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20-16

## **No charges approved following IIO investigation into the death of Myles Gray**

**Victoria** – The BC Prosecution Service (BCPS) announced today that no charges have been approved against the Vancouver Police Department (VPD) officers involved in the arrest of Myles Gray on August 13, 2015 in Burnaby BC. During the incident Mr. Gray suffered extensive injuries. While he was being restrained by the VPD officers he went into cardiac arrest and died. The forensic pathologist who conducted the autopsy could not determine the specific cause of death.

The incident was investigated by the Independent Investigations Office (IIO). Following the investigation, the Chief Civilian Director of the IIO determined that there were reasonable grounds to believe the officers may have committed offences and submitted a report to the BCPS (IIO file 2015-116).

In this case, the BCPS has concluded that the available evidence does not meet the BCPS's charge assessment standard. The only witnesses to the physical altercation and restraint of Mr. Gray by the police were the attending members of the VPD. Based on the evidence available, the BCPS is not able to prove, beyond a reasonable doubt, that the officers committed any offence in relation to the incident. As a result, no charges have been approved. A [Clear Statement](#) explaining the decision in more detail is attached to this Media Statement.

In order to maintain confidence in the integrity of the criminal justice system, a Clear Statement explaining the reasons for not approving charges is made public by the BCPS in cases where the IIO has investigated the conduct of police officers and forwarded a report for charge assessment.

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## Clear Statement

### Summary

On the afternoon of August 13, 2015 Mr. Gray was walking in the area of South East Marine Drive in Burnaby. During an encounter with a local resident, Mr. Gray took her garden hose and sprayed her with water. Her son, who observed the incident, called 911 out of concern for the conduct. Witnesses, including the resident and her son, described Mr. Gray as agitated and disturbed with incoherent speech. A VPD member who responded to the 911 call and had dealings with Mr. Gray, also observed that he became agitated, causing the officer to call for back up. Mr. Gray then climbed the stairs into the raised yard of a residence, the view of which to anyone outside the yard was obscured by trees.

Immediately thereafter, at 15:18 hours, two other VPD officers arrived, and the three officers climbed the stairs to the yard. During the following nine minutes, four other officers arrived and entered the yard, where efforts were made to arrest Mr. Gray. The only eyewitnesses are the seven VPD members who were involved in the arrest. There are no civilian witnesses or video.

At 15:28 hours, Mr. Gray was unconscious, restrained with hand and leg restraints, and suffering obvious injuries. Shortly before 15:41 hours, he went into cardiac arrest. At 16:21 hours Mr. Gray was declared deceased.

A post-mortem examination could not determine a discrete cause of death. It revealed extensive injuries to Mr. Gray, likely suffered during his arrest. These included bruising to the body and extremities, bruising and lacerations to his face, an orbital bone fracture, nose fracture, possible partial dislocated jaw, a minor brain bleed, throat cartilage fracture, rib fracture, and bilateral testicular hemorrhage. None of these injuries would have been fatal in itself.

Toxicology evidence revealed that Mr. Gray had ingested Mitragynine (a drug commonly known as Kratom) before his death. The forensic pathologist who conducted the post-mortem examination and other experts could not exclude the possibility that Mr. Gray's death was caused solely by factors unrelated to the use of force by police, specifically, by the ingestion of the Mitragynine or by the condition known as "excited delirium".

Because of the seriousness of Mr. Gray's injuries, the IIO investigated the actions of the police officers. At the conclusion of the investigation, the IIO submitted a Report to Crown Counsel to the BCPS. Following a thorough review, the BCPS has concluded that the available evidence does not support approving any charges against any police officers. As a result, no charges have been approved.

This Clear Statement provides a summary of the evidence gathered during the IIO investigation and the applicable legal principles. These are provided to assist in understanding the BCPS's decision not to approve charges against the officers involved in the incident. Not all the relevant evidence, facts, case law, or legal principles are discussed.

The charge assessment was conducted by Crown Counsel with no prior or current connection to the officers who were the subjects of the investigation.

## **Timeframe for investigation and assessment**

The IIO first submitted this file for charge assessment on March 1, 2019. Two experienced Crown Counsel were assigned. They completed an initial review of the Report to Crown Counsel ("RCC") and met with the IIO to request further information on October 28, 2019. Thereafter, ongoing review and discussions with the IIO led to further materials being provided on November 23, 2019, and February 3 and 13, April 16, and June 17, 2020.

The IIO faced several challenges affecting the pace of its investigation. A key police witness refused to participate in a follow up interview, making it necessary for the IIO to apply to BC Supreme Court. In addition, there was an unavoidable delay in obtaining a peer review of the forensic pathologist's post-mortem report.

## **Charge Assessment and the Criminal Standard of Proof**

The standard of proof in a criminal case requires that each essential element of the offence be proven beyond reasonable doubt.

The charge assessment guidelines that are applied by the BCPS in reviewing all RCCs are established in policy and are available at:

[www.gov.bc.ca/charge-assessment-guidelines](http://www.gov.bc.ca/charge-assessment-guidelines)

BCPS guidelines for assessing allegations against Peace Officers are also established in policy and are available at:

[www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/pol-1.pdf](http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/pol-1.pdf)

In most cases, the BCPS applies a two-part test to determine whether criminal charges will be approved, and a prosecution initiated. Crown Counsel must independently, objectively and fairly measure all available evidence against a two part test:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether the public interest requires a prosecution.

Under BCPS policy, a substantial likelihood of conviction exists when Crown Counsel is satisfied there is a strong, solid case of substance to present to the court. To reach this conclusion, a prosecutor will consider whether the evidence gathered by the investigating agency is likely to be admissible in court; the objective reliability of the admissible evidence; and the likelihood that viable, not speculative, defences will succeed.

In exceptional circumstances, BCPS policy permits a charge approval even though the usual evidentiary test is not met. These circumstances arise where public interest factors weigh so heavily in favour of a prosecution that it is necessary to resort to a lower charge assessment standard in order to maintain public confidence in the administration of criminal justice. Under such

circumstances, the minimum evidentiary standard, which continues to apply throughout the prosecution, is whether there is a reasonable prospect of conviction.

The public interest factors weighing in favour of prosecution in this case are:

- the seriousness of the allegations
- the likelihood of significant sentence upon conviction as would inevitably follow conviction for any of these offences
- the gravest possible harm to the victim who died in the course of his interaction with VPD officers
- the fact that serious and/or fatal assaults by police officers fundamentally affect the integrity, safety, or security of the justice system and its participants
- the fact that police officers must be accountable for their uses of force in order to preserve public confidence in the administration of justice

The “reasonable prospect of conviction” threshold is lower than the “substantial likelihood of conviction” threshold. It requires more than just “some evidence” on each essential element of an alleged offence but it does not require that a conviction be more likely than an acquittal. Based on the factors outlined above, the lower charge assessment standard of “reasonable prospect of conviction” was resorted to in this case.

### **Potential Charges**

The IIO referred this file to the BCPS for charge assessment after the IIO concluded that officers involved in the arrest may have committed the following offences of the *Criminal Code*:

- manslaughter, contrary to section 236
- aggravated assault, contrary to section 268
- assault causing bodily harm, contrary to section 267(b)

### **Relevant Law**

To prove any assault, the Crown must establish the accused intentionally applies, threatens, or attempts to apply force, with or without a weapon, to another person without that person’s consent.

To make out aggravated assault, the force used must wound, maim, disfigure or endanger the life of the victim, and the risk of that result must have been reasonably foreseeable.

A person who intends to cause death or intends to cause bodily harm that the person knows is likely to cause death, and is reckless whether death ensues or not, is guilty of murder. A person who causes death by an unlawful act, such as assault, without the intent for murder is guilty of

manslaughter if it was reasonably foreseeable that the unlawful act may cause bodily harm that is not trifling or transitory.

Any person who causes death by showing wanton or reckless disregard for the lives or safety of others while doing anything or omitting to do anything which it is their duty to do, commits manslaughter by criminal negligence.

An act or omission will have caused death where it is at least a contributing cause of death, outside the de minimis range. It is not necessary to prove that the accused's acts were the sole, or dominant cause of death provided there was a significant contribution to that result.

### **Legal Justification**

Section 25(1) of the *Criminal Code* provides that a peace officer who acts, in the course of their lawful duties, on "reasonable grounds" is "justified in doing what [they are] required or authorized to do and in using as much force as necessary for that purpose." This defence is limited by Section 25(3) which provides that an officer will only be justified in using force likely or intended to cause grievous bodily harm or death where they subjectively and reasonably believed that it was necessary to protect themselves or another from grievous bodily harm or death.

Section 26 of the *Criminal Code* provides that an officer "who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess."

The Crown bears the onus of proving beyond reasonable doubt that the justification provisions are not applicable.

In assessing whether a particular amount of force used by an officer was necessary within the meaning of the *Criminal Code*, the trier of fact must have regard to the circumstances as they existed at the time the force was used, recognizing that an officer cannot be expected to measure the force used with precision.

The reasonableness of the peace officer's belief must be assessed on an objective standard but one that also "takes into account the particular circumstances and human frailties of the accused". In applying the standard, "a certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances."

Notwithstanding the deference afforded to police officers in the exercise of force in exigent circumstances, the law still requires that the use of force not be excessive. Case law interpreting these sections recognizes that police officers may need to resort to force in order to execute their duties but also that courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences. The degree of force that a police officer may use is constrained by the principles of proportionality, necessity, and reasonableness.

## Outline of Evidence

In August 2015, Mr. Gray was 33 years old and ran a business on the Sunshine Coast. On August 13th, he travelled to Burnaby to make a delivery to a customer. Shortly before 15:41 that day he went into cardiac arrest and at 16:21 was pronounced dead by paramedics. This followed an encounter with seven officers of the Vancouver Police Department (VPD) which took place in the raised, wooded yard of a property in Burnaby ("the yard").

Police became involved when a resident of South East Marine Drive, Burnaby, called 911 to report that Mr. Gray had taken a garden hose from the witness's mother, and directed it at her, spraying her with water. The mother described Mr. Gray as speaking "gibberish".

Having called 911, the witness then followed Mr. Gray for some 30 minutes before police arrived. He reported that, over this period, Mr. Gray walked back and forth on the street, yelling "random stuff" and had threatened to hit the witness. The witness thought Mr. Gray was "high or intoxicated...he didn't look like he was doing well".

Mr. Gray was also seen by the witness's neighbour. She was concerned for Mr. Gray's well being and thought he could be taken to hospital. Mr. Gray had removed the shirt and boots he had been wearing earlier when he was seen walking away from his delivery van with earphones in his ears, having left his keys and backpack in the van.

The first officer on scene, who was driving a police wagon alone, arrived at 15:12, approximately 33 minutes after the witness called 911. This officer's account was that Mr. Gray was initially cooperative and interacted coherently with her but became agitated when she mentioned the incident with the hose.

He approached her pointing at her police badge from very close range, so she got back into her police van. Mr. Gray attempted to pull down the partially open driver's side window and open the door of the van, but the officer told him to "back off" which he did. The officer said that Mr. Gray then ascended steps to the raised yard of a residence and shouted "Welcome to the jungle" flexing his arms. The officer believed that Mr. Gray was acting as if he was either intoxicated or under the influence of drugs.

Two other officers arrived at the Joffre Avenue address at approximately 15:18. The first officer told them that Mr. Gray was very aggressive. At 15:18:45, all three walked up the stairs and into the yard.

Subsequent police radio broadcasts indicate that Mr. Gray was handcuffed and unconscious at approximately 15:27 hours. Two officers arrived at approximately 15:24 and two others at approximately 15:26. At some time prior to being handcuffed, Mr. Gray had been taken to the ground and a "hobble" or strap tying Mr. Gray's ankles together, had been applied. Shortly after that time, Mr. Gray regained consciousness and began struggling. He was restrained again up to the time when he entered cardiac arrest and fell into unconsciousness shortly before 15:41. Attempts to resuscitate Mr. Gray did not succeed and he was pronounced dead at 16:21.

A post-mortem examination report disclosed numerous injuries to Mr. Gray but could establish no definitive cause of death. The forensic pathologist documented the following injuries to Mr. Gray:

- numerous areas of bruising, most dense over the left thigh and the right arm, and with many bruises showing injuries consistent with having been caused by a rigid object, possibly a police baton
- bruises and lacerations to the face
- fracture of the right orbit
- fracturing of the right nasal bone
- possible partial dislocation of the joints of the jaw on both sides
- very localized bleeding within the subdural space over the brain
- bruising within the muscles of the neck
- focally fractured laryngeal skeleton with adjacent hemorrhage
- fracturing of the inner rear part of the right third rib with adjacent hemorrhage
- hemorrhage within both testes
- fracture to the upper sternum (possibly a resuscitation related injury)

Some of the officers involved in the arrest sustained minor injuries. Medical records note that one officer had been punched in the left side of his face and had a small cut under his chin. Another officer was noted to have a 5 cm laceration to his forehead, apparently caused by a low hanging tree branch.

### **Specific Uses of Force Against Mr. Gray**

Radio transmissions from the police and GPS data from police vehicles provide some objective evidence of the timeline of events between 15:18 and 15:28, when additional officers arrived on scene. The eyewitness accounts of the seven VPD officers present prior to 15:28, provide incomplete and, in several respects, inconsistent accounts of the detail and sequence of events in this critical ten minutes.

While all officers describe Mr. Gray as resisting and offering a threat to the officers present, accounts of what he and the officers actually did at each stage of the encounter vary considerably. With limited exceptions, the officers present have spoken only to their own use of force, without describing the actions of others. In many respects, the contradictions between officers' accounts in key areas are incapable of resolution such that it is difficult to determine a coherent narrative of events between 15:18 and 15:28 with any reasonable degree of confidence.

Despite the inconsistencies, it appears relatively clear from police reports and witness statements that, during this period, Mr. Gray broke free from attempts to handcuff him and, after an altercation, was taken to the ground by a "bear hug" where he was restrained and hobbled prior to being handcuffed.

It is also clear from the various reports and statements that Mr. Gray was subjected to several instances of the use of force by one or another VPD member during the ten minute period. These include the use of pepper spray; repeated baton strikes to the legs and lower body; neck and head restraint; foot, knee, and closed fist strikes to the back, and upper body; and closed fist strikes to the head and face. Officers' accounts as to the degree of resistance and threat Mr. Gray offered in this period are inconsistent, although all say that he was resisting and was not compliant with handcuffing.

## Forensic Evidence

### Pathology

The forensic pathologist who examined Mr. Gray indicated that none of the injuries would have been fatal in themselves. This doctor was unable to identify a discrete cause of death. He was able to say only that it "appeared probable" that Mr. Gray's death was "multifactorial," with the following factors thought possibly to have been contributory:

- the toxic effects of the Mitragynine found in the deceased blood (a drug commonly known as Kratom)
- a pre-existing slightly enlarged heart condition
- asphyxia and/or compromised cardiorespiratory function due to forcible restraint and/or the position of the deceased's body, possibly involving the compression of the chest and/or abdomen
- external pressure on the neck structures as evidenced by the soft tissue hemorrhage and the fractured laryngeal skeleton
- other injuries sustained
- agitation, in keeping with instances of "excited delirium"
- physical exertion
- anxiety
- possibly pain
- the effects of OC spray (commonly known as pepper spray), primarily on respiratory function

With respect to Mitragynine, the pathologist noted that case reports exist suggesting that this drug can cause death, but that expert toxicological opinion would be required in this respect. The pathologist also identified "excited delirium" as a factor that could potentially cause death independently of the use of force. Further expert opinion was sought in respect of both these issues. Those follow-up expert



opinions could not exclude either the ingestion of Mitragynine or "excited delirium" as potential causes of death, independent of Mr. Gray's interaction with the police.

Although the pathologist did not review the detailed statements of all officers he was aware that "multiple force options" had been used on Mr. Gray, including baton strikes and pepper spray and understood that, at some point, Mr. Gray had been rendered unconscious by "application of a 'lateral vascular neck hold.'"

### **Expert Review Panel**

The autopsy performed by the pathologist was reviewed by a panel of expert pathologists comprised of the chief medical examiners of Alberta, Nova Scotia, and the chief pathologist of Ontario. The panel concluded that the pathologist had conducted a high-quality autopsy and agreed with his findings and conclusions regarding the cause of death. The panel noted that the absence of reliable information about the physical altercation had complicated the ability of the panel to establish a conclusive medical cause of death.

### **Use of Force Expert**

A qualified expert in the use of force by police was retained by the IIO. He provided evidence in relation to relevant modes of use of force, the force used against Mr. Gray, including their rationale, relevant standards and training, and their likely impact. He commented specifically on the use of: baton strikes, including multiple strikes; pepper spray; vascular neck restraints (VNR); closed fist strikes, including to the head; the correct use of a leg restraint or "hobble"; and police training and standards in respect of the use of strikes on a hobbled subject.

His general opinion was that all such uses of force could be consistent with police training and standards, where justified by a sufficient degree of threat and resistance from an individual.

## **ANALYSIS**

### **Manslaughter**

To meet the legal test for manslaughter, the Crown must prove beyond a reasonable doubt that the accused's act or omission made a significant or more than minimal contribution to the death of the victim. The pathologist concluded that none of the physical injuries which Mr. Gray suffered can be identified as being directly responsible for his death. He was unable to identify a discrete cause of death but observed that it appeared probable that the cause was "multi-factorial" with nine factors which he thought possibly to be contributory. These included two factors, excited delirium and Mitragynine toxicity, which he was unable to exclude as potential causes of death and which are entirely independent of Mr. Gray's interaction with police. Further expert opinion has not provided any further certainty. As noted, the pathologist's conclusion was endorsed by the panel of expert pathologists.

Given these opinions, there is no reasonable prospect that the Crown could prove beyond a reasonable doubt that the VPD officers' use of force caused Mr. Gray's death. Any potential charge

of manslaughter by gross negligence based upon the way Mr. Gray was restrained suffers from the same lack of evidence to prove causation. Without proof of causation there is no reasonable prospect of a conviction for any form of manslaughter

## **Assault**

While there is no doubt Mr. Gray suffered very serious harm, this does not automatically lead to the conclusion that the force used against him was unlawful. It is clear that Mr. Gray was arrestable on the basis of his interactions with the witnesses, spraying the first and threatening to assault the second. There is no basis for the Crown to allege that the police were not acting in the course of their lawful duties when they dealt with Mr. Gray. The issue is whether the force used was excessive.

In reviewing the evidence as to the lawfulness of force used, it is important to emphasize that neither the law, nor police standards or training, deem any particular manner or mode of applying force to be excessive or unlawful. All depends upon the circumstances in which the force was used and, specifically: the threat which the officer concerned subjectively perceived that he faced; the reasonableness of that perception and, the objective reasonableness of the force the officer used in response.

The Crown therefore bears the burden of proving, beyond a reasonable doubt, either that the officer(s) concerned did not subjectively perceive the threat that they claimed, that the perception was not reasonable or that, given that perception, the force they used was excessive.

Moreover, the law does not require that an officer use the minimum possible force necessary in order to qualify for the protection afforded by the legal justification provisions of the Criminal Code, only that the force used was within a reasonable range of force options. The law does not require an officer to judge necessary force with exactitude. Given the dynamic and confused nature of the situation, considerable latitude is likely to be given officers exercising judgment as to whether the force used was objectively excessive.

The accounts given by the officers must also be viewed in the context of independent evidence to the effect that:

- Mr. Gray was an observably very muscular and strong individual who, in the words of the pathologist, would be able to "put up a significant fight";
- prior to his interaction with police, Mr. Gray had been acting in a manner which suggested some kind of mental or emotional disturbance which included elements of aggression;
- Mr. Gray is heard in the background of a radio transmission screaming in a manner which could be interpreted as disturbed and aggressive;
- medical evidence corroborates that one officer was punched in the face; and,
- witnesses, including fire and paramedic personnel, say that Mr. Gray continued to offer a degree of resistance even after he was handcuffed and hobbled.

## **Analysis of specific uses of force against Mr. Gray**

Based on the legal and factual background outlined above, there is no reasonable prospect of proving that any of the following uses of force against Mr. Gray were excessive or otherwise unlawful: punches and knee strikes to the arms and upper body, baton strikes while Mr. Gray was still upright and mobile, or the use of kicks to the torso or a “bear hug” to take him to the ground. In a physical struggle with an apparently resistant detainee, such applications of force by arresting officers would fall within the range of what is reasonable and legally justifiable.

There were, however, four discrete uses of force that in Crown Counsel’s opinion required particular consideration as to whether the force used was excessive:

- use of pepper spray during initial dealings with Mr. Gray in the yard
- punches to Mr. Gray’s head and face
- use of a VNR
- various uses of force which occurred after Mr. Gray was hobbled but before he was handcuffed

### **Pepper spray**

The first reported use of force against Mr. Gray was the deployment of pepper spray.

Officers reported that they perceived Mr. Gray to present a significant threat. One officer stated that Mr. Gray appeared aggressive and was “screaming”. She said she felt he presented a risk to the public if not contained. Another said he believed Mr. Gray was suffering some form of drug-induced psychosis or excited delirium such that it would not be possible to de-escalate the situation. He said that he believed Mr. Gray was a significant risk and that he would assault them.

Given the available evidence there is no reasonable prospect of proving that the officer who deployed the pepper spray did not perceive Mr. Gray to be offering a threat of assault or that such perception was unreasonable. Given that the effects of pepper spray are quite painful for the subject but temporary and with a very low medical risk, there is no reasonable prospect that a court would conclude that such use of force was excessive.

### **Punches to Mr. Gray’s head and face**

In his statement, one officer admitted to punching Mr. Gray in the head repeatedly. Another officer also reported using an unspecified number of “closed hand strikes” to Mr. Gray’s face.

The first officer said that he had been told that Mr. Gray was acting aggressively before he arrived. He further stated that, at the time he punched him, Mr. Gray had broken away from attempts to handcuff him with great strength and speed and was intent on fighting. He said that Mr. Gray, who seemed unresponsive to pain, presented a threat of grievous bodily harm or even death to the three officers present.

The second officer said, having observed that two other officers were injured, that Mr. Gray's "remarkable" strength caused him to fear for his and others' safety. He said that as Mr. Gray began to break free from other officers, he delivered several knee strikes to Mr. Gray's upper body in an attempt to gain control of his arm. These strikes failed and Mr. Gray continued to resist. This officer said that he then used fist strikes to Mr. Gray's head "in attempts to stun him and gain immediate control".

Other officers said that, both before and after he was taken to the ground, Mr. Gray was swinging at officers with the set of handcuffs that had been attached to only his left wrist during the earlier attempt to restrain him.

The use of force expert advised that officers are frequently taught to avoid striking a subject's head with a fist strike. He further advised that high energy strikes to the head or neck area are fraught with high risk of injury and are typically avoided but not excluded in the case of "extremely high-risk violent encounters". Given the uncontradicted officer statements about Mr. Gray's conduct, there is insufficient evidence to prove that the use of these strikes was contrary to police training or standards.

Even applying the lower "reasonable prospect" threshold, there is insufficient evidence to prove either that the officers did not subjectively believe that Mr. Gray posed a threat of grievous bodily harm to them at the time the blows were delivered, or that such belief was unreasonable. There is also insufficient evidence to prove that the degree of force used was excessive in light of that perception.

### **Vascular Neck restraint**

One officer reported using a VNR on Mr. Gray on two occasions. The use of force expert described a VNR as a maneuver in which the officer's arm encircles the subject's neck with the elbow of the encircling arm "overtop the subject's sternum" so that there is no resulting compression on the respiratory airway. The aim of the hold is to use the encircling arm to compress the carotid arteries along both sides of the neck and reduce the flow of oxygen to the brain to render a subject unconscious. The use of force expert observed that this technique is different from a dangerous respiratory restraint and is relatively safe if correctly executed. He said that it was appropriate particularly where the subject has not responded to other, pain response-based techniques.

The officer said he used the hold because Mr. Gray had demonstrated remarkable strength to break free of restraint, had his hands free, and was trying to fight with the officers. He observed that Mr. Gray was "apparently not feeling any pain" and "other means" had had no effect on him. He applied a second VNR as Mr. Gray continued to struggle and released the hold once others had handcuffed Mr. Gray. There is insufficient evidence to prove that either hold was incorrectly executed or that either caused any injury to Mr. Gray.

There is no evidence available to the Crown that could show that this officer did not perceive Mr. Gray to be offering considerable resistance to arrest and a potential threat to officers, or that such perception was unreasonable. The accounts of other officers describe resistance equal to or greater than that described by this officer. In the circumstances, there is insufficient evidence to raise a reasonable prospect of proving that this use of force was excessive.

### **Force used after Mr. Gray was hobbled**

Crown Counsel specifically considered whether it was unreasonable for officers to continue to apply any force at all after Mr. Gray's legs were secured through use of a hobble. All the available evidence indicates that Mr. Gray was not handcuffed at the time he was hobbled and that he was, according to one officer, trying to get out of the hobble.

The hobble is a long strap with a buckle. It was looped around and restraining Mr. Gray's ankles but it would be possible for Mr. Gray to remove it if his hands remained free. The available evidence indicates that they did remain free.

Based on the statements of various of the VPD officers the force used against Mr. Gray after he was hobbled included kicks to his legs, strikes with a baton, use of a hold "similar to a headlock", pepper spraying, punches to the upper body, a wrist lock, the placement of an officer's knees on his head and shoulders, and knee strikes. The available evidence is unclear as to the precise nature and location of several uses of force at this stage and as to the nature of the action referred to as similar to a headlock.

The officers variously describe Mr. Gray continuing to offer a significant threat and level of resistance even after he was hobbled. They say, respectively, that he was not under control, he was continuing to fight, kicking out, trying to stand up and get out of the hobble, swinging the handcuff attached to his left wrist, and continuing to display remarkable strength. Given those statements there is no reasonable prospect of proving that their individual responses were excessive.

As such there is no reasonable prospect of proving that, so long as his hands remained free, the officers' decision to continue to use force, rather than disengage, was unreasonable given the potential for Mr. Gray to escape the control they had established with the hobble.

Careful consideration has also been given the fact that these uses of force did not occur in isolation, but that Mr. Gray was subject to various modes of force applied by several different officers within a short period of time. Given the lack of coherent narrative to be drawn from the available evidence, there is no reasonable prospect of the Crown proving that officers used force simultaneously against Mr. Gray. Nor is there any reasonable prospect of proving that it was excessive for the officers present to continue, successively, to use of force against him given the undisputed evidence that Mr. Gray continued strongly to resist arrest throughout.

### **Conclusion**

For the reasons given above the BCPS concluded that there is no reasonable prospect of conviction of any officer in respect of the offences referred by the IIO and no charges have been approved.