



County of Fairfax, Virginia

MEMORANDUM

DATE: October 14, 2022

TO: Fairfax County Board of Supervisors
FCPD Chief of Department, Kevin Davis
Richard Schott, Independent Police Auditor

FROM: Fairfax County Police Civilian Review Panel

SUBJECT: Report of Panel Findings for Complaint No. CRP-22-06

Executive Summary

This review report concerns the investigation into Complaint No. CRP-22-06. The Complaint centered on a call for service related to an interaction between a Black female Amazon delivery driver and a White male resident of an apartment building. The Complainants, both the delivery driver and her mother, alleged that officers of the Fairfax County Police Department (“FCPD”) did not respond properly to a 9-1-1 call that the mother made after receiving a phone call from her frightened daughter about a man and a gun. The daughter alleged in that phone call and to responding officers that the male resident walked behind her carrying a gun at his side minutes after a short, terse conversation regarding a parking spot. The responding FCPD officers neither arrested nor charged the resident with a crime following interviews of the driver and resident, respectively.

The Complainants’ primary contention was that responding officers, both White males, demonstrated racial bias in how they handled the matter because the outcome would have been different if the races of the individuals involved were reversed. The Internal Affairs Bureau (“IAB”) of the FCPD investigated the Complaint and ultimately agreed that a supervisor of the responding officers had mistakenly provided inaccurate and incomplete information to the mother of the delivery driver the day after the incident, in violation of FCPD policies, and the IAB took corrective action with respect to the supervisor. The IAB, however, did not find the responding officers (or the supervisor) to have engaged in bias-based policing constituting serious misconduct.

A subcommittee of the Panel reviewed the IAB investigation and determined that it contained allegations of serious misconduct and abuse of authority and sufficient evidence to support a full Panel review. After reviewing the IAB investigation, the full Panel requested additional investigation. Following the conclusion of the additional investigation and with the additional requested information, the Panel concurred with findings of the IAB and determined unanimously that the investigation was complete, thorough, objective, accurate, and impartial.

The Panel did not take the allegations of the Complainants lightly and wrestled with significant issues in the case. Several Panel members were candid about their concern that the call for service may possibly have been handled differently if the races of the individuals involved were reversed. Ultimately, however, the Panel found that the investigation, including the requested additional investigation, properly examined and assessed the officers' behavior, that the responding officers' actions were consistent with law and FCPD policy, and that there was no evidence to support an allegation of bias, which constitutes serious misconduct under the Panel's rules. The Panel further agreed with the IAB that the supervising officer's misstatements of the law were problematic, but that there was no evidence the error was motivated by bias.

For reasons described in more detail below, however, the Panel believes that the FCPD would benefit from using this case as a teaching tool in discussions of de-escalatory tactics, implicit bias, and policing in an Open Carry Commonwealth. Further, the Panel wishes to emphasize that its determination that the investigation was complete, thorough, objective, accurate, and impartial is neither a determination that the incident was handled perfectly nor that there is no room for improvement, which, again, is itself a position wholly consistent with the findings of the IAB investigation itself.

A complete description of the Panel's process, deliberations, analysis, conclusions, and recommendations follow

I. Introduction

On November 12, 2021, the Panel received an informal email complaint from the mother of an Amazon delivery driver and a follow-up formal complaint using the Panel's official complaint form from the Amazon delivery driver herself regarding an incident in the parking lot of a McLean apartment complex. (Hereinafter, the mother and daughter will be referred to collectively as the "Complainants" and individually as "Complainant Mother" and "Complainant Driver.") The Complaint alleged improper handling of a call for service and racial bias.

On January 25, 2022, Chief of Police Kevin Davis sent a disposition letter to the Complainants informing them that the administrative investigation found no misconduct or evidence of bias on the part of the responding officers.

On March 26, 2022, the Complainants submitted a review request to the Panel.

On April 28, 2022, a subcommittee of the Panel convened to discuss the investigation and whether the Complaint raised issues the full Panel should consider. The subcommittee voted unanimously to recommend the full Panel consider the matter.

On May 5, 2022, the Panel voted unanimously to hear the Complaint as a full Panel.

On June 2, 2022, the full Panel convened and reviewed the investigation. The Complainant Mother appeared in person and addressed the Panel. The Panel also heard from IAB

representatives. As discussed below, following a lengthy discussion the Panel recommended that IAB conduct additional investigation into the Complaint.

On July 15, 2022, Chief Davis informed the Panel of the completed additional investigation. The additional investigation did not change the findings with respect to the responding officers. Unlike the disposition letter sent to the Complainants, the July 15 letter did make clear, as was discussed in the investigation file, that the FCPD did find a “regrettable” mistake on the part of the supervising officer in how he handled follow up with the Complainant Mother, but emphasized that IAB had addressed this mistake, remedial action had been taken, and that the mistake did not constitute serious misconduct or an abuse of authority.

On September 1, 2022, the full Panel convened a second time to review the additional investigation. Following a lengthy discussion, the Panel voted unanimously to concur with the investigation and find that it was complete, thorough, accurate, objective, and impartial. The Panel determined that that this report would include recommendations regarding police policies and practices consistent with the Panel’s discussions and analysis during the Panel review meetings.

On October 6, 2022, the full Panel met to consider this report and adopted this report and its recommendations.

II. Background Facts¹

On November 10, 2022, at 4:34 p.m., the Complainant Mother called 9-1-1. She recounted to the dispatcher that she had just received a call from her daughter, a twenty-one-year-old Amazon driver on her second day on the job. The Complainant Mother explained to the dispatcher that her daughter had told her that she was delivering a package when “a driver and his wife pulled a gun out on her.” The Complainant Mother emphasized in the call that her daughter was Black and that the alleged perpetrator (the “Alleged Perpetrator”) was White. Complainant Mother explained that according to her daughter who had called her using FaceTime, following a short discussion about a parking space, “he was walking towards her [daughter] with a gun in his hand.” “She is very afraid,” the Complainant Mother explained.

Two officers were dispatched to the scene, an apartment complex in McLean, with the first officer arriving approximately ten minutes after clearing a prior incident in another part of the service district, and a total of 24 minutes after the 9-1-1 call started. The officers traveled several miles through the congested McLean district and their response times were consistent with typical travel times at that time of day.

The officers, both of whom were White males, met the Complainant at the apartment complex, finding her several minutes after arriving when she got back to her van from delivering more

¹ These Background Facts regarding the incident in question are drawn primarily from audio recordings and documentation in the investigative file and from bodycam footage recorded by the responding officers. The Panel’s role is to review the investigation into the actions of the police officers, not to investigate the underlying incident. The Panel’s recitation of the facts is consistent with that mission.

packages. One officer (“Lead Interview Officer” or “LIO”) took the lead in interviewing the Complainant Driver while the other officer (“Support Officer” or “SO”) assessed the scene and took appropriate safety precautions given the stated presence of a gun in the call for service.

The Complainant Driver explained to the Lead Interview Officer that she parked her Amazon van in a spot outside the door of a section of the complex to begin delivering packages. When she returned to her van from an initial round of deliveries, she noticed that a car with a White man in the driver’s seat and a White woman in the passenger seat had pulled up in front of her van. At the time, the man was talking to a FedEx worker on the street. “Complainant Driver stated that she attempted to determine why the car was parked in front of her truck, so she approached the vehicle “trying to talk to him like am I in your spot because he was parked in front of my van . . . But I still had more deliveries right here so I wasn’t worried about moving right now, but he didn’t say nothing, he ignored me.” The Complainant Driver went to retrieve more packages from her van and then the Alleged Perpetrator said “are you going to move out of my spot?” At that point, the Complainant Driver said that she had asked him if this was his spot but in any event she would move but she needed him to move his car first. Following this terse, short conversation, he moved his car at which point she moved the van across the parking lot to another spot directly across from where she had parked initially and the Alleged Perpetrator backed into the spot

When speaking with the Lead Interview Officer (“LIO”), the Complainant Driver (“CD”) described what happened as she prepared to deliver another package:

CD: “And then I just happened to turn around just to look because I felt like there was some animosity or something and I looked and he had his gun in his hand, just holding it, with his wife beside him, and walking behind me. And I just like flinched. Yeah, like why you have your gun in your hand. I know it’s Virginia and you can carry but like I feel like if I wasn’t right here you wouldn’t have had your gun out, because is your neighborhood, why are you pulling your gun out?”²

LIO: “So it was out of the holster and everything, like he had it, just in his hand.”

CD: “Yeah it was just in his hand.”

LIO: “Did he point it at you or anybody or anything like that.”

CD: “No, he didn’t point it at me or anything. He just had it in his hand, walking, with something else in his other hand.”

The Complainant Driver motioned to indicate that the gun was in the Alleged Perpetrator’s hand down at his side. She explained that after seeing the gun, she had turned around and

² The Complainant Driver later told an IAB Investigator, consistent with what she told the Lead Interview Officer, that “He didn’t really pull his gun on me; he just has it in his hand walking behind me with his wife.” But she did not offer this exact characterization—that of not “really pull[ing] his gun on me”—during her interaction with the responding officers.

walked back to her van and that she had seen the Alleged Perpetrator look back at her as she passed.

When asked to describe the gun, the Complainant Driver said that it was a black handgun that was not in a holster and that it “fit in his hand.”

The Lead Interview Officer tried to get further clarification regarding the interaction:

LIO: “And so he wasn’t like, I just want to make sure, he wasn’t like trying to intimidate you or anything like that with the gun or anything?”

CD: “I felt scared. But I don’t know what his intention was.”

LIO: “Ok, but you felt scared”

CD: “I felt threatened, yes.”

LIO: “Did he say anything to you at all other than like ‘Are you going to move your van?’”

CD: “No, he just said ‘Are you going to get out of my spot?’”

When asked by the Lead Interview Officer, the Complainant Driver described the Alleged Perpetrator as White, bald, and around forty years old, wearing a navy blue long-sleeve shirt or sweater with jeans and black shoes. The Complainant Driver described the woman with the Alleged Perpetrator as White with short blond hair wearing a black dress. The Complainant further explained that she believed that the Alleged Perpetrator lived on the fourth floor because, after stopping back at her van, she got into the elevator “right after them and it was coming from the fourth floor.”

The Lead Interview Officer asked if the dashcam on the Amazon van would have picked anything up, but the Complainant Driver said it would not have because she was parked in the opposite direction.

At the end of the initial interview, the Lead Interview Officer asked: “So if through the course of my investigation if I go speak to him and everything I determine that there is a crime like a brandishing or something, do you want to go to court, do you want to press charges?” The Complainant Driver responded affirmatively.

The Lead Interview Officer then went back to his car to run the Alleged Perpetrator’s license plates. The Support Officer arrived having already verified that the Alleged Perpetrator did have a conceal carry permit for his weapon.

With the Lead Interview Officer still working in his car, the Support Officer asked “Ma’am, was anyone else out here that like witnessed it or anything that you saw.” The Complainant Driver explained that she wasn’t sure about others, but there was the FedEx worker. The Complainant Driver explained “Like when I walked out I was like [to the FedEx worker] ‘You

didn't see him with a gun in his hand' and he was like 'I'm pretty sure your fine, just finish doing your job.'" The Complainant noted that the FedEx worker had been previously talking to the Alleged Perpetrator.

The Lead Interview Officer then handed his card, with a case number, to the Complainant Driver and told her that if she needed anything she should just send him an email. The Lead Interview Officer then explained that he was going to "go up and speak" with the Alleged Perpetrator and "see how cooperative he is." He described the potential crime generally as "brandishing" which was a misdemeanor. The Lead Interview Officer double-checked that he had the right phone number and said that he would give the Complainant Driver "a call in a little bit and I'll explain to you what the process is for pressing charges and getting a warrant and everything." The Lead Interview Officer did not suggest that he would arrest the Alleged Perpetrator. He did say that he didn't know whether she had other business to do and that she could stick around but he would talk to her either way.

The Officers found the Alleged Perpetrator's apartment and knocked on the door. When the Alleged Perpetrator opened his door, he was wearing a dark short-sleeved t-shirt and jeans, which was fairly consistent with the Complainant Driver's description. The Lead Interview Officer explained that the police had gotten a call because someone in the parking lot said they had had a dispute with the Alleged Perpetrator. The Alleged Perpetrator looked confused and the Lead Interview Officer supplied "like an Amazon driver?" The Alleged Perpetrator responded that he had had an interaction with an Amazon driver when he had come home because the van was in two spots, but explained nonchalantly that while waiting he had had a conversation with "Kevin, the mailman" and then after a short conversation he had moved his car, the driver had moved her van, and then he (and his companion) "just went inside."

The Lead Interview Officer asked "Was there a gun involved?" The Alleged Perpetrator responded "No, I mean, I have a firearm that I carry with me." The Lead Interview Officer asked if it was with him at the time, asked if it was in a holster, and proffered that it was "concealed, I assume." The Alleged Perpetrator asserted that he had the gun with him and it was in a holster, but it was not concealed. "No, because we just got back from the gym, so it was locked up in the glove compartment, come home, unlock it, take it out, I don't put it back on the sweats," the Alleged Perpetrator explained, indicating that he had been wearing sweatpants, "and I just carried it, as I always do." The Alleged Perpetrator indicated that the gun was in the holster but just in his hand.

The Lead Interview Officer explained that the Amazon driver had seen the gun and was "kinda freaked out, understandably." The Lead Interview Officer said that it sounded like there wasn't an issue because he hadn't threatened her or done anything like that. "No, no," the Alleged Perpetrator replied, adding that "there's actually video in the lobby that points to the road. No, we're licensed concealed carriers so when we're out and about I will carry . . . so if we go out somewhere I'll take it with me and lock it in the glove compartment. I'm happy to show you what it is if you want to see it." The Lead Interview Officer said that wouldn't be necessary. The Lead Interview Officer indicated that he thought that it was a misunderstanding.

The Alleged Perpetrator considered the situation and again reiterated “I always carry it and I don’t really think much about it because I always carry it in the holster.” The Lead Interview Officer asked about the holster and what kind of a holster it was. The Alleged Perpetrator told him that it was a Kydex holster and added “I can show you, I’m happy to show you.” The Lead Interview Officer demurred but the Alleged Perpetrator invited him inside his apartment. “I just want you to see what it is, I’m happy to show it to you.”

The Lead Interview Officer entered the apartment while the Support Officer remained at the door. The Alleged Perpetrator’s wife, a White woman with wet, short brown hair, was behind the kitchen countertop and the officer exchanged pleasantries as the Alleged Perpetrator retrieved the gun from a back room, which the Lead Interview Officer said was an alright thing to do “as long as it’s in the holster.” Upon his return, the Alleged Perpetrator presented a black gun inside of a small black holster. The holster was not bulky and roughly conformed to the outline of the gun. The Alleged Perpetrator showed how he carries the gun pointed down at his side as his wife again explained that her husband was simply carrying his gun at his side as they entered the apartment building after returning from the gym. The Alleged Perpetrator again said that he had never threatened the Complainant Driver and his wife pointed out that “Kevin, the mailman” was right there for the interaction.

After providing the Alleged Perpetrator with the case information, advising him that he probably shouldn’t be carrying his gun out in the open next time and can just “throw it in a gym bag,” and indicating that he did not expect there to be charges, the Lead Interview Officer left the Apartment. The interaction lasted a little over five minutes and was largely comfortable and cordial.

At 5:32 p.m., shortly after leaving the apartment, the Lead Interview Officer made one phone call to the Complainant Driver, but when the phone went to voicemail and he did not leave a message. There was no second attempt to contact the Complainant Driver that evening.

The next morning, November 11, 2021, the Lead Interview Officer briefed his supervisor (the “Supervising Officer”) regarding the incident and informed the Supervising Officer that he had not yet reached the Complainant. By then, the Complainant Mother had already called the station and the Supervising Officer told the Lead Interview Officer that he would handle it. The Lead Interview Officer never attempted to make another call to the Complainant Driver.

The Supervising Officer called the Complainant Mother back. The Complainant Mother was incensed and asserted that she wanted to file for a restraining order against the Alleged Perpetrator. She requested that the Supervising Officer provide her with the name of the Alleged Perpetrator for that purpose. During that conversation, the Supervising Officer explained, incorrectly, that unfortunately he could not discuss her daughter’s case with her because she was twenty-one years of age and he had not been granted permission to discuss the case, which meant he was unable to provide specific information concerning the case. The Complainant Mother explained that she was very troubled that there had been no follow up and explanation provided to her daughter.

At that point, the Supervising Officer explained that what he could tell her was that under state code a brandishing had not occurred because a brandishing requires that a gun be pointed at an individual, wrongly omitting, as discussed further below, that the state code does provide that there can be violations of the statute when a gun is not pointed at an individual but is held in a manner that reasonably induces fear. The Supervising Officer further incorrectly explained that by state code, officers that do not witness elements of a crime cannot make an arrest or obtain a warrant and that she would have to go to a magistrate to obtain the warrant. (As discussed below, in fact, a police officer does not have to witness a crime to make an arrest.)

The Supervising Officer explained correctly that the Complainant Driver could go to a magistrate to obtain a warrant or a restraining order, but that he would not provide the name of the Alleged Perpetrator due to policy but that this would not prevent the Complainant Driver from acting because he could provide the case number, which was all that was necessary to give to the magistrate. The Supervising Officer and the Complainant Mother argued about the incident before the Complainant Mother appeared to hang up on the Supervising Officer. The Supervising Officer immediately called back and left a message. The Complainant Mother never returned his call.

Although the Supervising Officer had asserted in no uncertain terms to the Complainant Mother that he did not believe a criminal violation had occurred here, four days later (November 15) he directed the Support Officer to request the apartment complex video. An employee of the apartment complex advised the Support Officer that they were in the process of changing vendors and that the video, therefore, could not be immediately accessed. The Support Officer left his card for the property manager and asked them to update him on the video tape.

The Supervising Officer did not order any additional investigation. At no time before the IAB investigation did FCPD follow-up to locate the FedEx/Mailman who purportedly witnessed the incident. Similarly, there was no further attempt to determine if there was any dashcam footage from the Amazon truck that might shed light on the incident. The property manager never contacted the Support Officer about the missing footage.

III. Procedural Background and Initial Investigation.

On November 12, 2022, the Complainant Mother sent an email directly to the Police Civilian Review Panel titled “White man threatens 21 year old [sic] black woman Amazon driver with gun for being in his assigned parking space.” In the email, the Complainant Mother set forth the facts related to her daughter’s incident and said that at the time her daughter “began walking to deliver packages . . . this man is walking behind her with a gun saying ‘are you gonna move your car?’” She complained that no action had been taken by the police and that the Supervising Officer had “said the perpetrator had a 1st amendment right to say what he wanted to say while walking behind my daughter and that the perpetrator had 2nd amendment right to have his gun outside his holster and he never threatened my daughter [and that] the perpetrator violated no Virginia codes by walking behind my daughter with his gun out of the holster asking her if she’s going to move her vehicle.” Later that day, a formal complaint form

completed by the Complainant Daughter with the same allegations was received by the Panel as well.

The IAB opened an investigation into the incident. Based on initial conversations with the Complainant Mother, the IAB investigated the incident specifically with an eye toward evidence of bias-based policing. The Complainant Mother explained her belief that the police had discounted the evidence in the case and had not improperly made an arrest because her daughter is Black and the Alleged Perpetrator is White. The Complainant Driver told an IAB interviewer: “I was in a predominantly white area and I didn’t see any other black people out there and I feel like if I was a white person that called in a black neighborhood and had the same complaint, it would have [been taken] more serious[ly]. And I don’t think they took it seriously enough.”

The initial investigation also specifically considered whether the responding officers had properly performed their investigative duties, including whether they should have placed the Alleged Perpetrator under arrest; whether the Lead Interview Officer failed to properly follow up with the Complainant; and whether the officers took too long in their response to the call for service.

The initial investigation consisted of, among other things, reviewing body worn camera footage from the Lead Interview Officer and the Support Officer, interviewing by phone both Complainants, reviewing the 9-1-1 calls, interviewing both the Lead Interview Officer and the Support Officer via videoconference, asking for legal advice from the County Attorney’s office regarding the statutes involved,³ proffering the facts to a Commonwealth’s Attorney for information about whether a crime was committed, studying collected data concerning the officers’ response time and utilizing Google Maps to predict reasonable times to arrive on the scene, performing an open source review of the responding officer’s social media profiles to look for any bias-related information, attempting to obtain footage from the apartment complex, and attempting to obtain footage from the Amazon van dashcam. The IAB was not able to obtain videos from the apartment complex, which this time when approached by the police asserted that the cameras in the hallway were not in fact operational. Amazon did not respond to several requests for footage.

The initial investigation reviewed and concluded based on the totality of the circumstances that the responding officers had not violated their duty in believing that there was no probable cause for an arrest. The incident as described both by the Complainant Driver and the Alleged Perpetrator had not involved any outward threats or acts that would make out a violation of the **Code of Virginia § 18.2-282 – “Pointing, holding, or brandishing firearm, air or gas**

³ Although the initial investigation did not specify who had assisted in the review of the caselaw, which is part of why a second investigation was conducted, the follow up investigation indicated that the IAB had consulted with the County Attorney’s Office.

operated weapon or object similar in appearance, penalty.”⁴ Consulting with the Commonwealth’s Attorney had confirmed that this would not be a case to prosecute. The initial investigation also quoted from a Virginia case from 1983 where a perpetrator had pointed a pistol at a victim, in contrast to what occurred here, and a Virginia case from 2011 defining the term “brandishing” as exhibiting a firearm in an “ostentatious, shameless, or aggressive manner.” The incident clearly had not consisted of brandishing, but the investigation also found that the responding officers had not been in error because it was not clear that the gun had been held in a manner to “reasonably induce fear” in another, though the investigation did not contain caselaw regarding this non-brandishing standard. Further, the initial investigation found no indication that the responding officers had come to this conclusion based on the race of the participants or engaged in bias-based policing.

The initial investigation considered whether the Lead Interview Officer had violated FCPD General Orders in failing to follow up with the Complainant Driver. While the initial investigation asserted that it would have been advisable to leave a message or call multiple times after the incident, the initial investigation noted that the Lead Interview Officer had intended to and offered to reach out further to the Complainant Driver the next day but had been told to stand down by his Supervising Officer, therefore he had not been in violation of the General Orders.

Although the initial investigation did not explicitly target the Supervising Officer, it did find that the Supervising Officer had made errors in his conversation with the Complainant Mother. First, he had said that he was not allowed to discuss the case with the Complainant Mother, which was incorrect under the circumstances. Second, he had improperly described the brandishing statute, because in fact “pointing” the gun is not a necessary element in order to violate the statute. Finally, the Supervising Officer had provided incorrect information regarding the need for officers to witness an incident in order to make an arrest without a warrant. The IAB investigation indicated that corrective disciplinary action was taken with respect to the Supervising Officer.⁵

Finally, the initial investigation reviewed all of the information regarding the length of time it took the officers to arrive on the scene and determined that there was no indication that the officers had not acted with appropriate and speed. For instance, the Google Maps estimated travel time from the first responding officer’s prior event to the apartment complex at that time of day was 12 to 22 minutes, but he had arrived in just under 11 minutes.

⁴ “It shall be unlawful for any person to point, hold or brandish any firearm or any air or gas operated weapon or any object similar in appearance, whether capable of being fired or not, in such a manner as to reasonably induce fear in the mind of another or hold a firearm or any air or gas operated weapon in a public place in such a manner as to reasonably induce fear in the mind of another of being shot or injured.”

⁵ The Panel does not review or comment on what specific disciplinary actions are taken, nor does the Panel have any authority to discipline officers.

IV. First Panel Review Meeting

The Panel held its first Review Meeting on June 2, 2022. Under the Panel's remit, the Panel is charged with reviewing investigations into allegations of serious misconduct or abuse of authority to determine if the investigation was "complete, thorough, accurate, impartial, and objective."

The Complainant Mother appeared in person at the Review Meeting and the Complainant Driver did not appear. The Panel heard from the Complainant Mother and from IAB representatives and asked questions of all.

a. Complainant Mother's Statement and Questioning

In her opening statement, the Complainant Mother recounted how on the evening in question she received a call from her daughter who was deeply distressed about a White man who she claimed had pulled a gun on her. The crux of the Complainant Mother's complaint about FCPD in her opening statement was "had she [Complainant Driver] been a white female saying that some black man was brandishing a gun behind her, none of this would have happened this way."

She went on to recount how she called the police on her daughter's behalf and provided FCPD with all of the information she had at the time. Her daughter had told her that following a discussion about a parking space, the alleged perpetrator "was walking with a gun" behind her leading her to fear that she might "get shot in the back." The Complainant Mother stated that she "was shocked because although [she] told them [she] was the mom and that [her daughter] was scared for her life, no one called me and no one called her."

Instead, the Complainant Mother had to reach out FCPD the next day. According to the Complainant Mother, the FCPD rebuffed her and asserted that no crime had been committed. Further, according to the mother, although she said "[g]ive me his name and I'll go to the magistrate and I'll press charges and I'll file a civil suit," the officer had refused to provide a name and she was not able to vindicate the rights of her daughter.

Panel members asked follow up questions. One Panel member asked what, given the limited scope of the Panel's review, in which the Panel reviews the IAB investigation not the underlying incident, did the Complainant Mother want out of the process. She responded that she wished to see additional and better training for the officers. She asked that officers be trained to at times "close their eyes and see the victim as white" because she believed that the outcome would be different. She also asked that the police go back over this case to determine why it went wrong in her view and why it was handled differently than it would have been handled with a white victim. She also expressed again that she wanted the Alleged Perpetrator's information so that she could obtain a restraining order.

Another Panel member asked what the Complainant Mother's reaction would have been had the police properly followed up with her daughter and with her and had informed her of what the Alleged Perpetrator had said and that they would be following up with another witness.

The Complainant Mother said that she could not evaluate what did not happen. The Panel member further asked what the Complainant Mother thought should happen in a similar situation where the races were reversed and how the police should handle that situation, using a hypothetical regarding the facts of the case. She responded that she knew that if the races were reversed the outcome would have been dramatically different as the whole interaction would have begun differently, likely with the police taking a much more aggressive tact with a Black alleged perpetrator—she asserted that the police never would have approached such an alleged perpetrator in the manner they did here. The Panel member conceded that yes, the outcome very well could have been different for exactly the reason expressed by the Complainant Mother, but reiterated that he was asking what should happen in these cases regardless of race because the Panel’s job is to consider police practices and procedures. The Complainant Mother surmised that what should happen is that the police should send “officers who would respond without seeing race,” while stating that that is not the way the world actually works.

A Panel member asked a final question as to whether Complainant Mother felt that her daughter’s age and gender had anything to do with what happened in addition to her race. The Complainant Mother responded that she did think that the situation was exacerbated because her daughter was a young Black woman.

b. IAB’s Statement and Questioning

IAB Representatives presented the findings of the IAB investigation. They first recounted the facts of the FCPD’s interview with the Complainant Driver as evidenced on the bodycam footage. They further discussed the 9-1-1 call and what the Complainant Driver reported during the IAB investigation, namely that the Alleged Perpetrator had had his gun in his hand while he walked behind her but that he had never pointed the gun at her.

The IAB Representatives also set forth the Complainants’ contentions that: 1) the officer did not properly perform his duties by not placing the suspect under arrest; 2) after the investigation, the officer did not follow up with the complainant as promised; 3) the officer would have treated her differently if she were a White woman in a Black neighborhood; and 4) the officers took a long time to arrive on the scene following her 9-1-1 call.

The IAB representatives addressed each contention in turn. The IAB investigation concluded that the officer was correct in deciding that there was not probable cause to make an arrest on the scene. Among other things, the IAB proffered the facts to the Commonwealth Attorney’s Office, which also determined that no crime occurred and that they would not attempt to prosecute such a case. The IAB also asserted that Virginia case law defines brandishing where the suspect has acted in an ostentatious, shameful, or aggressive manner, none of which were observed or described by anyone involved.

The IAB noted that immediately after the investigation, the officer attempted to call the Complainant Driver, but the phone call went to voicemail. The officer did not leave a message with the intention to call the Complainant Driver back on his next shift the following day. Before the officer’s next shift, however, the Complainant Mother called the FCPD to inquire about the status of the investigation. The officer’s supervisor told him that he would handle the

call and the officer believed his supervisor would perform the follow-up. The IAB Representative then conceded that the Supervising Officer incorrectly stated several aspects of Virginia law to the Complainant Mother and asserted that the FCPD had required the Supervising Officer to undergo additional training to correct his mistakes.

The IAB Representatives explained that the IAB investigation found no evidence that race was a factor in how the call for service was responded to. For instance, regarding the allegation of slow police response, the Complainant Mother called 9-1-1 at 4:34 p.m., and the 9-1-1 call taker created an event 3 minutes later. The primary officer was handling a different event in the area. The officer cleared the event he was handling 10 minutes after the complaint was created and 13 minutes after the Complainant Mother originally called 911. The officer was dispatched 43 seconds after he cleared the other event and arrived on the scene at 4:58 p.m. The response time of the officer was 10 minutes and 18 seconds. It took another 6 minutes and 57 seconds before the officer located the Complainant Driver, who had continued to deliver packages in the same location. The IAB reported that their investigation showed no anomalies in these response times.

Panel members extensively questioned the IAB Representative regarding the investigation.

One line of inquiry several Panel members pursued concerned the legal analysis in the IAB file regarding Code of Virginia § 18.2-282, colloquially referred to as the “brandishing” statute. As one Panel member pointed out, under Code of Virginia § 18.2-282 it is unlawful “to point, hold or brandish any firearm . . . in such manner as to reasonably induce fear in the mind of another.” Despite the fact that the statute refers to “pointing,” “holding,” or “brandishing,” the IAB investigation seemed to focus on brandishing. Worse still, the Panel member asserted, the caselaw provided was old caselaw related to “brandishing” rather than newer caselaw discussing that a crime can be committed simply by “holding” a gun in a manner that would “reasonably induce fear in the mind of another.” The Panel member thus asserted that the critical element here was the Complainant Driver’s fear and questioned why that had been discounted. Another Panel member questioned whether it should matter that the situation involved a young Black woman being followed by an older White man carrying the gun.

The IAB Representative could not comment on the intricacies of the statute and caselaw but asserted that the officers felt that based on the totality of the circumstances, including the comments of the Complainant Driver regarding how the gun was carried and the interview with the Alleged Perpetrator, that there was not probable cause for arrest here. In response to several questions, the IAB Representatives also noted that Virginia is an Open Carry state where legal firearm owners are allowed to carry weapons out in the open, so long as they do not violate § 18.2-282. They further noted that the facts of the case had been brought before a Commonwealth’s Attorney and that they had been informed that such a case would not be prosecuted, but members of the Panel questioned *how* the police had actually presented such facts.

Another line of inquiry concerned the actions of the Supervising Officer. One Panel member expressed frustration that the Supervising Officer had shut down investigation of the incident

prematurely and that the Supervising Officer's actions had meant that there was no proper attempt to contact a crucial witness: "Kevin, the mailman" (or FedEx worker) who allegedly saw the whole thing. The IAB Representatives asserted that in fact there was an attempt to locate the driver when one officer returned to the complex several days later, but the officer did not have the necessary information to identify the driver. Further, the IAB Representatives conceded that the actions of the Supervisor had been improper, especially in providing incorrect information to the Complainant Mother. The Panel member asked why a full and complete investigation into the actions of the Supervisor similar to the responding officers had not been completed and why the Supervising Officer had not been interviewed. IAB Representatives asserted that the Supervising Officer's phone calls with the Complainant Mother had been recorded in full, so there was no need to interview the Supervising Officer, who had received additional training for his mistakes.

Panel members also questioned the actions of the responding officers in interviewing the Alleged Perpetrator. For instance, one Panel member asked whether it was standard practice to enter the apartment of an Alleged Perpetrator known to be armed and then allow that Alleged Perpetrator to go into a back room to retrieve his gun. IAB Representatives asserted that it depends on a number of variables, including where the officers are, how many there are, and how they are positioned; every officer has to make their own judgement based on their training and experience. Another Panel member asked whether the officers in question had ever been asked to imagine that the racial makeup of the individuals were flipped and how that might have affected their response. The IAB responded that it does not ask questions in that manner. The IAB does ask officers direct questions about whether racial bias affected their thinking.

Panel members also zeroed in on what was not in the IAB file. Several Panel members questioned why the IAB file did not include the arrest and stop statistics of the officers in question. IAB Representatives asserted that such statistics are provided in cases where there are complaints that the arrests or stops were the result of bias. This situation was a little different than that because it was a response to a call for service. Panel members pushed back asserting that such statistics might still be useful. One Panel member asked, for instance, if there were any statistics regarding the race of arrests involving a brandishing charge.

And important final line of inquiry in questioning revisited the question of whether the responding officers properly considered the Complainant Driver's stated and expressed fear. IAB Representatives asserted that while the stated fear is obviously a very important factor to consider, the officers still judged the totality of the circumstances here as being insufficient to create probable cause for arrest.

c. Discussion and Request for Additional Review

The Panel deliberated extensively and for reasons described below unanimously concluded that that additional investigation was necessary. Under Article VI.E.(1)(h) of the Bylaws governing the Police Civilian Review Panel, "[a]t the Panel's discretion, it may request further investigation by FCPD, and the FCPD shall, within a reasonable time, conduct further

investigation and provide to the Panel a supplemental report that details the findings of the additional investigation.”

At the outset, the Panel grappled with how to assess alleged bias as serious misconduct in this case. The Panel seemed generally in agreement that, yes, if the races of the individuals had been reversed, the situation might very well have turned out differently, but did that indicate “serious misconduct” on the part of the officers here, in this specific instance? There were significant efforts to grapple with how to consider bias as related to the responding officers’ exercise of discretion: people of color (and not, for that matter) have been arrested based on a lot less evidence, but did that make the officers decision (*i.e.*, exercise of discretion) to not make an arrest here “serious misconduct” demonstrating bias?

For instance, one Panel member asserted, the responding officers appeared professional but reserved with respect to the Complainant Driver, but seemed, in his words, “almost chummy” with the Alleged Perpetrator. Other Panel members explained that the responding officer’s comments opining on what the likely outcome of the complaint would be seemed inappropriate at the time. And yet that same first Panel member conceded that de-escalatory tactics and actions taken by police aren’t necessarily a bad thing, particularly if said de-escalation is applied regardless of race in similar situations. Another Panel member fully conceded that things might have turned out differently if the races had been reversed but asserted that the responding officers handled the situation as they should have regardless of the race of the participants, and thus counseled against a finding of serious misconduct.

What emerged in the midst of this debate was genuine disagreement if not confusion among the members of the Panel as to a central question in the case: regardless of race, was there probable cause to make an arrest here? Some Panel members thought there might be based on the Complainant Driver’s real, expressed fear; others believed that there was not based on the facts before the responding officers, including that the Alleged Perpetrator held the gun at his side and another witness allegedly saw nothing wrong with the incident, and the objective standard regarding fear. And this only created another question to be grappled with (a tricky one at that): given race, was there probable cause to arrest here? In other words, how does (and/or how should) the lived experience of a young Black woman factor into understanding whether the actions of the Alleged Perpetrator reasonably induced fear?

Trying to hew to the mission and purpose of the Panel, which is to review the *investigation* into misconduct, the Panel came to a general consensus on one thing despite such disagreements: the IAB investigation had not provided a proper, useful legal analysis of a situation where, as here, the Alleged Perpetrator merely “holds” a gun (as opposed to brandishing or pointing it).⁶ Such an analysis would need to occur before the Panel could find the investigation to be complete, thorough, accurate, impartial, and objective. And as a corollary to that aspect of the

⁶ Indeed, the discussion in the IAB investigation of the standards for “brandishing” seemed misplaced because the actions as described by the Complainant Driver were nowhere near brandishing in the first place but rather, on their own terms, conceded that the gun had been carried but neither pointed nor waved.

investigation some Panel members also felt that they needed a better explanation of whether the responding officers had properly accounted for the Complainant Driver's expressed fear.

Panel members also questioned whether the actions of the Supervising Officer had completely been investigated. In many ways, the actions of the Supervising Officer, shutting down the investigation before it was complete and providing improper information to the Complainant Mother seemed to exacerbate everything that led to the Complaint in the first place. Although the IAB asserted mistake on the part of the Supervising Officer, this mistake was not formally investigated in a manner comparable to other aspects of the case.

Finally, with respect to the investigative file itself, Panel members questioned why the IAB's now generally standard practice—the result of a previous Panel recommendation—of providing arrest and stop statistics of the responding officers had been discarded. Panel members conceded that such statistics might not provide apples to apples comparisons, but the Panel had previously emphasized that a review of such statistics is an imperfect prophylactic measure in bias cases. Such statistics could reveal an apparent history of bias that would certainly inform whether bias occurred in the specific case at hand.

Following its extensive deliberation period, the Panel articulated its specific ask to the IAB and requested the following occur in order to complete the investigation:

- That the statistics and/or arrest and stop record of the primary officer be considered and made available to the Panel;
- That an independent legal analysis regarding instances in which a gun is held but not brandished” be conducted and provided;
- That an additional and complete investigation of the actions of the supervising officer be performed; and
- That the investigation into the original matter consider the crucial element of fear articulated by the complainant, and whether it was adequately addressed.

Several days after the Panel Meeting, the Chair of the Panel sent a letter with the exact asks listed above.⁷

⁷ It is also worth mentioning that the Panel did consider the question of whether it could ever recommend reopening an investigation, but several members of the Panel strongly asserted that this was not the province of the Panel and would be inappropriate. As reiterated repeatedly in this report, the Panel considers allegations of serious misconduct and abuse of authority, and the Panel's concurrence with or acceptance of an IAB investigation is not a conclusion that the acts of the police were infallible. During review of the bodycam footage, one thing noticed by the Panel's Executive Director was that the Alleged Perpetrator asserted that he had carried the gun at his side rather than attaching his holster because he was wearing sweatpants and the gun would cause his pants to sag, but when he arrived at his door, he was wearing jeans as the Complainant Driver had described him. The Executive Director asked whether the Panel could recommend reopening the investigation based on this

V. Additional Investigation

On July 15, 2022, Chief Davis informed the Panel that the additional investigation had been completed. Chief Davis's letter closed by explaining:

I have thoroughly reviewed and concurred with the supplemental investigative findings and confirmed that no new evidence was revealed to support any further investigative steps. Furthermore, my officer acted within both policy and applicable case law. Regrettably, there was improper information provided by the officer's supervisor, which was thoroughly documented, and proper corrective action has since been taken.

The additional investigation is summarized below.

a. Arrest and Stop Record Statistics

The IAB compiled the arrest and stop record statistics of the Lead Interview Officer. There were no apparent anomalies based on race and his arrest and stop statistics were consistent with those of other officers at his duty station. Nothing in the statistics indicated a history of bias.

b. Legal Analysis.

As discussed, the Panel faulted the initial legal analysis largely on two grounds: (1) that it did not adequately cover situations in which a gun is neither brandished nor pointed and (2) that it did not provide insight into or comment on how to assess the element of fear described in the statute to assess what should have happened here, where the Complainant Driver expressed significant fear. There were also concerns expressed that any legal analysis provided in the initial investigation was improperly colored by how the incident was presented by the police themselves to the analyzer.

The additional investigation contained analysis from the Deputy Commonwealth's Attorney.

The Deputy Commonwealth's Attorney was provided with the same body cam footage that the Panel had access to; in other words, the Deputy CA was able to assess the situation without giving undue weight to the editorializing of the FCPD. The Deputy CA explained that the statute creates an objective standard with respect to what induces fear by explaining that it is unlawful to hold any firearm "in such manner as to *reasonably* induce fear in the mind of another" (emphasis added). *See* Code of Virginia § 18.2-282. The objective reasonableness standard was not met here in the view of the Deputy CA because, among other things, the complaining witness had stated that the gun was never pointed at her, that the individual did

fact. Panel Members agreed that the Panel is not a place to go to request that cases be reopened. Rather, the Panel is supposed to investigate *police misconduct*, not underlying alleged crimes. Further, this after-the-fact observation did not demonstrate serious misconduct on the part of the officers. But it did, arguably, suggest that the Panel might make a police practice recommendation—which is squarely within its mandate—that investigations not be closed in advance of a full bodycam review.

not make any threats, and that the individual was simply walking into his building with the gun at his side. Further, this account was corroborated in an interview with the Alleged Perpetrator who also offered a reason why he had the gun, he was returning it to his apartment from the glove compartment of his car, and a reason he had the gun out, because the holster did not fit with his post-gym clothes. As such, the legal analysis explained there was no probable cause established for a criminal violation and no probable cause to make an arrest because the gun had not been held in a manner that an objectively reasonable person, as understood by the law, would interpret as a threat, regardless of whether the complaining witness here expressed subjective fear of the situation.

c. Additional Investigation into the Actions of the Supervising Officer.

The additional investigation reiterated points made in the prior investigation regarding the actions of the Supervising Officer. The additional investigation conceded that the Supervising Officer had acted in error. First, he had simply been wrong in asserting that there could be no arrest without a warrant in a case where the responding officers had not been witnesses to the incident because under Code of Virginia § 19.2-81, this is not a requirement for an arrest without a warrant. Second, as explained above, the Supervising Officer had been wrong to focus only on brandishing because brandishing is not a necessary element in all violations of Code of Virginia § 18.2-282. The additional investigation made clear that the Supervising Officer's actions were unacceptable and had been addressed by his Division Commander. While the actions were unacceptable and regrettable, however, there was no evidence that these mistakes were the product of bias and the additional investigation asserted that such mistakes did not constitute serious misconduct or abuse of authority.

VI. Second Panel Review Meeting

The Panel reconvened on September 1, 2022, to consider whether, with the benefit of the additional investigation provided, the investigation into allegations of serious misconduct and abuse of authority was complete, thorough, accurate, impartial, and objective. The Panel further attempted to look at the case and investigation holistically to consider what it could learn from the case in order to make recommendations to improve the policies and procedures of the FCPD.

The Complainants did not choose to participate in this meeting and were not present.

a. Discussion of the Additional Investigation

While IAB representatives attended the meeting, there was no question-and-answer session like in the prior meeting. Rather, the preamble to the discussion of the additional investigation was a request that the Executive Director share his thoughts on the additional investigation and information provided. The Executive Director reviewed the lines of inquiry requested as described above and offered his opinion that the additional investigation was adequate and thorough.

i. Additional Investigation: Statistical Analysis

The Panel was in agreement that the additional statistical analysis provided in response to its request was sufficient and that it revealed no anomalies in the history of the responding officers that would suggest bias.

There was disagreement among the Panel with the assertion made by Chief Davis in his response letter that proactive statistics—*i.e.* records of stops and arrest—are not useful in assessing a reactive situation—*i.e.* where the officer responds to a call for service like that made by the Complainant. One Panel member agreed with the Chief’s view that police dispatched to a scene is different than police acting on their own initiative. She wondered whether apples to oranges comparisons could be useful.

Other Panel members conceded that point but emphasized that the inclusion of such statistics is still necessary to *complete* a bias investigation. One Panel member noted that the Panel started asking for statistics as a prophylactic measure when bias is alleged to see if there is any history of bias that may reveal a potential motive in the underlying case. He explained that, in most cases one would hope that the statistics do *not* reveal a history of bias and are not all that useful. However, if the arrest and stop statistics are widely out of step with the police officers’ peers, this could be helpful information—or, as another Panel member put it, helpful “context”—in assessing bias in a present case. In other words, exposed anomalies could be revelatory, which is why the Panel started asking for such information in the first place. One Panel member made clear to the IAB representatives present that he intended to continue asking for such information in the future.

ii. Additional Investigation: The Supervising Officer

As noted during the First Review overview above, the Panel generally agreed with the IAB’s assertions that the deficiencies and mistakes by the Supervising Officer were not the product of bias and could be sufficiently addressed by providing additional training. For some members of the Panel, it was the actions of the Supervising Officer, especially the lack of communication with the Complainant Driver on the night of the incident and lack of subsequent, corrective follow-up with Complainant Mother that did more than anything to ensure that the case ended up before the Panel.

iii. Additional Investigation: Legal Analysis

As one Panel member observed, the charge to provide additional legal analysis into the question of whether a crime can be committed when a gun is held rather than brandished was largely “comingled” with the question of whether the responding officers and investigation adequately addressed the crucial element of fear in this case. This was because, as described above, the question was what it really means to hold a firearm “in such manner as to *reasonably* induce fear in the mind of another” and whether the responding officers were correct to not effectuate an arrest here.

The Panel continued to grapple with these questions as it did in its prior review meeting, and further grappled with the question in the context of the sufficiency of the investigation.

As to the latter issue, several Panel members pointed out that they were uncertain how to view the completeness of the legal analysis before them. For instance, one Panel member expected to see more because the legal analysis explained why the facts of this case did *not* present fear regarding the holding of the firearm that was “objectively reasonable” under the statute to warrant an arrest or prosecution, but did not go further to say explicitly what *would have* been enough for prosecution.

Other Panel members disagreed. Having been asked to obtain an independent legal analysis regarding the statute in question and whether the responding officers had acted appropriately and properly considered fear, the IAB went to the Deputy Commonwealth’s Attorney, provided him with all body cam footage, and received an explanation as to why there was no reason to prosecute this case (and further why the officers had acted appropriately in not effectuating an arrest). Importantly, as was noted, by providing all the bodycam footage to the Deputy Commonwealth’s Attorney, the IAB ensured that the legal analysis would not be overly influenced by how the police framed the case in their proffer. Thus, other Panel members argued, the IAB had adequately completed its task.

As to the substantive issue, some members of the Panel continued to question the analysis of the Deputy Commonwealth’s Attorney and to express further frustration around the law itself. One Panel member, for instance, while acknowledging that she did not believe that the Panel could really do anything more here, explained that she believed that any young person who found themselves confronted with the sight of a gun after having terse words with someone would be fearful and would probably think that they had seen a gun brandished “as a means of intimidation.”⁸ Another Panel member also emphasized that while she knew that guns are prevalent in society and the Commonwealth is an Open Carry jurisdiction, it was to her apparent that the “having words with someone” followed by the behavior shown would make for a scary situation. Still another Panel member expressed frustration at how difficult it is figure out “objective reasonableness,” and how difficult it is for the Panel to play judge and jury on such a question. Moreover, several members of the Panel acknowledged the difficulty of making such fear determinations given the many different emotional responses that one can

⁸ This Panel member, again while conceding that she probably thought the legal analysis was sufficient, also identified another specific concern in the case at hand. As she explained, in her experience and in society, people of color often appear to be treated as older than they actually are and given less latitude to be young. To her in this instance, she felt that the Complainant Driver, a twenty-one-year old, had been asked a question—what kind of gun was it?—more appropriate for a mature adult than a scared kid. This Panel member’s view of the inappropriateness of that specific question was not necessarily shared by other members of the Panel who believed the question and those like it regarding a description of the gun were necessary, and by another token, many would assert that a twenty-one-year old has reached the age of maturity in the eyes of society and the law, but the Panel member’s point is still well taken, and only emphasizes another challenge in this case: the age disparities of the participants involved.

have to scary situations.⁹ Another Panel member noted that cultural bias could be a factor in scenarios involving Complainants who do not display sufficient fear or whose allegations of fear are deemed objectively reasonable by the prosecutor. One Panel member expressed her belief that if the responding officers had read the statute in full, an arrest would have occurred.

But other members of the Panel agreed with the Deputy Commonwealth's Attorney's analysis and asserted that the facts before the responding officers at the time did not support probable cause for an arrest (and they did not *require* an arrest). Accordingly, a finding of serious misconduct or abuse of authority based on bias simply was not appropriate. As one Panel member put it, the statute contemplates that there are instances involving the holding of guns where no crime is committed "regardless of how scared [the complaining witness] may have [actually] been." The same Panel member also urged the Panel to confine its review of the legal analysis (and the investigation itself) to the facts of the case before it and not the legitimate and understandable gut feeling and intuition (in the words of the Panel member: "especially among the Black and Brown members of the Panel") that the officers may have taken a different approach with the races reversed. Confined to the case, the legal analysis and the officers' actions to not arrest the Alleged Perpetrator were reasonable. Another Panel member emphasized that he shared some of the same frustrations with the state of the law as had been expressed, and that he shared some of the same perceptions of what could or should cause fear.¹⁰ But he pointed out that such perceptions were not necessarily in line with the law in an Open Carry Commonwealth. Further, the facts as presented to the responding officers, including the fact that the gun was down at the side, that the Alleged Perpetrator said nothing additional to the Complainant Driver after asking if she was going to move out of a parking spot minutes before, that there was a witness who supposedly told the Complainant Driver that things were OK, and that the interview with the Alleged Perpetrator largely confirmed these facts, did not create probable cause for arrest.

Finally, as to the question of how the legal analysis informs what *should* have happened, there were strong sentiments from several Panel members that the responding officers' de-escalatory tactics were themselves commendable. As one Panel member put it, he found it hard to fault officers who responded in a calm and de-escalatory manner that "he would like to see" from police officers as often as possible. In fact, it was in part his concern about how police officers have violently responded to other instances of legal gun owners of color notifying police of the presence of their guns that made that Panel member applaud a situation in which that did not happen. Another Panel member cited General Order 540, which emphasizes the importance of de-escalatory strategies when possible and suggested that he did think "we want a situation where if the races were reversed the black legally armed person would not be arrested" based

⁹ For instance, for one Panel member, it did not make sense that a person's response to a situation she found fearful would be to call her mother rather than 9-1-1; for another Panel member, just the opposite was true.

¹⁰ Indeed, he surmised that the principle of Open Carry for protection perhaps necessarily includes a component of intimidation of other (carrying openly means displaying a gun in a manner that protects you by alerting to others that you are armed and potentially dangerous).

on the facts before the Panel here because the de-escalatory element should be applied universally.

b. Panel Purpose and Vote

During deliberations, a common discussion among the Panel emerged as to what its role really is and how it is supposed to approach the Complaints before it. That discussion involved both assertions of the importance of the Panel “staying in its lane” in terms of assessing individual cases (and individual officer actions), but also that the Panel’s role is to be a *civilian* review Panel that candidly expresses and elevates *civilian* and *public* views. This led, for instance, one Panel member to make clear that even though she would ultimately concur in the findings of the case based on the rubrics of Panel review, she wanted it on the record that certain aspects of the case troubled her and that she felt the pain and frustration of the Complainants. Another Panel member emphasized that the Panel had been highly conscientious and deliberative in arriving at its conclusions. Still another Panel member emphasized that concurrence (and even, in his case, a belief in the appropriateness of the individual officers’ actions here) was neither a belief that the police acted perfectly nor an assertion that there were not things that could be learned from this process.

In the end, the Panel voted unanimously that the initial investigation and the additional investigation were complete, thorough, accurate, objective, and impartial. The Panel also voted to produce at its next meeting recommendations based on the deliberations and discussed.

VII. Analysis and Conclusions

The Panel’s dual mission clearly presented a challenge in this case.

On the one hand, the Panel’s mission is case-specific. The Panel’s first stated purpose in its bylaws is to “Review certain Investigations to ensure the thoroughness, completeness, accuracy, objectivity, and impartiality of the Investigations [into alleged police misconduct].” *See* Bylaws Article II.A.

On the other hand, the Panel’s mission is to engage in broad, systemic review. The Panel also exists to “[m]ake recommendations on law enforcement policies, practices, and procedures to assist the FCPD Chief of Police (“Chief”) and Board of Supervisors in policy review.” *See* Bylaws Article II.C.

What the Panel had before it was a case in which police officers acted in a calm, de-escalatory, and professional manner to best assess the facts before them. They did not lead the complaining witness but neither did they discount her concerns. They asked necessary and useful questions. They did not promise an arrest but nor did they tell the complaining witness that her concerns were unfounded.

The officers were candid with the Alleged Perpetrator as to the situation at hand, but not aggressive. Responding and reacting to the conversation and the facts and circumstances

surrounding them, the officers did not rush to judgment with respect to the actions of a gun owner and his possession of a legal firearm. Although the situation concerned very real, expressed fear and the presence of lethal weaponry, no actions were taken that could have likely led to a deadly confrontation.

In a County where there have unfortunately been five officer-involved shootings as of the time of this report, in a country where gun violence is an epidemic, and in a Commonwealth where open carry is legal and there are hundreds of thousands of registered guns,¹¹ this is an outcome that should be welcomed. Multiple Panel members specifically commended the responding officers on how they handled a potentially volatile situation.

At the same time, the Panel can and must acknowledge the frustrating nature of this case for the Complainants and for Community Members. Although there is no evidence that the officers in this case acted with bias, and there is a sincere hope that the racial makeup of the complaining witness and the alleged perpetrator is not definitive here, there is real, justifiable concern that it could be. There are simply too many well-known examples across the country of Black gun owners who did not meet with the same fate when carrying legally owned firearms to discount.¹²

Further, this concern, especially for the Complainants themselves, could have only been exacerbated by the failure to effectively communicate the rights of the Complainants and the mistake that probably cut off all further investigation of the incident. (Notably, the Panel makes no comment on what that investigation would have or would not have revealed.)

In the end though, based on the record before it, the Panel must find that the investigation was complete, thorough, accurate, impartial, and objective, and that the responding officers (if not their supervisor) generally acted appropriately. Put most basically, the responding officers did not abuse their discretion nor were they, as explained by an independent legal analysis, wrong to find no probable cause here. As such, their behavior did not constitute serious misconduct or abuse of authority.

But importantly, this case-specific determination is not a systemic analysis. The Panel does not make this determination out of confidence that if the races had been reversed the situation would have been handled in the same manner, but perhaps despite the lack of such confidence. Rather, what arguably becomes clear in reviewing this incident while acknowledging that reality is that police *can* handle volatile situations in a calm and professional manner *when race and implicit bias do not cloud the judgment of the actors involved*.

¹¹ See World Population Review, “Gun Ownership by State,” <https://worldpopulationreview.com/state-rankings/gun-ownership-by-state>.

¹² See, e.g., the killing of Philando Castile (<https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html>), the killing of Donovan Lynch (<https://www.washingtonpost.com/dc-md-va/2021/11/30/va-beach-donovan-lynch-shooting-police/>), or the killing of Amir Locke (<https://www.washingtonpost.com/nation/2022/02/15/amir-locke-police-shooting-explainer/>).

It is for that reason that the Panel sincerely hopes that the FCPD will find a way to use a case study of this incident in its trainings and officer development going forward. This incident arguably displayed the intersection of race, gender, and gun issues facing society and police departments today. Reviewing the de-escalatory approach taken by the responding officers while asking police officers to consider how the racial, gender, and age makeup of the participants may or may not have affected outcomes would be a useful tool in training officers to treat all who they encounter equally and respectfully while also engaging in effective harm avoidance. This is essential where police officers themselves face potentially explosive situations understanding that they may not be the only armed individuals involved, situations that if improperly escalated can have deadly consequences. Finally, a case study of this incident would be useful in any discussion of how implicit bias affects perception and policing.

VIII. Recommendations

1. The FCPD should, if not already a part of its training, develop a training based on the facts and circumstances of this case that considers how race, gender, age, and socioeconomic status affect policing and de-escalation. This training should be provided to trainees at the Criminal Justice Academy and to officers throughout the FCPD.
2. In order to emphasize and maintain compliance with General Order 201.1 “Knowledge and Obedience to Laws, Regulations, and Training,” FCPD officers should be encouraged to directly consult criminal code language when in the field when time and circumstances permit. Such consultation can aid both in proper application of the criminal code and in providing accurate and useful information to alleged victims.
3. FCPD officers should directly consult the criminal code in advance of all follow-up interactions with alleged victims.
4. General Order 501.II should be revised to add the italicized language that follows: “Victims and witnesses shall be provided with assistance pertaining to victim’s rights, their role in the court process, *the magistrate’s role in the court process*, support services, and any other needed resources required by law or Department policy.”
5. General Order 501 should be revised to require that responding officers take all deliberate care to follow up with crime victims and complainants before the end of their shifts and leave voicemail messages when necessary.
6. FCPD implicit bias training should, to the extent that it does not, consider how implicit biases may affect how FCPD officers interact with alleged *victims* and *witnesses* in addition to alleged perpetrators.
7. With respect to Complaints that include allegations of bias and/or racial profiling, the arrest, stop, community contacts, and search statistics of the officers involved shall be provided to the Police Civilian Review Panel in the IAB investigation file.