

I. OVERVIEW AND RECOMMENDATION

This memorandum recommends that the United States Attorney's Office for the District of Columbia decline for criminal prosecution the fatal shooting of Ashli McEntee. The incident occurred inside of the United States Capitol, on January 6, 2021. Ms. McEntee, along with hundreds of demonstrators, illegally entered the United States Capitol in an attempt to obstruct Congress from certifying the results of the 2020 election. United States Capitol Police Department ("USCP") Lieutenant Michael Byrd fired one round striking Ms. McEntee in the left shoulder, after she started to climb through a broken glass door to enter the Speaker's Lobby which led directly to the floor of the House Chamber that was occupied by members of Congress and/or staff at the time. D.C. Fire and Emergency Medical Services transported Ms. McEntee to MedStar Washington Hospital Center where she later succumbed to her injuries.

This declination is based on a review of law enforcement and civilian eyewitness accounts, physical evidence, recorded radio communications, cell phone footage, MPD reports, forensic reports, and the autopsy report for Ms. McEntee. After a thorough review of the facts and circumstances in this case, there is insufficient evidence to prove beyond a reasonable doubt that Lieutenant Byrd violated Ms. McEntee's civil rights by willfully using more force than was reasonably necessary, or was not acting in self-defense or the defense of others.

II. INVESTIGATIVE SUMMARY

When viewed as a whole, the evidence is most consistent with the following chronology of events:

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On January 6, 2021, there was a large scale, pre-planned First Amendment Rally, "March to Save America," permitted by the National Park Service that was held at The Ellipse, regarding the congressional certification of the Electoral College.² At some point during the rally, participants began to march to the United States Capitol. At approximately 1:15 p.m., several rally participants joined by other demonstrators became violent, and began to breach established police lines that surrounded the United States Capitol building. The rally participants and demonstrators then broke several windows, breached a number of entry points that led into the east side of the United States Capitol building, and then illegally entered the United States Capitol.

Several hundred demonstrators forcefully entered into the United States Capitol building and moved freely through different areas of the building. Demonstrators attempted to gain access to the floor of the House Chamber through the doors at the main point of entry, but their attempts to access the floor were unsuccessful. Some of the demonstrators then moved into a hallway area near the east stairwell that led directly into an area identified as the Speaker's Lobby. The Speaker's Lobby is also an access point that leads onto the floor of the House Chamber.³ Once in the hallway outside of the Speaker's Lobby, the demonstrators attempted to breach the glass entry doors by utilizing, their hands, flagpoles, helmets and other objects to strike and break the glass.

² The Ellipse is the oval-shaped field between the Mall (Washington Monument) and the White House.

³ If the demonstrators had been successful in entering the Speaker's Lobby, they would have had immediate access onto the floor of the House Chamber.

USCP Lieutenant Michael Byrd and USCP Sergeant Paul McKenna, both assigned to the House Chamber security detail, along with USCP Officer Reggie Tyson, and other unidentified officers, assigned to the House Chamber Division, were inside the Speaker's Lobby when the demonstrators arrived and started their attempts to breach the doors.⁴ Lieutenant Byrd and Officer Tyson, along with the unidentified officers, began to barricade the east side glass entry doors with desks, a couch, and chairs. The unidentified officers then responded onto the floor of the House Chamber to assist with escorting members of Congress off the floor.⁵ As the last members of Congress were being led off the floor of the House Chamber, Sergeant McKenna also exited the floor into the Speaker's Lobby. By that point, the demonstrators had broken out three of the four glass doors that led into the Speaker's Lobby using their hands, sticks, flagpoles, helmets and other unidentified objects, and were then able to reach through the broken glass doors and push the chairs off the top of the barricaded furniture.⁶

Once the demonstrators broke the glass, Lieutenant Byrd took up a tactical position to the immediate right of the barricaded entry doors, Officer Tyson took up a tactical position behind Lieutenant Byrd on the right side behind the third pillar and Sergeant McKenna took up a tactical position behind Officer Tyson and behind the fourth pillar on the right side of the Speakers Lobby. All three officers had their service pistols drawn, pointed them in the direction of the barricaded entry doors, and repeatedly instructed the "mob" to get back. The "mob" of demonstrators ignored the officers' commands and continued to break the glass on the doors in their attempt to breach the Speaker's Lobby. Suddenly, Ashli McEntee began to crawl through one of the doors where the glass was already broken out. As Ms. McEntee was climbing through the door, Lieutenant Byrd stepped forward from his tactical position towards Ms. McEntee and fired one round from his service pistol striking Ms. McEntee in her left shoulder, just below her clavicle. Ms. McEntee then fell back from the doorway and onto the floor.

Unbeknownst to Lieutenant Byrd or the other officers in the Speaker's Lobby, a USCP Containment Emergency Response Team (CERT) was coming up the east stairwell towards the Speaker's Lobby at the same time Ms. McEntee was climbing through the door. The CERT officers arrived right before Lieutenant Byrd fired the round and Ms. McEntee fell to the floor, and immediately began to administer aid. A short time later, the CERT officers carried Ms. McEntee down the east side stairwell into an area where members of the District of Columbia Fire and Emergency Medical Services (DCFEMS) Medic 10 were stationed. DCFEMS began to render medical aid and transported Ms. McEntee to MedStar, Washington Hospital Center. While at the hospital, Ms. McEntee succumbed to her injuries and was pronounced dead at 3:15 p.m.

⁴ Lieutenant Byrd and Sergeant McKenna were in business attire, the other officers were in uniform. None of the USCP personnel were equipped with BWC.

⁵ The members of Congress were escorted out through the west side doors of the Speaker's Lobby.

⁶ Three uniform USCP officers, Sergeant Timothy Lively, Officer Kyle Yetter, and Officer Christopher Lanciano, were standing in front of the entry doors, however the protestors still managed to break the glass by swinging objects at the glass around the officers.

III. EVIDENCE

1. BWC Footage

USCP officers are not equipped with BWCs.

2. Closed Circuit Television

There are several USCP operated Closed-Circuit Television Video (CCTV) cameras inside of the United States Capitol Building. However, there were no CCTV cameras observed or located in the Speaker's Lobby area.

3. Social Media Footage

Multiple videos from various social media and news outlets were received and reviewed. All the videos are captured from the vantage point of outside the Speaker's Lobby. The videos capture the "mob" using their hands and various weapons to break the glass doors leading into the Speaker's Lobby. Several of the videos depict Lieutenant Byrd with his service pistol drawn and pointing at the Speaker's Lobby doors (as depicted in the screenshot below), and several protestors are heard yelling "gun, gun!" Ms. McEntee is then seen climbing through the doorway on several videos (as depicted in the screenshot below), before a gunshot rings out and she is seen falling to the floor. There is a video that captures the CERT officers immediately attempting to render aid to Ms. McEntee after the shooting.

Lieutenant Byrd is not visible on any of the footage, although one recording does appear to show him stepping forward (arm and hand are the only visible portion of his body), and firing at Ms. McEntee as she enters the doorway.



4. Physical Evidence

Subsequent processing of the crime scene by members of the Department of Forensic Sciences (DFS) included the following tasks:

1. Photographs were taken of the scene;
2. LEICA scan of the Speakers Lobby;
3. Recovered numerous items of assorted clothing;
4. Recovered California driver's license in the name of Ashli McEntee;
5. Recovered a red, white and blue "JANSPORT" backpack;
6. Recovered numerous assorted flag poles;
7. Service Weapon of USCP Lieutenant Byrd was turned over to DFS by USCP CSS Officer West;
8. Glock Magazine and fifteen "SPEER .40 S&W" cartridges turned over to DFS by USCP CSS Officer West; and
9. Recovered one "SPEER .40 S&W" cartridge casing recovered from the floor of the Speaker's Lobby.

5. Medical Evidence

On January 7, 2021, an autopsy was performed by Francisco Diaz, M.D. of the Office of the Chief Medical Examiner (OCME) for the District of Columbia. Dr. Diaz determined that Ms. McEntee's death was caused by a gunshot wound to the left anterior shoulder. The bullet travelled left to right causing injuries to blood vessels, her trachea, and her right lung, before lodging in the right anterior shoulder area. The manner of death was ruled a homicide.

6. Civilian Witness Statements

On January 6, 2021, Mr. Jason Gandolph from the Office of the House Sergeant at Arms, along with three or four uniform USCP officers, attempted to keep the demonstrators from advancing towards the Speaker's Lobby after the Capitol was breached. According to Mr. Gandolph, the demonstrators were unruly, and the USCP officers were unsuccessful in stopping the demonstrators from proceeding to the doorway that led into the Speaker's Lobby. The doorway to the Speaker's Lobby, which is mostly glass with a wooden frame, had been barricaded from the inside with large pieces of furniture, and several USCP officers were behind the barricade as well. The demonstrators were very large in numbers, loud, and agitated. The demonstrators eventually began to utilize their flag poles and other objects, to strike the glass which eventually caused the glass to break and fall to the floor.

Ms. McEntee was directly in front of Mr. Gandolph during all of the unrest at the doorway, and he observed Ms. McEntee participate in breaking the glass to the doors. Mr. Gandolph recalled observing the CERT officers coming up the southeast stairs, and then heard a single gunshot, which was loud and appeared to be have come from over his right shoulder. Mr. Gandolph did not observe a gun, nor did he see any muzzle flash. Immediately after hearing the gunshot he observed Ms. McEntee fall to the floor. Mr. Gandolph described Ms. McEntee as "bleeding really bad," and he immediately began to administer aid along with the CERT officers. Mr. Gandolph indicated that

Ms. McEntee's clothing was cut away to expose a gunshot wound to the left shoulder area which he eventually covered with a chest seal.

Congressman Markwayne Mullin from Oklahoma was on the floor of the House Chamber on January 6, 2021. Congressman Mullin heard the USCP officers' radios going off, and started receiving notifications on his cell phone that something was happening outside the Capitol. Lieutenant Byrd addressed the members and "gave them some instructions on what needed to take place." Protestors started banging on the front doors to the House Chamber that had been locked. Congressman Mullin helped the USCP officers barricade the doors, and when the officers told him he needed to leave, he told them that he wanted to help because of what he did prior to joining Congress.⁷

Congressman Mullin heard glass breaking and then "people started yelling, shots, shots, shots!" He quickly recognized they were not shots and told the officers, who had taken a defensive position, that they were not shots. Congressman Mullin then engaged with the "rioters" at the door by asking "is it worth it? You almost got shot!" The rioters stopped beating on the glass, but then started shaking the doors. Congressman Mullin then started discussing evacuating the House Chamber with the USCP officers.⁸ At this point, members started being evacuated from the floor of the House Chamber, however, there were members still "trapped" in the balcony.

Congressman Mullin then heard the rioters banging on the doors to the Speaker's Lobby, and he looked over and saw Lieutenant Byrd in a defensive position behind a pillar.⁹ He heard Lieutenant Byrd yelling commands to the rioters, but does not recall exactly what he was saying. He then heard glass break, and heard what he thought was two gunshots. He did not see the woman coming through the door, he could only see Lieutenant Byrd.

In Congressman Mullin's opinion, Lieutenant Byrd did everything he could do to defend that position, and saved a lot of people's lives, because "if she had breached others would have followed...they could have also taken his gun away from him."

7. Officer Statements

Sergeant Paul McKenna USCP

On January 6, 2021, Sergeant McKenna arrived at his office at 1:00 p.m., and was advised that there may be a lockdown at the Capitol building due to a large demonstration. Sergeant McKenna started preparing for this potential lockdown, and went over plans for getting House Members out of the House Chamber if necessary. Sergeant McKenna was then advised that there was a breach at the Capitol building, and that demonstrators were approaching the House Chamber door, so he assisted in evacuating House Members out of that area. The east doors of the Speaker's Lobby, which are located just outside of the House Chamber, were subsequently barricaded.

⁷ Congressman Mullin was a former Mixed Martial Arts (MMA) fighter before becoming a member of Congress.

⁸ While Congressman Mullin made it clear he thinks the USCP officers did their best they could, he could tell there was no contingency plan in place for a scenario like this.

⁹ Congressman Mullin was still at the entry doors to the House Chamber, but had an elevated view and was able to see Lieutenant Byrd through the doors that lead from the floor of the House Chamber into the Speaker's Lobby.

Demonstrators began banging on the House Chamber's doors. A representative that was on the floor of the House Chamber shouted that shots had been fired. Sergeant McKenna was advised that the sound was breaking glass, not gunshots. Sergeant McKenna then radioed that the report of gunshots was incorrect, and that it was glass breaking. Sergeant McKenna was then approached by a USCP officer who advised that the sound was, in fact, gunshots. Sergeant McKenna went back over the radio and reported that there were gunshots on the House floor.¹⁰

Sergeant McKenna later walked out of the House Chamber and into the Speaker's Lobby, and observed glass being broken out of the doors at the east end of the Speaker's Lobby. Sergeant McKenna observed that an officer (USCP Officer Tyson) and Lieutenant Byrd had taken up tactical positions and had removed their service pistols. Sergeant McKenna then removed his service pistol and positioned himself behind a pillar in the Speaker's Lobby.

A glass panel came completely out of one of the windows on the far north side, and a demonstrator started to come through the opening. Sergeant McKenna reported hearing a lot of screaming, and then overheard someone yelling, "Get back! Get back!" As Sergeant McKenna observed the demonstrator climbing through the open area, he heard a gunshot. The demonstrator was then observed falling backwards onto the floor. The crowd on the outside of the barricaded east doors, began to step back, and some raised their hands in the air. Sergeant McKenna did not see anything in the demonstrator's hands prior to hearing the gunshot.

Sergeant McKenna advised that he was approximately three to four pillars back from Lieutenant Byrd, who was positioned closest to the barricaded doors. Sergeant McKenna explained that he did not know who had discharged their pistol until he spoke with Lieutenant Byrd a couple of moments after this incident occurred. Sergeant McKenna related that Lieutenant Byrd looked upset and stated, "I was the one who took the shot."

Officer Reggie Tyson USCP

On January 6, 2021, approximately 1:30 p.m., Officer Tyson was assigned to the Upper House door, when the demonstrators rushed the United States Capitol building. The demonstrators then entered the lower level of the building at which time USCP officers were directed to fall back into the building to institute a lock down of the building. Officer Tyson and other USCP officers then barricaded the Speaker's Lobby doors from inside of the Speaker's Lobby, as the demonstrators made their way up to the other side of the doors. Officer Tyson then heard, "Shots fired!" announced over the radio.

Officer Tyson and Lieutenant Byrd then took up positions near the first couple of pillars in the Speaker's Lobby. The demonstrators began breaking out the glass on the doors as well as the windowpanes, by using sticks, flags and helmets to break the windows that led into the Speaker's Lobby. The demonstrators were yelling, cursing at the officers, and making obscene gestures. Officer Tyson and Lieutenant Byrd then gave several commands to the crowd stating, "Stay back! Back up!" Officer Tyson then observed a demonstrator climbing through the far north window

¹⁰ This was later found to be inaccurate. There was no evidence of gunshots fired on the House floor.

pane, and he then heard a gunshot.¹¹ After hearing the gunshot, Officer Tyson observed the demonstrator fall backwards towards the floor.

Officer Tyson did not observe the demonstrator in possession of any weapons, but his attention was drawn to her because she was climbing through a broken out window pane. After he heard the gunshot, he and Lieutenant Byrd maintained their covered positions behind the pillars and continued scanning for other threats. Although no other demonstrators attempted to come through, the crowd did not disperse and continued to chant and yell.

Officer Tyson observed additional USCP officers on the outside of the barricaded doors, but he was unsure where those officers came from. Officer Tyson, along with Lieutenant Byrd and Sergeant McKenna then went back into the House Chamber, in order to continue to evacuate other members of Congress that were still present in the House Chamber.

USCP Uniform Officers

On January 6, 2021, Sergeant Timothy Lively was assigned to the civil disturbance unit at the west front of the Capitol. The Intel briefing received that morning was that there was a first amendment protest and a rally at The Ellipse planned for the day. Sergeant Lively was on the line at the very base of the stage outside the Capitol building, and had been pepper sprayed approximately five or six times by demonstrators. As Sergeant Lively was rinsing his eyes out with bottles of water, he heard a radio call that demonstrators were on top of the stairs of the west front, so he went over there to help out. There were about four or five USCP officers trying to hold everyone back there, as Sergeant Lively went to assist the officers, he was “bear sprayed,” and tossed or tackled down the stairs. Sergeant Lively crawled back up the steps, and another USCP officer grabbed him and ran inside.

When Officer Kyle Yetter arrived to work early on January 6, 2021, the “rioters” had already breached the building. Officer Yetter immediately responded to the southeast door of the Capitol and was sprayed by the rioters with a fire extinguisher. Officer Yetter and other officers retreated from the area and once he was able to catch his breath, he made his way towards the Speaker’s Lobby and linked up with Sergeant Lively and Officer Christopher Lanciano.

Officer Lanciano was assigned to the west front of the Capitol on January 6, 2021, before he was sprayed with a fire extinguisher, and then went inside before finding himself in front of the Speaker’s Lobby. When he arrived at the Speaker’s Lobby, he observed members of Congress exiting the floor of the House Chamber. The protestors were screaming and chanting and threatening the officers.

When Sergeant Lively arrived at the east entrance to the Speaker’s Lobby he observed that the doors were barricaded from the inside, and knew that they “need(ed) to hold this line as long as we can. To let people that are in there, that are evacuating, that need to get out.” Once the three officers were in front of the doors leading into the Speaker’s Lobby, Sergeant Lively told them to “hold there,” and after about ten seconds, 60 to 80 screaming and yelling “rioter(s) and protestors had filled that immediate hallway.” One of the rioters “punch(ed) the side- the glass on the door

¹¹ Although he heard the gunshot he did not see Lieutenant Byrd discharge his service pistol.

adjacent to the door” to Officer Yetter’s left. According to Sergeant Lively, they stayed there as long as they could, “the crowd just started surging towards us and I said we’re going to get trapped here.” Sergeant Lively and the other officers did not use force because “there was just so many of them there I just don’t think- I think they would have overpowered us.”

Sergeant Lively then observed the CERT officers coming up the stairs and saw an “escape route.” At that point Sergeant Lively was in the center of the door, Officer Yetter was to his right, and Officer Lanciano was to his left. Sergeant Lively pulled the officers close together and told them that the CERT officers were staged on the stairs. Sergeant Lively then grabbed the other officers to get them out, because “they were going to try and just blow through us. It was either- they were going to have to attack us.”

Once the officers passed the CERT officers as they were going down the stairs they heard a gunshot. The officers went back up the stairs and started assisting with crowd control while the CERT officers attended to Ms. McEntee. Officer Yetter described Ms. McEntee as passionate about what she was doing and screaming and yelling. Sergeant Lively recalls McEntee being at the front of the crowd at the doors to the Speaker’s Lobby. Ms. McEntee was the only woman in the front of the crowd, Officer Lanciano pushed her back at one point, but she returned back to the front of the crowd.

From the time they arrived at the east doors to the Speaker’s Lobby to the time they left the area, the three officers did not have contact with anyone on the other side of the doors of the Speaker’s Lobby.¹²

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USCP Containment Emergency Response Team (CERT)¹³

Officer Don Smith was the team leader of the CERT on January 6, 2021, and Officer Brandon Sikes, Officer Mike Brown and Officer Steven Robbs were assigned as members of the CERT. Officer Smith received a radio call for shots fired on the House floor. Once Officer Sikes and Officer Robbs arrived at the Capitol, they made contact with a lieutenant, and also heard a call came over the radio for shots fired. The CERT officers immediately headed up the east side stairs towards the Speaker’s Lobby, and three uniform USCP officers went past them in the opposite direction. When they got to the top of the stairs, they saw “a massive crowd of people who obviously aren’t supposed to be there,” and Officer Sikes observed “some individuals, protestors, hitting the glass.” The noise from the glass being broken was very loud. Officer Robbs described the area in front of the Speakers Lobby as “chaotic, it was ummm, felt very hostile.”

Officer Smith saw Mr. Jason Gandolph standing in the corner, and walked toward him to find out what was going on.¹⁴ As he was approaching Mr. Gandolph, Officer Smith saw a female protestor “jump up,” and then heard a loud noise that sounded like a gunshot, and saw a woman fall to the floor. Officer Sikes also heard a “noise and uh that’s when the individual, um I look over and she’s falling down and holding her chest.” Initially, Officer Sikes was not sure what had

¹² In fact, Sergeant Lively “tried to stay off the radio as much as possible cause I knew that everyone was you know, under attack and I just tried to-you know it just seemed that it was constantly going off.”

¹³ CERT members are responsible for higher level threats and tactical responses at the Capitol.

¹⁴ Officer Smith knew Mr. Gandolph worked with the House Sergeant at Arms office.

happened to Ms. McEntee, but quickly realized she had been shot. After Officer Robbs heard a “pop” and then saw Mr. Gandolph lay a woman on the floor. Officer Brown was last up the stairs, so by the time he reached the top, he just saw Ms. McEntee laying on the ground.

After the CERT officers heard the shot, Ofc Robbs then “saw several ummm plain clothes officers with their guns drawn, that they were actually in the Speaker’s Lobby. Their guns pointed back towards our direction and the direction of the protestors.” Officer Smith heard Officer Robbs yell “blue, blue, blue,” after determining that the shot was fired by a USCP officer. Officer Robbs then gave the officers in the Speaker’s Lobby “a thumbs up, trying to let them know there’s police out here.” Officer Sikes and Officer Robbs then started to render aid to Ms. McEntee.

Uniform USCP officers came and attempted to get the protestors under control while Officer Sikes and Officer Robbs applied a chest seal to Ms. McEntee. At some point CERT officers realized that the protestors were not moving, so Officer Robbs made the call to move Ms. McEntee out of there. The CERT officers were able to get her down the steps, clear of the crowd, and prevent anybody from following them down the stairs. Just inside the south door, a medic from FBI SWAT team started assisting with rendering aid to Ms. McEntee. Officer Sikes and Officer Robbs then escorted Ms. McEntee to the ambulance.

Officer Brown climbed through the broken glass door into the Speaker’s Lobby after he saw two other CERT officers inside the Speaker’s Lobby. According to Officer Brown. Lieutenant Byrd was “down and out and almost in tears” when he saw him inside the Speaker’s Lobby.

CERT officers did not see who fired the shot from inside the Speaker’s Lobby, and also did not communicate with any officers inside the Speaker’s Lobby prior to the shooting.

USCP Lieutenant Michael Byrd

Lieutenant Byrd has been employed by USCP for 27 years. He did not create any police reports or documents relating to the incident, and did not provide an official statement regarding the use of force.¹⁵ Lieutenant Byrd did agree to participate with his counsel, Mark Schamel, in a voluntary debrief and walk-through of the scene on January 29, 2021. According to Lieutenant Byrd, he was in charge of overseeing the USCP operations for the House Chamber on January 6, 2021.¹⁶ Part of his responsibility overseeing the operations was staffing USCP officers for the House Chamber. Due to COVID-19 and other issues, the normal staffing for a joint session was less than half of what Lieutenant Byrd usually has assigned to the House Chamber. Once he arrived that morning, he was informed that USCP operations had made the decision that the uniform officers needed to pick up riot gear.¹⁷

¹⁵ During the debrief of Lieutenant Byrd, he did recall writing a few sentences on an evidence bag the evening of January 6, 2021, at the request of a crime scene officer. To date, the bag has not been located by USCP or MPD.

¹⁶ When he arrived at work that day, he was also told that he would need to oversee the Senate Chamber operations as well since the person responsible did not come to work that day.

¹⁷ Lieutenant Byrd had participated in a walk through in the days leading up to January 6, 2021, which is standard practice in preparation for a joint session. However, there was no discussion about concerns regarding the rallies that were also scheduled to occur that day.

Later in the afternoon, Lieutenant Byrd starting hearing “chaos” on the radio channels, and had superiors calling him for officers to be sent to help stop rioters from breaching the Capitol. Lieutenant Byrd sent five to eight of the officers from the House Chamber to assist. Lieutenant Byrd was also tasked with updating the House Chamber about what was happening, and recalls addressing the members from a podium on the floor of the House Chamber two to three times.¹⁸ Lieutenant Byrd also recommended a lockdown of the House Chamber to the representatives from the House Sergeant at Arms. Lieutenant Byrd and several USCP uniform officers then started barricading the east side entry doors into the Speaker’s Lobby. While they were barricading the doors, a “mob of protestors” came to the doors, and calls went out over the radio that shots had been fired. Lieutenant Byrd drew his service weapon after the call for shots fired came over the radio, took a tactical position behind a wall in the Speaker’s Lobby, and started yelling at the mob of rioters to “get back!” Members of Congress started entering the Speaker’s Lobby to offer assistance, but Lieutenant Byrd told them multiple times to go back inside.¹⁹ At this point, Lieutenant Byrd knew that if the mob of rioters got into the Speaker’s Lobby, it “wasn’t going to go well,” and he knew that he and the other officers had to do everything they could to stop the rioters from entering the Speaker’s Lobby.

Lieutenant Byrd heard glass breaking and saw some of the items used to barricade the doors being pushed down. Lieutenant Byrd continued to tell the rioters to “get back, get back!” Lieutenant Byrd then saw a rioter with a backpack on start to climb through one of the broken glass doors. Lieutenant Byrd saw the rioter “as a threat,” so he stepped forward from his tactical position and fired one round at the rioter. The rioter fell back out of the opening and Lieutenant Byrd eventually stepped back into the seated area of the Speaker’s Lobby before confirming to other USCP officers that arrived on the scene that he was the one that fired his service weapon.²⁰

Without prejudice to exemption
all the Freedom of Information and Privacy Act

IV. USE OF FORCE/CRIMINAL HISTORY

1. Use of Force History

Lieutenant Michael Byrd has been an USCP officer since 1994. Prior to this incident Lieutenant Byrd had never been investigated by USAO-DC for any use of force incidents. Lieutenant Byrd had one prior use of force matter, that was originally sustained by USCP, but after Lt. Byrd appealed, he was found not guilty by the Disciplinary Review Board.

2. Criminal History

Ms. McEntee was convicted of reckless endangerment on August 6, 2016, in Calvert County, Maryland.

¹⁸ Lieutenant Byrd recalled making an announcement about the Capitol being breached, and telling the members where the gas masks were located.

¹⁹ Lieutenant Byrd did not remember the names of the members that tried to enter the Speaker’s Lobby to assist, but he recalled there being multiple different male members of Congress that made the attempt to enter at different times.

²⁰ Lieutenant Byrd did not find out that the rioter was a woman until sometime after the shooting.

V. RECOMMENDATION

This matter does not constitute a prosecutable violation of the federal criminal civil rights statutes or the District of Columbia homicide statutes. To show a violation of 18 U.S.C. § 242, the applicable federal criminal civil rights statute, the Government must prove beyond a reasonable doubt that an officer willfully used more force than was reasonably necessary under the circumstances. “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham v. Connor*, 490 U.S. 386, 396 (1989). In reviewing an officer’s use of force, allowance must be made for the fact that “police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” *Id.* at 396-97. Moreover, although the use of *deadly* force is not constitutionally reasonable to prevent the escape of *all* felony suspects, whatever the circumstances, if an officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. *Tennessee v. Gardner*, 471 U.S. 1, 11 (1985). Thus, if a suspect threatens an officer with a weapon or “there is probable cause to believe that [the suspect] 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.” *Id.*

Even assuming there is evidence of unreasonable force, the government must show that an officer acted willfully, that is with the specific intent to deprive the victim of a constitutional right. *Screws v. United States*, 325 U.S. 91 (1945). “Willfully” in a § 242 prosecution means that an act was done “voluntarily and intentionally, and with the specific intent to do something the law forbids; that is, with a bad purpose either to disobey or disregard the law.” *United States v. Garza*, 754 F.2d 1202, 1210 (5th Cir. 1985); *see also United States v. Johnstone*, 107 F.3d 200, 209-10 (3d Cir. 1997) (for § 242, “willfully” requires specific intent to do what the law forbids, which is to violate a specific protected right); *United States v. Reese*, 2 F.3d 870, 885 (9th Cir. 1993) (same). The mere intention to use force that is later found to be unreasonable is not enough; rather, an officer must have “*intended to use unreasonable force* – that is, [the officer] intended not only the force, but its unreasonableness” as well. *Reese*, 2 F.3d at 885. Mistake, fear, misperception, and even poor judgment, do not constitute willful conduct prosecutable under the federal statute.

In addition to prosecution pursuant to 18 U.S.C. § 242, an officer could be prosecuted pursuant to the District of Columbia homicide statutes. An officer acting under color of law who is alleged to have used excessive force while engaged in legitimate law enforcement duties does not lose his or her status as an officer – and thus the right to use a reasonable amount of force in the performance of those duties – when local charges are filed instead. Accordingly, when pursuing a local charge against a police officer who was acting under color of law, the Government must start with the fact that officers are allowed to use a reasonable amount of force in performance of their duties, and then prove that the force used was unreasonable. *See Rogala v. District of*

Columbia, 161 F.3d 44, 57 (D.C. Cir. 1998); *Kotsch v. District of Columbia*, 924 A.2d 1040, 1047 (D.C. 2007); accord Criminal Jury Instructions for the District of Columbia 4.114 (5th ed. 2013) (in Assault on a Police Officer instruction, “officer may use the amount of force that appears reasonably necessary to make or maintain the stop”).

Although not couched in “Fourth Amendment” terms, this is the same objective reasonableness inquiry that is undertaken pursuant to *Graham* and the courts have treated it as such. *Armbruster v. Frost*, 962 F. Supp. 2d 105, 117 (D.D.C. 2013) (noting standard for analyzing assault claim is “similar to the excessive force standard applied in the Section 1983 context,” and holding that defendant officer did not use excessive force under either the constitutional standards applicable to § 1983 action or under the District’s assault statute); *Rogala*, 161 F.3d at 57; see also *Smith v. District of Columbia*, 882 A.2d. 778, 790 (D.C. 2005) (relying on “reasonableness” principles articulated in *Graham* in a civil claim brought pursuant to D.C. statute alleging assault and battery by an officer acting under color of law); *District of Columbia v. Chinn*, 839 A.2d 701, 706 (D.C. 2003) (same). Moreover, the Government must also prove the elements of the crime charged.

To prove Second Degree Murder, the Government must prove beyond a reasonable doubt that the defendant caused the death of the decedent, intended to kill or seriously injure the decedent or “acted in conscious disregard of an extreme risk of death or serious bodily injury”, and did not injure the deceased in the heat of passion caused by adequate provocation. *Jones v. United States*, 828 A.2d 169, 180 (D.C. 2003). Moreover, where there is some evidence of mitigation or self-defense, the Government must also prove beyond a reasonable doubt that there were no mitigating circumstances and that the defendant did not act in self-defense. See D.C. Code § 22-2103 (2013); *Comber v. United States*, 584 A.2d 26, 41 (D.C. 1990); Criminal Jury Instruction for the District of Columbia 4.202B (5th ed. 2013) (hereinafter “Crim. Jury Instr.”).

Mitigating circumstances may exist in two situations. The first situation is where a person acts in the heat of passion, including anger and fear, that is caused by “adequate provocation.” See Crim. Jury Instr. 4.202B. Adequate provocation is “conduct on the part of another that would cause an ordinary, reasonable person in the heat of the moment to lose his/her self-control and act on impulse and without reflection.” *Id.* The defendant’s response must not be “entirely out of proportion” to the seriousness of the provocation; an act of violence or an immediate threat of violence may be adequate provocation, but mere words are not. *Id.* The second situation where a mitigating circumstance can exist is where a person actually believes both that he is in danger of serious bodily injury, and that the use of force is necessary to defend against that danger, but where one or both of those beliefs is not reasonable. *Id.* Voluntary Manslaughter, which is based on common law in the District of Columbia rather than statute, is a killing that would otherwise be

Second-degree Murder but for the existence of one or both of these mitigating circumstances. *Id.*; *Comber*, 584 A.2d at 35, 42.²¹

To prove Involuntary Manslaughter, the Government must prove that the defendant unlawfully caused the death of another person, notwithstanding the fact that the killing was accidental or unintentional, and that the killing was not justifiable or excusable. *Comber*, 584 A.2d at 47-48. There are generally two species of Involuntary Manslaughter: “Misdemeanor Involuntary Manslaughter” and “Criminal-Negligence Involuntary Manslaughter.” *Id.* at 48-49.

Misdemeanor Involuntary Manslaughter requires (1) that the defendant engaged in conduct constituting a misdemeanor offense bearing an inherent danger of physical injury, and (2) that the offense resulted in the death of another person. *See id.* at 50.

Criminal-Negligence Involuntary Manslaughter creates criminal liability in a person who “unintentionally causes the death of another as the result of non-criminal conduct . . . only where that conduct both creates ‘extreme danger to life or of serious bodily injury,’ and amounts to ‘a gross deviation from a reasonable standard of care.’” *Id.* at 49 (quoting *Faunteroy v. United States*, 413 A.2d 1294, 1298-99 (D.C. 1980)). In order to prove that a defendant “causes the death of another,” the Government must prove (1) that the defendant’s conduct was a substantial factor in the fatal injury, and (2) that death was a reasonably foreseeable consequence of the defendant’s conduct. *Fleming v. United States*, 148 A.3d 1175, 1180 (D.C. 2016); *see also Roy v. United States*, 871 A.2d 498, 507-08 (D.C. 2005).

For a defendant to invoke self-defense as justification for homicide, the defendant must show that there was an actual or apparent threat to the defendant, the threat was unlawful and immediate, the defendant honestly and reasonably believed that he was in imminent danger of death or serious bodily harm, and the defendant’s response was necessary to save himself from danger. *Rorie v. United States*, 882 A.2d 763, 771 (D.C. 2005); *accord* Criminal Jury Instructions for the District of Columbia 9.501B (2018). A defendant loses his claim to self-defense if the defendant was the aggressor or if he provoked the conflict upon himself. *Swann v. United States*, 648 A.2d 928, 930 (D.C. 1994).

In the present matter, there is insufficient evidence to refute Lieutenant Byrd’s description of the circumstances, corroborated by the civilian and officer witness statements, under which he fired his weapon at Ms. McEntee and caused her death. The government would have to prove not only that Lieutenant Byrd used force that was constitutionally unreasonable, but that he did so “willfully,” which the Supreme Court has interpreted to mean he acted with a bad purpose to disregard the law. As this requirement has been interpreted by the courts, evidence that an officer

²¹ First Degree Murder pursuant to D.C. Code § 22-2101, which requires premeditation and deliberation, does not apply to the facts of this case. *See Comber*, 584 A.2d at 35-36; Crim. Jury Instr. 4.201A.

acted out of fear, mistake, panic, misperception, negligence, or even poor judgment cannot establish the high level of intent required under Section 242.

Because Ms. McEntee was an active participant in a “mob” that had just illegally entered the Capitol building, and then broke out the glass doors and removed barricades to forcefully gain entry into the Speaker’s Lobby, there is insufficient evidence to refute Lieutenant Byrd’s fear for his life or the life of others at the time he discharged his weapon. Therefore, there is insufficient evidence to prove beyond a reasonable doubt that he willfully deprived Ms. McEntee of a right protected by the Constitution or laws of the United States.

Accordingly, I recommend declination of this matter.

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Withheld pursuant to exemption
Reference -- EOUS
all the Freedom of Information and Privacy Act