

M E M O R A N D U M

July 8, 2020

TO: Public Safety Committee

FROM: Christine Wellons, Legislative Attorney

SUBJECT: Expedited Bill 27-20, Police – Regulations – Use of Force Policy

PURPOSE: Worksession – Committee votes expected

Expected Attendees

Marcus G. Jones, Chief of Police

Haley Roberts, Associate County Attorney

Expedited Bill 27-20, Police – Regulations – Use of Force Policy, sponsored by Lead Sponsors Councilmembers Jawando, Rice, Navarro, and Albornoz, and Co-Sponsors Council Vice-President Hucker, Councilmember Riemer, Council President Katz, and Councilmembers Friedson and Glass, was introduced on June 16, 2020.¹ A public hearing was held on July 7, at which 26 speakers commented upon the bill. Final action on the bill is tentatively scheduled for July 21.

Bill 27-20 would: (1) require the Police Chief to adopt a policy directive regarding the use of force; and (2) require the use of force policy to include certain minimum standards, including standards regarding the use of deadly force, the use of carotid and neck restraints, and required intervention by officers when another officer is violating law or policy. The minimum standards of the policy would not be subject to collective bargaining.

BACKGROUND

In response to the recent murder of George Floyd in Minneapolis and extensive data regarding racial disparities in police use of force throughout the nation, many state and local governments are examining potential legislative solutions and police reforms. In this vein, Bill 27-20 seeks to limit and ban certain practices that can contribute towards unnecessary deaths and serious bodily injury.

In the State of California, a law passed in 2019 prevents the use of deadly force except when necessary in defense of human life. In particular, California’s law states: “[A] peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons: (A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person. (B) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended....” (2019 Laws of California, Chapter 170).

¹#UseofForce #PoliceReform

Certain local police departments also have modified their policies regarding use of force. For example, police departments of Seattle and San Francisco have adopted such reforms as limiting use of deadly force to necessary situations and banning or limiting carotid restraints and neck restraints. *See* San Francisco Police Department General Order 5.01; Seattle Police Department Manual, Title 8.

SPECIFICS OF THE BILL

Under Bill 27-20, the Police Chief would be required to issue a directive regarding police use of force. The policy directive would be required to meet certain minimum standards. The minimum standards would, among other things:

prohibit a member of the police from using deadly force, including a neck restraint or carotid restraint, against a person unless:

- (A) such force is necessary, as a last resort, to prevent imminent and serious bodily injury or death to the officer or another person;
- (B) the use of such force creates no substantial risk of injury to a third person; and
- (C) reasonable alternatives to the use of such force have been exhausted....

The term “necessary” – as used in the bill’s prohibition against deadly force except when “necessary” to protect against an imminent threat of death or serious bodily injury – would be defined as follows:

Necessary means that another reasonable law enforcement officer would objectively conclude, under the totality of the circumstances, that there was no reasonable alternative to the use of force.

The term *reasonable alternatives* to the use of force would mean:

tactics and methods used by a law enforcement officer to effectuate an arrest that do not unreasonably increase the risk posed to the law enforcement officer or another person, including verbal communication, distance, warnings, deescalation tactics and techniques, tactical repositioning, and other tactics and techniques intended to stabilize the situation and reduce the immediacy of the risk so that more time, options, and resources can be called upon to resolve the situation without the use of force. With respect to the use of deadly force, such term includes the use of less lethal force.

Additional minimum standards of the policy would include a prohibition against striking a restrained individual, and a duty to stop another officer who is using excessive force. These minimum standards of the policy would not be subject to collective bargaining, and they would not affect standards of criminal liability or constitutional torts in courts of law.

SUMMARY OF PUBLIC HEARING

Twenty-six individuals and organizational representatives spoke at the public hearing on July 7. All speakers were supportive of the intent of the bill, but some speakers supported the bill contingent upon amendments.

Chief of Police Marcus G. Jones testified that the Police Department generally supports Bill 27-20, but that several amendments and clarifications are needed. Chief Jones stated that the provisions of the bill – especially definitions of “deadly force”, “de-escalation”, “neck restraint”, “restrained”, and “reasonableness” – should be considered carefully and thoughtfully. The use of force policy is critical to the safety of the public and the safety of police officers.

Additional testimony included the following points.

- Several individuals and organizations testified that the “objectively reasonable officer” standard of judging the necessity of the use of force should be changed to an “objectively reasonable person” standard.
- A speaker pointed out that people of color are disproportionately affected by crime. He recommended that the County should analyze zip codes most affected by violent crime and hold hearings in those areas.
- Multiple individuals and organizations – including CASA, the ACLU, Montgomery County Chapter, Jews United for Justice, the Takoma Park Youth Council, Takoma Park Mobilization, the Women’s Democratic Club, and the Montgomery County Community Action Board – supported the bill contingent on amendments that have been proposed by the Silver Spring Justice Coalition in its written testimony. In particular these groups and individuals called for: (1) a prohibition against no-knock warrants; (2) a prohibition against shooting vehicles unless they are being used as weapons; and (3) a prohibition against chokeholds.
- Multiple speakers noted that any police reform must address the needs of vulnerable populations.
- Multiple speakers noted that it would be greatly beneficial for police officers to speak Spanish.
- Several community members shared personal experiences with excessive force by law enforcement. One speaker said that she did not report the incident at the time due to fear.
- Some individual speakers supported defunding the police and creating other public safety agencies.
- Some speakers stated that police disciplinary and accountability processes are inadequate.

POTENTIAL AMENDMENTS AND ISSUES FOR DISCUSSION

The Public Safety Committee might wish to discuss the following potential amendments and issues regarding the bill.

1. High-risk, no-knock warrants

The Committee might wish to amend the bill to prohibit or restrict the use of no-knock warrants. The bill does not currently address the issue of no-knock warrants, but some Councilmembers have expressed an interest in limiting the use of these warrants.

Under current police policy directives, a specially trained SWAT unit is responsible for effectuating “high-risk” warrants:

Special Weapons and Tactics (SWAT) Unit - responsible for handling life threatening/high risk arrest situations. This unit is trained to handle hostage/barricade situations, high-risk felony arrests, and high-risk search warrant entries. Includes Decentralized SWAT.

FC No. 220 (12-04-18). Aside from making the SWAT Unit responsible for high-risk warrants, current MCPD policy does not appear to address procedures for no-knock warrants.

Several jurisdictions have banned no-knock warrants. In Louisville, Kentucky, the legislature recently enacted “Breonna’s Law” to completely prohibit local officers from seeking or participating in the execution of no-knock warrants within the jurisdiction. (Louisville Metro Council, Ordinance No. 069, 2020 Series) The Louisville legislature considered, but decided against, allowing no-knock warrants in cases of “imminent harm or death” involving “murder, hostage taking, kidnapping, terrorism, human trafficking and sexual trafficking.”

Under the George Floyd Justice in Policing Act of 2020, pending in the U.S. Senate, federal no-knock warrants would not be banned in all situations, but they would be banned in federal drug cases. (HR1720, Sec. 362). <https://www.congress.gov/bill/116th-congress/house-bill/7120/text#toc-HF620524CF928495D8F8FB5544C25D0EA>

In deciding whether to prohibit or restrict MCPD’s use of no-knock warrants in the County, it is important to note that – under existing law – law enforcement officers have two means of entering private property without first knocking and announcing themselves: (1) if a judge issues a no-knock warrant; or (2) if exigent circumstances exist. Under the exigent circumstances exception to the general rule that police must “knock and announce,” the U.S. Supreme Court has held that “exigent circumstances” exist when “police have a ‘reasonable suspicion’ that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation.” *U.S. v. Banks*, 540 U.S. 31 (2003).

According to the Congressional Research Service: “Typical examples [of exigent circumstances] include instances where police believe that the suspect is armed or likely to destroy evidence.” <https://crsreports.congress.gov/product/pdf/LSB/LSB10499>. These are the same type of circumstances in which no-knock warrants are granted. *See id.* (“No-knock warrants, and exigent circumstances, both typically involve instances where there is a risk that knocking and announcing would endanger officers or result in the destruction of evidence.”).

If County law were to preclude the police from seeking and participating in no-knock warrants, the police still would be able to enter property without knocking and announcing themselves if exigent circumstances existed. Instead of being able to rely upon a warrant approved

in advance by a judge, however, the law enforcement officers would need to rely on their own judgment of exigency.

Assuming that the County wants to preserve its ability to enter property without “knocking and announcing” in certain exigent circumstances (*e.g.*, hostage taking), **one option** would be to adopt an amendment to Bill 27-20 that prohibits not only no-knock warrants – but also any entry without knocking and announcing – unless exigent circumstances exist in connection with certain types of offences, such as certain serious crimes of violence. A potential amendment would be to add to subsection (c) that the Police Chief’s use of force policy must:

- (6) prohibit a member of the police from seeking or participating in the execution of a no-knock warrant unless:
 - (A) exigent circumstances exist; and
 - (B) the search or seizure involves a reasonable suspicion of a crime of violence, including murder, hostage taking, kidnapping, terrorism, human trafficking, sexual trafficking, or domestic violence; and
- (7) prohibit a member of the police from entering any private premises to conduct a search or seizure without first knocking and announcing the member’s presence, unless:
 - (A) exigent circumstances exist; and
 - (B) the search or seizure involves a reasonable suspicion of a crime of violence, including murder, hostage taking, kidnapping, terrorism, human trafficking, sexual trafficking, or domestic violence.

Alternatively, the bill could be amended to ban no-knock warrants entirely, understanding that police would still have the ability to use the exigent circumstances exception to the “knock and announce” rule.

A third option would be to ban any exceptions to the “knock and announce rule,” understanding that the County would not have the tool available in any circumstances, including when life is in imminent danger.

RECOMMENDATION: Determine whether and in what manner to limit the use of no-knock warrants. Options include: (1) the amendment above to ban no knock warrants, or otherwise entering without “knocking and announcing,” except for certain exigent circumstances in connection with crimes of violence; (2) banning no-knock warrants altogether; or (3) banning any exceptions to the “knock and announce” rule.

2. Neck Restraints and Carotid Restraints

The Committee might wish to prohibit neck or carotid restraints under all circumstances. Under the bill as currently drafted, any deadly force by the police – including neck restraints and carotid restraints – would be prohibited unless:

- (A) such force is necessary, as a last resort, to prevent imminent and serious bodily injury or death to the officer or another person;
- (B) the use of such force creates no substantial risk of injury to a third person; and
- (C) reasonable alternatives to the use of such force have been exhausted.

Some jurisdictions have banned carotid and neck restraints in all circumstances – even when deadly force is warranted – and the Committee might wish to do the same. *See, e.g.*, San Francisco Police Department General Order 5.01 (Rev. 12/21/16). According to NPR, “Some of the biggest police departments in the country have already instituted bans on chokeholds. The Los Angeles Police Department banned what’s called the ‘bar-arm chokehold’ in 1982. The New York Police Department banned chokeholds in November 1993 — except when an officer’s life is in danger. And the Chicago Police Department did the same in May 2012. Philadelphia and Houston have similar policies.” <https://www.npr.org/2020/06/16/877527974/how-decades-of-bans-on-police-chokeholds-have-fallen-short> (June 16, 2020).

The Committee might wish to ask the Police Department to comment upon whether there are any scenarios in which chokeholds would be a necessary or appropriate use of force.

RECOMMENDATION: Determine whether to amend the bill regarding neck and carotid restraints. Options include: (1) maintaining the current provisions of the bill, which ban the restraints unless deadly force is warranted; or (2) banning the restraints in all circumstances.

3. Use of Force Involving Vehicles

The Committee might wish to amend the bill to address the ability of officers to shoot at moving vehicles.

Under current MCPD policy:

“Officers are prohibited from shooting at or from moving vehicles unless the circumstances would authorize the use of deadly force.”

FC No. 131 (9/21/16)

The Committee might wish to codify the current police policy against shooting at, or from, moving vehicles unless deadly force is warranted – for example, if the driver of a vehicle is ramming it into pedestrians. According to the *Washington Post*, police departments have generally banned shooting at moving vehicles, but in recent years departments have made exceptions for the situation of a terrorist using a vehicle as a ramming weapon. https://www.washingtonpost.com/local/public-safety/police-in-dc-new-york-revise-shooting-policies-in-response-to-vehicle-ramming-attacks/2018/05/01/9561d1ee-418b-11e8-ad8f-27a8c409298b_story.html (May 1, 2018).

One potential amendment, which would be a slight variation on the current policy, would be to provide that the use of force policy must:

prohibit a member of the police from shooting from a moving vehicle unless circumstances would authorize the use of deadly force; and

prohibit a member of the police from shooting at a moving vehicle unless the vehicle is being used as a weapon and the circumstances would authorize the use of deadly force.

RECOMMENDATION: Determine whether and in what manner to limit the ability to shoot at moving vehicles. Options include: (1) codifying current MCPD policy (described above) regarding moving vehicles; (2) not addressing moving vehicles within this bill; or (3) modifying current police policy regarding moving vehicles (option described above).

4. Striking Restrained Individuals

Under the bill as drafted, the use of force policy would be required to prohibit an officer from striking a restrained individual.

a. Definition of striking. Councilmember Jawando has recommended adding a definition to define “striking”. A potential definition would be:

Striking means hitting forcibly and deliberately with: a weapon; a body part such as a hand, elbow, knee, or foot; or any other implement.

The Committee might wish to adopt this or a similar amendment.

b. Definition of restrained individual. The Office of the County Attorney (OCA) has recommended defining “restrained individual as an individual who is under control, is not resisting arrest, and no longer poses a threat to the officer or others in the immediate area.” In making this recommendation, the OCA has pointed to caselaw in which an officer justifiably shot a handcuffed individual who (despite being handcuffed in the back of a police cruiser) pointed a handgun at officers and refused to drop the weapon. *Elliot v. Leavitt*, 99 F.3d 640 (4th Cir. 1996).

RECOMMENDATION: Determine whether and in what manner to define the terms “striking” and “restrained individual”.

5. Use of Force Against Fleeing Individuals

Councilmember Jawando’s office has proposed specifically addressing the issue of use of force against fleeing suspects. Currently, the bill does not mention fleeing individuals, although under the current subsection (c) of the bill, deadly force against a fleeing individual – just like deadly force against any other individual – would be permitted only if:

(A) such force is necessary, as a last resort, to prevent imminent and serious bodily injury or death to the officer or another person;

(B) the use of such force creates no substantial risk of injury to a third person; and

(C) reasonable alternatives to the use of such force have been exhausted.

If the Committee wishes to explicitly address fleeing individuals, the bill could be amended to provide that the use of force policy must:

prohibit a member of the police from using deadly force against a fleeing person unless:

- (A) such force is necessary, as a last resort, to prevent imminent and serious bodily injury or death to the officer or another person;
- (B) the use of such force creates no substantial risk of injury to a third person;
- (C) reasonable alternatives to the use of such force have been exhausted; and
- (D) reasonable suspicion exists that the fleeing person committed a felony that threatened or resulted in death or serious bodily injury.

RECOMMENDATION: Determine whether and in what manner to explicitly address force against fleeing individuals.

6. Treatment of Certain Populations, Including Individuals with Disabilities

The bill, as drafted, requires the use of force policy to, among other things:

protect vulnerable populations, including individuals with disabilities, children, elderly persons, pregnant women, persons with limited English proficiency, individuals without regard to sex, including gender identity or orientation, and populations that are disproportionately impacted by inequities.

Councilmember Jawando had suggested an amendment to explicitly include within the above list: individuals without regard to race, and persons with mental or behavioral disabilities or impairments.

Regarding the treatment of vulnerable populations, Councilmember Jawando also has recommended adding an additional section to the bill, which would require the Police Chief to issue written guidelines – simultaneously with the new use of force policy – as follows.

The Police Chief, in consultation with impacted persons, the Police Advisory Commission, communities, and organizations, including representatives of civil and human rights organizations, victims of police use of force, and representatives of law enforcement associations, must provide written guidance regarding:

- (1) the types of less lethal force and deadly force that are prohibited under this Section; and
- (2) how a law enforcement officer may assess whether the use of force is appropriate and necessary, and how to use the least amount of force necessary, when interacting with:
 - (A) pregnant individuals;
 - (B) children and youth under age 21;
 - (C) elderly persons;
 - (D) persons with mental, behavioral, or physical disabilities or impairments;
 - (E) persons experiencing perceptual or cognitive impairments due to use of alcohol, narcotics, hallucinogenic, or other drugs;
 - (F) persons suffering from serious medical conditions; and
 - (G) persons suffering from mental health concerns.

RECOMMENDATION: Determine whether to adopt these amendments regarding vulnerable populations, including: (1) whether to further enumerate vulnerable populations; and (2) whether to require separate written guidelines regarding police interactions with vulnerable populations.

7. Effects on Criminal and Civil Liability

The bill contains the following language regarding civil and criminal liability: “The policy directive established under this Section...must not be construed to alter standards of civil or criminal liability.”

The OCA has recommended that this language be strengthened by adding: “This Section does not create private rights enforceable by any person or individual.” This language would clarify that the bill is not intended to create a private right of action.

The OCA also has pointed out examples in which a use of force policy might be relevant evidence in a qualified immunity decision or a negligence action. Therefore, even though the bill would not create a new cause of action or alter existing standards of civil or criminal liability, the policy still might be relevant evidence in various court proceedings. To clarify this point in the bill, the following amendment to lines 79-83 could be adopted.

- (d) Scope of directive. The policy directive established under this Section:

* * *

- (3) must not be construed to alter state or federal rules of evidence.

RECOMMENDATION: Determine (1) whether to adopt the OCA’s amendment regarding a private right of action and (2) whether to adopt the additional amendment described above regarding evidence.

8. Less Lethal Force

Under the bill as currently drafted, the police use of force policy would be required to prohibit “deadly force” unless, among other things, “reasonable alternatives to the use of force have been exhausted.” “Reasonable alternatives” – in turn – include “less lethal force.”

Current MCPD policy defines “less lethal force” as, “Any use of force other than that which is considered deadly force.” The MCPD policy further provides:

Authorized Use of Less Lethal Force

1. Less Lethal force, as defined herein, may be used to effect arrests, to safely make or maintain an investigative detention or seizure, or to protect officers or others from personal harm, physical resistance, or injury, provided the force applied is reasonable based upon the immediate circumstances confronting the officer at the time.
2. Less Lethal force may involve the use of defensive tactics (hands/body) and/or protective instruments.
3. Although the department issues authorized protective instruments, in exigent circumstances, officers are not prohibited from using another object or instrument in order to protect themselves or others as long as the object is used in accordance with the limitations on force contained in this policy.

Councilmember Jawando has suggested defining “less lethal force” under the bill as “any degree of force that is not likely to have lethal effect.” In addition, he has suggested an amendment to require the use of force policy to:

Prohibit any less lethal force unless such less lethal force is necessary and proportional in order to effectuate an arrest of a person who the officer has probable cause to believe has committed a criminal offense, and only after exhausting alternatives to the use of such force.

This language regarding less lethal force would be similar to provisions of the federal PEACE Act, pending in Congress. <https://www.congress.gov/116/bills/hr7120/BILLS-116hr7120rh.pdf#page=76>

This amendment would – similar to the bill’s requirements about deadly force – require an officer to exceed the Constitutionally required minimum standards under the Fourth Amendment when using any force. Under the bill, the officer would have to use a level of force only once alternatives, such as de-escalation techniques, have been exhausted. As the OCA has pointed out, this would be a higher standard than the current standard required under the Fourth Amendment. *See Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989) (“The fourth amendment reasonableness standard does not turn on the availability of less intrusive alternatives. The real question is not what “could have been achieved,” but whether the Fourth Amendment requires such steps. . . . The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative less intrusive means.”) (Internal citations and quotations omitted.)

RECOMMENDATION: Determine whether to adopt these amendments to define use of “less lethal force” and to restrict its use.

9. Exemption from Collective Bargaining

With respect to collective bargaining, the intent behind the bill is to completely exempt the minimum standards of the use of force policy from collective bargaining. The bill provides:

The minimum standards of the policy directive under subsection (c) of this Section:

- (1) must not be construed to be mandatory subjects of collective bargaining under Section 33-80(a); and
- (2) must be considered employer rights not subject to collective bargaining under Section 33-80(b).

To make the intent to exempt the minimum standards from bargaining abundantly clear, the OCA has suggested deleting the above-mentioned language and, instead, amending Section 33-80(c) of the Code:

(c) [[Exemption]] Exemptions.

- (1) Nothing contained in this article shall be construed to limit the discretion of the employer voluntarily to discuss with the representatives of its employees any matter concerning the employer’s exercise of any of the enumerated rights set forth in subsection 33-80(b) above, but such matters ~~[[shall]]~~ must not be subject to bargaining.
- (2) The minimum standards of the use of force policy adopted by the Police Chief under Section 35-22 must not be subject to bargaining.

RECOMMENDATION: Determine whether to approve of the amendment to the collective bargaining law described above.

10. Technical amendment – Change “reasonable alternatives” to “alternatives”

Under the bill as drafted, the police use of force policy would require officers to exhaust “reasonable alternatives” prior to using deadly force. Councilmember Jawando has suggested using the term “alternatives” instead of “reasonable alternatives.” Substantively, the bill would not change as a result of this change in terminology because the definition of “alternatives” would remain the same:

[[Reasonable alternatives]] Alternatives means tactics and methods used by a law enforcement officer to effectuate an arrest that do not unreasonably increase the risk posed to the law enforcement officer or another person, including verbal communication, distance, warnings, deescalation tactics and techniques, tactical

repositioning, and other tactics and techniques intended to stabilize the situation and reduce the immediacy of the risk so that more time, options, and resources can be called upon to resolve the situation without the use of force. With respect to the use of deadly force, such term includes the use of less lethal force.

RECOMMENDATION: Determine whether to adopt this technical amendment.

11. Technical Amendment – Delete Surplus Language

The bill would require the adoption of a use of force policy that, among other things, would:

prohibit a member of the police from using deadly force, including a neck restraint or carotid restraint, against a person unless:

- (A) such force is necessary, as a last resort, to prevent imminent and serious bodily injury or death to the officer or another person;
- (B) the use of such force creates no substantial risk of injury to a third person; and
- (C) reasonable alternatives to the use of such force have been exhausted;

The OCA has recommended deleting paragraph (C) from this provision of the bill as follows: [(C) reasonable alternatives to the use of such force have been exhausted;]. The reason for the deletion would be that paragraph (C) is redundant of paragraph (A), which already provides: “(A) such force is necessary, as a last resort, to prevent imminent and serious bodily injury or death to the officer or another person;”. The language is redundant because in order to force to meet the definition of “necessary” under the bill, “reasonable alternatives” would have to have been exhausted. “Necessary” is defined as meaning “that another reasonable law enforcement officer would objectively conclude, under the totality of the circumstances, that there was no reasonable alternative to the use of force”.

RECOMMENDATION: Determine whether to adopt this technical amendment.

NEXT STEPS

A final vote on Bill 27-20 is tentatively scheduled for July 21. The Committee is expected to make a recommendation on the bill and any amendments to the full Council.

This packet contains:

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Expedited Bill No. 27-20
Concerning: Police – Regulations – Use
of Force Policy
Revised: 06/15/2020 Draft No. 8
Introduced: June 16, 2020
Expires: December 16, 2021
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsors: Councilmembers Jawando, Rice, Navarro, and Albornoz
Co-Sponsors: Council Vice-President Hucker, Councilmember Riemer,
Council President Katz, and Councilmembers Friedson and Glass

AN EXPEDITED ACT to:

- (1) require the Police Chief to adopt a policy directive regarding the use of force;
- (2) require the use of force policy to include certain minimum standards; and
- (3) generally amend the County law regarding use of force by members of the police and policing.

By adding
Montgomery County Code
Chapter 35, Police
Section 35-22

Boldface	<i>Heading or a defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland, approves the following act:

1 **Sec 1. Section 35-22 is added as follows:**

2 **35-22. Police use of force policy – minimum standards.**

3 (a) Definitions. In this Section, the following terms have the meanings

4 indicated.

5 Carotid restraint means a technique applied in an effort to control or

6 disable a subject by applying pressure to the carotid artery, the jugular

7 vein, or the neck with the purpose or effect of controlling a subject's

8 movement or rendering a subject unconscious by constricting the flow

9 of blood to and from the brain.

10 Deadly force means force that creates a substantial risk of causing death

11 or serious bodily injury, including the discharge of a firearm, a carotid

12 restraint or neck restraint, and multiple discharges of an electronic

13 control weapon.

14 Deescalation tactics and techniques means proactive actions and

15 approaches used by a law enforcement officer to stabilize the situation

16 so that more time, options, and resources are available to gain a

17 person's voluntary compliance and reduce or eliminate the need to use

18 force, including verbal persuasion, warnings, tactical techniques,

19 slowing down the pace of an incident, waiting out a subject, creating

20 distance between the officer and the threat, and requesting additional

21 resources to resolve the incident.

22 Necessary means that another reasonable law enforcement officer

23 would objectively conclude, under the totality of the circumstances,

24 that there was no reasonable alternative to the use of force.

Neck restraint means a technique involving the use of an arm, leg, or other firm object to attempt to control or disable a subject by applying pressure against the windpipe or the neck with the purpose or effect of controlling a subject's movement or rendering a subject unconscious by blocking the passage of air through the windpipe.

Reasonable alternatives means tactics and methods used by a law enforcement officer to effectuate an arrest that do not unreasonably increase the risk posed to the law enforcement officer or another person, including verbal communication, distance, warnings, deescalation tactics and techniques, tactical repositioning, and other tactics and techniques intended to stabilize the situation and reduce the immediacy of the risk so that more time, options, and resources can be called upon to resolve the situation without the use of force. With respect to the use of deadly force, such term includes the use of less lethal force.

Serious bodily injury means bodily injury that creates a substantial risk of death, causes a serious, permanent disfigurement, or results in long term loss or impairment of any bodily member or organ.

Totality of the circumstances means all credible facts known to the law enforcement officer leading up to and at the time of the use of force, including the actions of the person against whom the law enforcement officer uses such force and the actions of the law enforcement officer.

(b) Use of force policy directive – required.

(1) The Police Chief must issue a policy directive that establishes the permissible uses of force by members of the police.

49 (2) The directive must:

50 (A) prioritize the safety and dignity of every human life;

51 (B) promote fair and unbiased policing; and

52 (C) protect vulnerable populations, including individuals with
53 disabilities, children, elderly persons, pregnant women,
54 persons with limited English proficiency, individuals
55 without regard to sex, including gender identity or
56 orientation, and populations that are disproportionately
57 impacted by inequities.

58 (c) Minimum standards. The use of force policy directive required under
59 this Section must, at a minimum:

60 (1) comply with the Constitutions of the United States and the State
61 of Maryland;

62 (2) prohibit a member of the police from using deadly force,
63 including a neck restraint or carotid restraint, against a person
64 unless:

65 (A) such force is necessary, as a last resort, to prevent
66 imminent and serious bodily injury or death to the officer
67 or another person;

68 (B) the use of such force creates no substantial risk of injury
69 to a third person; and

70 (C) reasonable alternatives to the use of such force have been
71 exhausted;

72 (3) prohibit a member of the police from striking a restrained

individual;

(4) require a member of the police to stop, or attempt to stop, another officer who is using excessive force, violating the use of force policy, or committing a crime; and

(5) protect a member of the police from retaliation or discipline for taking action under paragraph (4).

(d) Scope of directive. The policy directive established under this Section:

(1) must dictate the conduct of members of the county police in the performance of their duties; and

(2) must not be construed to alter standards of civil or criminal liability.

(e) Collective bargaining. The minimum standards of the policy directive under subsection (c) of this Section:

(1) must not be construed to be mandatory subjects of collective bargaining under Section 33-80(a); and

(2) must be considered employer rights not subject to collective bargaining under Section 33-80(b).

Sec. 2. Expedited Effective Date. The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on the date on which it becomes law.

Sec. 3. Implementation. The Police Chief must issue the use of force policy required under this Act within 6 months after the effective date of the Act.

LEGISLATIVE REQUEST REPORT

Expedited Bill 27-20
Police – Regulations – Use of Force Policy

DESCRIPTION: Expedited Bill 27-20 would require the Police Chief to adopt a policy directive regarding the use of force; and require the use of force policy to include certain minimum standards

PROBLEM: Unnecessary use of force

GOALS AND OBJECTIVES: Set standards regarding the use of deadly force; the use of certain carotid and neck restraints; the striking of restrained individuals; and required intervention by officers who observe another officer violating law or policy.

COORDINATION: Police Department

FISCAL IMPACT: OMB

ECONOMIC IMPACT: OLO

EVALUATION: To be done.

EXPERIENCE ELSEWHERE: California, Seattle, San Francisco

SOURCE OF INFORMATION: Christine Wellons, Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: N/A

PENALTIES: Pursuant to personnel rules.

Fiscal Impact Statement
Bill 27-20, Police – Regulations – Use of Force Policy

1. Legislative Summary

Bill 27-20 would require the Police Chief to adopt a policy directive regarding the use of force and require the use of force policy to include certain minimum standards regarding the use of deadly force, the duty to stop another officer using excessive force, and the prohibition against striking a restrained individual.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

No changes in County expenditures or revenues are anticipated due to the amendments of this bill.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

No changes in County expenditures or revenues are anticipated over the next 6 fiscal years due to this bill.

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

Not applicable.

5. An estimate of expenditures related to County's information technology (IT) systems, including Enterprise Resource Planning (ERP) systems.

Not applicable.

6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Bill 27-20 does not authorize future spending.

7. An estimate of the staff time needed to implement the bill.

There is no additional staff time needed to implement the bill.

8. An explanation of how the addition of new staff responsibilities would affect other duties.

The change in standards contemplated in this bill will not have a fiscal impact.

9. An estimate of costs when an additional appropriation is needed.

No additional appropriation is needed to implement Bill 27-20.

10. A description of any variable that could affect revenue and cost estimates.

Not applicable.

11. Ranges of revenue or expenditures that are uncertain or difficult to project.

Not applicable.

12. If a bill is likely to have no fiscal impact, why that is the case.

This bill directs the Police Chief to adopt a policy directive meeting certain minimum standards and the Police Department anticipates no measurable change in workload or expenditures to accomplish this task.

13. Other fiscal impacts or comments.

None.

14. The following contributed to and concurred with this analysis:

Neil Shorb, MCPD Management and Budget Division

Trevor Lobaugh, Office of Management and Budget



Richard S. Madaleno, Director
Office of Management and Budget



Date

Economic Impact Statement

Office of Legislative Oversight

Expedited Bill 27-20

Police – Regulations – Use of Force Policy

SUMMARY

The Office of Legislative Oversight (OLO) expects Expedited Bill 27-20 to have a minimal impact on the Montgomery County economy.

BACKGROUND

Drawing on laws enacted in California, San Francisco and Seattle, Expedited Bill 27-20 would seek to limit the “excessive use of force” by County police by changing the Montgomery County Police Department’s use of force directive. The Police Chief would be required to issue a use of force directive that, at a minimum, must include the following standards: (i) prohibit the use of deadly force, including neck and carotid restraints, except under particular circumstances; (ii) prohibit striking a restrained person; (iii) require officers “to stop, or attempt to stop, another officer who is using excessive force, violating the use of force policy, or a committing a crime”; and (iv) prohibit retaliation against any officer who reports their counterparts.¹

INFORMATION, ASSUMPTIONS and METHODOLOGIES

No methodologies were used in this statement. The assumptions underlying the claims made in the subsequent sections are based on the judgment of OLO staff.

VARIABLES

The variables that could affect the economic impacts of Expedited Bill 27-20 in the County are the following:

- Loss of income, medical costs, and other financial costs for individuals and households in the County impacted by use of force incidents
- Legal settlement amounts for individuals involved in use of force incidents
- Crime rates

¹ Montgomery County Council, Expedited Bill No. 27-20 Police – Regulations – Use of Force Policy, Introduced on June 16, 2020, Montgomery County, Maryland, 1-5.

Economic Impact Statement

Office of Legislative Oversight

IMPACTS

Businesses, Non-Profits, Other Private Organizations

Workforce, operating costs, property values, capital investment, taxation policy, economic development, competitiveness, etc.

OLO believes that Expedited Bill 27-20 would have a minimal impact on private organizations in the County. OLO sees no direct connection between the bill and the Council's priority indicators, namely workforce, operating costs, property values, capital investment, taxation policy, economic development, and competitiveness.

Residents

Employment, property values, taxes paid, etc.

OLO believes that Expedited Bill 27-20 would have a minimal economic impact on County residents overall, as OLO sees no direct connection between the bill and employment, property values, and taxes paid.

WORKS CITED

Montgomery County Council. Bill No. 24-20 Administration – Police – Assistant Chiefs of Police. Montgomery County, Maryland.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

This economic impact statement was drafted by Stephen Roblin (OLO).

Testimony of Chief Marcus Jones
Expedited Bill 27-20, Police - Regulations - Use of Force Policy
July 7th, 2020

Thank you for the opportunity to speak tonight about this important piece of legislation. I have reviewed expedited bill 27-20 in its entirety, and I have discussed this legislation with my internal subject matter experts. In general, the Police Department supports this legislation and its intent. There are several details of this bill that I feel need further clarification and amendment. I would like to note that the department currently has a robust and well-contemplated use of force policy. Many of the requirements of this legislation are met, or exceeded, by the department in our current policies. Some examples include:

- Our use of force policy recognizes the sanctity of human life.
- Our department rules state that all officers must carry out their duties in a non-discriminatory matter.
- In December 2002, the department published Headquarters Memorandum 02-13, which classified the Lateral Vascular Neck Restraint as deadly force. We have not taught it as a defensive tactic at our academy since then.
- On June 11, 2020, we implemented an “intervention policy” which requires officers to intervene when they observe excessive force.
- Department rules state that officers are protected from retaliation and harassment when they file complaints, or participate in investigations, against other police officers.

When drafting policy, much like drafting legislation, words have meaning, and their definition is important. That is why I feel a more thorough discussion needs to occur about the definitions of certain terms; terms such as “deadly force”, “de-escalation”, “neck restraint”, “restrained”, and “reasonableness”. Their meaning, and how they are defined, are critically important to ensuring that the department is responsive to the expectations of the community we serve.

Every department policy is important; however, none is as important as our use of force policy. Any changes to this policy must be made with care and thoughtfulness. Ultimately, this policy serves to ensure the safety of the public as well as the safety of our police officers. I can not overstate its importance in our profession. I ask that any legislation that affects this policy be carefully contemplated and evaluated judiciously.

I look forward to being a partner with you in these important discussions.



OFFICE OF THE COUNTY ATTORNEY

Marc Elrich
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

TO: Marcus Jones
Chief of Police

VIA: Marc P. Hansen *Marc P. Hansen/EBL*
County Attorney

FROM: Edward B. Lattner, Chief *Edward B. Lattner*
Division of Government Operations

DATE: June 18, 2020

RE: **Bill 27-20E, Police - Regulations - Use of Force Policy**

SUMMARY

Bill 27-20E requires the Police Chief to issue a use of force policy directive that, at a minimum, would prohibit an officer from using deadly force under circumstances where the use of deadly force is currently permitted by the U.S. and the Maryland Constitutions. The Bill makes clear that violation of this policy is not intended to create civil or criminal liability for the County or an offending police officer. As a standard of conduct, enforcement of the policy could occur through training, performance evaluation, and the internal disciplinary process. And to ensure the Police Department's unfettered ability to enforce the policy, the Bill provides that it is not subject to collective bargaining.

The Bill is legally valid; the Council has the authority to direct the issuance of a use of force policy, including a use of deadly force policy that is "stricter" than required by the U.S. and Maryland Constitutions. This memorandum:

- 1) Discusses how the use of deadly force policy described in the Bill would differ from current law (and, therefore, differ from current police training);
- 2) Makes suggestions to help ensure that the policy would be used solely as a standard of conduct enforced through training, performance evaluation, and discipline, without altering the standards of civil or criminal liability; and
- 3) Notes that although the Bill provides that the policy is an "employer right" and not a

mandatory subject of collective bargaining, without further changes to the collective bargaining law the Department may still find itself forced to bargain over many aspects of the policy, including the ability to impose discipline for a violation of the policy, because the Permanent Umpires and Labor Relations Administrators have consistently taken a narrow view of employer rights and a broad view of bargainable issues.

Bill 27-20E

Bill 27-20E requires the Police Chief to issue a use of force policy directive prohibiting an officer from using **deadly force**¹ (including a **neck restraint**² or **carotid restraint**³ against a person unless

- that force is **necessary**, *as a last resort*, to prevent imminent and serious bodily injury or death to the officer or another person;
- the use of such forces creates no substantial risk of injury to a third person; and
- **reasonable alternatives** to the use of such force *have been exhausted*.

The use of force is **necessary** when another reasonable law enforcement officer would objectively conclude, under the **totality of the circumstances**, that there was no **reasonable alternative** to the use of force.

Totality of the circumstances means all credible facts known to the law enforcement officer *leading up to and* at the time of the use of force, including the actions of the person against whom the law enforcement officer uses such force and the actions of the law enforcement officer.

Reasonable alternatives means tactics and methods used by a law enforcement officer to effectuate an arrest that do not unreasonably increase the risk posed to the law enforcement officer or another person, including verbal communication, distance, warnings, **de-escalation tactics and techniques**, tactical repositioning, and other tactics and techniques intended to stabilize the situation and reduce the immediacy of the risk so that more time, options, and resources can be called upon to resolve the situation without the use of force. With respect to the use of deadly force, such term includes the use of less lethal force.

De-escalation tactics and techniques means proactive actions and approaches used by a

¹ Terms defined in the bill are bolded.

² Neck restraint means a technique involving the use of an arm, leg, or other firm object to attempt to control or disable a subject by applying pressure against the windpipe or the neck with the purpose or effect of controlling a subject's movement or rendering a subject unconscious by blocking the passage of air through the windpipe.

³ Carotid restraint means a technique applied in an effort to control or disable a subject by applying pressure to the carotid artery, the jugular vein, or the neck with the purpose or effect of controlling a subject's movement or rendering a subject unconscious by constricting the flow of blood to and from the brain.

law enforcement officer to stabilize the situation so that more time, options, and resources are available to gain a person's voluntary compliance and reduce or eliminate the need to use force, including verbal persuasion, warnings, tactical techniques, slowing down the pace of an incident, waiting out a subject, creating distance between the officer and the threat, and requesting additional resources to resolve the incident.

Bill 27-20E is not limited to a *deadly* force policy; it requires the Chief to issue a use of force policy directive which, *at a minimum*, prohibits the use of "deadly force" (line 62) in certain circumstances. However, the Bill only details the parameters of the *deadly* force policy. For example, the Bill's defined terms appear solely within the section of the Bill that describes the use of deadly force (lines 62-71). To that end, the Council should add the word "deadly" before the word "force" in lines 65, 68, and 70.⁴

Under the Bill, the policy must also (1) prohibit a member of the police from striking a restrained individual and (2) require a member of the police to stop or attempt to stop another officer who is using excessive force,⁵ violating the use of force policy, or committing a crime, and protect a member of the police from retaliation or discipline for taking such action.

ANALYSIS

I. Differences Between the Deadly Force Policy and Existing Caselaw.

A. The required deadly force policy is more stringent than currently required under applicable Constitutional standards.

Under current Fourth Amendment jurisprudence, a police officer may use that force which is objectively reasonable to effectuate a seizure.⁶ Department Rule 6 ("Use of Force") provides as follows: "Officers will use force only in accordance with law and departmental procedures and will not use more force than is objectively reasonable to make an arrest, an investigatory stop/detention or other seizure, or in the performance of their lawful duties, to

⁴ If the Council's intent is to limit the entire bill to the promulgation of a *deadly* force policy, the Council should also add the word "deadly" before the word "force" where ever it appears throughout the bill (e.g., lines 18, 24, 37, 43, 46, 48, 58, 75, and 93).

⁵ On June 11, 2020, the County Executive and the FOP agreed to amend Department Rule 6 ("Use of Force") to include a similar requirement: "It shall be the duty of every officer present at any scene where physical force is being applied to either stop, or attempt to stop, another officer when force is being inappropriately applied or is no longer required." As discussed in more detail below, *to the extent there are any bargainable issues surrounding the implementation of this rule*, the Department must bargain them. Subject to the discussion in Part II of this memorandum, that would not be the case with the passage of Bill 27-20E because the Bill explicitly provides that the policy directive established under that bill is not subject to collective bargaining. Lines 84-89.

⁶ These same standards apply to use of force claims under the Maryland Constitution. *Meyers v. Baltimore Cnty.*, 981 F. Supp. 2d 422, 430 (D. Md. 2013) (Article 24 of Maryland Declaration of Rights is the state constitutional counterpart to the Fourth Amendment and ordinarily interpreted *in pari materia* with its federal analog). See also *Richardson v. McGriff*, 361 Md. 437, 452-53 (2000).

protect themselves or others from personal attack, physical resistance, harm, or death. No officer will use force in a discriminatory manner.”

The Supreme Court’s decision in *Graham v. Connor* remains the current standard governing police officers’ use of force.

The Supreme Court has held that all claims that law enforcement officials used excessive force—deadly or not—in the course of making an arrest, investigatory stop, or other seizure of a free citizen, should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard. The test for whether force employed to effect a seizure is excessive is one of objective reasonableness under the circumstances. The standard of review is an objective one. The intent or motivation of the officer is irrelevant; the question is whether a reasonable officer in the same circumstance would have concluded that a threat existed justifying the particular use of force. The *Graham* [*v. Connor*, 490 U.S. 386, 396 (1989)] analysis requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Whether a particular use of force is reasonable must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

Dean v. Cameron, 2009 U.S. Dist. LEXIS 142947, at *17-19 (D. Md. Mar. 6, 2009) (internal citations and quotations omitted).

Because officers must make “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving,” *Graham v. Connor*, 490 U.S. 386, 396 (1989), a reviewing court evaluates the reasonableness of the officer’s conduct “from the perspective of the officer on the scene, not through the more leisurely lens of hindsight.” *Njang v. Montgomery County*, 279 Fed. Appx. 209, 213 (4th Cir. 2008) (citing *Abney v. Coe*, 493 F.3d 412, 416 (4th Cir. 2007)).

The use of deadly force is reasonable only when the officer has sound reason to believe that a suspect poses a threat of serious physical harm to the officer or others. “Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). “Because deadly force is extraordinarily intrusive, it takes a lot for it to be reasonable. Indeed, an officer may reasonably apply deadly force to a fleeing suspect—even someone suspected of committing a serious felony—only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. And even a significant threat of death or serious physical injury to an officer does not justify the use of

deadly force unless the threat is immediate.” *Williams v. Strickland*, 917 F.3d 763, 769 (4th Cir. 2019) (internal citations and quotations omitted).

The use of deadly force policy described in the Bill differs from these standards in the following ways.

1. Under present law, use of force is judged at the time it is used, and not by looking at the event leading up to the use of force.

The use of force policy described by the Bill prohibits an officer from using deadly force unless it is **necessary**, based in part, upon the **totality of circumstances**. The **totality of circumstances** means all credible facts known to the law enforcement officer *leading up to and* at the time of the use of force, including the actions of the person against whom the law enforcement officer uses such force and the actions of the law enforcement officer. Consideration of events leading up to the use of force is not a relevant consideration under current law.

The Fourth Circuit has made clear that “*Graham* requires us to focus on the moment force was used; conduct prior to that moment is not relevant in determining whether an officer used reasonable force.” *Elliot v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996). “The court’s focus should be on the circumstances at the moment force was used and on the fact that officers on the beat are not often afforded the luxury of armchair reflection.” *Id.* When evaluating “reasonableness,” the court should look exclusively to the information known to the officer at the moment, and the liability of the officers should be weighed and examined based on the information the officers had “immediately prior to and at the very moment” they acted. *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (citations omitted). *See Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) (“It is established in this circuit that the reasonableness of an officer’s actions is determined based on the information possessed by the officer at the moment that force is employed.”)⁷

For example, in *Elliot v. Leavitt*, 99 F.3d 640 (4th Cir. 1996), Officer Leavitt and another police officer arrested Elliot for drinking while intoxicated. They handcuffed Elliot and seat belted him in a police cruiser. However, Leavitt failed to thoroughly search Elliot for weapons. As the officers were talking besides the cruiser, “they noticed a movement and looked to find Elliott with his finger on the trigger of a small handgun pointed at [them]. After Elliot refused to respond to their commands to drop the gun, they fired 22 bullets, killing Elliot. The court held

⁷ Although the reasonableness of an officer’s actions is determined based on the information possessed by the officer at the moment that force is employed, force justified at the beginning of an encounter may not be justified even seconds later if the justification for the initial force has been eliminated. In *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005), the court held that while officers were justified in using deadly force against the driver of a car who had reportedly tried to run over them, the same officers violated the Fourth Amendment to the extent that they started, or continued, to use deadly force once the car had driven by them—i.e., once it was no longer reasonable for them to believe that the car was about to run them (or their fellow officers) over. *Id.* at 481-822. This was true even though mere seconds separated the point at which deadly force was lawful from the point at which deadly force was unlawful. *See also Williams v. Strickland*, 917 F.3d 763 (4th Cir. 2019).

that this was a reasonable use of force. “Even assuming Leavitt should have conducted a more intensive search, this issue is irrelevant to the excessive force inquiry. As we noted in *Greenidge, Graham* requires us to focus on the moment force was used; conduct prior to that moment is not relevant in determining whether an officer used reasonable force.” *Id.* at 643.

The courts’ focus on the moment force was used is a logical outgrowth of their refusal to second guess officers’ actions.

2. Under present law, the court does not inquire whether the officer considered reasonable alternatives (e.g., less than deadly force and/or de-escalation tactics) to the use of deadly force and it does not require that the officer exhaust reasonable alternatives to the use of deadly force.

The use of force policy described by the Bill prohibits an officer from using deadly force unless it is **necessary, as a last resort**, based in part, upon the lack of any **reasonable alternative** to the use of deadly force. Reasonable alternatives include **de-escalation tactics and techniques**.

As an initial matter, the Council should strike lines 70-71. Those lines provide that deadly force is proper where there is no “reasonable alternative.” But the concept of “reasonable alternative” is part of the definition of “necessary,” and line 65 provides that deadly force can only be employed when necessary. Rules of legislative drafting would counsel against repetition in a statute, as it could lead to confusion and misinterpretation.

Additionally, the Bill differs from current caselaw when it permits the use of deadly force only “*as a last resort*,” (line 65) after the officer has first “*exhausted*” reasonable alternatives to the use of deadly force (line 71).⁸

“This suggestion that the [officer] might have responded differently is exactly the type of judicial second look that the case law prohibits.” *Elliot v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996). Other circuits agree. *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997) (“The Fourth Amendment does not require law enforcement officers to exhaust every alternative before using justifiable deadly force.”); *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989) (“The fourth amendment reasonableness standard does not turn on the availability of less intrusive alternatives. The real question is not what “could have been achieved,” but whether the Fourth Amendment requires such steps. . . . The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative less intrusive means.”) (Internal citations and quotations omitted.)

For example, in *Abney v. Coe*, 493 F.3d 412 (4th Cir. 2007), Officer Coe attempted to pull Abney over for a moving traffic violation. Abney led the officer on a high speed eight-mile

⁸ Whether “all” reasonable alternative must be exhausted is not made clear.

chase, endangering other motorists and pedestrians on the road. Officer Coe “terminated” the chase by striking Abney’s motorcycle, killing him. In determining that Officer Coe’s actions were reasonable under the circumstances, the court rejected the estate’s argument that Officer Coe acted unreasonably because he had obtained Abney’s license plate number and could have tracked him down at a later date. In addition to its doubt that suspending the chase would have transformed Abney “into a model driver,” the court wrote

Plaintiff’s suggestion that Deputy Coe should have done this or should have done that fails for an additional reason. Those who were not on Old Country Farm Road should be cautious in applying the very hindsight analysis which the Supreme Court has disfavored. It is fundamental that an officer’s use of force is judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. We thus decline plaintiff’s invitation to second-guess the reasonableness of Deputy Coe’s conduct based on what plaintiff later argues may have been a preferable course of action.

Id. at 419 (internal citations and quotations omitted).

In *Waterman*, discussing the possibility of waiting for an accelerating vehicle to potentially pass by the police instead of potentially hitting them, the court wrote that “although [the officers] could have held their fire and taken the chance that Waterman’s acceleration in traffic was not for the purpose of committing another assault against an officer, the Constitution simply does not require police to gamble with their lives in the face of a serious threat of harm.” *Waterman v. Batton*, 393 F.3d 471, 479 (4th Cir. 2005) (internal quotation omitted). “Additionally, the reasonableness of the officer’s actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis; rather, reasonableness is determined based on the information possessed by the officer at the moment that force is employed. *Id.* at 477. *See also Greenidge v. Ruffin*, 927 F.2d 789, 791-92 (4th Cir. 1991) (court rejected Greenidge’s argument that Officer Ruffin’s failure to obtain proper backup and employ a flashlight was relevant in his excessive force claim).

Again, the reasonableness of a particular use of force must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation. *Graham v. Connor*, 490 U.S. 386, 388 (1989). The determination of whether a police officer’s actions were reasonable must be viewed from the officer’s perspective of the objective facts at the time of the incident. *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994). “[A]n officer does not have to wait for confirmation before being entitled to use force.” *Dobbs v. Townsend*, 416 F. Supp. 3d 441, 450 (D. Md. 2019). *See also Elliott v. Leavitt*, 99 F.3d 640, 644 (4th Cir. 1996) (“[T]he Fourth Amendment does not require omniscience. Before employing deadly force, police must have sound reason to believe that the suspect poses a serious threat to their safety or the safety of others. Officers need not be absolutely sure, however, of the nature of the threat or the suspect’s intent to cause them harm—the Constitution does not require that certitude precede the act of self-protection.”)

3. Under the Bill, the policy must also prohibit a member of the police from striking a restrained individual.

The Bill would impose a blanket prohibition against “striking a restrained individual.” Lines 72-73. Although unusual, the use of force against a restrained individual can be reasonable under certain circumstances. For example, in *Elliot v. Leavitt*, 99 F.3d 640 (4th Cir. 1996), discussed above, the court found no Fourth Amendment violation in use of deadly force against an armed individual who was handcuffed inside a police cruiser. We understand that there have been situations where arrestees, even after being handcuffed, have still attempted to grab the arresting officer’s service weapon. If this prohibition is retained, the Council should define a restrained individual as an individual who is under control, is not resisting arrest, and no longer poses a threat to the officer or others in the immediate area.

B. How to ensure these more stringent standards do not increase civil or criminal liability.

Even though violation of a local statute or policy does not equate with a violation of the Fourth Amendment (which governs probable cause), we recommend retaining and possible strengthening the Bill’s admonishment that the policy directive “must not be construed to alter standards of civil or criminal liability.”

Violation of a state (or local) statute does not equate with a violation of the Fourth Amendment. In *Fisher v. Wash. Metro. Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982), a WMATA officer told Fisher that she was violating a county ordinance by eating on a train. Fisher refused to stop eating. Although state law provided that misdemeanants such as Fisher were generally to be released with a summons, the officer arrested Fisher. She was released the following day and never prosecuted for violating the ordinance. The Fourth Circuit concluded that even if the officer did violate state law by arresting and detaining her, the officer did not violate federal law (the Fourth Amendment) because he had probable cause to arrest Fisher.

Where, as here, the claimed violation is by state action, binding precedent in this circuit has it that the constitutional standard is not affected by the fact that state law may impose a more stringent arrest standard upon state police officers. *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974). “The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.” *Id.* at 372. Probable cause remains the sole constitutional standard by which this § 1983 claim is to be judged.

Here the evidence indisputably disclosed that Mickelson had probable cause—tested by the constitutional standard—to believe that Fisher had committed a criminal offense. Indeed there is no dispute that it was committed in his presence. It is immaterial—if it be the case—that the ensuing arrest on probable cause violated Virginia law. Because no federal constitutional right was violated by the arrest, Fisher’s § 1983 arrest claim against WMATA and Mickelson was properly

denied by directed verdict.

Fisher v. Wash. Metro. Area Transit Auth., 690 F.2d 1133, 1138-39 (4th Cir. 1982). It is “settled law” that a violation of departmental policy does not equate with constitutional unreasonableness.” *Abney v. Coe*, 493 F.3d 412, 419 (4th Cir. 2007).

Maryland law is in accord. In *Richardson v. McGriff*, 361 Md. 437 (2000), the trial court refused to allow into evidence police guidelines providing that officers may use deadly force “only as a last resort” that they “should try to avoid putting themselves in a situation where they have no option but to use deadly force,” that they should “try to use other less deadly means,” and that they should “wait for [a] sufficient number of officers to handle situations without undue force.” *Id.* at 447. “The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively reasonable under the Fourth Amendment. Alternative measures which 20/20 hindsight reveal to be less intrusive (or more prudent), such as waiting for a supervisor or the SWAT team, are simply not relevant to the reasonableness inquiry.” *Richardson v. McGriff*, 361 Md. 437, 455 (2000) (internal citation and quotation omitted). The court concluded that the guidelines would allow the jury to engage in the type of “Monday morning quarterback approach” prohibited by the Fourth Amendment and the Maryland Constitution. *Id.*

However, policy directives may be instructive on whether an officer acted in good faith and entitled to qualified immunity. *Harper v. McCloud*, 2014 U.S. Dist. LEXIS 37177, 2014 WL 1159129, at *21 (S.D. W. Va. Mar. 21, 2014). Although the possibility of a negligence action against an officer is remote given available immunity defenses, violation of a policy may be considered evidence of negligence. *See Mayor of Balt. v. Hart*, 395 Md. 394, 398, 910 A.2d 463, 465 (2006) (“We hold that a police department’s internal rules and guidelines are admissible in specific situations in a vehicular negligence case when they are relevant to whether an officer’s conduct in that particular situation was reasonable.”)

While the trial court may instruct the jury that, where admitted, guidelines are not relevant to the Fourth Amendment issue, it is hard to completely discount that the jury will not consider a policy violation in reaching a verdict. We therefore recommend that the Council add the following language to subsection (d): “This section does not create private rights enforceable by any person or individual.”

II. “Employer Rights” Have Been Limited Over the Years by The Decisions of Labor Relations Administrators and Permanent Umpires.

Although the Bill provides that the policy directive is a management right (colloquially referred to as a “management right”), and not a mandatory subject of bargaining, the Fraternal Order of Police, Lodge 35, Inc. (FOP) may demand bargaining over implementation of the policy (including discipline for a violation of the policy) because Labor Relations Administrators

(LRA) and Permanent Umpires (PUs)⁹ have consistently taken a broad view of employee rights and a narrow view of management rights.

The Department's recent experience with the implementation of body worn cameras serves as a good example. *Even after the Council removed effects bargaining from the police collective bargaining law*,¹⁰ the PU held that although the Department's decision to use body worn cameras may be a management right, the County would have to bargain over their implementation. *FOP - PPC - 2015-10-30 - Jaffe - body worn cameras*. In that case, the FOP conceded that the Department's decision to use body worn cameras was a management right. But PU Jaffe agreed with the FOP that the Department had to bargain every aspect of the pilot program challenged by the FOP before implementation because they involved bargainable working conditions as well as health and safety matters under the collective bargaining law. Specifically, those were (1) the particular location that cameras would be worn (e.g., placement of the equipment on the body, on the brim of a hat, etc.); (2) the actual equipment to be worn, including negotiation over the camera's features; (3) the Department's ability to use the video, "including whether and to what extent" it could use the video for discipline, training, or performance evaluation, as well as the Department's ability to release video to the public; and (4) Department policies on retaining video records and access to those records.

PU Jaffe relied upon LRA Barrett's conclusion that the collective bargaining law does not forbid an agreement from touching upon enumerated management rights; it forbids only those agreements that "impair," meaning to weaken or damage, those rights. Montgomery County Code § 33-80(b).¹¹ Mandatory subjects of bargaining, PU Jaffe reasoned, include those matters that are of "direct and fundamental concern" to employees. *A "proposal's impact on a clear management right would need to be transparently obvious and beyond any doubt" for a finding of impairment of a management right to be made*. PU Jaffe also cited LRA Barrett's predecessor, LRA Strongin, who wrote that the Council has "broadly defined" bargaining subjects "except as clearly and unequivocally limited" by management rights. Here, there was "little question" that "the limited subject areas as to which the FOP has sought bargaining" did not impair any management rights. *See also MCGEO - PPC - 2005-03-03 - Strongin - Wage Compression* ("Any element of the employment relationship is subject to negotiation unless the law clearly and unequivocally exempts it from bargaining or public policy concerns outweigh employees' interests.")

Thus, while the Bill may make the policy a management right, the *existing* collective bargaining law, as interpreted by LRAs and PUs, would still require the County Executive to

⁹ Under the County's collective bargaining laws an LRA (a PU in the police collective bargaining law) determines the bargainability of a specific proposal. Unlike contract arbitrators, who are chosen by the County Executive and the appropriate union to resolve a collective bargaining agreement (or contract) dispute, LRAs and PUs are appointed by the County Executive and confirmed by the County Council for a specified term.

¹⁰ Bill 18-11 took effect on December 6, 2012, 30 days after it was upheld in a County-wide referendum.

¹¹ The term "impair" appears in all three collective bargaining laws. § 33-107(c) (general employees); § 33-152(b) (fire).

bargain over implementation of the policy, including the imposition of discipline for violating the policy.¹²

In addition, the County's collective bargaining laws preclude collective bargaining agreements that *impair* management rights. LRAs and PUs have seized upon the term "impair," interpreting it to sometimes require that the County Executive still *bargain* over management rights and even enter in to *agreements* that may limit management rights, so long as that limitation does not amount to what LRAs and PUs consider to be an *impairment* of management rights. See *MCGEO - PPC - 2012-01-27 - Barrett - 9 subjects*. ("To find impairment, the proposal's impact on a clear management right would need to be transparently obvious and beyond any doubt.")

The view of the LRAs and PUs is at odds with Maryland jurisprudence. As Maryland courts have observed, management rights are "jealously guarded" in the public sector because, unlike the private sector, those rights ultimately reflect the residents' right to direct and control their government—a right that cannot be collectively bargained away.

It should be noted at the outset that even in the private sector certain management rights are retained by the employer. When a municipality or government agency is the employer, these management rights are even more jealously guarded. Without question decisions concerning a city's budget, its programs and organizational structure, and the number of personnel it employs to conduct its operations are matters of managerial policy which it is not required to negotiate although it may do so voluntarily. This is so because, while in the private sector, collective bargaining is the only instrument through which employees can have any effective voice in determining the terms and conditions of employment public sector employees as citizens already have a voice in such matters and public employers only have a duty to bargain as to those decisions where a larger voice is appropriate. Moreover, while a private employer can bargain away whatever prerogatives it deems appropriate, a citizen's right to participate in governmental decisions cannot be bargained away by the public employer.

Baltimore v. Balt. Fire Fighters, Local 734, I.A.F.F., 93 Md. App. 604, 614 (1992) (internal citations and quotations omitted).

If the Council wants to ensure that "implementation" of use of force policies are not subject to collective bargaining, something more than adding them to the present list of

¹² The investigation and interrogation of law enforcement officers that may lead to discipline is governed by the Law Enforcement Officers' Bill of Rights (LEOBR), Md. Code Ann, Pub. Safety, §§ 3-101 to 3-113. The LEOBR provides that two key aspects of the disciplinary process—the composition of the hearing board (which may include public members) and whether the hearing board's decision on punishment is binding on the Chief—are subject to collective bargaining *where authorized by local law*. The County has bargained over these provisions, and the current FOP contract provides for an alternate hearing board whose imposition of discipline is binding on the Chief.

“employer rights” is required. The Council will have to consider amending the collective bargaining laws to address years of LRA and PU interpretation and gloss. For example, the Council could place the employer’s right to establish and implement the use of force policy in § 33-80(c) (“Exemptions”) because that subsection does not allow management right to be “impaired.”¹³

III. The Bill Does Not Violate the Contract Clause.

We do not believe that the Bill violates the Contract Clause of the U.S. Constitution. Article I, § 10, clause 1 of the United States Constitution provides that “No State shall . . . pass any Law impairing the Obligations of Contracts . . .”. It is well settled that, despite the absolutist nature of the Clause, the Constitutional prohibition against impairing the obligation of contracts is not to be read literally. *Keystone Bituminous Coal Ass’n. v. DeBenedictis*, 480 U.S. 470, 502 (1987). The Contract Clause does not prohibit governments from impairing contracts but limits a government’s right to do so.

Beginning in the last part of the eighteenth century, the Supreme Court relied upon the Contract Clause to invalidate statutes that retrospectively impaired almost any contractual obligation of private parties. Within the last 100 years, however, “the Court rarely has relied on the clause as a reason to invalidate state legislation which retroactively affected contractual rights or obligations.” John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 503-04 (8th ed. 2010).

The courts employ a three-part test for harmonizing the command of the Contract Clause with the necessarily reserved sovereign power of the government to provide for the welfare of its citizens. *Baltimore Teachers Union v. Mayor and City Council*, 6 F.3d 1012, 1015 (4th Cir. 1993). A reviewing court must determine: (1) whether there has been an impairment of the contract; (2) whether that impairment was substantial; and (3) if so, whether the impairment was nonetheless a legitimate exercise of the police power. *FOP Lodge No. 89 v. Prince George’s Cty.*, 608 F.3d 183, 188 (4th Cir. 2010).

As to the first factor, impairment, the government does not impair the obligation of contracts merely by breaching one of its contracts or by otherwise modifying its contractual obligation. *Cherry v. Baltimore City*, 762 F.3d 366, 371 (4th Cir. 2014). The line between mere breach and unconstitutional impairment is crossed where the state or local government action forecloses the possibility of damages or an equivalent remedy. *Crosby v. City of Gastonia*, 635 F.3d 634, 642 n.7 (4th Cir. 2011).

In addition, for purposes of the Contract Clause, there is impairment only if the challenged legislative action operates with retrospective or retroactive effect. *Md. State Teachers Assoc. v. Hughes*, 594 F. Supp. 1353, 1360-61 (D. Md. 1984). Legislation with purely

¹³ Similar “exemption” subsections, which do not include the word “impair,” appear in the other collective bargaining laws. § 33-107(d) (general employees) and 33-152(c) (fire).

prospective effect is not considered an “impairment” within the meaning of the Contract Clause. *Howell v. Anne Arundel Cty.*, 14 F. Supp. 2d 752, 755 (D. Md. 1998).

As to the second factor, a contract violation occurs only if the government substantially impairs a party’s right under the contract. Legitimate expectations of the parties determine whether the impairment was substantial. In *Baltimore Teachers Union v. Mayor and City Council*, 6 F.3d 1012 (4th Cir. 1993) the court noted that the Supreme Court provided little guidance as to what constitutes substantial impairment, but assumes that a substantial impairment occurs “where the right abridged was one that induced the parties to contract in the first place or where the impaired right was on which there had been reasonable and especial reliance.” “Total destruction of contractual expectations is not necessary for a finding of substantial impairment.” *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983).

As to the third factor, a government may substantially impair a contract if reasonable and necessary to serve a legitimate public purpose. Reasonableness is determined in light of whether the contract had “effects that were unforeseen and unintended by the legislature”. Necessity means that the government did not have a less drastic modification available and the government could not achieve its goals without altering the contractual terms. Courts generally defer to the government in determining the reasonableness and necessity of a particular measure, unless a government seeks to impair its own contracts. But even where the government acts to impair its own contracts some degree of deference is appropriate. *United States Trust of New York v. New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234. In gauging the substantiality of the impairment, the court also considers whether the particular sector at issue has been regulated in the past. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). For example, in *Baltimore Teachers Union v. Mayor and City Council*, 6 F.3d 1012 (4th Cir. 1993), the court held that a city salary reduction plan adopted to meet immediate budgetary shortfalls was reasonable and necessary and, therefore, did not violate the Contract Clause.

We believe that the modification of the scope of collective bargaining proposed by the Bill does not violate the Contract Clause. Employees do not have vested right to the scope of collective bargaining akin to a vested right in a pension plan. And even if they did, the proposed change to the scope of bargaining is prospective. The Bill directs the Chief to establish a new policy that will dictate the conduct of officers going forward—it does not address past conduct that occurred under (the soon to be) prior use of force policy. *See, e.g., Howell v. Anne Arundel Cty.*, 14 F. Supp. 2d 752, 755 (D. Md. 1998) (there is no constitutional impairment where changes to the pension system only applied prospectively to benefits not yet earned by an employee; previously earned benefits remained unaffected); *Davis v. Annapolis*, 98 Md. App. 707, 719 (1994) (right created under disability retirement pension plan accrues at the time of the injuries giving rise to the claim for disability).

Moreover, the authority and scope of public sector collective bargaining has always been dependent upon the law. Public sector collective bargaining must be authorized by law. At the

local level, that law is typically a local ordinance. *Freeman v. Local 1802, Am. Fed'n of State, etc., Council 67*, 318 Md. 684, 690-91 (1990).¹⁴ As noted above, management rights are jealously guarded in the public sector because intrusion in to those rights can interfere with residents' right to a responsive government.

The Council must retain the power to adjust the scope of collective bargaining as it sees fit in order to discharge its primary obligation to the County's residents. "[T]he contract clause will not prevent a state from altering its own contractual obligations that involve its inherent police powers. The Court has recognized that a state cannot bargain away its police power." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 504 (8th ed. 2010).

In this case, the Council has made a legislative judgment that a use of force policy, as described in the Bill, will better serve the County's residents. And to ensure the unfettered application of that policy, it has determined that implementation of that policy must not be subject to collective bargaining.

Although we do not believe that the Bill violates the Contract Clause, the Council could avoid the issue altogether by making the Bill effective July 1, 2021. The police collective bargaining law provides that by April 1 of each year the County Executive must submit to the Council for approval any term or condition of a collective bargaining agreement which requires an appropriation of funds or enactment, repeal or modification of a County law. Montgomery County Code § 33-80(g). If the FOP wants to make the new use of force policy subject to collective bargaining, it can collectively bargain a proposed change to the collective bargaining law (the Bill), effective July 1, 2021. Depending on the outcome of collective bargaining, that proposed legislative change would be presented to the Council for consideration by April 1. The Council would then consider whether to amend the Bill before it takes effect on July 1.¹⁵

CONCLUSION

If you have any questions, please do not hesitate to contact me.

ebl

cc: Christine Wellons, Legislative Attorney
Andrew Kleine, CAO
Dale Tibbitts, Special Assistant to the County Executive

¹⁴ However, authorization by charter or state general public law is required where that local collective bargaining ordinance seeks to delegate to others certain duties involving the exercise of discretion specifically assigned by a county charter to the county executive and council. *Id.*

¹⁵ The Council might be able to have the best of both worlds by including an uncodified section providing that, if the Bill is struck down as violative of the Contract Clause (because it takes effect before July 1), then it should be considered to become effective July 1.

Marcus Jones
July 8, 2020
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John Markovs, Deputy County Attorney
Patty Kane, Litigation Div. Chief, OCA
Silvia Kinch, Human Resources Chief, OCA
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20-003608



Montgomery County Community Action Board Testimony
County Council Bill 27-20 – Police Regulations – Use of Force Policy
Tuesday, July 7, 2020

Good evening. My name is Zelda Wafer-Alonge and I am a member of the Community Action Board Executive Committee. As advocates for the low-income community, the Community Action Board strongly supports Bill 27-20. Community Action was created during President Johnson’s War on Poverty and grew out of the Civil Rights Movement. Our history is closely connected to the ongoing fight for racial equity, in part because we know that race and income are so often closely aligned, with a disproportionate number of Black and Hispanic community members living below the poverty line here in Montgomery County and across the country.

The Community Action Board supports this bill because we are deeply concerned that policing practices continue to disproportionately impact minority and lower-income community members. According to a 2019 study, “police-related death rates were highest in neighborhoods with the greatest concentrations of low-income residents (vs high-income residents) and residents of color (vs non-Hispanic White residents).”¹

Our Board’s advocacy focuses on policies and programs that will help lower-income community members move towards self-sufficiency. In addition to expanding programs that support the lower-income community, such as increasing affordable housing and high-quality early care and education, we believe that reforming policing practices is critical because it will do more than just address the specific interactions between police officers and community members. Research shows that the effects of police violence spread to the entire community, resulting in many negative consequences, including reduced school attendance and increased symptoms of

¹ <https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304851>

depression among Black people.² Such effects can perpetuate the cycle of poverty in the most impacted communities.

While progress has been made with the County's policing practices, including the use of body cameras, recent requirements regarding equity training and policies, and passage of the LETT Act, we know that Montgomery County is not immune from the epidemic of police violence. According to a recent Washington Post article, Black people make up about 1 in 5 County residents, but in 2018, they were the targets in more than half of cases of police use of force.³ The restrictions on police use of force like the ones laid out in this bill are an important first step, but our Board strongly believes that additional training must be an essential component of long-term change. We ask the Council to explore additional training requirements for law enforcement personnel, specifically anti-racism training, training geared towards reducing implicit bias, and training focused on de-escalation techniques so that officers do not feel the need to use excessive force. We also ask the Council to consider funding to hire mental health professionals to support the officers' work in the community, providing direct assistance to those who require mental health services rather than police intervention. A police force that has a better understanding of systemic racism and how it impacts our daily lives, and is equipped with the mental health supports necessary to address individual needs, will be in a much better position to interact with our diverse community members and work with the community in a more equitable way.

The Community Action Board stands ready to work with the Council; our fellow Boards, Committees, and Commissions; DHHS colleagues; and local advocacy groups to develop and support policies that reduce disparities in the County. We thank you for your ongoing commitment to equity in Montgomery County and we look forward to continuing to work with you on these efforts.

² <https://psmag.com/news/police-are-most-likely-to-use-deadly-force-in-poorer-more-highly-segregated-neighborhoods>

³ https://www.washingtonpost.com/local/washington-region-has-problems-with-police-shootings-and-racist-practices-too/2020/06/28/c94819a8-b7dd-11ea-a8da-693df3d7674a_story.html

Testimony of the Silver Spring Justice Coalition in support of Bill No. 27-20, if amended

The Silver Spring Justice Coalition (SSJC) is a coalition of community members, faith groups, and civil and human rights organizations from throughout Montgomery County. We envision a state and county where community and individual needs for safety are met while harm by police is eliminated.

We support Bill No. 27-20 only if it is amended.

Any use of force bill is simply a band-aid meant to stop the bleeding that policing continues to cause in all marginalized communities, but particularly among our Black and brown neighbors. While our current system requires this type of intervention, the SSJC seeks to fundamentally re-envision the role that police play in our community; to reallocate resources from our police department to health and human services, affordable housing, and economic development where it is needed most. Put simply, we envision a day when we no longer need to discuss when it is permissible for police officers to harm and kill members of our community.

While the SSJC applauds the Council for taking up this issue and thanks the lead sponsor for strengthening the bill prior to introduction, we do not believe the bill, in its current form, goes far enough to make a meaningful difference. To strengthen the bill, we request the following amendments:

Modifications to Current Language

Amendment:

Necessary means that a reasonable person (including members of the community and law enforcement officers) would objectively conclude, under the totality of the circumstances, that there was no alternative to the use of force.

-This amendment seeks to remove the “reasonable law enforcement perspective” from the analysis because it has historically been used as a shield behind which officers can escape liability; it is the view of the community member that should be the barometer of whether force is necessary.

Amendment:

Neck restraint or carotid restraint is never permitted under any circumstance.

-Officers should never use this type of force; it is a form of torture and officers should, through proper training, be able to use less harmful tactics to gain physical control over someone if and when it is necessary.

Amendment:

Shooting at a vehicle is never permitted unless the vehicle is being used as a weapon against the officer or another person.

-News reports abound with cases in which officers have endangered the lives, or taken the lives, of both the targets of their enforcement and innocent bystanders through this reckless and unnecessary use of force. It should be limited unless it is absolutely clear that the car is being driven towards the officer or another person with the intent to use the car as a weapon.

Amendment:

Officer may not use deadly force unless all alternatives (not “all reasonable alternatives”) to the use of such force have been exhausted.

-The use of the word “reasonable” is another way in which officers are shielded from liability when using excessive force. Officers should have to employ *all available alternatives* before using force; there should be no evaluation of whether the alternative was reasonable.

Amendment:

Policy must include specific provisions governing the use of deadly force against specific classes of persons.

-The current bill only requires the policy to “protect vulnerable populations.” The bill should be amended so that each of these vulnerable populations is expressly considered within the use of force policy. The policy should state how the officer should adapt his or her conduct for each class of vulnerable people.

Amendment:

The definition of reasonable alternatives, should become a definition of “alternatives.” Alternatives should include calling for the assistance of a mental health crisis unit where one exists.

-The use of the word “reasonable” is another way in which officers are shielded from liability when using excessive force. Officers should have to employ all available alternatives before using force; there should be no evaluation of whether the alternative was reasonable.

-The current list of alternatives does not include calling for the assistance of a mental health crisis unit; this is a necessary step that any officer should have to take prior to using force when the person they have encountered is in crisis.

Deletion

Remove subsection(d)(2): “The policy directive must not be construed to alter standards of civil or criminal liability

-This clause is confusing and may lead to attempts to argue that a violation of the MCPD use of force policy cannot be used as evidence in a civil or criminal proceeding.

Additions

Amendment:

Use of deadly force is never permitted where the officer's behavior created the need for the use of force.

-In so many instances, including the cases of Robert White and Finan Berhe, it was the officer's actions that escalated the encounter and therefore gave the officer the alleged justification for using deadly force. This should not be permitted.

-In the PEACE Act recently introduced in the US House of Representatives, there is a subsection stating that it is not a defense to a charge of murder or manslaughter that the use of force was justified if the officer's own gross negligence led to the need to use force. While Bill 27-20 does not address criminal liability, similar language could be added to say that it is not a defense to an alleged violation of this policy that the use of force was justified if the officer's own gross negligence led to the need to use force.

<https://www.congress.gov/bill/116th-congress/house-bill/4359/text?q=%7B%22search%22%3A%5B%22hr4359%22%5D%7D&r=1&s=1> -

Amendment:

Add definition for "Striking" as used in 32.55(c)(3).

-The term Strike can mean many things and must be defined to ensure that the prohibition on striking a restrained person is enforced.

Amendment:

Policy must prohibit the execution of a "no knock" search warrant.

-No knock warrants are a common way in which police officers interact with members of the public using excessive violence. These warrants can have fatal consequences and frequently result in significant trauma to occupants of the home, regardless of whether or not they were personally suspected of any wrongdoing. This is how Breonna Taylor was killed and this is why Montgomery County is facing legal liability for the excessive use of force during the execution of a no-knock warrant at the Palmas family's home. No knock warrants are not necessary and they endanger the lives of police and the public; they should be prohibited.

Amendment:

Duty to intervene must include a duty to report any violations of the use of force policy.

-In order to adequately enforce any use of force policy and to maintain data regarding compliance, individual officers must have an obligation to report known violations. We appreciate that the bill currently contains an obligation to intervene and protections for those who do, but it is missing a significant piece without also including a duty to report.

Amendment:

Policy must be created in consultation with members of the community via the Policing Advisory Commission or other transparent public process.

-The targets of police violence should have a say in the development of any policy meant to protect them. This Council created a Policing Advisory Commission and it or another

community-involved process should be included in the development of any use of force policy.

Amendment:

Less than lethal force should be defined and should include guidance regarding the proportionality of the force to the alleged offense and the degree of danger confronting the law enforcement officer.

-The bill as now written addresses only the use of deadly force. Given that most violence by police officers does not result in death, any policy that aims to keep the public safe must include guidance regarding the use of less-than-lethal force.



July 6th, 2020

The Montgomery County Council
Council Office Building
100 Maryland Avenue, 6th Floor
Rockville, MD 20850

RE: Expedited Bill 27-20, Police – Regulations – Use of Force Policy

Dear Councilmembers,

On behalf of the ACLU of Maryland, Montgomery County Chapter, I would like to express our support of Expedited Bill 27-20, **only if requested amendments are accepted**. These amendments are part of those laid out by the Silver Spring Justice Coalition, of which our chapter is a member.

- (1) Amendment: Necessary means that a reasonable person (including members of the community and law enforcement officers) would objectively conclude, under the totality of the circumstances, that there was no alternative to the use of force.
 - Reasonable law enforcement officer - that language has left too much up to interpretation in the past. What is reasonable is extraordinarily subjective and provides limited means for guaranteeing accountability. By substituting "person", which would include community members, witness evidence and testimony would be admissible and guaranteed to be heard. As community members are held accountable around the community, at work, in their homes, police officers must be held accountable to those they serve and protect. If there is valid evidence and perspective, we need to support that.
- (2) Amendment (addition): Use of deadly force is never permitted where the officer's behavior created the need for the use of force.



Maryland

Montgomery County
Chapter

- Police officers must be trained not only to deescalate but also not to escalate a situation and raise the stakes. Officers who deviate and choose to escalate must be held to account. Use of deadly force must be an ABSOLUTE last resort. If an officer provokes a suspect / community member and escalates the situation themselves, then that officer should remove him/herself and allow another officer to deescalate the situation, or a duty should step in. It is inexcusable for an officer to create a situation that would lead to deadly use of force.

Most of the other original requested amendments appear to have been accepted, but we must do more to ensure the safety of our community members and hold all accountable, regardless of position. No one is above the law, and that includes the police department, who should do as they have sworn to do - look out for us – all of us.

We support the bill, only with the requested amendments.

Regards,
Joe Shaffner
ACLU of Maryland,
Montgomery County Chapter



MONTGOMERY COUNTY, MARYLAND WOMEN'S DEMOCRATIC CLUB

EXPEDITED BILL 27-20, POLICE—REGULATIONS—USE OF FORCE POLICY

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND SUPPORT WITH AMENDMENTS

Thank you for this opportunity to submit written testimony to the Montgomery County Council concerning an important priority of the **Montgomery County Women's Democratic Club (WDC)**. WDC is one of the largest and most active Democratic Clubs in our County with more than 600 politically active women and men, including many elected officials.

WDC recently created a Task Force on Racial Equity in Public Safety. This Task Force is leading WDC's work to support greater racial justice in our County's policing, and the Task Force has recommended its support for the immediate implementation of the policing reforms known as **#8CANTWAIT**, as a first step in an overall re-imagining and re-structuring of the Montgomery County Police Department (MCPD). The eight immediate reforms of the **#8CANTWAIT** agenda are:

- 1. Ban on Chokeholds and Strangleholds** - Allowing officers to choke or strangle civilians results in unnecessary death or serious injury. Chokeholds and all other neck restraints must be banned in all cases.
- 2. Require De-escalation** - Require officers to de-escalate situations, where possible, by communicating with subjects, maintaining distance, and otherwise eliminating the need to use force.
- 3. Require Warning Before Shooting** - Officers must give a verbal warning in all situations before using deadly force.
- 4. Require Exhausting All Alternatives Before Shooting** - Officers must exhaust all other non-force and less lethal alternatives before resorting to deadly force.
- 5. Duty to Intervene** - Require officers to intervene and stop excessive force used by other officers and report these incidents immediately to a supervisor.
- 6. Ban Shooting at Moving Vehicles** - Ban officers from shooting at moving vehicles in all cases, which is particularly dangerous and ineffective.
- 7. Require Use of Force Continuum** - Establish a Force Continuum that restricts the most severe types of force to the most extreme situations and creates clear policy restrictions on the use of each police weapon and tactic.
- 8. Require Comprehensive Reporting** - Require officers to report each time they use force or threaten to use force against civilians. Comprehensive reporting includes requiring officers to report whenever they point a firearm at someone, in addition to all other types of force.

County Executive Marc Elrich, together with MCPD and the Police union, has already implemented one of these reforms, which is also addressed in Expedited Bill 27-20: the requirement that fellow officers intervene to stop an officer from using deadly force. WDC appreciates the work of Councilmember Will Jawando and the Lead Co-Sponsors of this bill for taking the first legislative step to limit the use of force by MCPD, but we believe that Expedited Bill



MONTGOMERY COUNTY, MARYLAND WOMEN'S DEMOCRATIC CLUB

27-20 does not go far enough and should incorporate all of the **#8CANTWAIT** reforms as immediate measures to save lives and reduce the serious injuries that frequently result from police use-of-force. *Again, WDC stresses that it supports a more comprehensive review and reform process for MCPD, but we support the #8CANTWAIT reforms as first steps to control the use of deadly force right now.*

Expedited Bill 27-20 would require: 1) the MCPD Police Chief to adopt a policy directive regarding the use of force; 2) the use of force policy to include certain minimum standards, including standards regarding the use of deadly force, including the use of carotid and neck restraints, and 3) the intervention by officers when another officer is violating the law or police policies. The minimum standards adopted in accordance with Bill 27-20 would not be subject to collective bargaining.

As is noted above, WDC does not believe that Expedited Bill 27-20 goes far enough in protecting those in Montgomery County—and specifically Black individuals and other people of color—from unwarranted, potentially lethal use of force by MCPD police officers. We believe that the bill should incorporate all of the **#8CANTWAIT** reforms. If the County Council is not willing to expand the scope of Bill 27-20 to include all the **#8CANTWAIT** reforms, WDC urges the County Council to at least amend Expedited Bill 27-20 to: 1) expand the definitions of “deadly force” and “neck restraint” and “carotid restraint” to include, “chokeholds, strangleholds, Lateral Vascular Neck Restraints, carotid restraints, chest compressions, or any other tactics that restrict oxygen or blood flow to the head or neck”; 2) add “shooting at a moving vehicle” to the definition of “deadly force;” and 3) ban outright the use of these uses of deadly force.

On May 25, 2020, citizens of Montgomery County, together with people around the world, watched in horror as Minneapolis Police Officer Derek Chauvin killed George Floyd in just under nine minutes with a knee pressed to his neck. Three other Minneapolis police officers stood by and did nothing. This was nearly six years after we watched Eric Garner’s killing by police chokehold on Staten Island, an act of brutality that was watched by four additional police officers who did nothing to intervene. Eric Garner died by police chokehold despite the fact that chokeholds of the type used by Officer Daniel Panteleo had been banned by the New York City Police Department since 1993. A study by the New York Times found that nationwide, 70 people have died after uttering the words, “I Can’t Breathe.”¹

The first reason that WDC is urging amendment of Bill 27-20 is that we believe that the definition of restraints included in the definition of “deadly force” is too narrow and should explicitly include chokeholds of the kind that killed Eric Garner. It should also include any other means of restricting breathing or blood flow such as kneeling on the back of a prone suspect or using hoods as a means of restraint. Accordingly, WDC believes that Bill 27-20 should incorporate **#8CANTWAIT**’s broader definition of prohibited restrictions of oxygen and blood flow: *chokeholds, strangleholds, Lateral Vascular Neck Restraints, carotid restraints, chest compressions, or any other tactics that restrict oxygen or blood flow to the head or neck.*

¹ <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html>



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Secondly, WDC believes that Bill 27-20 should be amended to ban outright any restraint on an apprehended individual's blood flow or ability to breathe. These restraints are inherently dangerous and all too frequently are lethal, and they should no longer be permitted in Montgomery County. By making the use of these restraints subject to policy only—and a policy with large exceptions at that—Bill 27-20 does not go far enough to ensure that no one in Montgomery County will ever utter, “I Can’t Breathe” as their last words.

WDC also urges the County Council to amend Bill 27-20 to ban shooting at moving vehicles. According to Campaign Zero, the sponsor of the **#8CANTWAIT** reforms, this use of deadly force is an ineffective, but nonetheless deadly, tactic. According to Campaign Zero, 62 individuals were killed last year because police shot at their moving vehicles.² This practice should be included in the definition of “deadly force” and, like restraints on oxygen or blood flow, should be banned outright.

Bill 27-20 requires that the Police Chief issue a directive that establishes the permissible uses of force by members of the police. However, a directive is not law. It is not enacted by the elected representatives of the people of this County, and the Police Chief is not accountable to the public in the same way our elected officials are. The County Council is proposing to put in the hands of the Police Chief the responsibility for crafting a policy to reform the law enforcement agency of which he is the head. While we agree that MCPD must be a partner in a meaningful re-imagining of policing in the County, there are certain issues on which there should be no discretion. Restraints on breathing and blood flow and shooting at moving vehicles fall into that category.

Bill 27-20 states that the directive on use of force must “promote fair and unbiased policing,” and protect “vulnerable populations,” including those “that are disproportionately impacted by inequities.” Achieving this goal through a police directive is entirely unrealistic. A directive cannot erase the explicit and implicit biases and underlying structural racial disparities in policing that have resulted in a shockingly disproportionate number of deaths of Black individuals at the hands of law enforcement officers in Maryland. Pursuant to House Bill 954, the Governor’s Office of Crime Control and Prevention (GOCCP) must report annually on the number of law-enforcement-involved deaths in Maryland and must identify the race of both the deceased civilian and responsible police officer. As of the 2010 Census, Black citizens made up 29% of Maryland’s population. However, in 2013 (the first year for which data was reported), of those police-involved deaths determined to be homicides, 63% of the victims were Black. In 2014, the percentage of Black homicide victims was 78%; in 2015 78%; in 2016, 68.8%, in 2017 61.5%, in 2018, 78.6%.³ The overwhelming percentage of police officers involved in these homicides were white. These

²<https://8cantwait.org/>

³ See, First, Second, Third, Fourth, and Fifth Reports to the State of Maryland Under House Bill 954—Deaths Involving a Law Enforcement Officer. <http://goccp.maryland.gov/reports-publications/law-enforcement-reports/deaths-involving-law-enforcement/> Note that for several years of reporting, “Hispanics” were reported as an ethnicity not a race and were classified in the reporting as “White” or “Unknown,” thus lowering the number of police homicides involving people of color. In the report for 2018, “Hispanic” citizens were classified as a “race” for the first time. Therefore the 2018 numbers include all People of Color. As an aside, we note that “Hispanic” officers were classified by race from the very beginning of the reporting. The result is that the numbers of Black victims was lower because “Hispanic” victims were considered White. However, “Hispanic” officers were not classified as “White,” but were separately categorized thus lowering the number of “White” officers involved in the reported homicides.



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numbers replicate the numbers of Black citizens killed by law enforcement from 2010-2014 as reported by the ACLU of Maryland.⁴

The glaring racial disproportion of police-involved homicides is not the result of a policy that explicitly directs police to ignore fair and unbiased policing or instructs the police not to protect populations that are disproportionately impacted by inequities. If we believed that the disparities were the result of a deliberate police policy, then we might be willing to believe that a reversal of that policy could create a different outcome. However, these shocking numbers can only be explained by the explicit and implicit biases that reside in police officers and the structure of racism built into law enforcement within communities of color. The only way to ensure that police officers will not disproportionately use deadly restraints against Black people and other people of color is to forbid the police from using these deadly restraints at all.

WDC believes that the “Minimum standards” proposed as Section 35-22 (c) create a large loophole that will permit the use of deadly force with impunity. Specifically, subsection (c)(2)(A) prohibits the use of deadly force unless “*such force is necessary as a last resort to prevent serious bodily injury or death to the officer or another person.*” (emphasis added). The definition of “necessary” as set forth in proposed section (a) “*means that another reasonable law enforcement officer would objectively conclude, under the totality of the circumstances, that there was no reasonable alternative to the use of force.*” This standard derives from the Supreme Court’s decision in *Graham v. Connor*, 490 U.S. 386 (1989), in which the Court determined that the Constitutional standard under which matters of police violence and excessive use of force must be adjudicated lies in the Fourth Amendment’s prohibition on unreasonable searches and seizures.

As legal scholars have noted, the use of the “objectively reasonable” standard moves the adjudication of constitutionally actionable harm at the hands of the police from a rights-based, systemic evaluation of excessive use-of-force (as might be applied in a Fourteenth Amendment analysis), and examines only the facts of the specific use-of-force incident in isolation from the systemic, racist policing that often underlies the excessive use of force in the first place.⁵ This standard, which only sees death from excessive use-of-force from the “reasonable police officer’s” point of view and not as the intended, culminating act within a system of racist policing, will not stop death by police use-of-force. As Georgetown University law professor Paul Butler wrote, “what happens in places like Ferguson, Missouri, and Baltimore, Maryland—where the police routinely harass and discriminate against African-Americans—is not a flaw in the criminal justice system. Ferguson and Baltimore are examples of how the system [of structural racism and racial subordination] are *supposed* to work.”⁶

The “objectively reasonable” standard also perpetuates the “bad apple” theory of excessive use of force, that is, that most members of the police force are good and well-meaning, but it is just a few

⁴ ACLU of Maryland, *Briefing Paper on Deaths in Police Encounters in Maryland, 2010-2014*, https://www.aclu-md.org/sites/default/files/legacy/files/md_deaths_in_police_encounters.pdf

⁵ Obasogie & Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Conner*, *Northwestern University Law Review*, Vol 112, No. 6 (2018).

⁶ Paul Butler, *Chokehold: Policing Black Men*, 6 (2017).



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bad apples who use excessive force. The “objectively reasonable” standard individually pits the victim against the officer and views the incident from the officer’s perspective. It does not consider either the officer’s race or the victim’s race, factors which in a disproportionate number of cases determine the outcome of the encounter. This standard does not consider, for example, that a Black man might run from an encounter from the police precisely because the racist policing in his community has made him fear for his life. The benefit of the doubt goes to law enforcement, who become the judge and jury in deciding whether an apprehended or fleeing individual will be subject to deadly use-of-force. This standard also does not consider the nature of the offense the police may believe the victim had committed. Are there any circumstances in which the death penalty without trial is appropriate for an allegation (even if presumed to be true) of using a counterfeit \$20 bill or selling single cigarettes?

We must also recognize that the “objectively reasonable officer” is also operating within a structurally racist system that makes it seem objectively reasonable to apprehend a Black man just for being a Black man. The racist culture of policing in this country has corrupted the notion of what is “objectively reasonable.” The hundreds of thousands of protesters who have taken to American streets to protest police violence tell us that what a police officer might think is “objectively reasonable” is very different from what the majority of Americans think is “objectively reasonable.” This standard of judgment must not be incorporated into Bill 27-20. The lines that this bill draws must be clear to all. The only way that we can ensure that these life-threatening uses-of-force no longer result in death or serious injury to individuals in Montgomery County is to forbid their use entirely.

In conclusion, WDC urges the County Council to amend Expedited Bill 27-20 include all #8CANTWAIT policing reforms. Short of that, WDC urges the County Council to amend Bill 27-20 to: 1) expand the definition of deadly force to include “chokeholds, strangleholds, Lateral Vascular Neck Restraints, carotid restraints, chest compressions, or any other tactics that restrict oxygen or blood flow to the head or neck;” 2) to include shooting at moving vehicles in the definition of “deadly force;” and 3) fully ban the Montgomery County Police Department from using these forms of potentially deadly uses-of-force in every case and under all circumstances.

Respectfully,

Diana Conway
President