

**Comments from the Maryland Office of the Public Defender for Baltimore City
Recommendations Draft Policies
November 2018**

The Office of the Public Defender (OPD) provides these comments to the Baltimore Police Department (BPD) on its draft policies for OPR complaints, arrests, custody, interrogations, interviews, traffic citations and DUI/DWIs. As with our comments in the last round of policies for review (focused on searches, seizures, stops and arrests), these comments also focus on the issues we are uniquely able to address, related to our practice and the impact on our clients.

Overall, our recommendations are similar to those provided in the last round, focused on legal concepts that could use further explanation, principles that warrant reinforcement, and examples that can offer clarity. The complaint and classification process is of particular importance, and is an area where many members' knowledge is particular lacking. As a result, we suggest some organizational changes for ease of comprehension.

The process of developing and reviewing a large number of policies over time inherently results in some policies being developed or revised with the contemplation of other policies that have not yet been drafted. This gap is particularly relevant in this round of policies. The Complaint Intake and Classification Process, and related classification protocol, are one portion of a broader police accountability structure that is still under development. Likewise, the policies on interview and interrogations barely touch upon the considerations required for special populations, such as youth and people with behavioral health and cognitive disabilities that are due to have their own policies developed. While we support the ongoing development and adoption of policies that address the constitutional concerns that underlie the consent decree, we also recommend that these policies be revisited as their companion policies are established to ensure consistency, clarity, and sufficient compliance with constitutional, federal, and state law.

I. Policy 306 – Complaint Intake and Classification Process

Recommendation 1: Require effective investigations, rather than merely efficient investigations.

The draft complaint policy prioritizes efficiency, which suggests a quick – possibly streamlined – process, rather than effectiveness, which would further the aim of improving accountability and increasing confidence in the integrity of the BPD.

Suggested language: Revise the Policy section, first sentence.

It is the policy of the Baltimore Police Department (BPD) to openly and readily receive all Complaints of Misconduct reported by civilians and BPD members through several different avenues, to properly classify allegations, to monitor the status of all Complaints, and to fully, fairly, and ~~efficiently~~ effectively investigate these Complaints.

Revise Core Principles ¶ 2 and ¶ 3.

2. Accountability. BPD openly and readily receives all Complaints reported by civilians and BPD members and fully, fairly, and ~~efficiently~~ effectively investigates these

Complaints. Where such a Complaint is sustained against any BPD member, whether sworn or civilian, the member will be held accountable for their actions via a fair, objective, and consistent system that **complies with provides** due process.

3. Intake. As part of its commitment to the public, the BPD maintains a robust and transparent Complaint intake system and offers various avenues to make a Complaint. A Complaint can be made in writing using the Unified Complaint Form (Appendix A), online, by phone, through a third party, or in person at any BPD facility. A Complaint can be made anonymously, and anonymous Complaints will be investigated as fully, **and** fairly, **and effectively** as all other Complaints.

Revise the last sentence of the Receiving Complaints provision.

Complaints will be investigated as fully, **and** fairly, **and effectively** as Complaints in which the complainant party provides a name.

Recommendation 2: Incorporate CRB materials into the OPR investigative file and respond to CRB recommendations.

To promote transparency and address police accountability, there needs to be an improved interaction between the mechanisms developed to address misconduct. In particular, the Office of Professional Responsibility needs to sufficiently account for the Civilian Review Board's efforts and actions. Beyond just tracking complaints filed with the CRB, OPR should incorporate CRB materials into its investigative file. In addition to potentially providing relevant evidence for its investigation, this consolidation will help ensure that relevant Brady/Giglio material regarding a member is gathered when required.

The BPD should also respond to CRB recommendations. External oversight and accountability to the public are important components to a healthy police department, and particularly at this moment in time for BPD, critical to gaining public trust. All CRB recommendations sent to the BPD Commissioner for review, and he should document his consideration of these recommendations.

The section on OPR Command, Office of Professional Responsibility refers to an OPR-CRB Protocol. This Protocol is not provided here or with other policy review materials. We presume this protocol is still under development. Once completed, it should be disseminated for public comment and, once finalized, incorporated with this policy.

Suggested language: Revise Core Principle ¶5 as follows.

Tracking. The BPD will track and monitor the status of all Complaints, to include Complaints filed with the Civilian Review Board (CRB), to ensure a thorough, timely investigative and decision-making process, and to ensure that OPR can report to the public on its activities. **Accordingly, all CRB materials will be part of BPD's investigative file and BPD will respond to all CRB recommendations.**

Add the following to OPR Requirements, Administrative Unit, Tracking

1.1 Civilian Review Board (CRB) complaints should be logged and included within the BPD's investigative file.

Recommendation 3: Clarify that a CC number is assigned to each individual complaint.

The CC Number definition suggests that on investigative case may share a CC number even if it concerns numerous individual complaints. The language should be clarified to make clear which receives a unique identifier.

Suggested language: Revise Definitions, CC number as follows.

CC Number – A Complaint number generated by BPD's Communications Section that is used by BPD to assign a unique identifier to every **complaint case** requiring a written report.

Recommendation 4: Provide a definition of Blue Team

While the OPD Classification Protocol includes a definition of Blue Team, the Complaint Intake policy does not. The definition should be provided here as well.

Suggested language: Add the following to the Definitions section.

Blue Team – An internal software used to document allegations of police misconduct. Blue Team is the mechanism by which members of the department input complaints, which are then reviewed and populated into IAPro by OPR.

Recommendation 5: Make clear that criminal acts are violations of the law.

Suggested language: Revise the misconduct definition as follows.

Misconduct – Action, inaction, and/or failure to act committed by any member of BPD, civilian or sworn, that violates BPD policy, or the law, **including but not limited to** ~~or~~ criminal acts by any member of the BPD.

Recommendation 6: Clarify which member-initiated complaints will not be forwarded to the CRB.

The policy rightly notes that complaints made by BPD members should be handled the same as complaints lodged by community members. The exception for complaints that are not appropriate for the CRB, however, could use greater clarification. What constitutes an “internal complaint” should be defined or explained.

Suggested language: Revise Directives ¶ 3 as follows.

Any Complaint made by a BPD member will be accepted, classified and investigated in the same way as a Complaint made by a member of the public. The one exception is that ~~internal~~ Complaints **initiated by BPD members** that **exclusively concern internal employment matters or otherwise** do not involve a BPD member **interacting with the public** in a law enforcement capacity ~~involving the public~~ will not be forwarded to the CRB. Such Complaints will **still** be fully investigated by OPR and reported out to the public in OPR's quarterly misconduct report.

Recommendation 7: Require BWCs to be activated for the entirety of receiving a complaint, and allow for complainants to refuse to be recorded while still having their complaint received.

Members should generally have their BWC activated while in the community. Encouraging the continued activation of BWC throughout public interactions should be reinforced in applicable policies, including this one. However, a complainant should not be required to be recorded in order to lodge their complaint with a member. The fear of retaliation makes it especially likely that video recording might dissuade an individual from reporting serious police misconduct.

Suggested language: Revise Required Action for Members ¶ 2 as follows.

During all interactions with a person wishing to make a Complaint, member shall ensure their body-worn camera is activated for the ~~duration~~ **entirely** of the exchange. See Policy 824, Body-Worn Camera.

NOTE: If a person wishes to make a complaint, but refuses to be recorded, the member should deactivate the BWC but still accept the complaint. The member shall provide a copy of the Unified Complaint Form and assist the person as needed in preparing a written complaint.

Revise Required Action for Supervisors ¶ 1.

If a person desires to make a Complaint against a member, whether at the scene of an event, or in person at a police facility, the supervisor must activate their BWC **and keep their BWC activated for the entirety of the exchange.**

NOTE: If a person wishes to make a complaint, but refuses to be recorded, the supervisor should deactivate the BWC but still accept the complaint. The supervisor shall provide a copy of the Unified Complaint Form and assist the person as needed in preparing a written complaint.

Add Required Action for Supervisors ¶ 1.3.

1.3 If a person wishes to make a complaint that implicates the supervisor, the supervisor or another member should call the OPD Duty Supervisor to take the complaint.

Recommendation 8: Members should provide the Unified Complaint Form at the scene of an incident if the complainant does not want to wait for a supervisor.

Lodging of a complaint should not be denied because a supervisor is unavailable. To ensure that complaints are accepted by any appropriate means, and that complaint forms are readily available, a member at the scene of the incident should be able to provide a Unified Complaint Form if a supervisor is unavailable and the person is not willing to wait for one to arrive.

Suggested action: Revise Required Action for Members ¶ 5.1 as follows.

If a person does not want to wait, the member shall provide the complainant with **a Unified Complaint Form** and information about how to make a Complaint, which is **also** detailed on the back of the Unified Complaint Form.

Recommendation 9: Clarify that Misconduct must be reported even against coworkers.

The relationship between members is an important aspect to their effectiveness as a team. However, when one member commits misconduct, the obligation to report must take priority over that relationship. The policy should make clear that loyalty must be to appropriate law enforcement activity over individual coworker relationships.

Suggested language: Revise Required Action ¶ 8.1 as follows.

Allegations of misconduct must be reported regardless the relationship between members. This includes Misconduct by partners and other coworkers, sworn or otherwise. Failure to report an allegation of Misconduct will be considered Misconduct and will subject the member to discipline and/or appropriate corrective action based on the seriousness of the conduct.

Recommendation 10: Provide greater clarification on how to include electronic materials, such as emails and text messages.

As with all policies, the complaint intake and classification process will only be as effective as the training provided to the members involved in its implementation. However, tasks that are especially new or unfamiliar to members warrant greater detail in the policy to reinforce training topics and serve as a reference outside of the training session.

BPD's current technology and prior practices have not consistently prepared BPD members for processing certain types of electronic evidence. Email and text messages that relate to misconduct must be included in the BlueTeam entry, by members who understand how to add these materials, and without confiscating complainants' electronic devices.

Suggested language: In Communications Supervisor ¶6, remove the parenthetical and add the following.

6.1. Any email or text messages shall be uploaded and included in the BlueTeam entry with the Unified Form Complaint. For text messages, a screen shot should be taken and saved to provide a downloadable document.

In Office of Professional Responsibility Requirements, Intake Member, add the following after ¶3.

3.2. Intake members are not to confiscate phones or flash drives. Original materials should be copied so that all property can be returned to the complainant.

Recommendation 11: Require diligent efforts for allegations from anonymous complaints.

The policy rightfully strives to have all complaints taken seriously. Additional language should make clear the level of effort used to gather evidence even when the complainant remains anonymous.

Suggested language: Under OPR Responsibilities, Intake Members, If Information is Incomplete ¶3, revise the third (bolded) sentence as follows.

OPR will continue to investigate the allegation as a Complaint coming from a member of the public, and will make **diligent** efforts to gather evidence to verify the allegation, even without further participation by the complainant.

Recommendation 12: Include a copy of the STARS flyer and OPR-CRB Brochure in the Appendix

The Receiving Complaints section (Complaint Forms and Explanation of the Complaint Process, ¶2) mentions the STARS flyer and OPR-CRB brochure and highlights that they should be readily available. These forms should be appended to the policy to ensure that members are familiar with and can easily access them.

II. OPR Classification Protocols

Our understanding is that the Classification Protocol is one component of what will be a larger OPR Manual, and that it relies on BPD's current technology and organizational mechanisms. Both of these factors make it a work in progress, even once this draft is finalized.

Unlike our recommendations on the policies open for public comment, our suggests for the protocol is limited to organization and clarity, without specific language proposed. We question the efficacy of the complex categorization process, but recognize that it is consistent with current technologies and practices. Over time, we anticipate that this process will change, and we urge BPD to continue to refine this protocol and reopen it for public comment when changes are considered.

Recommendation 1: Provide a flow chart showing an overview of the classification steps (and ultimately the entire OPR process).

The protocol provides a lot of necessary detail for completing each step, but in doing so, does not present a clear overall picture of the process. This overview is needed both for OPR staff to better understand their roles and for all BPD members to fully understand the process, both to aid in their interaction with members of the public who seek to file a complaint and to protect their rights and interests as members who may be the subject of a complaint.

A proposed flow chart, based on our interpretation of the protocol and relevant portions of Policy 306, is attached.

Recommendation 2: Consider reorganizing Sections II (Classification Procedures) and III (Interpretation of Complaints as CRB-Eligible) based on official responsible.

BPD policies often detail responsibilities by the level of member responsible. Organizing the tasks this way helps those officials involved clearly identify their roles and responsibilities. It also provides a clearer process, as the flow of responsibilities follows the established hierarchy within the BPD.

Recommendation 3: Do not allow for Members to categorize a complainant as a witness.

Complainants are entitled to more information and have greater rights during the investigative process than mere witnesses. Members should never be permitted to classify someone who reports allegations of misconduct as a mere witness in IAPro.

Suggested language: Revise the definition for Complainant as follows.

Complainant – Any person who reports allegations of misconduct by a BPD member. This person will remain categorized as a Complainant in the IAPro case file, ~~unless the reporting person indicates that they wish to be categorized as a witness only.~~

III. Policy 1002 – Securing and Interviewing Witnesses

Recommendation 1: Require early and consistent use of BWC and documentation when the Witness refuses to be recorded.

As noted with respect to stops and searches in the prior round of public comment, BPD members often do not activate their BWC at the onset of an interaction, resulting in a lack of footage to provide the full context for their actions. This policy should cross-reference the Body-Worn Camera policy and clearly define when the BWC should be activated. It should also specify the protocol for documenting when a Witness refuses to be recorded.

Suggested language: Revise Directive, Member, Witness Determination Procedure, Required Action ¶ 1.1 as follows:

Activate BWC **at the onset of the interaction with any potential Witness, victim or other individual**, and shall not deactivate BWC until the completion of the Investigative Stop. **See Policy 824, Body Worn Camera.**

NOTE: When victims, Witnesses or other individuals wish to make a statement or share information during a voluntary interaction, but refuse to be recorded, members may deactivate the BWC in order to obtain the statement or information. **The member shall memorialize this request on the BWC prior to deactivating the BWC.** See Policy 824, Body-Word Camera.

Recommendation 2: Make clear that Witnesses cannot be compelled to provide identification.

Consistent with the policy for field interviews, Witnesses cannot be required to provide identification. The policy should reiterate this limitation on what members can demand.

Suggested language: Amend Directives ¶ 2:

As with any field Interview, a member may request a Witness statement but the Witness is not required to answer any questions and is free to leave at any point. **People are not required to carry any means of identification, and a Witness cannot be compelled to provide identification.**

Amend Directive, Member, Witness Determination Procedure, Required Action ¶ 4 as follows:

Request contact information from any person determined to be a Witness, such as phone number(s), email address, home address, work address, school attended, etc. **People are not required to carry any means of identification, and a Witness cannot be compelled to provide identification.**

Recommendation 3: Be clear that Witnesses may not be detained once they are ruled out as suspects.

As the policy otherwise makes clear, without a warrant or Body Attachment, a Witness may not be compelled to answer questions and is free to leave at any time. Nonetheless, the provision on “freez[ing] the scene” suggests that witnesses can be detained if considered “reasonable” for the investigation. While members can encourage witnesses to remain voluntarily and/or seek contact information for a subsequent interview, they should never be permitted to detain witnesses without a warrant or body attachment.

Suggested language: Revise Directive, Member, Witness Determination Procedure, Required Action ¶ 6 as follows:

6. Upon arrival at a scene of a crime where suspects or Witnesses may still be present, members may "freeze the scene" for a brief period of time in order to determine whether those present are involved and to identify any potential Witnesses. Officers may detain individuals only for a reasonable period of time necessary to determine whether they are involved or Witnesses. As soon as a person is deemed not a suspect ~~or a Witness~~, members shall not further detain them involuntarily. Members may seek to determine the identities of individuals at the scene consistent with Policy 1112, Field Interviews, Investigative Stops, Weapons Pat-Downs & Searches.

~~NOTE: Reasonableness is determined, in part, by considering: (1) the seriousness of the crime under investigation, (2) the nature of the information the Witness can reasonably be expected to provide, (3) the level of evidence suggesting that the Witness can provide such information, and (4) whether there are any less intrusive methods of obtaining the same information.~~ A member may request that a non-suspect Witness remain on the scene and/or request contact information for a subsequent interview or to notify the Office of the State's Attorney who can determine if the issuance of a Grand Jury Subpoena or Body Attachment is warranted. A Witness may not be compelled to provide identification.

Recommendation 4: Consolidate the directives regarding transporting a Witness off-site.

The directives concerning off-site interviews are separated by the directive on freezing the scene. For ease of comprehension and reference, the two provisions regarding off-site transport should be combined.

Suggested language: Combine ¶¶ 5 and 7 of Directive, Member, Witness Determination Procedure, Required Action as follows:

5. The primary detective, primary unit or supervisor responsible for the investigation shall then make the determination if an On-scene Interview or Off-site Interview of the Witness shall be conducted. The member shall not transport the person off-site, unless the person requested or consented to transport.

IV. Policy 1104 – Arrest Warrants

Recommendation 1: Ensure that any forced entry protects against individual harm and property damage as best as possible.

Similar to executing a search warrant, the provisions for executing an arrest warrant should take measures to reduce the likelihood of personal harm during a forced entry or unnecessary property damage during the search. The policy should further discourage forced entry when it is not needed.

Suggested language: Highlight in the first paragraph that the least amount of force should be used (moving this statement from ¶ 2.6.2):

1. Forced Entry into a property may be necessary to arrest the wanted person. **Members shall use the least amount of force that will accomplish an entrance without jeopardizing the safety of the entry team.**

Revise ¶¶ 2.6.1-2.6.2 as follows:

- 2.6.1. If a response is heard, the members must identify themselves again as police officers, state that they have a warrant and demand that the door be opened. If the occupant refuses to open the door after a reasonable amount of time an occupant would take to access the door, based on the size of the location, force may be employed to gain entry. **Announce loudly for any inhabitants to stand back from the door and that force is about to be employed. Members shall use the least amount of force that will accomplish an entrance without jeopardizing the safety of the entry team.**
- 2.6.2 If the members hear no response after the initial demand for entry after a reasonable amount of time an occupant would take to access the door, based on the size of the location, the members may use force to gain entry. **Announce loudly for any inhabitants to stand back from the door and that force is about to be employed.** Members shall use the least amount of force that will accomplish an entrance without jeopardizing the safety of the entry team.

Add the following provision after ¶ 2:

- 3. Members should remain respectful of the property being entered, minimizing disarray, disruption, or property damage.**

Recommendation 2: Provide more detail on the requirements for a no-knock entry, in language consistent with Policy 1007 – Search and Seizure Warrant.

No-knock entries are particularly invasive and subject to constitutional violations. Their limited use should be highlighted as well as the need for exigent circumstances. As the standard is identical for any type of no-knock entry – whether to execute a search warrant or serve an arrest warrant – the same language should be used to both policies to encourage comprehension and retention by members.

Suggested language: Revise Forced Entry ¶ 3 as follows:

Typically, the execution of a warrant at a residence or third party location requires the member to knock and announce prior to entering the premises. In order to justify a “no-knock entry, the members must have a reasonable suspicion “No-Knock” entry requires particularized exigent circumstances that knocking and announcing their presence under the **particular immediate** circumstances would be

dangerous. ~~For example, the members have credible information that the person is armed with a deadly weapon or has prior charges for use of a deadly weapon, or that knocking would inhibit the effectiveness of the investigation by allowing the destruction of evidence.~~ The exigent circumstances for allowing a No-Knock Warrant are:

3.1. Threat of violence or harm to members.

3.2 Probability of harm to occupants.

3.3 Escape of person to be arrested.

3.4 Destruction of evidence by person to be arrested.

Recommendation 3: Note that an arrest warrant does not authorize the search of the premises on which the person is found.

The policy should make clear that the execution of the warrant is limited to that same specificity, at least until more evidence or observations of a crime is obtained.

Suggested language: Amend Searching the Location as follows:

Authorization for an arrest does not, on its own, authorize a search of the location.

Once the members have gained entry into the residence, they will conduct a thorough search for the person, limited to the areas a person could hide, ~~until that person is located~~ **and solely for the purpose of locating the person. Once the person is located, Thereafter,** members shall not search any further and shall vacate the residence immediately.

V. Policy 1114 – Persons in Police Custody

Recommendation 1: Reference the overdose policies in the duty to provide medical attention.

The opioid epidemic has placed an additional public health responsibility on members. While this issue has unique protocols and needs that may warrant its own policy, it should be discussed within the medical attention procedures here and cross-referenced, if appropriate.

Suggested language: Add to the Duty to Medical Attention Core Principles.

NOTE: When responding to an overdose, refer to Policies 801 (Overdose Response and Investigation Protocol) and 821 (Use of Naloxone/Narcan for Opioid Drug Overdoses). Be aware that, under the Good Samaritan Law, any individual assisting in an emergency overdose situation, including by calling for help, cannot be arrested or prosecuted for their possession or use of a controlled dangerous substance or drug paraphernalia.

Recommendation 2: Include the obligations for transport vehicles, such as the Transportation Vehicle Camera Policy.

Directive ¶ 2.3 requires officers to have their body-worn camera activated through the duration of a transport but the policy makes no reference to the equally important Transportation Vehicle cameras. In addition, the policy only requires Fugitive Unit members to ensure their vehicle is properly equipped with functioning tools, but all members transporting individuals, regardless of the duration, should be reminded of similar obligations.

Suggested language: In the Transportation Procedures add the following.

1. Transporting member shall ensure that seatbelts, TVC and other equipment is properly functioning. Individuals may only be transported in seats with functioning seatbelts or other authorized restraining devices.

2. Transporting members shall ensure that, if their vehicle has a Transportation Vehicle Camera (TVC), the TVC is activated from the first moment a person is placed in the vehicle until the end of the transport.

Recommendation 3: Strengthen the use of force provision

Once a detainee is restrained, it is rare that use of force is needed or appropriate. The policy suggests that and provides the legal standard but should be clearer on the limited need for force and the specific circumstances required for it to be appropriate.

Suggested language: Revise Arrest Procedures ¶5 as follows:

5. Use of force is very rarely needed or appropriate once a detainee is restrained.

Members shall not use force against detainees who are handcuffed or otherwise restrained, except in exceptional circumstances where the totality of circumstances make it reasonable and necessary to prevent injury or escape. **What may have been needed before the person was restrained may no longer be appropriate after the person is handcuffed or otherwise restrained.** Members are cautioned that force that may be proportional against an unrestrained person may not be proportional when used on a restrained detainee. (See Policy 1115, Use of Force.)

Recommendation 4: Define the scope of search permitted as part of a transport.

The search permitted for transport, like any search incident to arrest, is limited to a search for weapons that pose a danger to the member or others. The limitations detailed in the arrest policies should be reiterated here.

Suggested language: Add the following to search procedures.

1. Prior to transport, the detainee shall be searched for weapons that pose a danger to the person or others in their presence.

1.1 A search incident to arrest may include a weapons pat-down and search of the person's pockets. It may also include a search of any articles of property found on the person and the minor manipulation of clothing that does not expose a person's groin/genital area, buttocks, female breasts, or more than the waistband or upper portions of the undergarments. (See Policy 1109, Warrantless Searches).

Recommendation 5: Reconcile the requirements that detainees be searched by the arresting and transporting members, and a member of the same gender.

The policy as currently drafted suggests that the requirement that the arresting and transporting members conduct a search supersedes the requirement that the search be conducted by a member of the same gender. The policy should encourage efforts to ensure a prompt search while complying with the gender requirement for searches.

Suggested language: Revise Search Procedure ¶ 1 and accompanying note as follows.

1. When a detainee is transported in a police vehicle, members shall ensure that the detainee is searched ~~by the arresting member and the transporting member~~ before being placed in a police transport vehicle. See Policy 1109, Warrantless Searches, for guidance on searches incident to arrest.

1.1. NOTE: As a general rule, **the arresting member and the transporting member should both conduct the search. However, absent exigent circumstances,** a person shall only be searched by a member of the same gender, **based on the gender identity stated by the detainee, or the detainee's stated preference for the gender conducting a search. If the arresting member and transporting member are not the mandated or preferred gender, a member of the mandated or preferred gender shall be summoned to the extent feasible to conduct the search. Absent exigent circumstances, the person's preferences with respect to the gender of the member conducting a search will be honored.** When it is not practicable to summon a member of the mandated or preferred gender, the member shall have another member or a supervisor witness the Search **and document that there was no member of the mandated or preferred gender available.** See **Policy 1112 Field Interviews, Investigative Stops, Weapons Pat-Downs & Searches,** Policy 1013, Strip Searches and Body Cavity Searches, and Policy 720, Interactions with Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning (LGBTQ) Individuals for further guidance

Recommendation 6: Limit the restraint permitted to the level needed to prevent escape and ensure safety.

The policy states that fugitive detainees “shall be secured to the maximum degree with appropriate restraints.” Maximum restraint suggests that there is no lawful limit to restraining an individual if they are considered a fugitive. The language should be more closely tailored to the legal standard.

Suggested language: Revise Fugitive Units ¶ 4 as follows.

The detainee shall be made as comfortable as possible, given the length of the trip, and shall be secured to the **extent needed to prevent escape and maintain safety** ~~maximum degree~~ with appropriate restraints per unit’s operating procedures.

VI. Policy 1105 – Custodial Interrogations

Recommendation 1: More clearly explain the constitutional rights implicated.

The core principles are intended to provide a context and understanding for the standards and principles that underlie the policy. While noting a dedication to the constitutional right to silence and right to counsel, there is less discussion than in other policies about what these mean and why they are especially important here.

Suggested language: Revise Core Principles ¶1 as follows.

1. **Constitutional Enforcement. Statements by suspects and witnesses are only lawful if they are knowingly and voluntarily made.** The BPD is dedicated to **preserving protecting** all persons ~~from violations of their~~ constitutional right to silence and right to counsel. **As people in custody are not free to leave on their own, protecting these rights requires additional precautions** when conducting Custodial Interrogations. **Consistent with *Miranda v. Arizona*, before questioning a person in police custody, he or she must be told of the Fifth Amendment right not to make any self-incriminating, including the right to remain silent, the right to an attorney and that anything they say can be held against them.** The manner in which a person is Interrogated must respect the need to ensure that only voluntary statements are obtained and must conform to guidelines established under state and federal law.

Recommendation 2: Provide a clear definition of custody to more accurately explain custodial interrogation.

Defining custodial interrogation requires defining both what amounts to custody and what constitutes an interrogation. This policy’s current definition equates custody with arrest, and relies predominantly on examples of what may be reasonable considered an arrest and a separate definition of interrogation. Custodial interrogation could be explained more clearly and accurately by providing definitions for the terms within the phrase custodial interrogation.

Suggested language: Revise the Definition of Custodial Interrogation to make clear it includes custody and interrogation and provide a definition of custody:

Custodial Interrogation – Interrogation of a person **in custody**.

Custody – **When a person is, or reasonable believes, that they are not free to leave.**
In general, a person in custody who is either under formal arrest or would reasonably believe that they are under arrest. **A member may not hold someone in custody without having probable cause to arrest.**

NOTE: A person may reasonably believe that they are in custody at any location where a member appears to limit their ability to leave. Circumstances that may make it more likely that a reasonable person would think that they are **in custody under arrest** include: being handcuffed, being confronted with evidence of criminal activity, hearing an officer express belief in the person's guilt, being held in a police facility or vehicle, being transported against their will, being Interrogated for an extended period of time, and whether the suspect was ultimately free to leave after the Interrogation.

Circumstances that may make it less likely that a reasonable person would think that they were under arrest include: being told that they are not under arrest, being told that they are free to leave, being interviewed in an open or clearly unlocked space, not being guarded during pauses in Interrogation, having transported themselves to the Interrogation, being allowed to leave at the conclusion of the Interrogation. **A person not under arrest must be permitted to leave at any point that they wish to do so.**

Recommendation 3: Reinforce that a member's body-worn camera (BWC) should be on throughout interaction with a Suspect.

While there may be circumstances when a member is in the proximity of a suspect who provides an excited utterance, this should be a rare occurrence. There also needs to be sufficient documentation to ensure that members who do not properly utilize their BWC are not able to wrongly categorize statements as excited utterances.

Suggested language: Amend Required Action ¶ 2.5 as follows.

In general, a member's BWC should be activated throughout their interactions with a suspect, unless they are in a controlled environment with other audio/video equipment activated. In the rare circumstance when a member is with a suspect without any recording, upon the occurrence of an excited utterance by the suspect that prompts the member to desire to ask follow up questions, the member must turn out their BWC or Departmental cell phone's audio recorder prior to asking any follow up questions. The member must also document in their written report the circumstances of the excited utterance and the reason why their BWC was not activated.

Recommendation 4: The documentation for unrecorded statements should include the efforts taken to secure recording capabilities.

A custodial interrogation is a controlled situation in which recording capability should generally be available and members should be encouraged to make the efforts needed to ensure recording capability. Documenting what efforts were taken to obtain recording equipment would identify when the lack of capacity was due to insufficient functioning equipment, officer deficiencies, or other issues that may require attention.

Suggested language: Revise the last sentence of Required Action ¶2.8 as follows:

Members must also document in their written report that 1) the Interrogation was not recorded; 2) when they notified their supervisor; 3) the reason why the Interrogation was not recorded; ~~and~~ 4) **the efforts taken to obtain recording capabilities; and 5)** the substance of the Interrogation.

Recommendation 5: Make consistent Required Action ¶ 3 and the Special Circumstances.

The draft policy rightly acknowledges that additional considerations are needed for people with special needs. However, the list and language in Required Action ¶ 3 is not consistent with the Special Circumstances section that it references.

The Special Circumstances section refers to policies that are still in development. We urge the BPD to further reconsider this policy once those specialized policies are developed to ensure consistency across policies and conformity with constitutional principles.

Suggested language: Revise Required Action ¶ 3 as follows.

If encountering a person who displays signs that his/her ability to understand is impaired by: **a behavioral health or intellectual disability (including use of alcohol or other drug use, suicidal ideation,** mental illness, **or** a developmental disability), language barriers, deafness/**hearing impairment,** ~~or~~ illiteracy (in the case of a written advisement) **or youth** refer to the section below entitled Special Circumstances, before proceeding with the Explanation and Waiver of Rights.

3.1 If the officer has reason to believe that one of these categories applies, but is uncertain whether it affects the person's ability to understand, the officer should inquire about whether the person is under the influence of any substance, has a mental health disability, developmental disability, language barrier, or physical disability that may affect the person's ability to understand or engage in this process. **Interrogation of youth must always follow the special guidance for youth, regardless of perceived maturity or comprehension of the youth.**

Revise Required Action, Member, Conducting the Interrogation ¶ 1 as follows.

All statements to the police must be knowingly and voluntarily given. Consider the age, education, and mental/physical condition of the person in custody in determining whether

they understand what is happening and whether or not they are capable of making a choice to speak with police. For youth, those exhibiting physical or mental impairment or disabilities, and those with limited English comprehension see section entitled **“Special Circumstances.”** **Where appropriate, see also Policy 1103 (Communicating with Individuals who are Deaf and Hard of Hearing), Policy 1739 (Special Considerations for Persons with Behavioral Health or Mental Illness/Developmental Disabilities), or Policy 1207 (Youth Interrogations).** ~~below. For youths under 18, see section entitled “Interrogation of Youths.”~~

Recommendation 6: Define when it may not be practical to use the explanation and waiver of rights form and require documentation for why Form 69 was not used.

After detailing how the member should use Form 69, Explanation and Waiver of Rights, the policy provides the questions to be asked if the form is not practical to use. As proceeding with an interrogation without the signed waiver form should be an exceptional circumstance, the policy should lay out the limited circumstances which constitute a proper basis to not use it. The member should also be required to document both the method by which they secured the verbal waiver and the basis for proceeding without a written waiver form.

Suggested language: Add the following provisions to Required Action, Member, Explanation and Waiver of Rights, Form 69 ¶ 2.

2.1 The Explanation and Waiver of Rights, Form 69 should be used whenever possible. The limited circumstances when it may not be practical are when the suspect has a visual impairment, language barrier (and the form is not available in their primary language), is illiterate, or physical disability preventing them from signing the form.

[Renumber 2.1-2.2 to 2.2-2.3]

2.4. Complete the Suspect Activity Sheet Form 429, if appropriate, and fully document: (a) the basis for not using Form 69; and (b) the questions asked and the responses elicited pertaining to any waiver given

Recommendation 7: Clarify the actions to take when the member is not certain if the person has waived their rights.

The policy advises members to “seek clarification pursuant to this policy” if they are not sure whether someone has waived their rights, but does not provide any guidance on how to gather that clarification. The policy should specify how to get that clarification and that the suspect’s waiver of their rights must be clear prior to any interrogation.

Suggested language: Revise Conducting the Investigation ¶ 1.2 as follows

Persons in custody must fully understand their constitutional rights as explained and unambiguously waive those rights prior to giving a statement. Officers doubting whether a person has waived their constitutional rights shall seek clarification **pursuant to this policy, through continued inquiry of the Miranda warnings. An interrogation may not take place until there is a clear waiver of rights.**

Recommendation 8: Make clear that the examples provided of statements that would indicate an invocation of rights are only examples.

As currently written, the policy suggests that the examples provided in Conducting the Interrogation ¶ 1.4.1 must be stated as written in order for a suspect to invoke their rights. The policy should make clear that there are no specific statements required so long as the suspect's intent is clear.

Suggested language: Revise Conducting the Interrogation ¶1.4.1 as follows.

Any statement that clearly conveys that the suspect is invoking his/her right to remain silent and does not wish to answer questions requires that the interrogation be terminated. No specific statement is required, but examples of how the right to silence may must be invoked include with a statement such as-(but are not limited to), "I want to remain silent," "I want to stop at this point," "I don't want to talk to you, and I am not signing anything," "I want to use my 5th Amendment Rights," "I don't want to say anything," "I want to speak with a lawyer," or any similar other statement that clearly conveys that the suspect is invoking his/her right to remain silent and does not wish to answer questions.

Recommendation 9: Include how connect a suspect with an attorney.

There are two rights implicated by the *Miranda* warnings – the right to remain silent and the right to an attorney. The policy does not detail how to respond if the person invokes this second right. Our office will provide provisional representation to anyone invoking their right to counsel while in police custody who does not have a private attorney. We will provide the BPD with a phone number to contact when this occurs.

Suggested language: Add the following provision to Conducting the Interrogation.

1.5 If a Suspect requests an attorney, the member must cease questioning immediately and provide access to a defense lawyer before any effort to recommence questioning. Once the suspect has stated that they would like an attorney, the only question the member may ask is whether the person has their own attorney and, if so, the contact information for that attorney.

1.5.1 If the suspect provides the name and contact for a private attorney, the member should promptly contact that attorney and continue to make efforts to contact the attorney until they are reached. If the suspect only provides the name of an attorney, the

member shall locate contact information and the make the same efforts to contact the lawyer.

1.5.2 If the suspect does not provide the name of an attorney, the member should contact the Public Defender's Office. [Contact number to be provided]

1.5.3 No questioning shall occur until the suspect has been able to speak privately with private counsel or a public defender. Subsequent questioning must include the lawyer, unless the suspect waives their right to their attorney's presence.

Recommendation 10: Require that searches prior to interrogation in an interrogation/interview room must be conducted by a member of the same and preferred gender.

Consistent with other policies and appropriate practices, pat-downs and other searches of suspects prior to interrogation should be performed by a member of the same gender as the suspect, or the gender preference stated by the suspect.

Suggested language: Add the following to Interrogations Conducted in an Interview/Interrogation Room ¶ 2.

NOTE: The suspect shall be searched by a member of the same gender, based on the gender identity stated by the detainee, or the detainee's stated preference for the gender conducting a search. See Policy 1112, Field Interviews, Investigative Stops, Weapons Pat-Downs and Searches; Policy 1013, Strip Searches and Body Cavity Searches, and Policy 720, Interactions with Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning (LGBTQ) Individuals for further guidance

Recommendation 11: More clearly discuss the standard for using deception.

The legal uses of deception are limited and require a careful analysis of their appropriateness in the context of the individual suspect and circumstances. The policy should note the legal requirements in the lead provision authorizing the use of reasonable forms of deception, and clearly lay out how the relevant factors should be considered. Particularly vulnerable individuals (i.e., youth and people with mental impairments) should be given special attention.

Suggested language: Revise ¶ 1 and ¶ 1.1 of Using Deception During Interrogation as follows.

1. Investigators may use reasonable forms of deception or subterfuge, including verbal trickery, during a Custodial Interrogation, **only to the extent that it does not overbear the person's ability to make a voluntary decision regarding whether to speak or to the extent that it is likely to induce a false confession.**

1.1. Caution shall be exercised in utilizing deception during an Interrogation and it shall not **result in any promises or inducement that would amount to**

~~coercion. be used to the extent that it would overbear the person's ability to make a voluntary decision.~~

Revise ¶ 2 and add the following ¶2.

2. Whether the pressure resulting from the use of deception would make a statement involuntary or likely to produce a false confession is based on the totality of the circumstances. When deciding whether deception would be appropriate, the member ~~shall~~ **should** consider the following factors ~~in determining whether the pressure resulting from the use of deception would make a statement involuntary or is likely to produce a false confession:~~ the age, background, criminal experience, education, and intelligence of the subject; the mental and physical condition of the subject; whether the subject was given Miranda warnings; where the Interrogation was conducted; the length of the Interrogation; how aggressively the Interrogation was conducted; and whether the subject was otherwise intimidated or pressured into making a statement.

2.1 Consistent with this policy's Special Circumstances, members should be especially mindful if the suspect is young, cognitively impaired, or has a behavioral health or intellectual disability. These individuals are especially vulnerable to coercion and are more likely to provide a false confession, such that deception is likely inappropriate.

VII. Policy 906 - Traffic Citations

Recommendation 1: Note that pretextual stops are not permitted.

A significant constitutional issue, in Maryland and beyond, are traffic stops that are used as a pretext to investigate for criminal activities where there is no reasonable articulable suspicion. Within its core principles, the policy should explicitly state that this practice is prohibited.

Suggested language: After Core Principle ¶ 1 add the following:

NOTE: Stopping a vehicle for a minor traffic infraction in order to investigate for criminal activity, also known as a pretextual stop, is prohibited. An investigative stop requires a reasonable articulable suspicion of criminal activity. See Policy 1112, Field Interviews, investigative Stops, Weapons Part-Downs and Searches.

Recommendation 2: Note that targeting specific neighborhoods is a form of discriminatory policing.

The policy rightly prohibits policing based on demographic category. Often discriminatory policing happens based on the choices of where and how to patrol for traffic violations. The

policy should note that targeting neighborhoods of people from a protected class (i.e. low income black communities) is a form of discriminatory policing.

Suggesting language: Amend Core Principles ¶ 4 as follows.

4. Non-Discriminatory Policing. Members shall not consider demographic category (including but not limited to race, ethnicity, national origin, religion, gender, sexual orientation, age, disability, gender identity or expression, or affiliation with any other similar identifiable group) as a factor in conducting a vehicle stop. **Targeting specific neighborhoods for traffic enforcement based on these demographic categories (such as because it is primarily a low income, black community) is a form of community policing.** See Policy 317, Fair and Impartial Policing

Recommendation 3: Highlight that most minor violations do not warrant an arrest.

For the vast majority of traffic violations, an arrest is neither necessary nor appropriate. The provision should make clear that an arrest should be rare.

Suggested language: Revise the second sentence of Core Principles ¶5 as follows.

For **most** ~~many~~ minor violations, warrantless arrest is not the preferred option, and certain violations only allow for the issuance of a citation and not arrest.

Recommendation 4: Provide definitions for Probable Cause and Reasonable Articulate Suspicion (RAS)

The policy notes that a traffic stop requires probable cause of a traffic violation and a continued stop requires reasonable suspicion of criminal activity. Both of those terms should be defined within the policy with a cross-reference to the stops and searches policy.

Suggested language: Add the following to the Definitions section.

Probable Cause — Where facts and circumstances taken as a whole, known to the member at the time of the arrest, would lead a reasonable member to believe that a particular person has committed, is committing or is about to commit a traffic violation or crime. See Policy 1112 (Field Interviews, Investigative Stops, Weapons Pat-Downs, and Searches).

Reasonable Articulate Suspicion (RAS) — A well founded suspicion based on specific, objective, articulable facts, taken together with the member’s training and experience, that a subject has committed, is committing, or is about to commit a

crime. See Policy 1112 (Field Interviews, Investigative Stops, Weapons Pat-Downs, and Searches).

Recommendation 5: Make clear that hearing also to challenge payable citation

The payable citation definition suggests that a person issued a traffic citation has no option that does not involve some form of pleading guilty. The definition should be clarified to include the right to contest the citation.

Suggested language: Revise the Payable Violation Definition as follows.

Payable Violation — A traffic violation a person can pay without appearing in court. Payment of the citation is a guilty plea and becomes a part of the cited person’s driving record. The person also has the option to **request a trial to contest the ticket or to** request a waiver hearing to plead “Guilty with an Explanation” in an attempt to have fees reduced or waived or to seek probation rather than a conviction because of extenuating circumstances.

Recommendation 6: Require the use of body-worn cameras for the entire duration of a stop for a traffic citation.

Other policies highlight the need for members’ body-worn camera to be activated. This policy should do so as well, with similar language and protocols.

Suggested language: Add the following after Directives, Issuance of a Traffic Citation, Member ¶ 1.3:

NOTE: As with any traffic stop, the member must activate their BWC at the onset of the interaction and shall not deactivate their BWC until the completion of the Stop. See Policy 824, Body Worn Camera.

Recommendation 7: Include guidance on what to do (and not do) when a defendant refuses to sign a traffic citation in the policy text.

The only discussion of what to do when a defendant refuses to sign a traffic citation is at the very end of the Appendix on how to complete the citation form. This concept should be added to the policy text.

Suggested language: Add to the Directives, Issuance of a Traffic Citation the following:

4. A defendant's refusal to sign a citation does not establish probable cause to arrest. Writing "REFUSED" and serving the defendant with the citation(s) is sufficient for the driver to appear in court.

Recommendation 8: Require a supervisor to respond and document any time a stop appears unlawful, unconstitutional or bias-based or information appears deliberately omitted from the citation.

The policy should require supervisors to respond to any unlawful, unconstitutional or bias-based stop, not wait for a pattern over several stops.

Suggested language: Revise Directives, Issuance of a Traffic Citation, Supervisor ¶4 as follows.

If a **stop appears to be pattern of** unlawful, unconstitutional, or bias-based **stops is noted** or information appears to be deliberately omitted from the citation, take corrective action and make a BlueTeam entry.

Recommendation 9: Do not encourage the Traffic Citation, description information box ethnicity section to be left blank.

The policy currently encourages that the descriptive information regarding ethnicity be left blank unless the person is Hispanic. This will equate unknown ethnicity with non-Hispanic ethnicity, which may distort data. Moreover, it will prevent sufficient review of whether a form is sufficiently completed. Each box should be required to be filled out, in order to effectively identify when a form is incomplete.

Suggested language: In Appendix B, Guide to Completing a Traffic Citation, Box 6, Descriptive Information, revise the Ethnicity paragraph as follows.

Ethnicity – If the defendant is Hispanic, enter "H" in the Ethnicity field. If the defendant is not Hispanic, **enter "N." If the defendant's ethnicity is unknown enter "U."**

Recommendation 10: Add an Appendix C listing charges where must appear.

If a charge requires a defendant to appear in court, consistent with the requisite form and instructions, the Member must indicate this on the citation. Nonetheless, there is no information provided about what charges require appearance. An appendix should be included with a list of these citations.

VII. Policy 1108 -- DUI Arrest procedure

Recommendation 1: Add public safety purpose as a Core Principle.

The bulk of the draft policy focuses on the steps required before and after an arrest, and only at the end of a note, more than halfway through the policy, does it state that “[m]embers shall engage in DUI/DWI enforcement for public safety purposes and not for the purposes of making an arrest.” (Breath Alcohol Test Result is Under 0.07, 2.3 NOTE) This comment applies to the entire policy, not just situations with a low BAT result, and should be more prominently and consistently addressed to ensure appropriate implementation of the policy.

Suggested language: Add the following to the Core Principles.

4. Public Safety Purpose. Members shall engage in DUI/DWI enforcement for public safety purposes and not for the purposes of making an arrest. Consistent with the prohibited actions for investigative stops and BPD’s community policing efforts, members may not target specific locations or prior arrestees for DUI/DWI to establish reasonable articulable suspicion for a stop. See Policy 1112 (Field Interviews, Investigative Stops, Weapons Pat-Downs & Searches).

Consistent with this principle, the policy should refer to the operator of the vehicle that is stopped as the “driver” rather than “arrestee.” This is consistent with other policies that refer to “suspects” and “individuals” rather than presuming that all stops should result in arrest.

Recommendation 2: Require the use of body-worn cameras for the entire duration of a stop for a DUI/DWI.

Other policies highlight the need for members’ body-worn camera to be activated. This policy should do so as well, with similar language and protocols.

Suggested language: Add the following after Required Action, Member ¶ 1.3 as follows:

NOTE: As with any traffic stop, the member must activate their BWC at the onset of the interaction and shall not deactivate BWC until the completion of the Stop. See Policy 824, Body Worn Camera.

Recommendation 3: Clarify the distinction between probable cause for a traffic stop and reasonable articulable suspicion of the DUI or DWI.

As noted in our prior comments, the standards for probable cause and reasonable articulable suspicion are worth explaining in each policy they are raised. Here, the Core Principle for Constitutional Stops would benefit from an example of probable cause for a traffic stop and reasonable articulable suspicion.

Suggested language: Add the following after Core Principle ¶ 1.

1.1 Probable cause cannot be established for a DUI or DWI based solely on driving observations or alcohol consumption, there must be facts and circumstances that the person is operating the vehicle and that their driving is impaired due to the influence of alcohol or other substance.

In the Directives, Required Action, Member ¶2 the examples provided suggest that any one of those elements can establish probable cause, when in fact a combination of them is needed, both to show impaired driving and influence of alcohol/intoxication.

Suggested language: Revise Member ¶ 2 as follows:

Upon observing a driver whose behavior indicates that they are under the influence of alcohol or drugs, develop the necessary probable cause prior to placing a person under arrest for any DUI/DWI violation. **Probable cause requires facts and circumstances both that the person is operating the vehicle and that they are under the influence of alcohol or other substance.** Elements contributing to probable cause can include:

2.1 Observations that a vehicle is being operated in an unusual or illegal manner, such as excessive speed, driving too slowly, swerving, striking a fixed object, or making sudden starts and stops.

2.2. Signs or physical indicators that the operator of a vehicle is impaired by, or under the influence of, alcohol, drugs and/or CDS, such as stumbling, slurring, odor of alcohol, flushed face, blood shot eyes, among others.

2.3. Evidence observed within a vehicle while speaking with the driver such as open alcoholic beverage containers or CDS. 2.4. The results of SFST

No single element is sufficient for probable cause.

Recommendation 4: Require that language barriers be addressed throughout the stop.

While the policy addresses language barriers in the Refusal to Consent to Breath/Blood Test section, the member's ability to communicate with the driver is important throughout the stop both to gather relevant information for probable cause and to ensure that the person is sufficiently advised of their rights.

Suggested language: Add the following to the Required Action section.

3. If there is a language barrier, the member shall request a Qualified Bilingual Member to assist in providing language access. If one is not available, or if time constraints do not allow for one to arrive promptly, the member shall use the Language Line to communicate with the arrestee. See Policy 1735, Language Access Services for Limited English Proficient (LEP) Persons.

Recommendation 5: Address health conditions that may be causing impairment.

The indications of alcohol impairment, such as slurred speech and poor coordination, could be the result of a health condition. While the policy notes that the health of the driver is paramount, it needs to also address how to identify and respond to a possible health condition.

Suggested language: Add the following to the Requiring Action Member section, after ¶2 and its subparagraphs.

3. The signs of alcohol impairment are often similar to the symptoms of a health condition. The member should assess whether the person may have a health condition, or be having a negative reaction to prescription medication that warrants medical attention.

Add the following to currently number ¶ 4 f the same section.

4.2 If the driver indicates or the member otherwise has reason to believe that the driver has a health condition, including a possible adverse reaction to prescription medication, impacting their impairment, the member should seek immediate medical attention.

Add the following provision to the Section for Breath Alcohol Tests Result is Under 0.07:

1. A driver with signs of impairment whose breath alcohol test reveals a blood alcohol content below 0.07 is especially likely to have a health condition impacting their impairment. Unless the member knows facts or circumstances to believe alcohol is the only cause of the driver's impairment, they should inquire whether the driver needs medical attention and, if so, call for medical assistance.

Recommendation 6: Make clear that arrest is only permissible, when a citation is not appropriate.

As noted above, referring to drivers throughout the policy as “arrestees” implies that an arrest is always appropriate. A driver should only be arrested and processed through CBIF when necessary for public safety purposes. In particular, it is never lawful to detain someone based on an interest to minimize law enforcement time.

Suggested language: As noted above, “arrestee” should be changed throughout the policy to “driver.” In addition, Discretionary Release of DUI/DWI Violators ¶ 1 should be revised as follows.

Under most circumstances, ~~arresting~~ members may release a driver DUI/DWI arrestee upon issuance of the appropriate citations. **Citation and release is encouraged in situations where there was no bodily injury or death and there is no ongoing risk to public safety.** In exercising discretion as to releasing ~~an arrestee a driver~~ with citations only, or processing them through CBIF, members must consider ~~both~~ the best interests of public safety ~~and the desirability of minimizing the time expended by law enforcement personnel.~~ Every ~~arrestee will have~~ individual has a different tolerance

for alcohol consumption, so it is imperative that **arresting** members give full consideration to the **arrestee's driver's** current mental and physical state prior to any decision to release ~~the arrestee~~. If there is any doubt as to the advisability of releasing a particular **driver arrestee**, the **arrestee driver** shall not be released.

Recommendation 7: Do not presume that DUI, particularly the highest charge, is appropriate when the BAT result is below the legal limit.

The policy presumes that every traffic stop based on reasonable articulable suspicion of driving under the influence may result in arrest for DUI or DWI. This is particularly problematic where the Breath Alcohol Test result does not support intoxication. Even when the results are on the line, the most serious DWI charge, § 21-902-(a)1, should not automatically be included but, consistent with the law, only when there is substantial impairment of coordination caused by alcohol. Lower Breath Alcohol Test results should rarely result in arrest and the policy should more clearly lay out the non-arrest options.

Suggested language: Add the following note to Breath Alcohol Test Result is 0.07 ¶ 6.2.

NOTE: Whether to charge the highest count of § 21-902(a)1 requires the driver to show a substantial impairment caused by alcohol. Whether to charge this count when the Breath Alcohol Test Result is below 0.08 should be based on the totality of the circumstances.

Revise the initial paragraph of the Breath Alcohol Test Result is Under 0.07 section to incorporate the note at the end of ¶ 1.

If **an arrestee driver** consents to a breath alcohol test which reveals a blood alcohol content of less than 0.07, ~~there are two potential courses of action: the member should err on the side of not charging in these cases, and have some particularized facts that, given the low blood alcohol level, to support the decision to arrest (such as public safety or observation of dangerous behaviors.)~~

In this same section, reverse ¶1 and ¶2 and revise as follows to better represent that a low BAT result indicates the unlikelihood of an alcohol impairment.

1.2. If the **arrestee's driver's** breath alcohol test reveals a blood alcohol content between 0.00 and 0.06, **and** the **arresting** member **should assess whether the driver believes the arrestee** is under the influence of prescription drugs/medication and/or CDS. **If the impairment may be due to a substance other than alcohol:**

[subparagraphs from draft to be included here]

2.1. If the **arrestee's driver's** breath alcohol test reveals a blood alcohol content between 0.02 and 0.06, and the **arresting** member believes alcohol is the only cause of the **arrestee's** impairment (i.e., the **arrestee driver** is displaying signs of impairment solely

due to having consumed ONLY alcoholic beverages and NOT prescription drugs, CDS, etc. —~~for example, has blood shot eyes, slurred speech, or is unable to stay awake~~):

~~1.2.1.~~ The arrestee may still be charged with DUI/DWI violations only if the member can articulate with competent evidence that the driver was impaired or under the influence of alcohol;

~~1.2.~~ ~~The arresting member will consider other competent evidence in determining whether the arrestee was impaired or under the influence of alcohol~~;

~~2.2-1.3.~~ Other competent evidence will include, but is not limited to: 1.3.1. Observations made during administration of SFSTs; 1.3.2. Physical evidence observed at the scene; and Report.

~~1.4.~~ ~~The arresting member's ability to articulate this competent evidence both in a Statement of Probable Cause and when testifying in court will be vital to their case.~~

~~2.3-1.5.~~ Issue citations for whatever DUI/DWI violations and other moving violations may be appropriate based on observations and competent evidence.

COMPLAINT

- Complaints received by BPD (in-person at station or via member, by phone, email, hotline or third party) forwarded to Classification Supervisor.
- Criminal misconduct provided by outside law enforcement or otherwise learned by OPD Command, forwarded to Classification Supervisor for internal investigation. OPD Commander and SAO to determine which BPD unit to conduct criminal investigation.
- A notice of claim in a civil complaint reviewed by OPR Administrative Unit to determine if part of another proceeding in IAPro. If so, forward to investigator assigned. If not, forward to Classification Supervisor.

ASSESS AND CLASSIFY

- Classification Supervisor to assess whether allegations, if true, would amount to a violation of law, policy, or regulation.
- Classification Supervisor to check IAPro for duplicate or associated complaint. If so, assign with other complaint.
- Classification Supervisor to provide preliminary classification (categories, classification, sub-classifications, and allegations) within 72 hours.

ASSIGN

- Upon classification, Classification Supervisor to assign to IA, Ethics or SIRT, and assign IAPro Security level.
- Investigative Lieutenant to secure and review recusal forms by end of tour of duty.

REPORT

- Classification Supervisor to inform Administrative Unit to notify CRB of CRB-eligible complaints.
- Classification Supervisor to provide weekly report of complaints and classification to OPR Command.

REVIEW

- OPR Commander to review week report and approve initial classification or return for revision.
- OPR Commander to notify SAO if facts allege misconduct indicating criminal conduct, and indicate consultation in IAPro.

RECLASSIFY

- Classification Supervisor to add allegations, change classification, reassign as instructed by OPD Commander and note in IAPro accordingly.
- Investigator to notify supervisor upon discovering additional facts that could change the classification or result in additional allegations. Supervisor, if they agree, to get approval from investigator's lieutenant and consult OPR Classification Supervisor.