaining to an officer's commission of a crime, the officer's interactions with members of the public, or the officer's receipt of a judicial officer's adverse credibility finding in a criminal proceeding, officer's integrity in criminal investigations, as determined by the Office, MPD, DCHAPD, or OIG for incidents that occurred on or after the effective date of the Comprehensive Policing and Justice Reform Amendment Act of 2022, passed on 2nd reading on December 20, 2022 (Enrolled version of Bill 24-320):

(1) The name, badge number, rank, race, gender, and length of service rank, length of service, and current duty status of an officer against whom an allegation of misconduct has been sustained;

(2) A description of:

(A) The complaint that is the basis of the sustained allegation of misconduct, if initiated by a complaint; or

(B) The conduct that is the basis of the sustained allegation of misconduct, if initiated by another means;

(3) Whether the allegation of misconduct was initiated by:

(A) MPD;

(B) DCHAPD;

(C) OIG;

(D) A complaint submitted to the Office pursuant to section 8(a);

(E) The Executive Director as described in section 8(g-1); or

(F) Other entity;

(4) A description of the final disposition and a copy of the final order or written determination;

(5) The discipline imposed on the officer in response to the sustained allegation of misconduct and the date on which it was imposed;

(6) If applicable, the discipline recommended by the Office, as described in section 12(i)(1)(A); and

(7) Whether the officer or another entity has requested an appeal regarding the sustained allegation of misconduct.

(b) In the event a sustained allegation is successfully appealed, overturned, vacated, or otherwise invalidated, the Office shall remove database entries related to the initial sustained allegation of misconduct.

(c) MPD shall maintain records necessary to update the database as needed and furnish that information to the Office as requested.

**§ 5–116.33. Body-Worn Camera Program; reporting requirements; access.**

(a) By October 1, 2015, and every 6 months thereafter, the Mayor shall collect, and make available in a publicly accessible format, data on the Metropolitan Police Department's Body-Worn Camera Program, including:

- (1) How many hours of body-worn camera recordings were collected;
- (2) How many times body-worn cameras failed while officers were on shift and the reasons for the failures;
- (3) How many times internal investigations were opened for a failure to turn on body-worn cameras during interactions, and the results of those internal investigations, including any discipline imposed;
- (4) How many times body-worn camera recordings were used by the Metropolitan Police Department in internal affairs investigations;
- (5) How many times body-worn camera recordings were used by the Metropolitan Police Department to investigate complaints made by an individual or group;
- (6) How many body-worn cameras are assigned to each police district and police unit for the reporting period;
- (7) How many Freedom of Information Act requests the Metropolitan Police Department ("Department") received for body-worn camera recordings during the reporting period, the outcome of each request, including any reasons for denial, any costs invoiced to the requestor, the cost to the Department for complying with each request, including redaction, and the length of time between the initial request and the Department's final response; and
- (8) How many recordings were assigned to each body-worn camera recording category.

(b) The Metropolitan Police Department shall provide the Office of Police Complaints with direct access to body-worn camera recordings.

(c) Notwithstanding any other law:

- (1) Within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Metropolitan Police Department ("Chairperson"), the Metropolitan Police Department shall provide unredacted copies of the requested body-worn camera recordings to the Chairperson and the Councilmember elected by the Ward in which the incident occurred. Such body-worn camera recordings shall not be publicly disclosed by the Chairperson or the Council; and

(2) The Mayor:

(A) Shall, except as provided in paragraph (3) of this subsection:

(i) Within 5 business days after an officer-involved death or the serious use of force, publicly release:

(I) The names and body-worn camera recordings of all officers directly involved in the officer-involved death or serious use of force; and

(II) A description of the incident; and

(ii) Maintain, on the website of the Metropolitan Police Department in a format readily accessible and searchable by the public, the names and body-worn camera recordings of all officers who were directly involved in an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014; and

(B) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the Office of the Attorney General, and the United States Attorney's Office for the District of Columbia, publicly release any other body-worn camera recordings that may not otherwise be releasable pursuant to a FOIA request or subparagraph (A) of this paragraph.

(3)(A) The Mayor shall not release a body-worn camera recording pursuant to paragraph (1)(A) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

(i) For a body-worn camera recording of an officer-involved death, the decedent's next of kin; and

(ii) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual's next of kin.

(B)(i) In the event of a disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (A) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

(ii) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interest of justice.

(d) Before publicly releasing a body-worn camera recording of an officer-involved death, the Metropolitan Police Department shall:

(1) Consult with an organization with expertise in trauma and grief on best practices for providing the decedent's next of kin with a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting prior to its release; and

(2) In a manner that is informed by the consultation described in paragraph (1) of this subsection:

(A) Provide actual notice to the decedent's next of kin at least 24 hours before the release, including the date on and the manner in which it will be released;

(B) Offer the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting; and

(C) If the next of kin accepts the offer in subparagraph (B) of this paragraph, provide the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting.

~~(e)(1) For any incident involving an officer-involved death or serious use of force, 609 officers shall not review any body-worn camera recordings to assist in initial report writing. (e)(1) Metropolitan Police Department officers shall not review their body worn camera recordings or body worn camera recordings that have been shared with them to assist in initial report writing.~~

~~(2) For an incident other than those described in paragraph (1) of this subsection, 611 officers shall indicate, when writing any initial or subsequent reports, whether the officer viewed 612 body-worn camera footage prior to writing the report and specify what body-worn camera 613 footage the officer viewed (2) Officers shall indicate, when writing any subsequent reports, whether the officer viewed body worn camera footage prior to writing the subsequent report and specify what body worn camera footage the officer viewed.~~

~~(f) When releasing body worn camera recordings, the likenesses of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, shall not be redacted or otherwise obscured.~~

(g) For the purposes of this section, the term:

(1) "FOIA" means [subchapter II of Chapter 5 of Title 2](#).

(2) "Next of kin" means the priority for next of kin as provided in Metropolitan Police Department General Order 401.08, or its successor directives.

(2A) "Serious bodily injury" means extreme physical pain, illness, or impairment 618 of physical condition including physical injury that involves a substantial risk of death, 619 protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily 620 member or organ, or protracted loss of consciousness.

(3) "Serious use of force" means any:

(A) Firearm discharges by a Metropolitan Police Department officer, 624 with the exception of a negligent discharge that does not otherwise put members of the public at 625 risk of injury or death, or a range or training incident;~~(A) Firearm discharges by a Metropolitan Police Department officer, with the exception of range and training incidents;~~

(B) Head strikes by a Metropolitan Police Department officer with an impact weapon;

(C) Use of force by a Metropolitan Police Department officer:

(i) Resulting in serious bodily injury;

(ii) Resulting in a protracted loss of consciousness,~~a loss of consciousness~~, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ;

(iii) Involving the use of a prohibited technique, as that term is defined in [§ 5-125.02\(6\)](#); and

(iv) Resulting in a death; and

(D) Incidents in which a Metropolitan Police Department canine bites a person.

"DCMR 24-3900.10.

(a) Notwithstanding any other law, the Mayor:

"(1) Shall, except as provided in paragraph (b) of this subsection:

"(A) Within 5 business days after an officer-involved death or the serious use of force, publicly release:

"(i) The names and body-worn camera recordings of all officers directly involved in the officer-involved death or serious use of force; and

"(ii) A description of the incident; and

“(B) Maintain, on the website of the Metropolitan Police Department in a format readily accessible and searchable by the public, the names and body-worn camera recordings of all officers who were directly involved in an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014; and

“(2) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the Office of the Attorney General, and the United States Attorney's Office for the District of Columbia, publicly release any other body-worn camera recordings that may not otherwise be releasable pursuant to a FOIA request or paragraph (2)(1)(A) of this subsection.

“(b)(1) The Mayor shall not release a body-worn camera recording pursuant to paragraph (a)(1)(A) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

“(A) For a body-worn camera recording of an officer-involved death, the decedent’s next of kin; and

“(B) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual’s next of kin.

“(2)(A) In the event of a disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (1) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia

“(B) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interest of justice.

“(c) Before publicly releasing a body-worn camera recording of an officer involved death, the Metropolitan Police Department shall:

“(1) Consult with an organization with expertise in trauma and grief on best practices for providing the decedent’s next of kin with a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting prior to its release; and

“(2) In a manner that is informed by the consultation described in subparagraph (1) of this paragraph:

“(A) Provide actual notice to the decedent’s next of kin at least 24 hours before the release, including the date on which it will be released;

“(B) Offer the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting; and

“(C) If the next of kin accepts the offer in sub-subparagraph (B) of this subparagraph, provide the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting.”.

#### DCMR 24 -3902.9

When releasing body-worn camera recordings, the likenesses of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, shall not be redacted or otherwise obscured.”.

#### DCMR 24-3999.1

...

“Serious use of force” means any:

(a) Firearm discharges by a Metropolitan Police Department officer, with the 2129 exception of a negligent discharge that does not otherwise put members of the public at risk of 2130 injury or death, a discharge at an animal, or a range or training incident; ~~“(1) Firearm discharges by a Metropolitan Police Department officer, with the exception of range and training incidents;~~



(b) Head strikes by a Metropolitan Police Department officer with an impact 2132 weapon;~~“(2) Head strikes by a Metropolitan Police Department officer with an impact weapon;~~

(c) Use of force by a Metropolitan Police Department officer that;~~“(3) Use of force by a Metropolitan Police Department officer;~~

(1) Results in serious bodily injury;~~“(A) Resulting in serious physical injury;~~

(2) Results in a protracted loss of consciousness, or that create a 2136 substantial risk of death, serious disfigurement, disability or impairment of the functioning of 2137 any body part or organ;~~“(B) Resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ;~~

(3) Involves the use of a prohibited technique, as that term is defined in 2139 section 3 of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 2140 (D.C. Law 6-77; D.C. Official Code § 5-125.02(6)); or~~“(C) Involving the use of a prohibited technique, as that term is defined in section 3(6) of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.02(6)); and~~

(4) Results in a death; and~~“(D) Resulting in a death; and~~

(d) Incidents in which a Metropolitan Police Department canine bites a person.”;~~“(4) Incidents in which a Metropolitan Police Department canine bites a person.~~

...

“Serious bodily injury” means extreme physical pain, illness, or impairment of physical 2146 condition including physical injury that involves a substantial risk of death, protracted and 2147 obvious disfigurement, protracted loss or impairment of the function of a bodily member or 2148 organ, or protracted loss of consciousness.

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**UNITED STATES,**  
vs.  
**TYSEAN T. BELLAMY.**

No. 19-Cr.-15  
Hon. Timothy J. Kelly

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**DEFENDANT’S POST-HEARING MEMORANDUM  
IN SUPPORT OF MOTION TO SUPPRESS PHYSICAL EVIDENCE**

Defendant Tysean T. Bellamy submits this Memorandum addressing evidence adduced in the Evidence Suppression Hearing July 11, 12 and 25, 2019, applicable legal principles and how the Court should apply those principles in evaluating the evidence. Defendant strongly believes the Court should suppress all physical evidence seized from him December 31, 2018, as products of an illegal search in violation of the Fourth Amendment to the U.S. Constitution.

The evidence demonstrates that no fewer than eight members of the Metropolitan Police 5<sup>th</sup> District Crime Suppression Team actively participated in stopping Mr. Bellamy. Lacking probable cause to arrest him, or reasonable, articulable suspicion that he was committing or would soon commit a crime to justify a *Terry*<sup>1</sup> stop, the officers had no intention of allowing him to ignore their inquiries and continue on his way.

Therefore, Defendant was seized for Fourth Amendment purposes as soon as Sgt. José Jaquez exited a police vehicle and began speaking to him. The evidence discovered after a short chase, a gun, marijuana, and drug paraphernalia, which police had no reason at the time of the stop to believe were in his possession, must be suppressed as fruits of an illegal seizure and search. *Wong Sun v. United States*, 371 U.S. 471 (1963).

**RELEVANT FACTS**

Kelly Brown has known Mr. Bellamy for four years, and they have lived together in

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

Hyattsville, Maryland, since October or November 2018. Tr. 7/25/19, 8 – 9 & 29.<sup>2</sup> She is pregnant, and Mr. Bellamy is the father. *Id.* at 9. She said she is like a stepmother to his sons, Tysean, 13, and Malik, 11; and that he is like a stepfather to her daughter Khiayn, 8. *Id.* at 24 – 25 & 27 – 28.

Ms. Brown planned to meet girlfriends at a club New Year’s Eve, and on her way there she gave Mr. Bellamy a ride to meet his friends near Brentwood Road, N.E. *Id.* at 11 – 12, “I had to meet my girlfriends at the club at least by 10:30. So me personally, I always try to be on time to get parking. So I had to drop him off ahead of time,” she explained. *Id.* at 15. “It was after, I want to say, like, 9:45, maybe, like, 10:00 — towards 10:00 — closer towards 10:00.” *Id.*

Ms. Brown said Mr. Bellamy got out of the car on Brentwood Road, a short distance south of Douglas Street, N.E., and that Carlos Branch, who also goes by CJ or Cheddar, lived there.<sup>3</sup> *Id.* at 15 & 17. She recalled that CJ and about three other men were present when she left Mr. Bellamy. *Id.* at 17 – 18. But she was unsure about who the other men were. *Id.* at 17.

Using street names, the prosecutor asked whether those individuals were present and whether Ms. Brown knew their real names. *Id.* at 18 – 19. The witness tentatively provided first names for some of the individuals. *Id.* But she could not recall whether any of them were present that night.

By the time Ms. Brown arrived at the club, Mr. Bellamy had contacted her using Facetime. *Id.* at 19. As they talked, Ms. Brown said, she could see “[h]is face and the houses. Like, just the sky and the scenery. That’s what I saw.... I believe he might have been walking a little....” *Id.* at 20. She recalled that Mr. Bellamy was with friends as they talked. *Id.*

When the prosecutor asked whether, during the call, Mr. Bellamy talked about “anything unusual happening,” the following colloquy occurred:

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<sup>2</sup> Citations to transcripts of proceedings will be in the form “Tr.” followed by the date of the proceeding and the relevant page number, i.e. Tr. 7/11/19, 3.

<sup>3</sup> Carlos Branch testified that his grandmother lives at that location. *See, below, at 3.*

I do recall him saying something about, [“]Are you all messing with me?[”] But ... I don't know who he was talking to ... at that time.

Q. While you were FaceTiming with him?

A. Yes.

Q. And after he said that, did you continue to talk to him?

A. For a second, we were talking. Probably for, like, a minute — not even a minute after, a few seconds, and then after that I just heard, like ... the phone rubbing against something.

Q. And then what?

A. And then it just disconnected.

Tr. 7/25/19, 20 – 21. Before the call disconnected, Ms. Brown testified, she heard more. “It was very, kind of, like, muffled. You could hear people talking, but it sounded like someone could have said, [“]No, not you,[”] but I didn't know who anybody was ... — like, who was talking.” *Id.* at 27.

Ms. Brown said she drinks alcoholic beverages, but she has never seen Mr. Bellamy drink them. He was not carrying or drinking out of a cup when she dropped him off. *Id.* at 12 - 13.

According to Ms. Brown, Mr. Bellamy lost a lung and suffers from back pain as a result of having been shot in the back. To relieve chronic pain due to that injury he smokes a large amount of marijuana. *Id.* at 13 – 14.

Mr. Branch testified that he and three or four other young men were standing outside the Papa John's Pizza at 1348 Brentwood Place, N.E., December 31, 2018. Tr. 7/12/19, 13 & 18. He said they were near the corner of the building where the chain link fence begins. *Id.* at 19 – 20. Although he recalled that it was about 9 p.m., he later clarified that they were there about 10 minutes before the 5<sup>th</sup> District Crime Suppression Team moved into the area where 14<sup>th</sup> Street, Montana Avenue and Rhode Island Avenue, N.E., intersect. *Id.* at 19 & 33.

Mr. Branch said Mr. Bellamy walked up to them and they talked for about five to 10 minutes about what they were going to do that night. *Id.* at 21 & 38. They planned to go to a New

Year's Eve party at his grandmother's residence, 1220 Brentwood Road, N.E., Mr. Branch testified. *Id.* at 14.

"The next thing you know, the police had came riding up the street. They didn't come, like, exactly to where we were at. So when we ... seen them, we decided that we were going to, like, walk a different way, step off. So we decided to walk away," he explained. *Id.* at 21.

He said Mr. Bellamy did not have a cup in his hand when he arrived or when the group disbursed. *Id.* at 13. When asked whether Mr. Bellamy drinks alcoholic beverages, Mr. Branch said "I know, for sure, he doesn't." *Id.* at 16. Asked if he knew why Defendant does not drink alcohol, he replied, "we've probably discussed it, but not off the top of my head. No, I don't." *Id.*

As the group left the area, Defendant trailed behind because he was talking on his mobile phone, Mr. Branch said. *Id.* at 13 & 22. "I'm pretty sure he was texting or something like that," he added. *Id.* at 22 – 23. His recollection that Mr. Bellamy was looking at his phone's screen is consistent with Ms. Brown's testimony that she and Defendant were on Facetime, and that during the conversation some of his friends were nearby. Tr. 7/25/19, 20.

Mr. Branch and the three or four other men walked along the north side of Rhode Island Avenue, and crossed to the median near the intersection with Brentwood Road. Tr. 7/12/19, 13 – 14. He later said they crossed a short distance west of the firehouse entrance. *Id.* at 24.

"[W]hen we crossed, I think that's when some police, like — it was police behind us. So we crossed over. I couldn't see [Mr. Bellamy], because the police cars was blocking my vision from seeing him at that point in time." *Id.* at 25. Mr. Branch said he was west of Brentwood Road and south of its intersection with Douglas Street, N.E., when he next saw Mr. Bellamy. *Id.* at 35 – 36. "[W]e turned around; I seen him. You seen ... police just coming, sirens on and all that, jumping out, telling everybody to move, rushing towards him." *Id.* at 27. By the time they turned around, police had already detained Mr. Bellamy, he said. *Id.* at 32 – 33.

During the five to 10 minutes Mr. Branch said he, Mr. Bellamy and three or four other young men were talking in front of Papa John's, an officer broadcast that four or five individuals

were outside Jerry Chan's, a Chinese carry-out next door to Papa John's, and a couple of other individuals "moved down toward the 24," a convenience store in the same block of Brentwood Place, N.E. Gov. Exh. 21, 01:40 – 01:58.<sup>4</sup> At 22:03:51, the officer said "Now there's a Jeep outside of Jerry Chan's." *Id.* at 02:11 – 02:25. The next broadcast, at 22:05:04, said "I think they're hanging around a white pickup parked outside. Right out front, there's probably four or five of them hanging out outside, and there's probably another four or five inside." *Id.* at 02:26 – 02:45. At 22:06:46, a minute before Ofc. Joseph Blasting's BWC video begins, the officer reported that "[t]here's one tucked around the side of Papa John's, too. Side of the building." *Id.* at 04:22 – 04:39.

The officer apparently was watching the activity closely from a position where he could see the west side of Papa John's, the gap in the fence, and the place from which Ofc. Blasting eventually retrieved the red Solo cup containing an unspecified alcoholic beverage. But that officer did not report seeing an individual holding the cup. His reports tend to corroborate Mr. Branch's testimony.

Ofc. Blasting broadcast at 22:05:32 that he was parking and would walk into the area of Rhode Island Avenue and Brentwood Place, N.E. Def. Exh. 11 (Ex 11\_5D\_Ops\_10-05-23.mp3). Ofc. Blasting testified that he and several other members of the 5<sup>th</sup> District Crime Suppression Team parked near the intersection of Franklin and 14<sup>th</sup> streets, N.E., and walked south on 14<sup>th</sup> Street. Tr. 7/11/19, 19. He said the other officers continued down 14<sup>th</sup> Street to the intersections of Brentwood Place or Rhode Island Avenue, then turned west. *Id.*

Ofc. Blasting entered an alley running west in the 1300 block of Brentwood Place, behind a row of stores so he "would have an angle to see any individuals hanging out on this sidewalk here." *Id.* at 19 – 21. He explained that between the 24-hour convenience store and Jerry Chan's<sup>5</sup> there

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<sup>4</sup> Citations to the recording of the 5<sup>th</sup> District Operations Channel recordings include times in minutes and seconds measured from the beginning of the recording

<sup>5</sup> See Gov't Exh. 2, Def. Exh. 2.

is an empty parking lot with ... some chain-link fence.... [M]y thought was that if I can stand back here, [] I can actually get eyes on any individuals hanging out ... in this block here, [] I can actually see them from the back here, [] as well as this alley opens up with a gate here, [] to come back, and I can also see from here, [] forward towards Brentwood and Rhode Island.

*Id.* at 21. While looking south through the parking lot, Ofc. Blasting could not simultaneously see individuals on Brentwood Place between the Papa John's pizza shop and the Rhode Island Avenue intersection.

About a minute to a minute-and-a-half after entering the alley from 14<sup>th</sup> Street, Ofc. Blasting said. he stopped at the rear of Papa John's, where he could see the west side of the building and the grassy area bounded by Brentwood Place and the firehouse. *Id.* at 22. "I was there just prior to the silent part of my video beginning" at 10:07:45 p.m., the officer acknowledged. *Id.* at 51.

Ofc. Blasting claimed he

was standing at the corner here, [] behind the Papa John's building, and I was peering or looking from around the corner down along the side of the building ... at which time, I observed an individual standing by the — there's a chain-link fence right here, [] and there's an opening, and I saw an individual standing right here, [] who was holding a red plastic cup.

*Id.* at 22 – 23.

[A]s I was standing in my location behind the Papa John's observing the defendant, I noticed he had the ... red plastic cup in his hand. He turned to his left, looking down the sidewalk ... towards what would be the direction of my assisting officers, and then he turned and placed the red plastic cup down on that wooden ledge we saw earlier in the picture, and then he quickly started to walk down the sidewalk ... away from the direction of the approaching officers on foot.

*Id.* at 26.

When Ofc. Blasting was at the back of the Papa John's, Ofc. Frederick Onoja and Ofc. Robert Marsh were in front of it on Brentwood Place. Gov't Exh. B, Onoja.mp4, 22:07:46 – 22:07:53.<sup>6</sup> Onoja was facing west toward the gap in the fence where Ofc. Blasting claimed Mr.

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<sup>6</sup> The government filed its Exh. B with its opposition to Mr. Bellamy's suppression motion. The exhibit is a CD including 12 BWC videos.

Bellamy was standing. Ofc. Marsh crossed the street in front of Ofc. Onoja. The government has produced no evidence that either officer saw Mr. Bellamy or anyone else holding a red Solo cup to corroborate Ofc. Blasting's testimony.

In Ofc. Blasting's video, the gap in the fence is between a silver car and a black SUV parked in front of it, and no one is standing near the gap. Def. Exh. 4, 22:07:45.<sup>7</sup> Mr. Bellamy becomes visible near the front of the black SUV walking at a slow rate of speed toward the intersection of Brentwood Place and Rhode Island Avenue, N.E. *Id.* at 22:07:50 – 22:08:09.

Ofc. Blasting acknowledged that several other officers were near the gap in the fence when he claims to have seen Mr. Bellamy with the red Solo cup, and videos recorded by Ofc. Onoja and Ofc. Anderson confirm that. But he never alerted them by radio that he saw Mr. Bellamy with the cup

When asked why he did not broadcast a lookout, Ofc. Blasting testified that he did not know whether the cup contained alcohol until he reached the gap in the fence. But considering the Crime Suppression Team's purpose that night, his explanation is specious. They were there to get guns off the street, not to arrest people for petit offenses like drinking in public. They did not need probable cause to walk up to an individual and ask questions. If Ofc. Blasting had given a lookout, one of the officers could have stopped Mr. Bellamy and confirmed that the cup contained alcohol, or could have asked whether he was armed.

Ofc. Blasting testified that when he reached the gap in the fence, "I stepped onto the sidewalk[,] ... I observed the red plastic cup. I looked over the cup that was placed down. I saw the inside of the cup had this dark red-in-color liquid. It also had an odor of an alcoholic beverage emanating from the cup which I could smell...." Tr. 7/11/19, 28, 37, 51. The video makes clear that Ofc. Blasting, who is 6-feet, one-inch tall, did not stop as he went through the

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<sup>7</sup> The time shown in the upper right corner of body-worn-camera (BWC) video is 24-hour UTC time, which is five hours later than Eastern Standard Time. For purposes of identifying the time frame of a video exhibit, this Memo will use 24-hour EST, i.e. if the video shows 03:07:45, it will be converted to 22:07:45, 10:07:45 p.m.



gap, did not shine his flashlight into the cup, and did not bend down to examine or smell its contents. Def. Exh. 4, 22:08:08 – 22:08:15.

Ofc. Blasting confirmed that Ofc. Joshua Anderson was on Brentwood Place near the gap in the fence. Def. Exh. 4, 22:07:59 – 22:08:10; Gov't Exh. B, Anderson.mp4, 22:08:19 – 22:08:21. He testified that he told Ofc. Anderson “the defendant [was] walking away. I, kind of, pointed with my right thumb towards the defendant and where he was and his direction of travel, and I let him know that he had placed down this open container of alcohol and he was walking away quickly from that location.” *Id.* But because he did not activate his body worn camera until about 22:09:45, there is no recording of their conversation.

After speaking with Ofc. Anderson, Ofc. Blasting testified, he broadcast a lookout for Mr. Bellamy “to the other officers in the block as well as the officers in the cars to let them know that the defendant had committed the crime of having an open container of alcohol and that he was good for a stop on that misdemeanor offense.” *Id.* But Ofc. Blasting did not broadcast his lookout until 22:08:57, after he met Ofc. Anderson and then walked west past the entrance to the firehouse on Rhode Island Avenue. *Id.* at 29. Over the 5<sup>th</sup> District Operations channel he described Mr. Bellamy’s clothing, and then said “He’s a POCA. He’s walking off pretending to be on the phone.” Def. Exh. 12 (Ex 12\_5D\_Ops\_10-08-57.mp3); Tr. 7/11/19, 41.

It is unclear why Ofc. Blasting said Mr. Bellamy was pretending to be talking on his phone. As Ms. Brown testified, he was talking to her over Facetime.

During the 47 seconds between his conversation with Ofc. Anderson and when he broadcast the lookout, Ofc. Blasting did not recall coming in contact with any other officers, or telling other officers that he had seen Mr. Bellamy with an open container of alcohol. *Id.* at 65. But the BWC videos tell a very different story.

At 22:08:23, over 35 seconds before Ofc. Blasting broadcast his lookout, Ofc. Tayshon Brown is walking west from the intersection of Brentwood Place and Rhode Island Avenue. Def.

Exh 16 (Ex 16\_Brown\_1A\_slow.mp4 is at ½ speed.). By 22:08:41, four officers are visible from Ofc. Brown’s camera: Ofc. Anderson crosses to the south sidewalk, Ofc. James Love<sup>8</sup> is on the left, Ofc. Blasting walks straight to the north sidewalk, and Ofc. Onoja comes from the firehouse entrance on the right.

It is difficult to understand how officers Brown, Love and Onoja became involved in the pursuit if Ofc. Blasting had not communicated with them. But there is no audio record because none of them had activated their body-worn cameras.

Ofc. Blasting continued walking west on the north side of Rhode Island Avenue, and at about 22:09:14 a cruiser driven by Ofc. Matthew Konkol passed him going the same way. Def. Exh. 4, 22:09:14 – 22:09:18 (Ex 04\_Blasting\_1.mp4). At that point, Ofc. Blasting broadcast, “570, you’re about parallel with him on your left.” Def. Exh. 13 (Ex 13\_5D\_Ops\_10:09:18); Tr. 7/11/19, 30.

He said Ofc. Konkol made a U-turn and as the cruiser drove up to where Mr. Bellamy was walking on the south sidewalk, Ofc. Blasting used his radio to “confirm[] that that was, in fact, the defendant that they needed to stop[,] wearing the hat.” Def. Ex. 14 (Ex 14\_5D\_Ops\_10-09-41.mp3); Tr. 7/11/19, 31.

Sgt. Jaquez testified that he has been assigned to the Metropolitan Police Gun Recovery Unit for nearly eight years, first as an officer and for the past three years as a sergeant. *Id.* at 77. As a member of the Gun Recovery Unity, he said, he received specialized training in “how to, basically, observe or spot individuals that are exhibiting characteristics that they are armed such as hand movements; body movements; body language — what else — just about that.” *Id.* at 78.

On December 31, 2018, Sgt. Jaquez was assigned to the 5<sup>th</sup> District Crime Suppression

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<sup>8</sup> After viewing Ofc. Brown’s BWC video, counsel was able to match videos from cameras worn by officers Blasting, Anderson and Onoja, but found no matching video for the fourth officer. Government counsel identified Ofc. Love as the fourth officer, and said his camera did not record video from this time period. See Government’s Opposition to Defendant’s Motion To Suppress Physical Evidence, Dkt. No. 20, 14 n. 15.

Team, supervising operations in the area that includes Brentwood Road and Rhode Island Avenue, N.E. *Id.* at 79. He said he was riding in the front passenger seat of Ofc. Konkol's cruiser, and that Ofc. John Javelle was in the right rear seat. *Id.* at 80. He said, "I heard over the radio that officers ... walking into the 1300 block of Brentwood and the group separated and there was a gentleman that Officer Blasting advised ... us that was walking away from the entire group by himself." *Id.* at 81.

Following Ofc. Blasting's directions over the radio, Ofc. Konkol made a U-turn on Rhode Island Avenue, putting him on the side of the cruiser closest to the south sidewalk, Jaquez explained. *Id.* at 82.

I heard on the radio Officer Blasting advising just, ["That's him. That's the one with the hat."] That's when I ... walked towards — there was a ... couple parked vehicles, and I walked past the parked vehicles and I basically told the gentleman, ["Hey, I don't care for the drinking."] ... something in the nature, ["I just want to talk to you, ... can we just talk?"]

*Id.* at 83; Def. Exh. 8, 22:09:32 – 22:09:41 (Ex 08\_Jaquez\_1.mp4<sup>9</sup>).

Jaquez employed his Gun Recovery Unit training in spotting physical characteristics, body language and behavior indicative of illegal firearms possession. But he saw nothing about Mr. Bellamy's demeanor, or bulges in his clothing indicating that Defendant might be armed. Tr. 7/11/19, 101. According to the sergeant, Mr. Bellamy kept walking toward the 1200 block of Brentwood Road, N.E., for several seconds. *Id.* at 83 & 109; Def. Exh. 8, 22:09:39 (Mr. Bellamy comes into view at the left of the screen).

Sgt. Jaquez did not recall whether Mr. Bellamy acknowledged him by turning toward him as he spoke. *Id.* at 103. But video recorded by Ofc. Javelle's camera shows him facing the cruiser. Def. Exh.18, 22:09:36 (Mr. Bellamy is to the left of another individual who is facing the street as well)(Ex 18\_Javelle\_1.mp4).

After Mr. Bellamy began running, his hand motions indicated that he had a gun, Sgt.

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<sup>9</sup> Def. Exh. 8A (Ex 08A\_Jaquez\_1A.mp4) is the same as Def. Exh. 8, but at ½ speed.

Jaquez testified. Tr. 7/11/19, 86 – 87.

Sgt. Jaquez acknowledged that when he got out of the cruiser Ofc. Javelle had already gotten out and was moving to the west around parked vehicles to the sidewalk in front of Mr. Bellamy. Tr. 7/11/19, 93, 97 & 108; Def. Exh. 8, 22:09:36 – 22:09:41; Def. Exh. 18, 22:09:33 – 22:09:41.

Ofc. Konkol, too, exited the cruiser, and followed Ofc. Javelle west towards the rear of the parked vehicles and the sidewalk in Mr. Bellamy’s path forward. Def. Exh. 19, 22:09:33 – 22:09:42 (Ex 19\_Konkol\_1.mp4).

After officers detained Mr. Bellamy, Ofc. Blasting returned to the Papa John’s to record the red Solo cup and its contents with his camera. Tr. 7/11/19, 32. He did not recover the cup as evidence because “we can’t recover liquids. They don’t allow us, really, to keep ... the liquids. It’s not our policy really to do that for alcoholic beverages.... I just wanted to get video of it, and so — the cup, what it looked like and the liquid inside of it as well for the record.”<sup>10</sup> *Id.* at 45 – 46. See Def. Exh. 5 (Ex 05\_Blasting\_2.mp4). Ofc. Blasting described the liquid as “a deep red color. It had an alcoholic odor to it. So I wouldn’t be able to specify exactly if it was wine or if it was some sort of mixed drink. It didn’t appear to be consistent with any beer that I’ve ever seen, but I couldn’t specify exactly what it is....” Tr. 7/11/19, 56.

#### **POINTS & AUTHORITIES**

“No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The Bill of Rights guaranteed in the Fourth Amendment this most sacred right: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”

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<sup>10</sup> A strong argument can be made that because Ofc. Blasting, who was credited with Mr. Bellamy’s arrest, was relying on the cup as providing probable cause, the cup was an important piece of evidence that could have been tested for Mr. Bellamy’s fingerprints.

Interpreting the Fourth Amendment, the Supreme Court has “[t]ime and again . . . observed that searches and seizures ‘conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.’ ” *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)(quoting *Thompson v. Louisiana*, 469 U.S. 17, 19 – 20 (1984)(*per curiam*)(quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)(footnotes omitted))).

Where there has been a warrantless search or seizure, *the government bears the burden of proving* by a preponderance of the evidence that the search or seizure was lawful. *United States v. Mendenhall*, 446 U.S. 544, 550 – 51 (1980). In meeting that burden, the government cannot rely on evidence seized in the search.

A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a[n] . . . officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed.

*Byars v. United States*, 273 U.S. 28, 29 – 30 (1927)(citations and footnotes omitted). At bottom, “a search unlawful at its inception may [not] be validated by what it turns up.” *Wong Sun, supra*, 371 U.S. at 484.

A seizure occurs when an officer, “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Terry, supra*, 392 U.S. at 19 n.16.

Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but “to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.” . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.

*Mendenhall, supra*, at 553 – 54.

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of

language or tone of voice indicating that compliance with the officer's request might be compelled. See *Terry v. Ohio*, *supra*, at 19, n. 16; *Dunaway v. New York*, 442 U.S. 200, 207, and n. 6; 3 W. LaFare, SEARCH AND SEIZURE 53 – 55 (1978).

*Mendenhall*, *supra*, at 554 – 55.

Mr. Bellamy's case falls squarely within the first example, and somewhat within the last. It may also be argued that he submitted, however slightly, to police authority before he attempted to flee.

Ofc. Blasting's testimony leaves little doubt that Mr. Bellamy would not be free to leave once Sgt. Jaquez exited the cruiser and began speaking. Asked why he did not pursue Mr. Bellamy, Ofc. Blasting said,

I knew that ... my assisting officers were on the south sidewalk already. So I stayed on the north sidewalk. Just in case the defendant ended up running northbound and crossed Rhode Island, I was already up on that side, as well as my assisting officers wouldn't have to chase him and cross Rhode Island — which is a pretty busy thoroughfare — quickly. So they had time to check for traffic to make sure they didn't get hit by a vehicle or anything if this individual did take flight.

Tr. 7/11/19, 30.

***THE PRESENCE OF SEVERAL OFFICERS MADE IT CLEAR THAT MR. BELLAMY WAS NOT FREE TO LEAVE WITHOUT RESPONDING TO SGT. JAQUEZ***

The stop of Mr. Bellamy involved no fewer than eight members of the Crime Suppression Team, including Ofc. Blasting. Five, including Sgt. Jaquez, were in close proximity, positioned to prevent him from freely disregarding questions and walking away, and three more positioned to stop him if he bolted. The inner ring included officers Javelle, Konkol, Onoja and Love. The outer ring included officers Anderson and Brown.

In its opposition to the suppression motion, the government argued that

the officers who were behind Defendant at the time (Officers Anderson, Brown, Onoja, and Love), were not remotely close in proximity to Defendant at the time that he ran from police. In fact, in most cases, it was not even possible to see Defendant from their body worn camera footage due to the distance and lighting conditions.

Gov't Opp, *supra*, at 14.

Through Sgt. Jaquez, the government attempted to establish that Ofc. Anderson, on the

south sidewalk about a half-block east, was the team member closest behind Mr. Bellamy.

Q. And was Officer Anderson one of the first of the other officers who were further east on Rhode Island Avenue — so basically, other than the three of you, was he the first closest other officer — part of your team to the defendant?

A. Yes.

Q. Okay. And showing you Government's Exhibit-14, what does this show?

A. This is showing the south side of Rhode Island Avenue going towards Brentwood. This — the sidewalk area where Mr. Bellamy was walking when I contacted him.

Q. Okay. And this — the upper right-hand corner indicates that the time was 10:09 and 26 seconds. This was just a few moments before Mr. Bellamy took off running; correct?

A. Yes, ma'am.

Q. And is this Officer Anderson's body-worn camera footage?

A. Yes, ma'am.

Q. Does it show any other police officers ahead of him on the sidewalk?

A. No, ma'am.

Tr. 7/11/19, 111 – 112.

But the BWC videos demonstrate that officers Love and Onoja, were much closer. It is likely that when Ms. Brown heard Mr. Bellamy say, near the end of the Facetime conversation, “Are you messing with me,” he was talking to Ofc. Love, and it was Ofc. Love who replied, “No, not you.” See above at 2 – 3. But Ofc. Love did not activate his camera until long after Mr. Bellamy was detained, and there is no video of the pursuit from his vantage point.

Ofc. Love, violated MPD General Order 302.13 governing body worn cameras, which states that officers “shall activate their body-worn cameras for all contacts initiated pursuant to law enforcement investigation, whether criminal or civil,” and define “contact” as “[c]onduct by a member which places the sworn member in face- to-face communication with an individual citizen under circumstances in which the citizen is free not to respond and to leave.” His failure to follow established procedure deprived the Court of evidence critical to determining the

constitutionality of the stop.

At 22:09:05, Ofc. Brown's camera shows that he is in the Rhode Island Avenue median behind officers Onoja (center) and Love (left). Def. Exh. 20 (Ex 20\_Brown\_1B.mp4). Ofc. Love begins running ahead and toward the south sidewalk. *Id.* at 22:09:13 – 22:09:24. Then, Ofc. Anderson's camera shows Mr. Bellamy near a curb tree, and two seconds later Ofc. Love appears, still running toward Defendant. Def. Exh. 21, 22:09:24 – 22:09:37 (Ex 21\_Anderson\_22-09-24.mp4).

Ofc. Onoja left the median headed for the south sidewalk. Def. Exh. 22, 22:09:33 – 22:09:39 (Ex 22\_Brown\_1C.mp4). As he crossed the eastbound lanes of Rhode Island Avenue, Ofc. Konkol's cruiser came to a stop, and Ofc. Konkol exited the car. *Id.* 22:09:33 – 22:09:38. Ofc. Onoja reached the south sidewalk at 22:09:39, about three car-lengths in front of the cruiser. Def. Exh. 23 (Ex 23\_Onoja\_2\_slow.mp4, excerpt at ½ speed).

As Sgt. Jaquez began speaking, officers Javelle and Konkol were on course toward the sidewalk to close the inner ring around Mr. Bellamy by blocking his path forward if he refused to stop and answer questions. As the sergeant testified, a low wall follows the sidewalk, preventing Mr. Bellamy from backing away. Tr. 7/11/19, 102; Def. Exh. 7.

***SGT. JAQUEZ OPENED WITH AN ACCUSATION, NOT MERELY A REQUEST TO TALK***

Sgt. Jaquez initiated the contact saying, “Hey, my man, I don't care for the drinking. Can I just talk with you real quick?” Def. Exh. 8, 22:09:33 – 22:09:38. The sergeant's tone seemed benign and non-threatening. According to the government,

there was no police conduct that “would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter,” ... and nothing the police said or did created circumstances “so intimidating as to demonstrate that a reasonable person would have believed” cooperation to be mandatory.... The officers showed no weapons; made no commands or demands from the vehicle or the street; and said or did nothing that might otherwise convey the message that the Defendant had to answer questions or not move. The officers simply began the process of exiting their vehicle and Sergeant Jaquez, in a calm, conversational tone of voice, asked Defendant if he could talk to him when the Defendant took off running.

Gov't Opp., *supra*, at 13.



But Sgt. Jaquez's first sentence was a false accusation that Mr. Bellamy had committed a crime, drinking in public.

The Sixth Circuit concluded in a case involving analogous facts that the defendant was seized for Fourth Amendment purposes because a reasonable person so accused would not believe he was free to leave. *United States v. Williams*, 615 F.3<sup>d</sup> 657, 663 – 66 (6<sup>th</sup> Cir. 2010). In that case, two officers approached a man standing on a public sidewalk adjacent to a public housing complex, one officer told the man “he was trespassing again,” asked if he had any outstanding warrants and whether he was armed.” *Id.* at 662. Interpreting the man's reply, that he had to protect himself, as an admission that he was armed, the officers patted him down and recovered a gun. *Id.*

In rejecting a government argument very similar to the one made in this case, the Court relied on *Florida v. Royer*, 460 U.S. 491 (1983). *See, also, United States v. Tyler*, 512 F.3<sup>d</sup> 405, 410 – 11 (7<sup>th</sup> Cir. 2008)(“the officers told Tyler — mistakenly ... — that he was violating the law by carrying an open container of alcohol in public. A reasonable person would not feel free to walk away after being confronted by two police officers and told he was committing a crime in the officers' presence.”); *Jordan v. City of Eugene*, 299 F. App'x 707, 708 (9<sup>th</sup> Cir. 2008)(encounter “became a non-consensual seizure when the officer told the plaintiff he needed to speak with him because the officer believed the plaintiff was carrying a gun.”).

Mr. Bellamy was seized when Sgt. Jaquez accused him of POCA. Under the totality of the circumstances, including the presence of two officers in full tactical gear close behind him and two more moving quickly to prevent him from walking forward, a reasonable person would not have believed that he was free to ignore the sergeant's questions and continue on his way.

Because police lacked reasonable, articulable suspicion when Sgt. Jaquez exited the cruiser and began speaking at 22:09:33, Mr. Bellamy's flight at about 22:09:41 cannot be a factor in determining whether to suppress the gun, marijuana and scale.

***MR. BELLAMY SUBMITTED TO THE CST'S SHOW OF AUTHORITY***

A seizure occurs when an officer, “by means of [a] show of authority, has in some way restrained the liberty of a citizen.” *Terry, supra*, 392 U.S. at 19 n.16. Such a seizure requires “submission to the assertion of authority,” and no seizure occurs where “the subject does not yield.” *California v. Hodari D.*, 499 U.S. 621, 626 (1991). The seizure can be momentary, however, and “later acts of noncompliance do not negate a defendant’s initial submission, so long as it was authentic.” *United States v. Brodie*, 742 F.3<sup>d</sup> 1058, 1061 (D.C. Cir. 2014)(defendant was seized when he put hands on car as instructed, even though he fled a few seconds later).

The test to determine if an encounter between the police and a citizen is a show of authority is whether “in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave,” *Mendenhall, supra*, 446 U.S. at 554, regardless whether the police expressly instructed the person not to leave. *Williams, supra*, 615 F.3<sup>d</sup> at 665 “[W]ords alone may be enough to make a reasonable person feel that he would not be free to leave.” *United States v. Richardson*, 385 F.3<sup>d</sup> 625, 629 (6th Cir. 2004).

Mr. Bellamy submitted to the CST’s show of authority when he turned and asked Ofc. Love “are you messing with me,” and when he turned to face Sgt. Jaquez. At that instant, officers Love and Onoja were immediately behind him, Sgt. Jaquez was calling to him from the street, and officers Javelle and Konkol were moving quickly to block his path forward. Under those circumstances a reasonable person would have believed he was not free to leave.

***WITNESS CREDIBILITY***

The government will argue that the Court should discount Ms. Brown’s and Mr. Branch’s testimony because of their close ties to Mr. Bellamy. Ms. Brown undoubtedly has a strong desire that Mr. Bellamy be present to raise their baby, her daughter and his two sons. Mr. Branch would like to help his friend avoid prison.

Before you accept the government’s argument, consider that Ms. Brown and Mr. Branch candidly acknowledged their brushes with the criminal justice system, however minor. Consider that Ms. Brown has received law enforcement training from the Metropolitan Police Department

in the importance of observing and reporting events accurately. She is a sworn special police officer qualified and entrusted to carry firearms. Finally, her need to care for her young daughter and unborn child is a powerful disincentive to commit perjury.

Consider that although Mr. Branch grew up in that neighborhood, he has largely avoided involvement in the crime that plagues it. Consider his history of steady employment, and clear statement that he would not testify falsely to help Mr. Bellamy.

Ms. Brown and Mr. Branch denied having discussed events New Year's Eve in detail with Mr. Bellamy or with each other. Differences in accounts they gave, some of which are unhelpful to Defendant, support their assertions.

For example, Mr. Branch said he and three or four other young men first met Mr. Bellamy in front of Papa John's. But Ms. Brown recalled Mr. Branch and others she could not name being present when she dropped Mr. Bellamy off in the 1200 block of Brentwood Road, N.E.

Mr. Branch recalled that they met at about 9 p.m., an hour before the Crime Suppression Team arrived in the neighborhood. He acknowledged that his recollections of events that night were not perfect after six months. Tr. 7/12/19, 33 – 34. After viewing BWC video of himself near where police arrested Mr. Bellamy, Mr. Branch candidly said “seeing some of the stuff, kind of, brings it back....” *Id.* at 34.

Mr. Branch and Ms. Brown provided two critical pieces of information, that Mr. Bellamy does not drink alcoholic beverages, and that he was not carrying a red Solo cup December 31, 2018. When Ofc. Blasting claims he watched from the rear of Papa John's as Mr. Bellamy put the cup down and walk away, at least two other officers, Onoja and Marsh, were standing in front of the pizza shop, much closer to the gap in the fence. Beginning before Ofc. Blasting and his team began walking into the area, another officer watching the front and west side of Papa John's and reported by radio about activity there. The government has introduced no evidence that those officers saw Mr. Bellamy with the cup or any other evidence corroborating Ofc. Blasting's testimony.

The government will argue that you should credit the testimony of two police officers who are well acquainted with and dedicated to preventing violent crimes in that high crime neighborhood. There are several reasons to reject that argument, in addition to the absence of corroboration for Ofc. Blasting's claim that Mr. Bellamy possessed a red Solo cup of alcohol.

Implicit in the government's argument is that Ms. Brown and Mr. Branch cannot be trusted because they have a stake in the outcome of this proceeding, but Ofc. Blasting and Sgt. Jaquez can be trusted because they do not have a stake in the outcome. But both officers clearly have a strong interest in convincing the Court to uphold their actions, and the evidence demonstrates their willingness to stretch the truth to reach their goal.

Not the least of the reasons for discounting Ofc. Blasting's testimony is the improbability of his testimony about the cup and its contents. He said that, as he went through the gap in the fence "I make that left-handed dip with the camera, I'm looking into the top of the red plastic cup, observing the dark-red-color liquid and I get the smell at that point as well of the odor of an alcoholic beverage coming from the cup." Tr. 7/11/19, 37.

Ofc. Blasting did not stop as he went through the gap; he did not shine his flashlight on the cup; and he did not bend down toward the cup. Def. Exh. 4, 22:08:06 – 22:08:09. He looked left toward Ofc. Anderson, stepped behind the parked black SUV, then turned right and started walking toward Rhode Island Avenue. *Id.* at 22:08:10 – 22:08:15.

Asked what type of alcoholic beverage the cup contained, Ofc. Blasting prevaricated. "It had an alcoholic odor to it. So I wouldn't be able to specify exactly if it was wine or if it was some sort of mixed drink.... I couldn't specify exactly what it is." Tr. 7/11/19, 56. Even though he went back to Papa John's, picked up the cup, and sniffed the liquid, he refused to say whether the liquid had the strong smell of liquor or the milder smell of wine.

Nonetheless, the government wants you to believe that a six-foot, one-inch tall man could smell alcohol in a small amount of liquid as he walked past the cup on a night when the temperature was about 50 degrees and it was raining intermittently. His claim defies common sense, and fundamental principles of physics and chemistry. One can smell alcohol as it

evaporates — changing from liquid to gas; low temperatures slow the evaporation process; and because cold, humid air is heavy, it prevents alcohol fumes from rising and disbursing into the air.

But, accepting for purposes of argument that Ofc. Blasting could smell the alcohol as he walked past the cup, he made a fair point when he testified that he delayed broadcasting a lookout until he reached the gap in the fence and determined that he had witnessed a crime.

I just observed the defendant at this time. I observed him walk away. I wanted to confirm the cup had an odor and was consistent with that of an alcoholic beverage in order to confirm the grounds for a stop, and then once I had done that and began walking to keep eyes on the defendant, that's when I provided my lookout.

*Id.* at 58. Although valid for the period from about 22:07:45 to 22:08:15, it does not explain why he failed to broadcast a lookout until 22:08:57. Def. Exh. 4; Def. Exh. 12.

Asked about the additional 42-second delay, he replied, “when our radio works, we have sometimes different transmissions. So I can't always get on right away.” Tr. 7/11/19, 59. That explanation fails because there were only four brief transmissions on the 5D Ops. A channel during that period — 22:08:29, 22:08:43, 22:08:46 and 22:08:50. Gov't Exh. 21.

On direct and cross examination, Ofc. Blasting repeatedly confirmed that he issued the lookout at 22:08:57. The prosecutor played the recording of his lookout and asked,

[T]hat's at 22:08:57. Is that 10:08 and 57 seconds?

A. Yes, ma'am.

Q. Is that time consistent with roughly your body camera footage time from when your hand was first covering your camera?

A. Yes, ma'am.

Tr. 7/11/19, 46 – 47. See, also, *id.* at 57, 58 – 59 and 71.

Then this colloquy occurred on redirect examination between the prosecutor, hoping to minimize the apparent delay, and Ofc. Blasting:

In this body-worn camera footage, the time that you are covering up your camera is 10:08 and 44 seconds; correct?

A. Yes, ma'am.

Q. Okay. And is that — you indicated earlier that this is when you believe you were making a recording of the lookout; correct?

A. Yes, ma'am.

Q. So is it safe to say, then, that the radio run timestamp and this timestamp is off by about 10 seconds?

A. Approximately.

*Id.* at 72 – 73. A short time later, he added, “I can just tell you from what the body camera shows and what — the markings on each, I believe, do not exactly line up as far as what time they keep....” *Id.* at 74.

A comparison of Ofc. Blasting’s BWC video and his next broadcast at 22:09:18 demonstrates that if there is a time difference between the two systems, it is much less than 10 seconds. In the video, at 22:09:14 Ofc. Konkol’s cruiser comes into view to Ofc. Blasting’s left, and at 22:09:18 Ofc. Blasting broadcasts that the cruiser is parallel to Mr. Bellamy’s location on the south sidewalk. See above at 9. Def. Exh. 4; Def. Exh. 13 (Ex 13\_5D\_Ops\_10-09-18.mp3).

Ofc. Blasting clearly demonstrated bias toward Mr. Bellamy after the evidentiary portion of the hearing concluded July 25. That day, the Court modified Mr. Bellamy’s conditions of release by changing the start of his curfew from 8 p.m. to 9 p.m.

On August 2, 2019 at about 5:30 p.m., over a week later, members of the Crime Suppression Team located an SUV on Saratoga Street, N.E., that contained a large quantity of marijuana. The officers waited on the scene until nearly 8:30 p.m. for a tow truck to take the vehicle away. BWC videos from nine officers, including Ofc. Blasting, show that there was a large crowd of people in the area, some taunting police. For at least part of the time Mr. Bellamy was present, but did not interact with police.

Sometime before 8 p.m., Ofc. Blasting began organizing officers to arrest Mr. Bellamy for violating his curfew, and shortly before 8:10 p.m., the officers surrounded Defendant and made the arrest for what Ofc. Blasting said was “contempt.” When Defendant informed the

officers of the Court's action regarding his curfew, Ofc. Blasting responded that MPD paperwork said his curfew was 8 p.m.

The case in Superior Court was no-papered the following morning, and Mr. Bellamy was released.

Ofc. Blasting knew that Mr. Bellamy was wearing a GPS tracking device, and if Defendant violated his curfew the Heightened Supervision Program would know that immediately. In addition, although he began organizing the arrest at least 15 minutes before carrying through, he made no attempt to confirm whether Mr. Bellamy would violate his curfew by staying out past 8 p.m. He wanted to arrest Mr. Bellamy, and the only logical explanation for his actions is that he wanted an opportunity to search Defendant in hopes of finding evidence that would support new criminal charges.

Finally, you should find Ofc. Blasting's testimony not credible because he failed to activate his body worn camera until after Mr. Bellamy began running from officers on the south sidewalk. Accepting his claim that he did not know until he reached the gap in the fence that Mr. Bellamy had possessed an open container of alcohol, from that point forward, he engaged in a "self-initiated police action" that brought at least seven other CST officers into play.

MPD General Order 302.13 requires

3. Members, including primary, secondary, and assisting members, shall start their BWC recordings ... at the beginning of any self-initiated police action.

4. In addition, members shall activate their BWCs for the following events:

a. All ... self-initiated calls-for-service;

Ofc. Blasting conceded that his pursuit of Mr. Bellamy was a "self-initiated police action," Tr. 7/11/19, 61. When asked why he did not activate his camera when he examined the cup, he replied, "I wish I had so we had the audio, but ... I typically activate when I make contact with individuals — I'm speaking with them. So because I was not speaking with a citizen or close to approaching a citizen to speak with them because of the distance, I didn't activate my camera at that time." *Id.* at 63. Agreeing that he enlisted Ofc. Anderson in the pursuit, broadcast a lookout, and

guided Ofc. Konkol's cruiser, but still had not activated his camera, Ofc. Blasting's only justification for violating the general order was that he had not come in contact with Mr. Bellamy. *Id.* at 63 – 66.

In fact, three officers who pursued Mr. Bellamy on foot beginning before Ofc. Blasting gave the lookout — officers Anderson, Brown and Onoja — did not activate their cameras until after Defendant began running. Ofc. Love did not activate his camera until long after Mr. Bellamy was detained.

The officers' failure to activate their cameras deprived the Court of the best evidence of what occurred December 31, 2018, at two critical points in the pursuit. There is no record of verbal communications among officers between Ofc. Blasting's purported sighting of Mr. Bellamy holding the red Solo cup and his broadcast lookout, and there is no audio record of interactions with Mr. Bellamy in the seconds immediately preceding Sgt. Jaquez's attempt to speak to Defendant. *See United States v. Gibson*, Dkt. No. 18-108, 2018 U.S. Dist. LEXIS 214696, 19 – 20; 2018 WL 6726891 (D.D.C. Dec. 21, 2018). In that case, which involved the 7<sup>th</sup> District Gun Recovery Unit, Judge Sullivan wrote,

the Court is troubled that all four officers failed to adhere to MPD policy, especially because the officers knew that not activating their cameras would prevent the conversation from being recorded.... Indeed, the very purpose of the "Body-Worn Camera Program," as set forth in General Order 302.13 is to "promote public trust, and enhance service to the community by accurately documenting events, actions, conditions, and statements during citizen encounters ... and to help ensure officer and public safety." ... By failing to adhere to MPD policy and activate their body-worn cameras, the MPD officers deprived the Court from reviewing the best evidence available.

*Id.* at 25 – 26.

Sgt. Jaquez, distorted the truth, particularly regarding actions of other officers who prevented Mr. Bellamy from walking away without answering questions. Therefore, the Court should discount his testimony as well.

In cross-examination the following colloquy occurred:

as you got out of the car, it is — appears the case that Officer Javelle was already out and moving in the direction toward the west; is that correct?

A. Yes, sir.



Q. Okay. And Officer Konkol, in fact, got out of the car at about the same time and started moving in the same direction, as well?

A. That, I don't know.

Tr. 7/11/19, 108 – 9.

At the conclusion of her redirect examination, the prosecutor attempted through Sgt. Jaquez to make it appear that Mr. Bellamy could have walked away to the east if he did not want to answer questions. But, as discussed above at 13 - 15, the BWC videos disprove his testimony. Ofc. Love came into view on Ofc. Anderson's video at 22:09:26, less than a second after the screenshot image Sgt. Jaquez was shown. Ofc. Love is then seen in the video running toward Mr. Bellamy. At 22:09:39, Ofc. Onoja crossed to the south sidewalk three car lengths in front of Ofc. Konkol's cruiser.

Sgt. Jaquez could have responded on re-direct as he had on cross examination, that he did not know where the other officers were. He could have said he was so focused on his contact with Mr. Bellamy that he took no note of the others. Instead, he denied knowing what Ofc. Konkol was doing to his west, and by doing so avoided testifying about whether Ofc. Konkol intended to block Mr. Bellamy's path. Without hesitation, Sgt. Jaquez claimed that Ofc. Anderson was the only member of his team to the east, avoiding having to admit that officers Love and Onoja blocked Mr. Bellamy from the rear.

Ofc. Blasting and Sgt. Jaquez clearly have a stake in the outcome of this proceeding. In *Gibson, supra*, Judge Sullivan accepted the government's assertion that if he did not credit the officer's testimony over the defendant's, the officer would "be on the Louis [sic] list<sup>11</sup> for the next several years or so." *Id.* 2018 U.S. Dist. LEXIS at 28. Although he found that the officer's "stake is small compared to Mr. Gibson's," he said "the Court cannot agree that he is a completely unbiased witness and that his impartiality warrants crediting his otherwise flawed

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<sup>11</sup> The Lewis list is a list containing impeachable information for government witnesses, including MPD officers. *See Humberson v. U.S. Attorney's Office for District of Columbia*, 236 F. Supp. 2<sup>d</sup> 28, 29 (D.D.C. 2003). Inclusion on the list may therefore affect an officer's ability to testify.

testimony. Moreover, [the officer's] testimony is not afforded greater weight because he is a law enforcement officer." *Id.* at 28 – 29.

In Mr. Bellamy's case, Ms. Brown may be viewed as having a greater stake in the outcome than Ofc. Blasting or Sgt. Jaquez. But of the four witnesses, Mr. Branch has the least significant stake in the outcome.

#### **CONCLUSION**

For the reasons set forth above, and for such other reasons as this Court may determine, Mr. Bellamy respectfully requests that this motion be granted, and that the Court bar the government from using as evidence all items seized as the result of the unlawful stop, arrest and search.

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I, Robert S. Becker, counsel for Tysean Bellamy, certify on August 26, 2019 that all counsel in the above-captioned case are registered users of the Court's CM/ECF system and will receive service electronically.

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Robert S. Becker