



LAWRENCE J. HOGAN, JR.
GOVERNOR

BOYD K. RUTHERFORD
LT. GOVERNOR

OFFICE OF THE PUBLIC DEFENDER
ADMINISTRATION
WILLIAM DONALD SCHAEFER TOWER
6 SAINT PAUL STREET, SUITE 1400
BALTIMORE, MARYLAND 21202
Ph. (410) 767-8460
Fax (410) 333-8496
Toll Free: 1 (877) 430-5187

PAUL B. DeWOLFE
PUBLIC DEFENDER

CHARLES H. DORSEY, III
DEPUTY PUBLIC DEFENDER

Maryland Office of the Public Defender
Recommendations for the Consent Decree
Between the Department of Justice and the City of Baltimore

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Table of Contents

Introduction.....5

Recordkeeping, Data Collection, and Transparency.....5

Recommendation 1. Institute policies and practices that require the completion and monitoring of accurate and thorough report forms. 5

Recommendation 2. Collect comprehensive data on policing activities 6

Recommendation 3. Collect data from the State Attorney’s Office (SAO) regarding the effectiveness of policing strategies 6

Recommendation 4. Collect data from the Baltimore City School Police Force 7

Recommendation 5. Post data of policing activities online..... 7

Recommendation 6. Post policies online. 8

Recommendation 7. Require case files to be provided to the SAO prior to the deadline for initial discovery in the Maryland Rules, with prompt disclosure of any subsequent documentation..... 8

Recommendation 8. Disclose specific information regarding officers and incidents, in accordance with Brady, Giglio, and discovery rules. 9

Police Misconduct9

Recommendation 9. Establish policies and implement practices that encourage the reporting of police misconduct and that treat misconduct complaints as mission critical as other law enforcement investigations. 10

<i>Recommendation 10. Establish and implement a policy and practice of periodically communicating with complainants, and, where applicable, complainant’s counsel, on the status of their complaint.</i>	11
<i>Recommendation 11. Mandate documentation of all trial board proceedings.</i>	11
<i>Recommendation 12. Establish and publish a schedule of disciplinary penalties that establishes a presumptive range of discipline for each type of rule violation.</i>	12
<i>Recommendation 13. Revise policies regarding expungement of complaints.</i>	12
<i>Recommendation 14. Provide the SAO with complete access to IAPro that includes dismissed/expunged matters.</i>	12
<i>Recommendation 15. Provide in-camera review of an officer’s full IAD file when Rule 5-608(b) is invoked for impeachment based on systemic abuse.</i>	13
<i>Recommendation 16. Engage civilians in officer misconduct proceedings.</i>	13
Community Policing and Engagement	14
<i>Recommendation 17. Integrate community policing throughout the BPD, not as a separate unit.</i>	14
<i>Recommendation 18. Establish recruitment and advancement priorities that encourage a culture of community engagement and conflict resolution.</i>	15
<i>Recommendation 19. Support civilian expungement efforts.</i>	15
Bias-Free Policing	16
<i>Recommendation 20. Establish a bias-free policing policy and ensure that its principles are integrated throughout the BPD’s policies, practices, and activities.</i>	17
<i>Recommendation 21. Mandate ongoing training on cultural competency, identifying and combatting discrimination, and procedural justice.</i>	17
Stops, Searches and Arrests	18
<i>Recommendation 22. Replace zero tolerance with policies and practices requiring articulable bases under the appropriate standard for stops, searches, and demands by the police.</i>	18
<i>Recommendation 23. Documentation for stops should be strengthened and include a “receipt” for the person stopped.</i>	18
<i>Recommendation 24. Require documentation of seized items with streamlined procedures for return of property.</i>	19
<i>Recommendation 25. Encourage increased use of citations in lieu of arrest.</i>	19
<i>Recommendation 26. Revise current policy so that prompt presentment can only be waived after consultation with an attorney.</i>	20

Use of Force	21
<i>Recommendation 27. Require ongoing mandatory training on de-escalation techniques.</i>	21
<i>Recommendation 28. Develop protocols for use of force and arrest techniques in dealing with individuals with disabilities and other people in crisis.</i>	21
<i>Recommendation 29. Include use of force administrative reports as part of the criminal case file provided to the SAO.</i>	22
Crisis Response	22
<i>Recommendation 30. Establish a comprehensive and effective crisis intervention team.</i>	22
<i>Recommendation 31. Require all officers to complete training about mental distress and appropriate response techniques, with CIT members and dispatch personnel receiving further specialized training</i>	23
<i>Recommendation 32. Develop protocols regarding crisis calls and response calls for emergency petitions, with ongoing monitoring.</i>	24
Diversion	24
<i>Recommendation 33. Expand Law Enforcement Assisted Diversion (LEAD) to a city-wide pre-arrest diversion.....</i>	24
<i>Recommendation 34. Create evidence-based youth diversion programs, including school arrest diversion programs.</i>	25
<i>Recommendation 35. Support legislative measures that minimize the arrest and detention of nuisance and petty offenses.</i>	25
Youth	26
<i>Recommendation 36. Develop and implement policies protecting the rights of children during a street encounter with an officer.</i>	27
<i>Recommendation 37. Limit the searches of youth and ensure they are conducted by appropriate personnel.....</i>	27
<i>Recommendation 38. Establish specialized policies and practices pertaining to the interrogation of children.</i>	28
<i>Recommendation 39. Mandate prompt parental notification of all police interactions and prompt processing of children at Baltimore City Juvenile Justice Center (BCJJC).</i>	28
<i>Recommendation 40. Require prompt processing of children at the Baltimore City Juvenile Justice Center.....</i>	29
<i>Recommendation 41. Mandate training on adolescent development and developmentally-informed policing.....</i>	29
<i>Recommendation 42. Encourage legislation ending the City’s curfews.</i>	29

Collaboration with Baltimore City School Police Force	30
<i>Recommendation 43. Limit the Interaction Between Children and Police in School Settings</i>	30
<i>Recommendation 44. Reevaluate the relationship with Baltimore City School Police Force (BCSPF), ending or limiting the BCSPF’s authority.</i>	31
Technology.....	31
<i>Recommendation 45. Establish an oversight board to review new technologies being considered for use by the BPD and to help establish protocols or guidelines for their use.</i>	33
<i>Recommendation 46. Develop additional guidelines on when body or vehicle cameras must be used, the documentation needed for instances when the camera is turned off, and how to incorporate this technology in BPD’s oversight and supervision.....</i>	33
<i>Recommendation 47. Retain potential video evidence for a longer period of time and provide video evidence to OPD at no cost.</i>	34
Training	35
<i>Recommendation 48. Include adolescent development and mental health expertise on the Maryland Police and Correctional Training Commission and encourage community collaborations in curriculum development and delivery.</i>	35
<i>Recommendation 49. Establish and implement curricula that provide all officers with training that conforms with current law and best practices.</i>	35
<i>Recommendation 50. Require appropriate retraining.</i>	36
Conclusion	36

Introduction

The Maryland Office of the Public Defender (OPD) is pleased to submit these comments to the U.S. Department of Justice (DOJ) and the Baltimore City Police Department (BPD) in consideration of its upcoming consent decree pursuant to the Agreement in Principle between the United States and the City of Baltimore entered into on August 9, 2016.

The DOJ's Investigation of the Baltimore City Police Department (the "DOJ Report") documented a pattern or practice of engaging in unconstitutional stops, searches, arrests, excessive force and retaliation, and disproportionately targeting African Americans in their enforcement strategies. These findings reflect what public defenders, our clients, and the communities we serve have experienced for years. While we are also heartened by the BPD's acknowledgement of its past deficiencies and willingness to collaborate with the DOJ, in addition to substantial changes in policy, practices, and training, there needs to be a significant culture shift that embraces transparency, community engagement, and external accountability.

As the public defender for the City (and all of Maryland), we have knowledge and expertise uniquely relevant to this consent decree. The law enforcement activities that have been prioritized by BPD and its staff (stops, arrests, seizures) typically result in criminal prosecutions where we represent the vast majority of defendants. When proper documentation of police activity is created and appropriately disclosed, the criminal proceedings should provide a base level of external oversight. Our comments reflect this integral aspect of our legal system, and what may be needed to restore the necessary checks on unconstitutional behavior.

Recordkeeping, Data Collection, and Transparency

The DOJ report documents widespread deficiencies in reporting and documentation coupled with a complete dearth of data collection. Unsurprisingly, without this information, the BPD has been unable to effectively assess its practices, supervise its officers, or take corrective action when needed. External accountability mechanisms are also hampered by the inability to provide basic information to stakeholders and the general public. In addition to precluding identification of problematic practices and efforts toward reform, the lack of data further erodes community confidence in the police as effective practices and measures of success are likewise unable to be documented.

Recommendation 1. Institute policies and practices that require the completion and monitoring of accurate and thorough report forms.

Similar to the experiences documented by DOJ, the police files that we receive in discovery are typically missing key documents. Even when reports are included in the file, vital information,

such as the facts underlying the stop and even the officers involved, is often omitted. Beyond the implications of poor recordkeeping for the criminal case, the lack of case-specific documentation makes it impossible to effectively monitor officer activity and gather aggregate data to identify patterns and trends.

The BPD needs clear policies and effective training for all officers on when and how to complete the requisite forms. Supervisors need further training and guidance on their role in supervising this work. Specifically, supervisors must understand that they may only sign off on documentation that appears complete, accurate, and consistent – with a level of quality for which they would be comfortable attesting to at a hearing.

To ensure that officers and their supervisors are meeting their reporting obligations, BPD policy should require a further signoff and review by a lieutenant or sergeant of the case file in all cases that proceed to prosecution before the file is provided to the State’s Attorney’s Office (SAO). This additional check is needed to ensure that documentation is complete, clear and consistent. Officers who consistently fail to develop sufficient case files and supervisors who sign off on insufficient report forms should be required to participate in additional training on completing police forms and the importance of documentation.

Recommendation 2. Collect comprehensive data on policing activities

With proper recordkeeping and reporting, the BPD can – and must – collect, analyze, and publish data about its practices. This should include comprehensive data on the police practices that implicate constitutional concerns– including stops, searches, arrests, emergency petitions, seizure of property, use of force, transports, use of surveillance technology, mental health calls, police misconduct complaints, racial disparities, and interactions with youth – as well as positive practices adopted – such as community meetings, trainings, pre-arrest diversions, and collaborations with community stakeholders. Creating a culture that promotes positive policing requires that these best practices receive prioritization and review as much as areas of potential concern, in order to assess their application, measure their impact, and identify areas for further growth. Where possible, data should be broken down by neighborhood; age, race, and gender of the suspect; and police unit, officer, and supervisor to allow for detailed analyses, comparisons, and reporting.

Recommendation 3. Collect data from the State Attorney’s Office (SAO) regarding the effectiveness of policing strategies

The Exclusionary Rule is intended to serve as a court-created deterrent for many of the Fourth Amendment violations detailed in the DOJ report. Compiling information about court findings that a stop or search lacked reasonable suspicion, that an arrest lacked probable cause, or that any Fourth Amendment violation occurred will help assess the extent to which law enforcement

activities are effective in supporting prosecutorial action. In addition to compiling information related to court decisions, the SAO should provide similar data about cases not pursued for prosecution based on its assessment that the evidence provided would not survive a constitutional challenge. Similar court findings or prosecution assessments pertaining to the strength, veracity, and quality of the BPD's work should likewise be communicated.

This information sharing will hopefully encourage greater dialogue between the BPD and the SAO and allow BPD leadership to identify and address problematic practices as well as specific officers whose repeated violations may warrant increased training, oversight or discipline. The SAO should be encouraged to provide the basis for the court or its determination. 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.

Recommendation 4. Collect data from the Baltimore City School Police Force

As discussed further in Recommendations 44 below, OPD believes the City and BPD should take appropriate measures to end its relationship with the Baltimore City School Police Force (BCSPF). To the extent that it continues, however, this collaboration needs data-driven monitoring and assessment.

At a minimum, BPD should require, as a condition of the memorandum of understanding, that BCSPF 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.

Recommendation 5. Post data of policing activities online

Data about police activities and their impact on the community should be readily available to anyone who wishes to view it. At a minimum, the public should be afforded data regarding the number of stops, searches, seizures, arrests, and uses of force each with a breakdown by neighborhood, race, age, and gender; the number of convictions and dismissals resulting from these activities, broken down by top offense; and the number of police misconduct complaints, broken down by type of complaint, and the resolution of these complaints. Data that the BPD already regularly gathers on a daily or weekly basis (such as the number of arrests) should be

provided on a weekly or monthly basis. More detailed breakdowns and analysis can be provided annually.

It is critical that this information not just be available on request, but be published on a public domain whereby any Baltimore citizen can review it without filing a request. In addition to the time and cost of public information requests, the fractured community relations and well documented, legitimate fear of retaliation make proactive efforts toward transparency especially important.

Recommendation 6. Post policies online.

The DOJ Report details how fractured, outdated, and disorganized the BPD's policies are. In addition to updating, consolidating and improving these policies, they should be made available online. Published policies will both improve their accessibility for officers and demonstrate the transparency needed to improve community relations and allow Baltimore residents to gain a greater understanding of how the police force operates.

Recommendation 7. Require case files to be provided to the SAO prior to the deadline for initial discovery in the Maryland Rules, with prompt disclosure of any subsequent documentation.

Far too often, the State Attorney's Office is unable to meet its basic discovery obligations because the BPD fails to promptly provide a complete case file. For criminal cases, the Maryland Rules require that the State's Attorney provide discovery in Circuit Court cases within 30 days of the first appearance of counsel or the defendant, whichever is earlier. Md. Rule 4-263(h)(1). In District Court cases, the prosecution's discovery must be completed before the hearing or trial to the extent practical. Md. Rule 4-262(i). In juvenile proceedings, the State must provide its discovery within five days after the entry of appearance of counsel or the waiver of counsel. Md. Rule 11-109(a)(7). All proceedings mandate a continuing duty to "promptly" disclose additional information as it becomes available. Md. Rules 4-262(h), 4-263(j), 11-109(a)(8).

The BPD must respect the court's deadlines, and its failure to provide the prosecution with case documents in a timely manner should be subject to sanctions. The data to be collected from the SAO, see Recommendation 3, should include information about discovery violations resulting from BPD inaction or delay.

Recommendation 8. Disclose specific information regarding officers and incidents, in accordance with Brady, Giglio, and discovery rules.

Information shared with the public need not disclose the identity of specific officers or incidents. However, this level of detail should be shared with the SAO. Additionally, these incidents often meet the legal definition of a "need to inspect" relevant documents and therefore should be shared with the court and defense counsel to conduct an in camera review of the relevant files. See Fields v. State, 432 Md. 650, 69 A.3d 1104 (2013); see also infra Recommendation 15 (proposing review of IID files when the criteria for impeachment under Rule 5-608 are alleged). Individual officer data, personnel files, police misconduct complaints (regardless of outcome), and Internal Investigation Division (IID) investigations may have exculpatory information that must be disclosed under Brady v. Maryland, 373 U.S. 83 (1963), or impeachment evidence to be disclosed under Giglio v. United States, 405 U.S. 150 (1972). Providing these materials to the SAO will allow for the prosecutor to assess what must be disclosed in which cases and comply with its constitutional obligations. See Strickler v. Greene, 527 U.S. 263, 280-81 (1999) (noting the Brady rule "encompasses evidence known only to police investigators and not to the prosecutor" (internal quotation omitted)); Conyers v. State, 367 Md. 571, 602, 790 A.2d 15, 33-34 (2002) ("Facts known to the police will be imputed to the State for Brady purposes.").

Notably, the DOJ Report details systemic deficiencies in the classification, processing and treatment of misconduct complaints. Credible allegations of criminal activity, patterns of clear racial animus, and other forms of misconduct and abuse are documented by DOJ, but information about these complaints has still never been disclosed as Brady information in any criminal case. Even before the consent decree is entered, the BPD must provide the SAO with the names of the officers and these complaints so that it can determine what Brady disclosures are imminently needed.

Police Misconduct

The DOJ Report shines a light on the various patterns and practices that have resulted in a police culture that is hostile to the people and neighborhoods it is charged to protect and allows abusive officers to act with impunity. The culture of impunity is also the result of a lack of transparency that is condoned by the larger criminal justice system. In particular, prosecutors ignore or hide apparent instances of police abuse without sanction or rebuke from the court.

Our efforts to gather impeachment evidence related to Officer Fabien Laronde illustrates how the entire IID process fails even in instances of clear patterns of misconduct. OPD attorneys repeatedly requested access to Laronde's IID files, and were told that there was nothing to disclose. Public records established that the City had settled three civil suits based on Laronde's actions and we believed that there were numerous internal complaints not associated with

litigation filed against him. Neither the SAO nor the BPD reviewed Laronde's file prior to objecting to any disclosure related to Laronde's prior bad acts. Similar motions in different cases were resolved differently, with most judges denying the defense motion to disclose and others requesting an IAPro printout, followed by ordering complete files to be disclosed. This litigation made clear that the IAPro sheet was not always accurate. Adding to the lack of transparency, all disclosures were provided under seal, precluding defense counsel from sharing this information with her colleagues or using it in other cases. Laronde was suspended in October 2015. One month into his suspension, Laronde was in court wearing a t-shirt with "police" printed on the back to testify against an OPD client when he threatened a defense witness in the case and attempted to film him. Because of this incident, the Sheriff's Office barred Laronde from the Baltimore City Circuit Court. In February 2016, the BPD terminated Laronde based on an incident from before the 2015 suspension. Despite his history, the SAO continues to prosecute cases in which Laronde is listed as a witness.

While the consent decree is focused on the BPD, the SAO is also a City agency that should be obliged to comply with both the spirit and the letter of the decree, particularly with respect to disclosing police misconduct in accordance with its obligations under Brady and Giglio.

Recommendation 9. Establish policies and implement practices that encourage the reporting of police misconduct and that treat misconduct complaints as mission critical as other law enforcement investigations.

The complaints that DOJ reviewed regarding officer misconduct are merely the tip of the iceberg. The procedural barriers to lodging a complaint, the intimidation imposed upon those who try to overcome these barriers, the legitimate fear of retaliation, and the history of insufficient investigation and lack of discipline has caused numerous instances of serious misconduct and abuse to never getting reported in the first place.

Unnecessary barriers to filing complaints need to be lifted, such that any complaint filed in any form (in-person, by telephone, email, online) will be taken seriously and will initiate an investigation. No complaint should require notarization sworn under penalty of perjury. Such a requirement has a silencing impact as anyone concerned that their account will not be not believed or is otherwise unable to be corroborate what happened will fear prosecution. Rather, anonymous complaints should be permitted. Similar to other anonymous tips received by the police, these complaints may have additional challenges to investigate and verify. However, even if not sustained on their own, these complaints can help enlighten a pattern or practice by an officer or unit that needs to be addressed. Finally, officers should be required to report misconduct they observe while on-duty, with disciplinary action for those who allow such action to continue on their watch, even if they did not directly participate.

Policies must also be revised and implemented to restore integrity to the investigation process. Timeframes for initiating and conducting an investigation should be imposed with clear repercussions for investigating officers who fail to follow them. A conflicts policy must also ensure that the investigating officer is not affiliated with the incident at issue or in the same line of command (whether above or below in rank) as any officer related to the investigation. Retaliation or intimidation by an officer in response to a complaint or an effort to file a complaint must not be tolerated and should result in termination. Finally, all complaints should be assessed for racial bias, with mandated training on implicit bias and other relevant topics for any officer remaining on the force who was involved in an incident that may have been motivated or influenced by the complainant's race.

Recommendation 10. Establish and implement a policy and practice of periodically communicating with complainants, and, where applicable, complainant's counsel, on the status of their complaint.

When a member of the community lodges a complaint against a BPD officer, they should be provided with a mechanism to track the status of the investigation as well as receive updates on when the investigation has been concluded, the general findings from the investigation (sustained, unfounded, closed), and what if any discipline has been imposed. Such communication will encourage the complainant to provide additional information to the BPD should contact information change or witnesses become available, as well as improve transparency and confidence in the BPD's actions.

If a prosecution resulted from the interaction underlying the complaint, or the BPD is otherwise aware that the complainant has an attorney, these notifications should also be provided to counsel. Such disclosures will minimize Fifth Amendment issues and ensure compliance with discovery obligations. Moreover, attorney notice can aid the police in continuing an investigation in which the individual has moved or is no longer able to be reached at the contact information provided.

Recommendation 11. Mandate documentation of all trial board proceedings.

The DOJ report notes the dearth of documentation that existed from the 139 trial boards conducted during the review period. At a minimum, each proceeding should result in a written statement of allegations, a transcript or summary of the trial board proceedings, and written findings. These documents should be maintained in the investigative file and the officer's personnel file. As discussed further in Recommendations 14 and 15 below, these documents must also be disclosed to the SAO in conjunction with other IID materials to ensure compliance with Brady, Giglio, and related discovery obligations.

Recommendation 12. Establish and publish a schedule of disciplinary penalties that establishes a presumptive range of discipline for each type of rule violation.

A transparent and consistent schedule of disciplinary penalties is needed both to put officers on notice of the repercussions for improper behavior and to ensure the public that findings of misconduct will be appropriately addressed. In many respects, police misconduct cases should be (and often are) treated like quasi-criminal proceedings. BPD disciplinary proceedings should adopt applicable best practices from sentencing law, including establishing clear penalties that are proportional to the misconduct, consistently applied, and readily accessible.

Recommendation 13. Revise policies regarding expungement of complaints.

The culture of unaccountability is reinforced by the expungement of unsustained findings after three years and even some sustained findings after only one year. Perversely, an officer who routinely engages in misconduct can avoid any long-term accountability for their behavior by accepting the minimal discipline recommended by the Command Division. Allegations that are not sustained may likewise have strong indicia of reliability that are relevant for identifying officer patterns, determining supervision and training needs, and assessing the credibility of an officer-witness at trial.

The DOJ report notes the limitations that the ease of expungement causes in officer supervision, including early intervention efforts. It also results in the systematic destruction of Brady and Giglio evidence. Regardless of how this information is considered in personnel decisions, documentation regarding an officer's participation in misconduct should be preserved so that it can be disclosed in accordance with the law.

Recommendation 14. Provide the SAO with complete access to IAPro that includes dismissed/expunged matters.

Police officers need not know the discovery rules or how they apply in any particular case, but they are obligated to comply with the disclosure requirements as part of the prosecution team. See Strickler v. Greene, 527 U.S. 263, 280-81 (1999) (Brady rule “encompasses evidence ‘known only to police investigators and not to the prosecutor’”); Conyers v. State, 367 Md. 571, 602, 790 A.2d 15, 33–34 (2002); Boone v. Paderick, 541 F.2d 447, 451 (4th Cir.1976) (“The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure.”). To do so, they must collaborate effectively with the SAO to make a good faith effort to provide all information that may warrant disclosure or production for discovery.

Specifically, the SAO should be provided with complete access to IID investigations and discipline so that this information is readily available to them when needed in each case. In addition to ensuring that the SAO can comply with its obligations, it will also allow for greater accountability when they do not. Without access to IAPro, some Assistant State's Attorneys have misrepresented the extent and content of officers' IAPro file while others insist that nothing is available. Sanctions against individual attorneys becomes nearly impossible, as the lack of information is usually attributed to the police. While prosecutorial misconduct is beyond the scope of the consent decree, ensuring that the SAO has the information needed will help identify where additional measures are warranted and encourage the court to impose sanctions when appropriate.

The database provided to the SAO needs to include dismissed and expunged matters. As discussed above, see Recommendation 13, OPD believes that the officer expungement policy needs to be revised so that an officer willing to admit misconduct or able to evade sustained findings is not able to continue ongoing abusive practices. However, any policy that remains must ensure that Brady/Giglio information remains available, regardless of how the information is considered in the employment context.

Recommendation 15. Provide in-camera review of an officer's full IAD file when Rule 5-608(b) is invoked for impeachment based on systemic abuse.

Maryland Rule 5-608 requires discovery of all potential impeachment material that can “be used in defense or lead to the discovery of usable evidence.” Fields v. State, 432 Md.2d 650, 670, 69 A.3d 1104, 1115-16 (2013) (quoting Zaal v. State, 326 Md. 54, 88, 602 A.2d 1247, 1264 (1992)). The documents need not be admissible themselves to be discoverable; nor is discovery properly limited to sustained allegations. Id. These expansive discovery rules are particularly important in response to police credibility in criminal cases. “[T]he State's desire that [the officer] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.” Davis v. Alaska, 415 U.S. 308, 320 (1974); Fields, 432 Md.2d at 672, 69 A.3d at 1116.

The BPD and SAO should cease uniformly objecting to the discovery of all IID information. Rather, it should provide the court and defense counsel with all documents for review and object to disclosure to defense counsel only of the specific documents for which it has an articulable basis for objection. See Fields, 432 Md.2d at 668, 69 A.3d at 1114 (“A strong need to inspect weighs in favor of allowing counsel to participate in the review as officers of the court.”).

Recommendation 16. Engage civilians in officer misconduct proceedings.

Rebuilding trust requires engaging community members in even the most difficult aspects of policing. To give credence toward its efforts at greater accountability and transparency, the BPD

needs to include civilian participation in its disciplinary system. Civilians should be included on the trial board with their voices given as much credence as the officer participants.

In the Supervision, Accountability and Coordination section of the Agreement in Principle, the City and BPD agree to improve coordination with other law enforcement agencies with concurrent jurisdiction. It should make equal effort to fully cooperate with the Civilian Review Board to ensure that it receives all complaints and information in a timely manner, has the ability to audit BPD and compel officers to participate in its investigations, and is provided with a written update on whether its recommendations were adopted and, if not, the BPD's rationale and any alternative actions taken.

Community Policing and Engagement

As noted in the Agreement in Principle, “rebuilding the relationship between BPD and the various communities it serves is essential to constitutional and effective policing.” Transforming the “us vs. them” culture into a positive community policing approach can help increase public confidence, reduce bias, and improve law enforcement outcomes.

“Community policing is a philosophy that promotes organizational strategies that support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.” President’s Task Force on 21st Century Policing, Final Report of the President’s Task Force on 21st Century Policing 41 (2015). To be effective, this philosophy needs to be incorporated throughout the agency and positive interactions with the community need to be recognized as important and valuable law enforcement activities.

Recommendation 17. Integrate community policing throughout the BPD, not as a separate unit.

The City and BPD have agreed to “ensure that the fundamental principles of community policing guide all aspects of BPD’s operations” Agreement in Principle 6. The Community Collaboration Division, created by the BPD to improve its community relations, counters this goal by siloing community outreach to a single unit. Such an approach implicitly encourages other officers to continue business as usual and to potentially see community policing as separate, apart, and potentially beneath their work.

BPD needs a comprehensive and integrated model of community and problem-oriented policing that engages all staff at all levels. All officers must have a detailed familiarity with the specific neighborhoods that they serve. Beyond knowing about the trends in criminal activity and problems in the community, they must also understand the neighborhood priorities, recognize the community’s assets, and be able to tap into its resources and leaders.

As much as feasible, the BPD should engage community members in its oversight and accountability efforts. This is particularly important in reviewing police misconduct complaints, see Recommendation 16, and in sharing data about police policies and activities, see Recommendations 5-6.

BPD must also prioritize youth leadership in its outreach and engagement. Youth voices provide an important perspective for community problem solving, research and decision-making. Positive youth interactions, such as coaching and mentoring, can also promote law abiding leadership and healthy living skills.

Recommendation 18. Establish recruitment and advancement priorities that encourage a culture of community engagement and conflict resolution.

The Baltimore police force is not representative of Baltimore. The majority of BPD officers live outside the city, have no connection (aside from their current employment) to the city, and the DOJ Report notes the hostility that many officers have toward the residents of Baltimore. To the extent permissible, BPD should strive for a force that reflects the city's demographics and diversity. BPD should encourage officers to reside in the city, prioritize candidates with a connection to Baltimore, and implement recruitment strategies that encourage residents with an interest in law enforcement to join their local police force.

Once on the force, officers should be encouraged to engage in positive policing activities that engage the community and minimize conflict. Promotion decisions should weigh factors such as the number of trainings completed, the number of community events attended, and new collaborations established. Arrest quotas need to be abolished, and supervisors and others who promote a "clearing corners" strategy must be subject to discipline. Officer data indicating a disproportionate number of stops, arrests, and/or uses of force should be considered for additional training, supervision, monitoring and disciplinary action.

Recommendation 19. Support civilian expungement efforts.

While officers accused of misconduct can often get these cases expunged from their personnel files relatively easily, the individuals who have been subject to discriminatory, retaliatory or other illegal police practices face significant hurdles in getting their criminal cases arising from this misconduct expunged. Once charges have been filed, there is no automatic expungement in Maryland. Baltimore residents are denied employment, housing and educational opportunities due to rap sheets filled with charges that have been acquitted, dismissed, not prosecuted, placed on "stet" for indefinite postponement of trial, or resulted in a plea to a petty nuisance offense. Charges lodged in Circuit Court but ultimately transferred to juvenile court likewise will provide

a child with a rap sheet despite no criminal prosecution. Expungement of these and other eligible cases requires filing a petition, typically with payment of a \$30 filing fee per case.¹ Crim. Proc. § 10-105; Revised Schedule of Circuit Court Charges, Costs, and Fees Established Under Cts. Art., § 7-202 § 11.A.3(B)(2).

This year alone, OPD has assisted with the expungement of approximately 2,000 cases, and civil legal advocacy groups with thousands more. Despite this effort, far more cases are eligible for expungement. In Maryland Fiscal Year 2015 (July 1, 2014-June 30, 2015), of the 38,730 Baltimore City cases with dispositions, an estimated 23,386 (60%) are, or will become, eligible for expungement. See MDExpungement.com, Expungement Statistics Baltimore City, <https://www.mdexpungement.com/statistics.php> (last visited Sept. 1, 2016). People who have been targeted by the BPD's "clearing corners" and other zero tolerance activities often have numerous cases eligible for expungement, resulting in substantial filing fees to have them all removed from their criminal record. Limited resources by advocacy groups to assist with petitions, coupled with limited awareness by the public of what can be expunged results in thousands of Baltimore residents facing unwarranted negative background checks.

As part of its efforts to redress prior misconduct and abuses, the City should collaborate with a civil legal organization that can assist with the expungement of cases and/or financially support expungement events held in the community. The City and its criminal justice agencies should likewise support legislative efforts to allow for the free and automatic expungement of cases that do not result in conviction, and automatic sealing and expungement of juvenile cases that do not result in a finding of guilt/involvement.

Bias-Free Policing

The DOJ Report documents an overwhelmingly pervasive culture of racial animus and discrimination. Shifting this culture is arguably the most challenging need of the consent decree, but also the most important. Baltimore is a majority African-American city that deserves for all of its residents to have a police force that serves, rather than targets, their communities.

As noted in the agreement in principle, merely entering the consent decree with the DOJ does not involve any admission of responsibility or agreement with the findings. To move forward, regain trust by the community, and establish credibility in its efforts, the BPD should acknowledge the differential treatment that has existed in the past and incorporate a race-conscious perspective throughout its efforts.

¹ Cases in which all charges resulted in acquittal or not guilty, or where the charges were transferred to juvenile court are eligible for expungement without a filing fee. In addition, the court may waive the fee upon a showing of indigency by the petitioner.

Recommendation 20. Establish a bias-free policing policy and ensure that its principles are integrated throughout the BPD's policies, practices, and activities.

The BPD should be held, at a minimum, to the same mandate as other police departments that have been similarly investigated by the DOJ: to “deliver police services that are equitable, respectful and free of unlawful bias, in a manner that promotes broad community engagement and confidence.” E.g., United States v. Cleveland, 1:15 CV 1046, Settlement Agreement ¶33 (E.D. Ohio 2015); United States v. Seattle, 12-CV-1282, Settlement Agreement and Stipulated (Proposed) Order of Resolution ¶ 145 (W.D. Wash. 2012). See also United States v. Ferguson, 4:16-cv000180-CDP, Consent Decree ¶ 64 (E.D. Mo. 2016) (mandating that the Ferguson Police Department officers and employees “provide police and court services free from unlawful bias or discrimination and to fully recognize and value the legal rights and inherent dignity of all individuals, regardless of their protected characteristics”)

Beyond adopting a bias-free policing policy, the BPD should re-examine its existing and developing policies, practices and initiatives to ensure that all services, activities and programs are administered without unlawful discrimination on the basis of race or any other protected class. Training curricula likewise need to be reevaluated to embrace bias-free policing principles and to promote practices that minimize the risk of bias.

Recommendation 21. Mandate ongoing training on cultural competency, identifying and combatting discrimination, and procedural justice.

All BPD staff need training on bias-free policing that addresses: the constitutional and other legal requirements related to equal protection; the historical and cultural systems that perpetuate profiling and biases; implicit bias; and strategies to avoid biased policing, such as problem-oriented policing and procedural justice. Supervisors need further specialized training on identifying, evaluating, and responding to biased practices and to complaints of bias. Baltimore is fortunate to have two historically black colleges – Coppin State University and Morgan State University – with staff who can likely assist with these trainings. Partnering with these institutions would promote community engagement, provide expertise beyond the BPD staff, and offer a first-hand understanding of the challenges faced by members of Baltimore's diverse African American community.

Overcoming biases is an ongoing process, and needs to be a continuing priority for BPD. In addition to training provided at the Academy or otherwise in the first instance to staff, refresher courses and retraining should be mandated on a regular basis. Ongoing training should incorporate emerging issues and best practices so that the information remains current, relevant and engaging. See also Recommendation 50.

Stops, Searches and Arrests

As the DOJ Report documents, BPD's zero tolerance law enforcement strategies have resulted in widespread constitutional violations, escalation of otherwise minor encounters, and a substantial rift between the BPD and the communities that it serves. With the Mayor and the Commissioner both acknowledging that zero tolerance has failed Baltimore, we expect that the consent decree will mandate policies and practices that replace this approach with ones that promote procedural justice, encourage community collaboration, and comply with constitutional, federal, and Maryland law.

Recommendation 22. Replace zero tolerance with policies and practices requiring articulable bases under the appropriate standard for stops, searches, and demands by the police.

At the base of many of the zero tolerance practices employed by the BPD are illegal stops, which have been used to trigger investigations or have escalated to the point of resulting in criminal charges and/or the use of force. BPD's policies, practices, training, and supervisory priorities must underscore that individualized reasonable suspicion is needed to stop someone; that geographic location, including presence in a high crime area, does not amount to reasonable suspicion without specific articulable facts indicating that the person has or is about to engage in criminal activity; and that pretextual stops for the purpose of checking for warrants are not appropriate. In light of the history of excessive force, discriminatory zero tolerance strategies, and retaliation resulting from efforts to complain, flight should also not be an appropriate basis for a stop on its own. Likewise, any frisk, pat down, search, demand for identification, placement in a police vehicle, transport, or unholstering or pointing of a weapon must be based on an articulable and reasonable safety concern.

Recommendation 23. Documentation for stops should be strengthened and include a "receipt" for the person stopped.

Unconstitutional stops have been able to proliferate in large part because there is no mechanism to identify, track or account for stops that do not result in arrest. See Recommendations 1-2. As a result, the BPD is unable to track and address problematic stops and individuals who have been repeatedly harassed by the police, often because they live or otherwise lawfully frequent areas targeted for "clearing corners," have no recourse or accountability mechanisms.

The efforts to address the unconstitutional stop and frisk policies and practices of the New York Police Department in Floyd v. City of New York, 959 F.Supp.2d 668, 692 (S.D.N.Y 2013), provide useful guidance. In addition to appointing an independent monitor and establishing a remedial process for developing reforms, the court ordered specific equitable relief, including

revising the stop reporting form to require a narrative explanation for the stop as well as a separate explanation for why a pat-down, frisk or search was performed. Notably, the court also advised that the form should include a tear-off portion that can be provided to the individual with the name of the officer who stopped them, the officer's badge number, and the reason for the stop. Similar reporting and documentation by the BPD could likewise discourage unconstitutional stops, allow for the monitoring of all stop activity regardless of whether an arrest was made, and provide an individual wrongly stopped with the documentation they may need to support a complaint. The DOJ Report highlights the sheer frequency by which many individuals have been stopped, often by the same officer. Stop receipts would better allow for these stops to be addressed in any related criminal proceedings and complaints to the Civilian Review Board or other entity.

Recommendation 24. Require documentation of seized items with streamlined procedures for return of property

Although not directly addressed in the DOJ Report, the BPD's stop and search practices also result in the widespread seizure of personal property that is not tied to any criminal activity but is exceedingly difficult to get returned. Even once a case is dismissed, cell phones, cash, and other basic living items are held by the BPD until the person can provide identification and proof of ownership. Proof of ownership can be impossible to obtain, and personal items difficult to replace, particularly for people with limited means. For youth, personal identification can be an additional barrier to having their belongings returned.

Documentation of seized items, with a receipt provided to the individual, can help ensure that seized property that is not considered evidence in a pending case is returned to its rightful owner. The police form and receipt can be used to establish ownership, and booking photographs or other records can assist with identifying individuals who lack personal identification. For youth, notification and receipts should also be provided to a parent or legal guardian, who may also obtain this property on behalf of the child. See also Recommendation 39 (recommending prompt parental notification of police involvement).

Recommendation 25. Encourage increased use of citations in lieu of arrest.

While the BPD's zero tolerance philosophy and practices encouraged widespread arrests and detention, some charges can be issued a citation in lieu of arrest. Md. Crim. Proc. § 4-101. For youth, only a handful of charges require arrest, all others can and should be provided with a citation. In both contexts, the BPD should implement policies, practices, and oversight mechanisms that encourage the use of citations for low level offenses.

Often referred to as “catch and release” in Baltimore, a citation is only issued in lieu of arrest after the individual is fingerprinted to confirm their identity and that they do not have any outstanding warrants. The BPD lacks the fingerprint database at its precincts, requiring this process to occur at Central Booking. While a slightly quicker process than the full processing of an arrest, securing the fingerprinting database at police stations and utilizing it to process citations in lieu of arrest would reduce unnecessary detention, minimize police transport, and increase officer efficiency.

The vast majority of children who are arrested are later released and given a date for arraignment. To minimize the unnecessary use of detention and decrease the likelihood of escalation, the BPD should develop a citation policy that requires officers to cite and release all juveniles accused of misdemeanors and non-violent felonies, except when a physical arrest is mandated by statute; when the release could jeopardize the safety and welfare of the child or any other person or when the suspect has already been cited and refuses to leave, or continues to commit the violation.

Recommendation 26. Revise current policy so that prompt presentment can only be waived after consultation with an attorney.

Maryland Rule 4-212(f) requires that an individual arrested without a warrant appear before a judicial officer of the District Court within 24 hours after arrest. The BPD is often able to circumvent this deadline by having individuals, without the benefit of counsel, waive their right to prompt presentment.

“The principle of prompt presentment . . . has been described as a sine qua non in any scheme of civil liberties. In Maryland, as elsewhere, the purpose of the rule is to insure that an accused will be promptly afforded the full panoply of safeguards provided at the initial appearance.” Johnson v. State, 282 Md. 314, 321, 384 A.2d 709, 713 (1978) (internal citation omitted). Although the right to prompt presentment can be waived if such waiver is knowing and voluntary, id. at 332, 384 A.2d 709, the frequency of lengthy detentions deriving from illegal stops and arrests, as documented by the DOJ Report, indicate that this right is being waived without a sufficient understanding by arrestees. In cases without a subsequent confession or other statement to be used against the individual, there is no court review or remedy of inadequate waiver.

To encourage timely police processing, minimize lengthy pre-charge detention, and ensure that waivers of prompt presentment are knowing and voluntary, the BPD should be required to provide access to an attorney before seeking a waiver of prompt presentment. OPD is willing, capable and ready to serve as ‘stand-by counsel’ for this purpose.

Use of Force

The DOJ Report documents a shocking pattern of police encounters that escalate into violence, often causing serious injury or death that could have been avoided. Such force by the police, particularly in situations that did not begin as violent or dangerous interactions, are harmful to the officer and devastating to the individual, their families and the community. The BPD needs to have an unwavering commitment to protecting human life, and to upholding the value of dignity of every person. Policies, training, monitoring and oversight need to reiterate that force is to be used as a last resort, only when necessary to accomplish a legitimate public safety objective, in a manner that avoids unnecessary injury or risk of injury, and that is proportional to the level of resistance or threat encountered. Officers should also have a duty to intervene and report any use of force that is unreasonable or unnecessary that they observe.

Recommendation 27. Require ongoing mandatory training on de-escalation techniques.

The aggressive tactics that have been prioritized by the BPD need to be replaced with strategies and skills that promote safe encounters and, when possible, de-escalate dangerous situations to avoid the need for force. In addition to providing information about the legal standards and requirements for use of force, officers need instruction and encouragement to utilize alternate strategies, such as disengagement, area containment surveillance, waiting out a subject, using cover, calling in specialized units, or delaying arrest. They should be provided with interactive and role-playing opportunities to utilize these skills and recognize that they may be the most appropriate response to a situation, even when force can be legally justified.

De-escalation as a priority needs to be incorporated into the BPD culture with ongoing training mandated for all officers to refresh the basic principles and provide an opportunity to practice new and established de-escalation techniques. See generally Recommendations 49-50.

Recommendation 28. Develop protocols for use of force and arrest techniques in dealing with individuals with disabilities and other people in crisis.

Many of the uses of force documented by the DOJ Report were the result of officers ill-equipped to deal with someone clearly in crisis or otherwise experiencing mental health distress. As discussed further in Recommendations 30-32, the BPD needs to implement protocols and training curricula related to crisis intervention and deployment of the Behavioral Emergency Response Team (BEST). Specific attention needs to be dedicated toward how to de-escalate encounters with people with mental health concerns and the reasonable modifications that may be needed under the Americans with Disabilities Act., 42 U.S.C. §§ 12131-12134.

Recommendation 29. Include use of force administrative reports as part of the criminal case file provided to the SAO.

Currently, the BPD's use of force report and related investigation documents are maintained separately from the case file related to any criminal charges. As a result, this report is not provided in discovery as a matter of course. Rather, counsel must know that force was used and explicitly request these documents so that the SAO can obtain them. The use of force evidence can potentially negate or mitigate a defendant's guilt or punishment, or be relevant toward impeachment of the testifying officer, mandating disclosure under Brady, Giglio, and Md. Rules 4-262(1) (district court), 4-263(d)(5)-(6) (circuit court). Including these forms within the case file will enable to prosecution to fulfill its Brady/Giglio obligations and disclose this information in all applicable cases.

Crisis Response

Among the more tragic aspects of the DOJ Report is the repeated documentation of instances resulting in force, arrest, or other trauma that were wholly preventable. In particular, the BPD's escalation of interactions with people in mental distress has both an immediate and long-term devastating impact. Often, the BPD entered these situations aware of the mental health issues that existed, as they were responding to a call for an emergency petition.

As discussed in the prior section, all officers need ongoing training on de-escalation techniques and specific protocols on arrest and use of force and arrest techniques in dealing with individuals with disabilities and those in crisis. See Recommendations 27-28. Additional specialized attention and resources are needed to ensure that the BPD's interaction with and treatment of people with mental disabilities includes the safeguards and accommodations needed to meet constitutional and statutory standards.

Recommendation 30. Establish a comprehensive and effective crisis intervention team.

Crisis intervention teams (CIT) are an emerging best practice for interactions with people with disabilities or otherwise in distress. This approach promotes the goals of assisting individuals in crisis, improving safety without the use of force, providing, encouraging community and stateside solutions to assisting individuals with mental illness, and reducing the need for individuals with mental illness to have further involvement in the criminal justice system.

The BPD's Behavioral Emergency Services Team (BEST) neither includes the necessary components of a CIT, nor is it deployed in a consistent and effective manner. BEST training needs to be incorporated beyond the Academy, such that experienced officers are part of the BEST team and all officers receive basic crisis intervention training, see Recommendation 31.

Moreover, an effective CIT is a community partnership that needs collaboration with behavior health experts, advocates and service providers.

The BPD should establish a CIT consisting of officers with advanced training in crisis intervention, a mental health professional, a juvenile mental health professional, a community services resource professional and others as need requires. Such collaboration should inform the development and implementation of appropriate de-escalation techniques, and encourage BPD referrals to community treatment services that are often more appropriate than jail or hospitalization.

With sufficient expertise and resources, the CIT should then be deployed to all calls known to involve an individual in mental health crisis, and not be limited to calls involving emergency petitions. Team members should also be expected to engage in community outreach as part of their responsibilities, both to engage with members of the behavioral health community and to educate the community about the CIT and its availability to respond to incidents involving individuals suffering a mental health crisis.

Recommendation 31. Require all officers to complete training about mental distress and appropriate response techniques, with CIT members and dispatch personnel receiving further specialized training.

While a dedicated crisis intervention team is an emerging best practice, all officers will still encounter people in crisis, including people with mental disabilities, and need to be equipped with the understanding and tools to ensure these interactions minimize trauma, deescalate potential tension, encourage alternatives to detention or hospitalization, and comply with the American with Disabilities Act, the Rehabilitation Act, and other federal and state disability laws.

At least annually, officers should receive training on how to recognize the signs of mental illness or distress, de-escalation techniques for interacting with people in distress, when and how to dispatch the crisis response team, and what to do if a CIT member is not available. Specialized CIT officers should receive additional training on suicide intervention, community mental health and drug treatment resources, common diagnoses, the effects of drug and alcohol, perspectives of consumers and their family members, the rights of people with mental illness, and civil commitment criteria.

Dispatch officers need additional instruction on how to identify a person in crisis, how to elicit information regarding mental health issues from callers, telephonic suicide intervention, crisis management, and which calls require dispatch to the crisis intervention team.

Recommendation 32. Develop protocols regarding crisis calls and response calls for emergency petitions, with ongoing monitoring.

Underlying the training to be provided to officers, CIT members, and dispatch workers, there need to be policies and protocols that specify how crisis calls and emergency petition calls should be handled. These policies should make clear that, when practicable, the BPD will dispatch at least one specialized CIT Officer and one other officer to all incidents involving a person in crisis, with additional policies for circumstances in which there is no CIT officer available to respond immediately. Policies should reinforce diverting people with mental illness and/or drug addiction to the health care system, rather than arrest and detention, including in appropriate situations where there is an apparent violation of law that does not implicate public safety.

As the BPD has not had a true crisis intervention team, supervisors and management should conduct ongoing monitoring and follow-up of police interactions with individuals in mental health crisis in order to refine and/or develop tactics to improve those interactions. Data-driven and qualitative assessments should include a review and analysis of whether CIT officers were dispatched for all calls or incidents that appeared to involve an individual in crisis, comparison of incidents with and without CIT officers, and a review of officer conduct. With this information, BPD can identify deficiencies and opportunities for improvement, implement appropriate corrective action and improvement measures, and document the measures taken.

Diversion

Currently, BPD culture and practices treat responding to a call involving a person in crisis as having two possible outcomes: an emergency petition or an arrest. Individuals with apparent mental health and/or substance abuse issues, who do not pose a significant threat to themselves or others, need access to community treatment services without the collateral consequences of a criminal conviction or involuntary hospitalization. A greater use of pre-arrest diversion would allow the BPD to deescalate interactions, improve community relations, and generally promote an effective criminal justice system that is focused on serious criminal activity, rather than the petty and nuisance offenses that dominated zero tolerance efforts.

Recommendation 33. Expand Law Enforcement Assisted Diversion (LEAD) to a city-wide pre-arrest diversion.

The Agreement in Principle includes a commitment by BPD to “work with disability organizations and mental health care providers in the community to increase its ability to divert individuals from the criminal justice system to community resources.” Agreement in Principle 4.

A step toward this goal is the BPD's effort to start a Law Enforcement Assisted Diversion (LEAD) program by Lexington Market.

OPD considers LEAD to be a promising development for the city that should be considered for a larger geographic area and for all low-level offenses related to drug or alcohol use and/or committed by people with serious mental health issues or youthful offenders. One area of concern, however, is the BPD potentially allowing for LEAD to include detention while services are identified and secured as LEAD expands to a city-wide program. Through increased collaboration with local hospitals and community service providers, the BPD should be able to achieve a true diversion program, preventing individuals desperate for treatment from having to endure jail time to secure these needed services.

Recommendation 34. Create evidence-based youth diversion programs, including school arrest diversion programs.

As part of its effort to shift away from failed zero tolerance efforts, the BPD needs to prioritize minimizing youth contact with the criminal or juvenile justice system. BPD should encourage officers to exercise their discretion in referring youth to alternatives, rather than arresting them, whenever possible. To be effective, the BPD must provide both a range of appropriate alternative options and guidance on when such alternatives are appropriate and how to access them. To establish appropriate options, the BPD should collaborate with the Baltimore City Public School System to develop a conflict resolution program, a system for referrals to school discipline personnel, and other disciplinary alternatives to arrest.

Recommendation 35. Support legislative measures that minimize the arrest and detention of nuisance and petty offenses.

The zero tolerance strategies by the BPD have resulted in disproportionate attention to petty offenses, with thousands of arrests resulting in no charges being filed or charges that are ultimately not pursued by the prosecution. As the DOJ Report notes, many of these arrests violate the Fourteenth Amendment based on the void-for-vagueness doctrine, unjustified impeachment on liberty, and/or a failure to provide requisite warning. Beyond reforming BPD policies and practices, the City should encourage legal reforms that would preclude such practices. At a minimum, the City should agree to support or not oppose legislation that would reform the citation law to decriminalize or otherwise minimize the extent to which nuisance and other petty offenses are incarcerable.

Unconstitutional detention, particularly based on petty offenses, is exacerbated by court practices with respect to bail. Individuals from low income communities who are targeted for "clearing corners" and other zero tolerance policies are regularly held on bail that is beyond their means. As a result, in addition to being subject to overly aggressive policing, Baltimore residents, particularly from low income communities of color, are detained – separated from their families

and jeopardizing housing and employment stability – based solely on their lack of financial means, in violation of the Equal Protection Clause. See Varden v. City of Clanton, 2:15-cv-34-MHT-WC, Statement of Interest of the United States (M.D.Ala. Feb. 13, 2015). In consideration of its residents who have been negatively impacted by police interaction and zero tolerance strategies, the City should be required to either support or take no position on bail reform legislation that mandates consideration of ability to pay as part of the court’s pretrial release consideration.

Youth

Children are different from adults in sufficiently significant ways that “[o]ur history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.” Eddings v. Oklahoma, 455 U.S. 104 115-16 (1982). The neurological and psychosocial development of youth make adolescents more prone to risk-taking, dangerousness, peer pressure and poor decision-making. As a result, the Supreme Court has repeatedly recognized that special consideration and treatment may be needed to comply with constitutional principles. See, e.g., Montgomery v. Louisiana, 136 S.Ct. 718 (2016) (holding retroactive Miller v. Alabama, 132 S.Ct. 2455 (2012), which required that juveniles convicted of homicide must be afforded “a reasonable opportunity for release”); J.D.B. v. North Carolina, 564 U.S. 261 (2011) (holding that a child’s age is relevant to the Miranda analysis); Graham v. Florida, 560 U.S. 48 (2010) (holding that sentence of life without parole for individual convicted as a juvenile of a non-homicide violates the Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (holding that death penalty is unconstitutional when imposed on juveniles); Haley v. Ohio, 332 U.S. 596 (1948) (finding confession to be involuntary in part because of the age of the defendant).

The decreased culpability of youth, the increased risk of an interaction with the police escalating, and the existing supervision of a parent or guardian warrant minimizing the extent to which children are arrested and detained. Diversion programs should be utilized to the greatest extent possible, see Recommendation 34, and only children accused of the most serious offenses should be arrested, see Recommendation 25.

Unlike many other city police forces, the BPD lacks a specialized youth division. More troubling it has no policies specifically addressing interactions with youth. As a result, police interactions with children often escalate, and children, particularly youth of color, are regularly mistreated by the BPD, often with force. In addition to reforming policies and practices generally, the BPD needs to establish developmentally-informed strategies to account for the unique needs and challenges of interacting with youth.

Recommendation 36. Develop and implement policies protecting the rights of children during a street encounter with an officer.

In addition to the general protocols and protections needed for stops, see Recommendations 22-25, special protections are needed for children. Children are less likely to understand their rights, particularly with respect to interactions with adult authority figures like the police. “[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.” *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011). Recognizing this distinction, an officer who makes contact with a child without the reasonable suspicion needed for a stop, should be required to calmly inform youth that they are free to go and do not have to talk to them, with no caveats or modifications.

The BPD must also end the practice of photographing children without probable cause. BPD officers regularly stop youth without reason, take their photographs, and store those photographs on the officer’s cell phone for use in investigations. Maryland law requires that police records concerning juveniles to be kept confidential and stored separately from those of adults. Md. Code Ann., Cts. and Jud. Proc., § 3-8A-27(a)(1). BPD must adopt and implement policies that comply with the law, including disciplinary measures for officers who violate this privacy protection.

Recommendation 37. Limit the searches of youth and ensure they are conducted by appropriate personnel.

As with all suspects, frisks and warrantless searches of youth should be based on a reasonable, articulable safety concern. See Recommendation 22. Within a reasonable child or adolescent framework, any officer request to frisk or search is inherently coercive. See J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) (applying a ‘reasonable child’ standard to the Miranda custody analysis). As a result, the BPD should prohibit consent as a sufficient basis for a frisk or search of a youth.

BPD policy should further limit the type of search that may be conducted on children, and ensure that they are conducted by staff trained in adolescent development. In assessing the reasonableness of a strip search, the Supreme Court has recognized that “adolescent vulnerability intensifies the patent intrusiveness of the exposure.” Safford Unified School Dist. # 1 v. Redding, 557 U.S. 364, 375 (2009). BPD staff should never strip search a child. When absolutely necessary based on an individualized, reasonable, and articulable suspicion that the child is secreting something in a body cavity, strip searches should be conducted in private by the Department of Juvenile Services with written documentation of the strip search request. A search conducted pursuant to probable case for arrest should generally be limited to a routine non-cavity, non-strip search.

Recommendation 38. Establish specialized policies and practices pertaining to the interrogation of children.

In J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011), the Supreme Court held that a child's age properly informs the Miranda custody analysis. Likewise, the BPD should establish developmentally-informed policies that apply when it seeks to question a child. Before questioning a child, the BPD should notify a parent or guardian, provide them with the opportunity to be present during questioning, and also provide an opportunity for the child to speak to a lawyer.

Far too often, youth are provided Miranda warnings that are beyond their cognitive capacity. The BPD should establish a protocol for Mirandizing youth that promotes comprehension, such as tailoring the warnings to a 3rd grade or below reading level, instructing officers to read rights one at a time, and having the child repeat back the meaning in their own words. Whenever applicable, law enforcement must inform young suspects that speaking to police may subject the child to adult criminal consequences, and ensure that the child understands the concept of "adult criminal consequences," along with any other concepts that the child may not grasp, before proceeding with questioning. Finally, the officer should videotape the Miranda warnings, to document both that they were provided and the level of comprehension that was exhibited.

Once an interrogation is to occur, whether as a suspect or a witness, interviewing youth requires communication that is age and developmentally appropriate. Barring exigent circumstances, children should not be questioned between the hours of 10 p.m. and 8 a.m., and every custodial interrogation should be video recorded in its entirety. BPD policy should prohibit officers from telling a juvenile suspect that they will avert or face reduced charges if they confess or from using unclear or technical language that could be interpreted as a promise of leniency. The interrogating office should further ensure that the child understands the consequences of confessing and the full implications of making a statement.

Recommendation 39. Mandate prompt parental notification of all police interactions and prompt processing of children at Baltimore City Juvenile Justice Center (BCJJC).

An adult caretaker plays an important role in a child's life and legal proceedings. As such, a parent, guardian or custodian is a party to any juvenile proceeding, Md. Code Ann., Cts. and Jud. Proc. § 3-8a-01(v), and should be notified about all police interactions with a child in their care. BPD policy should require officers to contact a parent, guardian or custodian immediately if they stop a child to notify them of the situation and of their location, and permit the parent to accompany the child throughout the process. The caregiving adult should also be contacted before any interrogation of a child, so that they have the option to be present, and after any search, so that they are aware of this intrusion and can potentially recover property on behalf of

their child. See Recommendation 24 (policy recommendations regarding seized property). The parent/guardian/custodian must also be notified immediately upon a child's arrest and, when unavailable, there should be renewed efforts to contact them within a designated short period of time.

Recommendation 40. Require prompt processing of children at the Baltimore City Juvenile Justice Center.

When a youth is arrested, the BPD should minimize the processing time during which a child is detained. Currently, children often wait hours between when they are brought to Baltimore City Juvenile Justice Center and when they are released to their parents. Parents are regularly turned away and told to call "in a few hours" causing unnecessary stress and fear for families. Strict timelines must be implemented to streamline this process, including immediate parental notification as outlined in Recommendation 39. Similar to the prompt processing that is afforded to adults as a matter of law, see Recommendation 26, children should be booked, processed, and transferred to the Department of Juvenile Services within a designated period of time, such as 2 hours after arriving at BCJJC or the police station.

Recommendation 41. Mandate training on adolescent development and developmentally-informed policing.

In addition to guidance on specific policies and practices pertaining to interactions with youth, BPD officers need a greater understanding of normal adolescent behavior, such as impaired long-term decision-making and challenging authority as natural features of healthy development, and how this should impact their policing. Training on child and adolescent development is essential for law enforcement officers to understand the differences between children, youth, and adults and how to appropriately respond to young people.

Recommendation 42. Encourage legislation ending the City's curfews.

Baltimore has imposed both daytime and nighttime curfews on the city's youth. See Balt. City Code, art. 19, § 34-3 (nighttime curfew), § 34-4 (daytime curfew). These ordinances collectively make it illegal for children under the age of 17 to be outdoors except for a very limited window of time. Violation of the curfew can result in up to 24 hours of detention. Balt. City Code, art. 19, § 34-8(d). Beyond the constitutional questions concerns raised by these provisions, cf. Ashton v. Brown, 339 Md. 706, 60 A.2d 447 (1995) (striking down Frederick County, MD curfew as unconstitutionally vague), their enforcement is another example of zero tolerance approaches that have resulted in more individual and community harm than effective policing. The City should introduce and support legislation in the City Council that would end the youth curfews and remove this zero tolerance policing priority.

Collaboration with Baltimore City School Police Force

The Baltimore City School Police Force (BCSPF) is designated, by state law, as the primary agency responsible for policing property owned, leased and operated or controlled by Baltimore City Public Schools. Md. Code Ann., Educ. § 4-318. BPD has granted BCSPF concurrent jurisdiction throughout the city, through an agreement which has essentially established the BCSPF as an auxiliary police force. This collaboration has extended the BPD's zero tolerance strategies into the public school system, removing these learning institutions as important safe havens for many youth and further establishing the school to prison pipeline for youth from low income communities of color.

Recommendation 43. Limit the Interaction Between Children and Police in School Settings

Schools should be safe learning environments for all children, and not used for law enforcement purposes except when absolutely necessary. See Code Md. Reg. 13A.08.01.12 (A) (“When possible and appropriate, arrest by police should be made during nonschool hours and away from the school premises.”); Code Md. Reg. 13A.08.01.13 (A) (limiting the questioning of students on school premises to crimes committed on the premises or when otherwise immediately needed). Likewise, school police should not be permitted to use their school-based authority for law enforcement efforts in the community.

BPD should establish and implement policies to limit its law enforcement efforts on school grounds, and mandate that the BCSPF also follow these policies. In particular, BPD should prohibit use force on school grounds unless necessary to address an immediate threat to the physical safety of the officer or any other person; limit arrests and interrogations to the narrow purposes authorized by regulation; provide protocols and training on how to de-escalate school-based incidents whenever possible, including the use of restorative approaches to address student behaviors; and delineate procedures to receive and respond to complaints regarding the school setting.

BPD policies and practices should also protect student privacy. Individual student records maintained by school personnel are confidential in nature. BPD should only be able to access a student's educational record without the consent of a guardian or student in the extremely limited circumstances where access serves a legitimate and recognized educational purpose or is connected to a specific and articulable health or safety emergency. School directory information, including photographs, should only be accessed when required by exigent circumstances, and should never be used for photo arrays or witness identifications.

Recommendation 44. Reevaluate the relationship with Baltimore City School Police Force (BCSPF), ending or limiting the BCSPF's authority.

In light of the civil rights and other abuses experienced by Baltimore's youth, the OPD believes that the BCSPF should be abolished. As the BCSPF is a state entity, the City's ability to limit its powers is limited. However, the City should promote legislation to repeal Md. Code Ann., Educ. § 4-318 and limit the use of city funds to support the BCSPF's activities.

To the extent that the relationship with BCSPF remains, a new memorandum of understanding is needed that clearly delineates the authority of the BCSPF, limits its assistance in BPD activities to exigent emergency circumstances, and specifies procedures for law enforcement interactions with students while on school grounds, including the adoption of BPD policies as delineated in Recommendation 43. As discussed in Recommendation 4, the BCSPF should be required to collect data about its involvement in law enforcement activities and provide this data to the BPD on a regular basis.

Technology

The BPD's overall lack of transparency and its efforts to use cutting edge technologies prior to developing protocols and guidelines has placed it at the forefront of a national debate regarding the right to privacy, law enforcement surveillance, and disclosure obligations. Rather than serving a prosecutorial interest, the BPD's secrecy and autonomy has created discovery violations and other legal issues resulting in the exclusion of evidence and ultimately dismissal of cases.

The BPD's use of cell site simulators, such as Stingray or Haelstorm, provide a useful example and set the stage for increasing levels of secrecy. BPD began using this technology in 2007. According to a 2011 nondisclosure agreement, entered into when the BPD purchased upgraded technology through the Harris Corporation, the BPD and the SAO agreed to not disclose "any information concerning the Harris Corporation wireless collection equipment/technology, operating manuals, and any related documentation (including its technical/engineering description(s) and capabilities beyond the evidential results obtained" including in case-related proceedings such as affidavits to support search warrants, discovery, and responses to court-ordered disclosure. Unsurprisingly, in light of this agreement, OPD and other defense attorneys were never informed of the use of this technology to locate or identify our clients. An OPD attorney learned about stingray and its use by police departments at a 2014 conference, after which OPD began to examine whether this technology appeared to be used in Baltimore.

In early cases identified by OPD, the SAO responded to discovery requests by either stating that the technology was not used in that case or that they were not at liberty to divulge information. In documents that required some mention of the resulting evidence, stingray was referred to as

“C.I.,” i.e., a confidential informant. As defense counsel was able to ask more directed questions, and the relevance of Stingray became increasingly clear, officers and prosecutors explicitly refused to provide information, resulting in the suppression of evidence in several cases. See, e.g., State v. Shemar Taylor, Case No. 114140031 (Balt. City Cir. Ct.), transcript of Nov. 21, 2014 at 73-75 (Det. Haley refusing to divulge information about the technology, despite judge’s threat to hold him in contempt).

Between 2007 and April 2015, without any guidelines or policies regarding its use of cell-site simulators, the BPD used stingray an estimated 4,300 times. See Justin Fenton, Baltimore Police Used Secret Technology to Track Cellphones in Thousands of Cases, Baltimore Sun, April 9, 2015. Some of these uses were for tracking phones to find the user, while others were to canvas locations that a suspect passed through to identify their cell phone number. These uses were not limited to violent offenses; Stingray has been used for cell phone robberies, petty theft, and even to track reticent witnesses to ensure they appeared in court.

It was not until September 2015, when the DOJ released its enhanced policy guidelines to increase privacy protections and compliance with legal disclosures for cell-site simulator use by the Department, that the BPD acknowledged its own use (but, to the extent known, still did not develop a policy or guidelines). Ultimately, in March 2016, the Maryland Court of Special Appeals held that the use of a cell-site stimulator device constitutes a search under the Fourth Amendment and, rather than merely securing a pen register, a warrant was required for its use. State v. Andrews, 227 Md. App. 350134 A.3d 324 (Md. Ct. Spec. App. 2016).²

Despite the lessons that should have been learned from Stingray, including the greater transparency and guidelines for use in DOJ’s enhanced policy, in January of this year, the BPD began collaborating with an outside entity, using private funds, to secretly purchase and begin using Cessna aircraft surveillance technology without the input or oversight of City officials, including the Mayor, the State’s Attorney, or the Board of Estimates, which oversees purchases by city agencies. Information about this technology and its use in individual cases was also not disclosed to defense counsel.

In addition to greater transparency, the consideration and use of technology requires forethought and guidance. Technologies develop and advance at a pace faster than the law can regulate. Complex issues regarding privacy, Fourth Amendment protections, evidence collection and retention, and disclosure are constantly raised and should be carefully considered at the outset.

² The State did not seek review to the Maryland Court of Appeals, and the time to request review has elapsed. Another case is currently before the Court of Special Appeals, State v. Copes, in which the State has conceded that use of the device is a search but is challenging the application of the exclusionary rule to an unconstitutional Fourth Amendment search.

Recommendation 45. Establish an oversight board to review new technologies being considered for use by the BPD and to help establish protocols or guidelines for their use.

An oversight board, consisting of stakeholders within the BPD, SAO, OPD, the private defense bar, advocacy groups, academia, and residents, should be established to assess and monitor new technologies being considered and implemented by the BPD. In addition to ensuring a base level of transparency and community engagement about law enforcement technology, this board can provide the BPD with greater perspectives and expertise than may be present within the BPD. With protections in place to secure the integrity of the BPD's investigations, this board should be empowered to establish binding policies and guidelines related to the use of technology, audit the BPD on its technology use, and recommend disciplinary measures for officials who fail to comply.

Recommendation 46. Develop additional guidelines on when body or vehicle cameras must be used, the documentation needed for instances when the camera is turned off, and how to incorporate this technology in BPD's oversight and supervision.

The DOJ rightly commends the BPD for equipping officers with body cameras in an effort to improve accountability and transparency. BPD vehicles are also equipped with cameras to further monitor potential dangerous transport practices. These are positive first steps, but additional guidelines are needed to minimize the discretion that officers have regarding when the cameras must be in use.

Recognizing the increased presence of police worn body cameras throughout the state and the need for guidance on their use, the Maryland Legislature established the Commission Regarding the Implementation and Use of Body Cameras by Law Enforcement Officers. In October 2015, the Commission released its Final Report, Including Findings as to Best Practices and a Recommendation to the General Assembly. While providing overarching best practices, the recommendations in the Final Report afford officers substantial discretion in the use of the camera and offers little guidance on the application of the best practices listed. The BPD should develop supplemental guidelines that more clearly detail when body and vehicle cameras must be used, the limited exceptions for when cameras may be turned off, and how those circumstances should be documented. In addition, supervisors should be instructed to identify and review recordings as part of their oversight duties. Officers who fail to comply with the camera policies should be subject to discipline and further training.

Recommendation 47. Retain potential video evidence for a longer period of time and provide video evidence to OPD at no cost.

With the increasing use of body and car cameras, as well as CCTV, video evidence is increasingly created and relied upon in criminal cases. Videotape evidence that is not being used in the prosecution's case is not readily provided to the defense. As an initial matter, videotapes are generally retained for only 30 days from the date of recording, which provides a very short window for defense counsel to request preservation once they are assigned to the case and learn about the possible video evidence. As technological advances have made video storage substantially easier and less expensive, the BPD should revise its retention policy to provide for a longer retention of video that may be relevant to a possible prosecution.

The BPD also charges high rates for copies of video evidence, based on the amount of time recorded.³ As OPD's clients are all indigent, and like many Maryland agencies, OPD is regularly underfunded, attorneys are not able to obtain all of the video in many cases. Rather, in order to adequately represent their clients, they need to watch the video at the police station, determine the specific sections that they may be needed and order the smallest amounts of time possible. This prevents full use and application of video to the defense case, and is an unnecessary and outdated cost. As the technology for recording has advanced, it is predominantly digitized which can be copied with minimal time or resources needed.

In light of the indigency of OPD's clients, the ease of copying video evidence, and the collaboration generally afforded between government agencies, other counties in the state provide OPD with more ready access to video evidence. For example, Washington and Frederick Counties provide OPD with CDs of video evidence free of charge; in Baltimore County, video discovery is provided via email with a link to the TASER website (www.myevidence.com) where it is stored and DVD recorded statements are provided on a thumb drive that is loaned to OPD to copy and then returned to the SAO; in Anne Arundel and Harford Counties, copies of video evidence are provided free of charge in response to discovery orders. The BPD should follow the example of other counties and enter a memorandum of understanding with OPD that establishes a process whereby OPD can secure videotape evidence related to its clients' cases at no cost.

³ OPD is provided with four hours of video free of charge. However, with increased multi-camera technology and use of CCTV and officer recordings, four hours is insufficient to gather all of the potentially relevant video evidence related to a client or incident.

Training

Many of the problematic practices documented by the DOJ are the result of poor training and the lack of guidance regarding policies and best practices. BPD needs to establish an internal culture that prioritizes training at all levels and recognizes a properly trained officer as a valuable asset. Attention and resources need to be dedicated to ensuring that officers have sufficient understanding and guidance on BPD policies, the diverse populations with whom they interact, and the skills and techniques needed to performing their jobs effectively.

Recommendation 48. Include adolescent development and mental health expertise on the Maryland Police and Correctional Training Commission and encourage community collaborations in curriculum development and delivery.

The Training Commission needs sufficient expertise to address the wide variety of topics and issues that need to be conveyed to BPD staff. This includes specific attention to vulnerable populations that come into regular contact with the police. Experts in mental health and adolescent development can develop and deliver curricula focused on the unique qualities and needs of these populations, while also providing input on operational trainings and how to apply them to these vulnerable groups, including best practices for deescalating interactions and engaging with relevant community partners.

The BPD should also be encouraged to collaborate with community partners on relevant portions of the training curricula. First-hand accounts from youth advocates, mental health organizations, and grassroots organizations from identified “hot spots” can help encourage community-oriented policing principles. See also Recommendation 21 (suggesting collaboration with the city’s historically black colleges on training related to implicit bias and overcoming racial animus).

Recommendation 49. Establish and implement curricula that provide all officers with training that conforms with current law and best practices.

BPD officers need adequate training to understand how to police effectively and safely in accordance with revised BPD policies, constitutional requirements, and federal and Maryland law. As the BPD adopts policies related to community-oriented policing, procedural justice, and bias-free policing, these philosophies need to be incorporated into the trainings with an expectation that officers further these principles in their policing. As discussed previously, certain topics require mandated training for all officers, including: adolescent development, trauma, implicit bias, de-escalation techniques, and interacting with people with disability and individuals in crisis. See Recommendations 21, 31, 41. Operational policies also require guidance and training on their implementation and relevant skills development.

Recommendation 50. Require appropriate retraining.

Training needs to be an ongoing process that continues to provide officers with up-to-date information, emerging trends, and promising new practices. The BPD should mandate ongoing training with documentation of course completion and comprehension, and disciplinary measures for failing to maintain appropriate education. In addition to recognizing a commitment to training as an aspect for promotion and review, training should also be a relevant component of supervision and discipline. Misconduct complaints, violations of BPD policies and protocols, and supervisory concerns that do not result in termination should require additional training on the topics relevant to the source of concern.

Conclusion

The widespread concerns identified in the DOJ Report warrant a comprehensive consent decree that addresses the policies, practices, training, oversight and culture that contributed to the constitutional violations documented. The decree should have quantifiable benchmarks, with sufficient specificity to clearly measure the BPD's progress and challenges. In addition to overseeing the broad policy and practice changes to be implemented, the monitor should have a means to address individual case-specific violations of the law, to ensure that people who have been the victim of clear violations of the law or the decree have an avenue to raise these concerns as well as remedy to make their complaints meaningful.

The Office of the Public Defender looks forward to serving as an external stakeholder, engaging as a community partner where appropriate and monitoring the progress of the decree and its impact on the constitutionality of police interactions.