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MEMORANDUM

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DATE: May 2, 2016
TO: San Francisco Police Commission
FROM: San Francisco Police Officers' Association
RE: **San Francisco Police Officer's Associations' Evaluation of Proposed General Order 5.02, as revised on 3/21/2016**

The following is a discussion of the proposed General Order 5.02 submitted by the San Francisco Police Department on March 21, 2016. The Department's proposed language appears in black italic text and the comments of the San Francisco Police Officers' Association ("SFPOA") appear in blue text.

USE OF FIREARMS AND LETHAL FORCE

The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using communication and de-escalation principles before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unreasonable force. These are key factors in maintaining legitimacy with the community and safeguarding the public's trust.

The purpose of the policy is not to restrict officers from using reasonable force to protect themselves or others but to provide general guidelines that may assist the Department in achieving its highest priority.

This order establishes policies and reporting procedures regarding the use of firearms and lethal force. Officers' use of firearms and any other lethal force shall be in accordance with DGO 5.01, Use of Force, and this General Order.

SFPOA'S PROPOSED CHANGE:

1. The Department should acknowledge that its highest priority is to protect the people of San Francisco.

While the SFPOA believes that the Department should emphasize the importance of all human life in its use of force general orders, failing to acknowledge that the primary purpose of any police force is to help protect its citizens is a mistake. We believe that the SFPOA proposed mission statement¹ is preferable because it combines the two concepts and better captures the highest priority of the Department. Unfortunately, in our society, there are occasions in which a suspect fails to share this reverence for human life and threatens civilians and officers. When that happens, an officer's "highest duty" is to protect innocent people from the suspect. Were this not the case, an officer would never be justified in using lethal force. The Department's proposed mission statement appears to place the "sanctity" of a suspect threatening to kill an innocent civilian or officer on par with the "sanctity" of the civilian or officer being threatened, which is contrary to the remainder of the general order, which authorizes an officer to use lethal force to protect him or herself or others. This is only exacerbated by the eight separate references in the general orders to the "sanctity" of all human life – three times in DGO 5.01 and four times in 5.02.

2. Substitute the word "sanctity" for "reverence," or some other synonym for importance.

The term "sanctity" has a religious connotation inappropriate for a San Francisco general order. For example, the Wikipedia definition of the phrase "sanctity of human life," is as follows:

"The phrase sanctity of life refers to the idea that human life is sacred and holy and precious, argued mainly by the pro-life side in political and moral debates over such controversial issues as abortion, contraception, euthanasia, embryonic stem-cell research, and the "right to die."

Accordingly, the SFPOA suggests that the Department substitute the word "reverence," which is defined as "a deep respect for something," which is the term used by P.O.S.T. and by the SFPOA in its proposal.

3. Change the statement addressing what the Law Enforcement Code of Ethics "requires" to indicate only what it "states."

The Law Enforcement Code of Ethics represents ideals to be strived towards for officers. It does not represent requirements. Although our initial proposal also uses the word "requires" in this context, it would be more accurate to use the word "states," so as to avoid confusion.

¹ On April 6, 2016, the SFPOA submitted to the San Francisco Police Commission an alternative revision of San Francisco General Orders 5.01 and 5.02, which is attached.

I. **POLICY**

- A. **GENERAL.** *The Department is committed to the sanctity and preservation of all human life, human rights, and human dignity. It is the policy of this Department to use lethal force only when no other reasonable options are available to protect the safety of the public and the safety of police officers. Lethal force is any use of force designed to and likely to cause death or serious physical injury, including but not limited to the discharge of a firearm, the use of impact weapons under some circumstances (see DGO 5.01, Use of Force), and certain interventions to stop a subject's vehicle (see DGO 5.05, Response and Pursuit Driving).*

SFPOA'S PROPOSED CHANGE:

1. Change the word "sanctity" to "reverence" and consider moving non-repetitive language to the introduction, while eliminating any repetitive language.

The SFPOA has the same concern with use of term "sanctity" as discussed above. Moreover, the introduction is a better-suited section for addressing general principles, and in any event, there is no reason to repeat this general principle twice within the first page of the general order. A good general order is clear and concise. Unnecessary repetition creates confusion.

2. Eliminate any general discussion as to when lethal force can be used because the language used here conflicts with other language in this proposal, proposed DGO 5.01 and case law. At a minimum, the Department should change the word "available" to "appropriate."

The purpose of general orders is to provide officers with clear instructions concerning departmental requirements. Conflicting orders lead to confusion and should be avoided. Here, this general policy conflicts with other portions of the same proposed order, the Department's proposed DGO 5.01 and relevant case law. Specifically, this proposal states that lethal force should only be used when "no other reasonable options are available." The Department's proposed DGO 5.02 (B), proposed DGO 5.01, Ninth Circuit and Supreme Court case law, however, provide that an officer's use of force must be objectively reasonable based on the totality of circumstances known to the officer at the time. The availability of less intrusive alternatives is a *factor* to be considered in evaluating the totality of circumstances, but it is not the only factor that should be considered, as this proposal suggests. For example, if an officer is attacked by an individual with a knife in close quarters, it might be reasonable for an officer to use his or her baton (which is normally not appropriate for lethal situations), *but* it might also be reasonable for an officer to use his or her firearm. An officer should not be subjected to discipline merely because the officer used one of a number of reasonable options under the circumstances. This language is confusing, conflicts with proposed DGO 5.01 and relevant case law and should not be included in this

general order.

Alternatively, the Department should substitute the term “available” for “appropriate.” Force options other than the use of deadly force are always “available” to an officer, but they are often not appropriate. For example, if a bank robber is pointing a shotgun at an officer, an officer would have the use of his personal body weapons, and/or OC spray “available” but no one would suggest that it would be appropriate to use them in that circumstance. Under this language, an officer would never be justified in using deadly force because other force options are always “available,” even if inappropriate.

3. Change the definition of “lethal force” to comport with case law, P.O.S.T. and every other police department in California, and consider using the term “deadly” instead of “lethal.”

This proposed general order defines lethal force as “any use of force designed to *and* likely to cause death or serious physical injury.” Under at least one reasonable interpretation, this definition does not make sense, and is in conflict with all Ninth Circuit case law, P.O.S.T. and every other police department in California of which the SFPOA is aware. Furthermore, this definition could be read to exclude the use of every type of deadly force by officers, including firearms. Officers are not trained to use force with the “design” to kill anyone. They are trained to use force to stop a threat. If this policy addresses only those situations in which it was an officer’s “design” to kill, it would never be applicable. In addition, the application of this policy would be based on the subjective intent of the individual officer, which case law and this Department’s other general orders hold is not the appropriate measure. Rather, a use of force should be judged by whether the use of force was “objectively,” not subjectively, reasonable. The appropriate definition, which is used by P.O.S.T., the Ninth Circuit and every other police department of which the SFPOA is aware, is that deadly force is “force that is substantially likely to cause serious bodily injury or death.” The Department should adopt this definition.

In addition, the preferred term used by most agencies, the courts and P.O.S.T. is “deadly” as opposed to “lethal” force, although the terms are generally interchangeable.

- B. *ALTERNATIVES TO LETHAL FORCE.*** *When safe and feasible under the totality of circumstances known to the officer, officers shall consider other force options before discharging a firearm or using other lethal force. Further, officers are reminded to consider the principles outlined in DGO 5.01, I.A. Sanctity of Human Life, I.B. Establish Communications, I.C. De-escalation, I.D. Proportionality, and I.E. Duty to Intervene, to decisions about the use of lethal force.*

SFPOA’S PROPOSED CHANGE:

1. The requirement that officers consider the de-escalation tactics in 5.01 should

be eliminated from this proposal because they conflict.

Proposed 5.01 states that de-escalation tactics apply only where “a subject is not endangering the safety of the public or an officer, fleeing, or destroying evidence.” Presumably, any time an officer is considering using a firearm, the subject is “endangering the safety of the public.” Therefore, the provision above purports to require that officers consider a proposed DGO 5.01, which, as a practical matter, won’t apply to any situation where the use of a firearm would be considered.

C. SUBJECTS ARMED WITH WEAPONS OTHER THAN FIREARMS.

When encountering a subject who is armed with a weapon other than a firearm, such as an edged weapon, improvised weapon, baseball bat, brick, bottle, or other object, officers shall follow DGO 5.01, II.F. Subject Armed with a Weapon—Notification and Command. Where officers can safely mitigate the immediacy of threat, and there are no exigent circumstances, officers should isolate and contain the subject, call for additional resources and engage in appropriate de-escalation techniques without time constraints. It is far more important to take as much time as needed to resolve the incident in keeping with the Department's highest priority of safeguarding all human life. Except where circumstances make it reasonable for an officer to take action including the use of lethal force to protect human life or prevent serious bodily injury, immediately disarming the subject and taking the subject into custody is a lower priority than preserving the sanctity of human life. Officers who proceed accordingly and delay taking a subject into custody, while keeping the public and officers safe, will not be found to have neglected their duty. They will be found to have fulfilled it.

SFPOA’S PROPOSED CHANGE:

1. The Department should eliminate this entire paragraph because it jumbles unrelated terms, is incompressible and directly conflicts with proposed DGO 5.01.

The paragraph should be eliminated entirely. First, it implies that the notification provisions of DGO 5.01 only apply to suspects armed with a weapon other than a firearm. This directly conflicts with proposed DGO 5.01, which states that the notification provisions apply to any “weapons” without limitation, which would include a firearm. Moreover, although the SFPOA does not believe that the notification provisions of proposed DGO 5.01 are appropriate, it does not make any sense to have them limited to individuals without a firearm. If anything, the notification provisions would seem more appropriate if a suspect is armed with a firearm.

Next, the proposed paragraph states that “where officers can safely mitigate the immediacy of threat, and there are no *exigent circumstances*, officers should isolate and

contain the subject, call for additional resources and engage in appropriate de-escalation techniques without time constraints.” This mixes and matches different unrelated terms that have very specific meanings in law enforcement and make little sense when combined together. “Exigent circumstances,” for example, relates to specific circumstances in which an officer can search or enter without a warrant. Exigent circumstances is defined as “those circumstances that would cause a reasonable person to believe that entry [or search] ... was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” *United States v. Camou*, 773 F.3d 932, 940 (9th Cir. 2014). The concept of “exigent circumstances” has never been applied to the use of force.

Moreover, the portion of the proposed paragraph that relates to de-escalation unnecessarily repeats the de-escalation requirements of proposed DGO 5.01, but uses different wording. This is unnecessary and dangerous. If the Department is attempting to describe a different de-escalation policy than what’s contained in proposed DGO 5.01, officers will be confused because both appear to apply to the same situations – individuals who are not a direct threat, who are not attempting to escape or destroy evidence. If the Department is attempting to describe the same de-escalation policy as proposed in DGO 5.01, then it should employ the same wording. Using different wording in two related general orders to provide guidance for officers, guarantees confusion that can easily be avoided by ensuring that the language used is identical.

Finally, the last provisions of the proposed paragraph – “except where circumstances make it reasonable for an officer to take action including the use of lethal force to protect human life or prevent serious bodily injury, immediately disarming the subject and taking the subject into custody is a lower priority than preserving the sanctity of human life” – is the most problematic. If this language is suggesting that officers who use of force should be evaluated based on whether their actions were “reasonable” after the fact, using 20/20 hindsight, this would be in conflict with proposed DGO 5.01, P.O.S.T., applicable law, all officer use-of-force training, common sense and basic fairness. If the Department is not suggesting that officers should be evaluated using 20/20 hindsight, and instead evaluated on what would have been objectively reasonable based on the totality of the circumstances known to the officer at the time, then this paragraph adds nothing that isn’t found in proposed DGO 5.01.

The bottom line is that there is no reason for the Department to include the proposed paragraph. It either fails to add anything new, or is in conflict with other general orders.

D. HANDLING, DRAWING AND POINTING FIREARMS.

- 1. HANDLING FIREARMS.** *An officer shall handle and manipulate a firearm in accordance with Department-approved firearms training. An officer shall not manually cock the hammer of the Department-*

issued handgun to defeat the first shot double-action feature.

2. ***AUTHORIZED USES*** *An officer may draw, exhibit or point a firearm in the line of duty when the officer has reasonable cause to believe it may be necessary for the safety of others or for his or her own safety. When an officer determines that the threat is over, the officer shall holster his or her firearm or shoulder the weapon in the port arms position pointed or slung in a manner consistent with Department-approved firearms training. If an officer points a firearm at a person, the primary officer shall, if feasible, advise the subject the reason why the officer(s) pointed the firearm.*

SFPOA'S PROPOSED CHANGE:

1. The requirement to advise suspects of the reason a firearm was pointed at them should only occur *after* the incident has been resolved.

Requiring an officer to advise a suspect why a firearm is being pointed at the suspect, while the weapon is being pointed at the suspect is dangerous and suggests a misunderstanding of the reason for pointing a firearm at a suspect. If a situation is sufficiently dangerous that an officer believes it is necessary to point a gun at a suspect, it will *never* be appropriate for the officer to engage the suspect in conversation about the reason for the gun pointing while the gun is still being pointed. The officer will have much more urgent matters to attend to, such as making the very difficult and often split-second decision as to whether to fire the weapon. The SFPOA cannot envision a scenario where it would be appropriate for an officer pointing a weapon at a suspect to – at that moment – explain why he or she is pointing the weapon. If an officer sees a bank robber exit a bank with a shotgun and a bag of money, should the officer shout “I am pointing my gun at you because I think you might try to kill me or someone else”? If an officer is making a high-risk felony stop and the suspect makes a sudden move for an open glove-box, should the officer be required to say “I am now pointing my gun at you because you appear to be reaching for a weapon to try and kill me or my fellow officers”?

3. ***DRAWING OTHERWISE PROHIBITED.*** *Except for maintenance, safekeeping, inspection by a superior officer, Department-approved training, or as otherwise authorized by this order, an officer shall not draw a Department-issued firearm.*
4. ***REPORTING.*** *When an officer intentionally points any firearm at a person, it shall be considered a reportable use of force. Such use of force must be reasonable under the objective facts and circumstances.*

SFPOA'S PROPOSED CHANGE: None.

D. DISCHARGE OF FIREARMS OR OTHER USE OF LETHAL FORCE.

1. PERMISSIBLE CIRCUMSTANCES. *Except as limited by Sections D.4 and D.5., an officer may discharge a firearm or use other lethal force in any of the following circumstances:*

- a. In self-defense when the officer has reasonable cause to believe that he or she is in imminent danger of death or serious bodily injury; or*
- b. In defense of another person when the officer has reasonable cause to believe that the person is in imminent danger of death or serious bodily injury. However, an officer may not discharge a firearm at, or use lethal force against, a person who presents a danger only to him or herself, and there is no reasonable cause to believe that the person poses an imminent danger of death or serious bodily injury to the officer or any other person; or*
- c. To apprehend a person when both of the following circumstances exist:
 - i. The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of lethal force; AND*
 - ii. The officer has reasonable cause to believe that a substantial risk exists that the person will cause death or serious bodily injury to officers or others if the person's apprehension is delayed; or**
- d. To kill an animal posing an imminent threat. To kill an animal that is so badly injured that humanity requires its removal from further suffering where other alternatives are impractical and the owner, if present, gives permission; or*
- e. To signal for help for an urgent purpose when no other reasonable means can be used.*

The above circumstances (D.1 a-e) apply to each and every discharge of a firearm or application of lethal force. Officers should constantly reassess the situation, as feasible, to determine whether the subject continues to pose an active threat.

SFPOA'S PROPOSED CHANGE:

1. Officers should not be required to reassess the danger before each individual shot is fired. In deadly force encounters officers shoot AND reassess simultaneously.

If this proposed policy is meant to require officers to reassess after each individual shot, this would be contrary to all officer training, P.O.S.T., Supreme Court precedent, inconsistent with every other police department in the country and exceedingly dangerous for officers and civilians. When officers are engaged in a potentially deadly situation, where the use of a firearm is appropriate, they are trained to shoot until the threat is stopped. Sometimes, depending on the situation, an officer may be able to fire one shot and reassess the situation. Often, however, that is impossible. Including such a requirement will get officers killed. For example, suppose a suspect who just robbed a bank emerges from the bank with a shotgun and aims it at an officer. If after a shot is fired, the officer is required to determine if the suspect has been incapacitated before firing again, the officer will likely be killed. While this proposal states that the officer should only reassess when feasible, the Department should make it clear that it is not requiring that an officer reassess between every shot unless it is safe and appropriate to do so.

2. **VERBAL WARNING.** *If feasible, and if doing so would not increase the danger to the officer or others, an officer shall give a verbal warning to submit to the authority of the officer before discharging a firearm or using other lethal force.*
3. **REASONABLE CARE FOR THE PUBLIC.** *To the extent feasible, an officer shall take reasonable care when discharging his or her firearm so as not to jeopardize the safety of the public or officers.*
4. **PROHIBITED CIRCUMSTANCE.** *Officers shall not discharge their firearm:*
 - a. *As a warning; or*
 - b. *At a person who presents a danger only to him or herself.*

SFPOA'S PROPOSED CHANGE: None.

5. **MOVING VEHICLES.** An officer shall not discharge a firearm at the operator or occupant of a moving vehicle unless the operator or occupant poses an imminent threat of death or serious bodily injury to the public or an officer by means other than the vehicle. Officers shall not discharge a firearm from his or her moving vehicle.

SFPOA'S PROPOSED CHANGE:

1. The blanket prohibition against officers shooting at occupants of vehicles who are using their vehicles as weapons should be removed.

It is beyond dispute that individuals can and do use their vehicle as a deadly weapon. It is also beyond dispute that officers can and have successfully saved lives by shooting at the operator of the vehicle to prevent them from killing officers or others.

In the past, there has been a concern that officers were unnecessarily shooting at drivers when the officer could have instead gotten out of the way. The previous general order, which was revised in 2011, directly addressed that concern, providing that officers could only shoot at the driver if there was an imminent threat of serious bodily injury or death *and* the officer had no reasonable or apparent means of retreat. The Proposed Order eliminates that language, and thus prevents an officer from shooting at the driver of a vehicle, even if there is no means of retreat, and where the officer or a bystander will likely be killed if the officer cannot shoot. In addition, this categorical ban prevents an officer from shooting at a driver of a vehicle to prevent their escape, even where there is a substantial risk that the driver will cause death or serious injury to others if allowed to escape.

Three examples illustrate the dangers of the proposed provision: First, if an individual were driving around San Francisco in an SUV, and running over pedestrians for fun, this policy would prevent an officer from shooting the driver to prevent that driver from killing a family of four in a cross-walk, even if the officer had a clear shot and there was little risk of injury to anyone else. Under the proposed policy, the officer would be required to hold his or her fire and watch the driver run over the family. This is not an abstract hypothetical. On August 30, 2006, Omeed Aziz Popal, struck 18 pedestrians, killing one in San Francisco with his Honda Pilot SUV.

Second, under the proposed policy, if a suspect driving their vehicle straight at an officer, who has no means of escape or retreat, the officer would have to choose between his or her life or violating the policy. Officers risking their lives for the citizens of San Francisco should never be forced to make that choice when it can be avoided by a carefully drafted, restrictive policy, such as the one that currently exists.

Third, under the proposed policy, if a terrorist was escaping after killing numerous civilians, an officer would be justified in using deadly force to stop the terrorist, but only as long as the terrorist was fleeing on foot. Once the terrorist got into a car, the officer would be precluded from stopping the terrorist, even if the car was barely moving at the time the officer had a clear shot. This proposal turns a vehicle into a safety zone for violent felons to escape.

The United States Supreme Court and the Ninth Circuit have repeatedly found that it can be reasonable for an officer to shoot at a suspect who is using their vehicle itself as a weapon. The dangers of an overly permissive policy can be, and have been, addressed by the Department's current policy. There have been no incidents of the current policy failing to

achieve the goal of protecting civilians and officers alike to warrant any re-evaluation of the existing policy. Other cities, such as Oakland, Portland, New Orleans, and Milwaukee, which have been held up as examples for San Francisco, have policies very similar to San Francisco's current policy, which allows for a narrow exception to the prohibition against officers shooting at drivers who are using their vehicle itself as a weapon.

One may wish that threats caused by moving vehicles will cease. But in the real world confronting police officers, there will be cases involving violent suspects seeking to harm innocent people using their vehicles. The only question remaining is if the Department and Police Commission will trust officers to make reasonable choices in dangerous, rapidly-evolving situations. This proposed policy change precludes that.

2. The Department's proposed blanket prohibition against shooting from a moving vehicle should be removed.

Similar to the blanket prohibition on officers shooting at suspects using their vehicle as a weapon, the Department should allow some latitude for situations in which it might be appropriate for an officer to fire from a moving vehicle. For example, if the officer's vehicle is moving slowly to a stop, but has not quite stopped, it would seem inappropriate to require the passenger officer who is being fired at by suspects to hold his or her fire until the vehicle has come to a complete halt, assuming that the officer can fire without unnecessarily endangering other people. An appropriate policy can craft very restrictive language that would allow for an officer to fire in that circumstance.

6. REPORTING.

- (a) **DISCHARGE OF FIREARMS.** Except for firearm discharges at an approved range or during lawful recreational activity, an officer who discharges a firearm, either on or off duty, shall report the discharge as required under DGO 8.11, Investigation of Officer Involved Shootings and Discharges. This includes an intentional or unintentional discharge, either within or outside the City and County of San Francisco.
- (b) **OTHER LETHAL FORCE.** An officer who applies other force that results in death shall report the force to the officer's supervisor, and it shall be investigated as required under DGO 8.12, In Custody Deaths. An officer who applies other lethal force that results in serious bodily injury shall report the force to the officer's supervisor. The supervisor shall, regardless whether possible misconduct occurred, immediately report the force to their superior officer and their commanding officer, who shall determine which unit shall be

responsible for further investigation. An officer who applies other lethal force that does not result in serious bodily injury shall report the force as provided in DGO 5.01.1, Reporting and Evaluating Use of Force.

SFPOA'S PROPOSED CHANGE: None.

II. EXCEPTIONAL CIRCUMSTANCES. If exceptional circumstances occur, an officer's use of force shall be reasonably necessary to protect others or him/herself. The officer shall articulate the reasons for employing such use of force.

SFPOA'S PROPOSED CHANGE:

1. The SFPOA proposes changing this language to give more guidance to officers.

As drafted, this language does not make sense. It states that “if exceptional circumstances occur, an officer’s use of force *shall* be reasonably necessary to protect others.” But, this is not correct. It is not “exceptional circumstances” that make it reasonably necessary for an officer to protect themselves; it is a suspect’s violent behavior. And, the existence of “exceptional circumstances” does not necessarily make an officer’s use of force reasonable, which is what is stated by the use of the term “shall.” It could be that exceptional circumstances existed, but the officer’s use of force was still unreasonable. What this language appears to be trying to express is that if there are circumstances in which an officer deviates from these orders to protect others or him or herself, the Department will carefully consider those circumstances so long as the officer can articulate why the actions taken were necessary and appropriate. The SFPOA suggests the following alternative language in order to better achieve this goal:

“It is understood that this policy in regards to discharging a weapon at or from a moving vehicle may not cover every situation that may arise. Department members are expected to act with intelligence and exercise sound judgment, attending to the spirit of this policy and to the Department’s use-of-force principles. Any deviation from the provisions of this policy shall be examined rigorously on a case-by-case basis. The involved officers must be able to articulate clearly the reason for any deviation from this policy.”