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Via email: Baltimore.Consent.Decree@usdoj.gov

RE: United States v. Baltimore Police Dep't et al., Civil No. JKB-17-99

March 7, 2017

Dear Judge Bednar and Parties to the Proposed Consent Decree,

On behalf of the Maryland Office of the Public Defender, we thank you for the opportunity to provide comment on the proposed Consent Decree. The proposed Consent Decree begins to address the widespread, systemic constitutional deficiencies that our clients have endured for years.

The federal indictment last week of seven BPD officers on racketeering charges, U.S. v. Gondo, 17-0106, make clear that, despite initial efforts lauded in the proposed decree, there is still a very long road ahead.

Significant oversight and accountability measures are urgently needed, and while the proposed Consent Decree includes many important provisions, it disregards the critical role that disclosure in criminal cases plays in protecting individuals' constitutional rights with respect to the police.

Disclosure of *Giglio* and *Brady* Materials

A systemic lack of compliance with constitutionally mandated disclosures in criminal cases has contributed to the culture of impunity that allowed for misconduct and abuse to permeate the BPD. Our office is rarely provided with materials that are constitutionally mandated for disclosure under Giglio v. United States, 4058 U.S. 150 (1972), and Brady v. Maryland, 373 U.S. 83 (1963). We uniformly face strong opposition from Assistant State's Attorneys on motions for in camera review of IID files and demands for discovery are heavily litigated. Shortly before last week's indictment was filed, OPD moved for in camera review of personnel files relating to two of the named officers who were the key witnesses in the underlying cases, but the BPD opposed

providing this information and the Assistant State's Attorneys insisted that they had no information.

Even prior to the indictment, the DOJ report noted credible allegations of criminal activity, patterns of clear racial animus, and other forms of misconduct and abuse by unnamed officers remaining on the force that amount to possible impeachment evidence. We submitted a FOIA request with DOJ, which was denied, and a discovery request to the State's Attorney's Office, which is pending. Once this Court removes its litigation hold, there is a significant risk that Giglio and Brady material will be destroyed.

As a condition of the decree, and prior to lifting any litigation hold, the Court should require DOJ and the City to disclose to OPD and the Federal Public Defender a full list of officers with IID investigations that were examined by DOJ; the charges and resolutions of those investigations; a list of officers cited by DOJ for misconduct that did not result in an IID investigation, and the allegations underlying DOJ's determination; and any documents specifically providing exculpatory information.

Moreover, it is not appropriate for BPD to object to discovery demands, and prosecutors should not be able to shield themselves from complying with constitutional obligations by relying on inadequate police responses to discovery requests. The Consent Decree should require BPD to respond to all discovery requests by promptly providing the requested materials to the State's Attorney's Office.

Addressing Officer Misconduct

The proposed Consent Decree rightfully requires BPD to provide our office with information about how to file and follow-up on complaints about officer misconduct. (¶ 358.) Consistent with the level of detail provided elsewhere in the proposed Decree, this provision should include more detail in terms of who in the chain of command is responsible for responding to OPD requests and providing information to the State's Attorney's Office for disclosure in relevant cases.

BPD must also ensure that misconduct investigations proceed in a timely manner and that its internal investigations database is kept up-to-date. The Consent Decree details how an internal investigation should be conducted, and by whom, but does not address the long delays in investigations that can make them meaningless. In addition, information is often not inputted or updated into the BPD's database in a timely manner, impeding transparency and disclosure needs. The consent decree should include a timeframe for completing misconduct investigations and for updating the internal investigations database, and establish a protocol for determining when extension are needed.

Prompt Presentment of Arrestees

Beyond investigating, documenting, and disclosing misconduct, the Consent Decree should encourage existing oversight mechanisms. Maryland Rule 4-212(f) is intended to safeguard against detention resulting from illegal stops and arrests by requiring that individuals arrested without a warrant appear before a judicial officer within 24 hours after arrest. The BPD often circumvents this Rule by having individuals, without the benefit of counsel, waive their right to prompt presentment. Adding a provision to the Decree to require BPD to provide access to an attorney before seeking a waiver of prompt presentment would encourage timely police processing, minimize lengthy pre-charge detention, and ensure that waivers of prompt presentment are knowing and voluntary. Such a provision could be added without any cost to the Parties. OPD is willing, capable and ready to serve as ‘stand-by counsel’ for this purpose.

Improving Transparency

The mechanisms within the criminal justice system, while important, are not sufficient. Greater transparency, as the Consent Decree seeks to achieve, is also vitally needed. OPD endorses the various provisions that mandate public access to BPD policies, data, policing strategies, and misconduct complaints. Further clarification is needed in some places to ensure that sufficient information is shared. In particular, the provision for the OPR and CRB quarterly public reports (§402) should define what constitutes “serious misconduct” to be included in the aggregated data related to multiple misconduct allegations. (§402(g).) If feasible, data should be collected and reported for all misconduct allegations, with delineated categories based on defined levels of seriousness. In addition, the Consent Decree should provide base requirements for the protocol to ensure transparency concerning the disciplinary hearing process and outcomes. (§403.)

The availability of current BPD policies has long been an issue for our office, and their presence on the BPD website is good progress that, as proposed in §289, must be maintained. The policies currently posted on BPD’s website do not include the document retention schedule, making it difficult for members of the public to be aware of the timing needed to access materials related to their interactions with the police. More importantly, BPD often destroys materials too soon to make access meaningful. For example, videotape evidence that is not being used in the prosecution’s case is generally retained for only 30 days from the date of recording. As a result, individuals interested in obtaining these materials, including defense counsel, have a very short window to request preservation and secure a copy.

The proposed decree, if accepted, will mandate that BPD notify the Monitor and DOJ of aspects of the purge schedule that may impact the Agreement and Monitoring Plan. (§482.) This provision should be expanded to more broadly consider whether the retention schedule needs adjusting to match the spirit of the decree. The retention schedule should also be posted on the BPD’s website with its policies.

Collecting Outside Data

The proposed Consent Decree will require the BPD to gather information from the District Court regarding cases that were dismissed because a stop or search lacked reasonable suspicion, that an arrest lacked probable cause, or that any Fourth Amendment violation occurred. (§75-76.) Similar information should be gathered from the SAO for cases not pursued for prosecution based on its assessment that the evidence provided would not survive a constitutional challenge. Determinations that the police action was related to racial animus, retaliation, and/or a First Amendment violation should require prompt investigation and discipline, including training relevant to the issue identified.

The BPD also needs data-driven monitoring and assessment of its relationship with the Baltimore City School Police Force (BCSPF). At a minimum, BPD should require, as a condition of the memorandum of understanding, that BSCPF collect and provide data regarding: calls and referrals received from BCSPF; warrants served and arrests conducted or participated in on or near Baltimore City Public Schools; use of force inflicted against a student on school property; and school-based diversions and referrals to DJS. Where possible, data should be broken down by school, neighborhood, age, race, and gender of student, and by officer and supervisor. Analysis and review of this data should be used to inform the relationship between BPD and BCSPF, addressing any trends and patterns identified and ensuring that BCSPF officers are held to the same standards as BPD officers.

Public Input

In its negotiations leading up to the proposed Consent Decree, and at the hearing that proposed this comment period, the Parties recognized the critical importance of engaging the public to ensure confidence and credibility in this process. This commitment should continue once the final Decree is in place. In particular, public input should be invited on the outcome assessment compliance review methodology (§467), any changes, modifications or amendments to the consent decree (§§468, 494), and termination of any part of the agreement (§508).

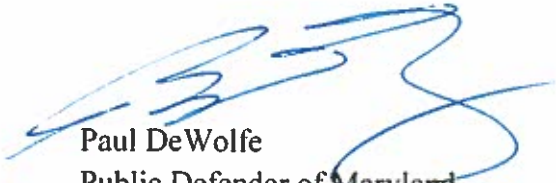
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As criminal justice stakeholders, counsel to individuals disproportionately impacted by BPD action, and members of the Baltimore City community, we are hopeful that the resulting Consent Decree will help the City move forward in meeting its constitutional obligations and properly serving all of its residents. Our recommendations will encourage and advance oversight beyond the Parties to this litigation, repairing existing mechanisms for accountability. We stand ready to play our part in this crucial effort.


Sincerely,




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Public Defender of Maryland



Elizabeth Julian
District Public Defender, Baltimore City



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