Comments from the Maryland Office of the Public Defender for Baltimore City.
Draft Policies for Searches, Stops, Arrests and Warrants
September 2018

The Office of the Public Defender (OPD) embraces the opportunity to provide these comments to the Baltimore Police Department (BPD) on its draft policies for searches, stops, arrests and warrants. As the public defender for Baltimore City, we see the impact of the BPD's actions every day through the experiences of our clients and our representation in court. Our comments focus on the issues we are uniquely able to address, related to our practice and the impact on our clients.

While we provide general anecdotes from our experience, our professional and ethical obligations to protect the safety and interests of our clients preclude us from providing identifying information from specific examples. A high profile incident in August captured on video, in which a BPD officer (who has since resigned and been charged with assault in the first degree) beat a young man who had previously raised concerns about the officer's conduct highlights the dangers still faced by our clients when they try to complain about police misconduct. In the long term, we are hopeful that the consent decree will create a process and environment where violations can safely be raised, but achieving that goal still has a long way to go. Our first priority is to protect our clients, and we remain committed to engaging in all components of the consent decree relevant to our commitment to our clients and our expertise and experience in the city's criminal justice system.

I. Policy 1007 – Search and Seizure Warrant

Recommendation 1: Provide more detail on what does, and does not, constitute probable cause for a valid warrant.

The specificity required to establish probable cause is among the biggest problems with invalid warrants obtained by BPD members. While the draft policy correctly notes that an accurate and clear description of the reasons for the request of the search is needed, it does not explain what this does (and does not) mean. The policy should make clear bases that are often relied upon that do not sufficiently meet the probable cause standard.

Suggested language: Under the Directives, Applying for a Search and Seizure Warrant, Affidavit in Support of Search and Seizure Warrant, revise ¶ 2 as follows:

> Must contain an accurate and clear description of the reasons for the request for the search (i.e. Probable Cause to Search). **The facts and circumstances provided must be sufficient for the issuing judge to conclude that there is a reasonable probability to believe that the specific items subject to seizure are at the location specified.**
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> **NOTE: After a street encounter, the mere fact of a suspect's residence is not sufficient for a valid warrant, unless there is corroborating information to support the likelihood of the specific items to be seized.**

Recommendation 2: Note that probable cause for a search does not automatically extend to probable cause for a different search or an arrest.

In addition to highlighting the specificity needed to support a warrant, the policy should make clear that the execution of the warrant is limited to that same specificity, at least until more evidence or observations of a crime is obtained.

Suggested language: Add the following to the General section.

> **Execute the warrant in accordance with the application. Authorization to conduct a search based on reasonable suspicion does not, on its own, authorize arrest of an individual or the search of another location. For example, a warrant to search a vehicle does not authorize search of the vehicle owner's house.**

Recommendation 3: Emphasize that searches must be conducted lawfully.

The draft policy rightfully encourages minimal damage for the execution of a property search, and should similarly ensure that police conduct remains lawful and minimally intrusive

Suggested language: Revise General ¶ 6 as follows:

> All searches shall be conducted in a thorough and professional manner with minimal damage or disruption to the location searched. To minimize property damage and the need for forcible entry, and where doing so would not place BPD members at heightened risk, members shall attempt to **lawfully** obtain keys, combinations or access codes when a search of locked property is anticipated.

Recommendation 4: Provide more detail on the requirements for a no-knock warrant.

The success of BPD's new policies will ultimately rely heavily on the strength of training to ensure understanding of the constitutional principles and how they apply. Nonetheless, more detail particularly regarding no-knock searches can help minimize violations.

Suggested language: Revise General ¶ 9 as follows:

> **Typically, the execution of a search warrant requires the member to knock and announce prior to entering the premises to be searched. No-Knock Searches require particularized exigent circumstances.** The exigent circumstances for allowing a No-Knock Search and Seizure Warrant are:
>
> 9.1. Threat of violence or harm to members.
>
> 9.2 Probability of harm to occupants.
>
> 9.3 Escape of suspects.

9.4 Destruction of evidence by suspect(s).

Prior knowledge of the suspect is not sufficient to justify a No-Knock Search and Seizure Warrant.[1]

Recommendation 5: Explain the requirements and limits for remote tracking of a suspect's movement.

The draft policy notes that amassing information that intrudes on privacy, such as remote tracking, may be part of a search, but provides no limitations or requirements on this type of search. Consistent with recent Maryland law, this provision should make clear the requirements and limitations of this type of privacy intrusion.

Suggested language: Revise General ¶ 11 as follows:

> A search may include amassing information about a suspect in a way that intrudes on their expectation of privacy (such as remote tracking of a suspect's movement over an extended time frame). **These searches almost always require a court order, and are limited in duration. GPS tracking requires a search warrant, is limited to 30 days and up to one 30 day extension, and notice must be provided to the user unless exigent circumstances.[2]**

Recommendation 6: Require the preparation to include consideration of people collaterally affected by the execution of the search warrant.

Individuals who reside at the target location and other bystanders who are not the subject of the investigation underlying the search should be protected as much as possible from any negative consequences from the search. This is particularly true for vulnerable individuals, who may have special needs due to age, disability, and infirmity.

Suggested language: Revise Preparing to Execute a Search and Seizure Warrant, Member ¶ 4 as follows:

> Provide a sketch/photograph of the target location, as well as any other intelligence. Examples of relevant intelligence to provide include the presence and/or location of known risk factors (e.g., weapons, dogs, locked gates, or cohabitants), whether there is known gang affiliation or violent criminal history, police or military experience, or a known history of drug or alcohol abuse. This shall be useful in assisting with the thorough completion of the Search and Seizure Warrant Risk Assessment (See Appendix C). **In addition, members should include information regarding safety factors to consider for known possible inhabitants of the property to be searched, including information on the possible presence of babies, small children, and persons with**

[1] Ford v. State, 184 Md. App. 535, 563, 967 A.2d 210, 227 (2009); Crim. Proc. § 1–203(a)(2)(ii), (iii).
[2] Crim. Proc. § 1-203.1

medical vulnerabilities, including for example the elderly, persons with developmental disabilities, or persons with known mental illness. Ensure a plan is put in place to prioritize and ensure the safety of such vulnerable bystanders.

Recommendation 7: Ensure that the execution of the warrant protects against individual harm and property damage as best as possible.

Consistent with recommendation 6, above, and General ¶ 6 in the draft policy, the provisions for executing the warrant should take measures to reduce the likelihood of personal harm during a forced entry or unnecessary property damage during the search.

Suggested language: Revise Executing a Search and Seizure Warrant, Member ¶¶ 3.1-3.2 as follows:

3.1. If a response is heard, identify yourself again as a police officer, state that you have a Search and Seizure Warrant and demand that the door be opened. If the occupant(s) refuse(s) to open the door after a reasonable amount of time an occupant would take to access the door, based on the size of the location, force may be employed to gain entry. **Announce loudly for any inhabitants to stand back from the door and that force is about to be employed.**

3.2. If no response is heard to the initial demand for entry after a reasonable amount of time an occupant would take to access the door, based on the size of the location, force may be employed to gain entry. **Announce loudly for any inhabitants to stand back from the door and that force is about to be employed.**

Add the following provision after ¶ 7:

8. Members should remain respectful of the property being searched, minimizing disarray, disruption, or property damage to that which is necessary to successfully execute the warrant in alignment with its scope.

II. Policy 1013 – Strip Searches and Body Cavity Searches

Recommendation 1: Focus the probable cause to a specific area to be searched.

As a strip search is far more intrusive than a pat-down, the probable cause required for it must be more specific than the general concern of concealing contraband. Rather, there should be probable cause that contraband is specifically concealed in the area to be searched.

Suggested language: Revise Strip Search, Justification ¶ 1 as follows:

In order to conduct a Strip Search, the member must have Probable Cause that a person is concealing contraband or a dangerous weapon **in the area to be searched** and the Strip Search must be conducted in accordance with the procedures outlined below.

Recommendation 2: Guard against the threat of a strip search being used as coercion.

The required actions include allowing for voluntary production of the suspected item to avoid a strip search. To ensure that this provision is not misused to coerce a suspect, it should make clear that the member can only discuss this alternative to a strip search when there is a legal basis for the search, with sufficient approval, and an intent to conduct a search. As voluntary production, or any response provided to the officer, is akin to a statement while in custody, the member should also be required to ensure that the person is aware of their rights against self-incrimination.

Suggested language: Revise Required Actions Prior to Conducting a Strip Search ¶ 4 as follows:

> 4. Prior to conducting the Strip Search, the member will explain to the person why they are being Strip Searched, **inform the person of their Miranda rights**, and give the person the opportunity to voluntarily produce the suspected item. The person will be allowed to voluntarily produce the item only if the member and permanent-rank supervisor, lieutenant or above, believe that the item can be produced without compromising member safety or risking destruction of evidence.
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> **NOTE: Under no circumstances may a Member tell an arrested person that they will conduct a Strip Search unless they already have probable cause to conduct such a search, have received permission from a permanent-rank supervisor lieutenant or above to conduct such a search, and have actual intent to conduct such a search.**

Recommendation 3: Require that gender identity be determined by inquiry to the person being the searched.

The consent decree specifically responds to violations that have uniquely impacted transgender individuals and other members of the LGBTQ community. OPD clients whose gender identity does not match their birth gender are often misgendered, either intentionally or based on misperceptions, stereotypes, or ignorance. While recognizing that gender identity is an important consideration, particularly with respect to highly invasive strip and body searches, the means by which gender identity is to be determined is unaddressed in the search policies. The most reliable way to determine gender identity is to ask the individual.

Suggested language: Amend Conducting a Strip Search ¶2 as follows:

> When authorized, Strip Searches shall be conducted by the fewest number of personnel necessary, in privacy, and by members who have been specifically trained in how to conduct a Strip Search. Absent exigent circumstances, when conducting a Strip Search of a person, members will 1) honor the person's preference about the gender identity of the member conducting the search; and 2) in the absence of a stated preference, the gender identity of the person being searched shall be consistent with the gender identity of the

member conducting a search. **The gender identity of the person being searched should be determined by asking the person being searched their gender identity.**

Amend Conducting a Body Cavity Search ¶ 3 as follows:

> A BPD member must be present during the search by a licensed medical professional, and will be responsible for preparing the necessary documentation. The gender identity of the present member should either 1) be the gender identity preferred by the person being searched; or 2) in the absence of a stated preference, the gender identity of the person being searched shall be consistent with the gender identity of the member present during the search. **The gender identity of the person being searched should be determined by asking the person being searched what their gender identity is.**

Recommendation 4: Emphasize that field strip searches are very rarely warranted.

In most circumstances, the restraint of the person pursuant to arrest will preclude the immediate safety concerns needed for a strip search to occur prior to transport to the station or another private setting. The policy should highlight how unusual it is for circumstances to justify a field strip search.

Suggested language: Add the following note after Conducting a Strip Search ¶ 3:

> **NOTE: Once a person is restrained via handcuffs or other restraints, the situation will be very rare in which the person cannot be transported safely to a district station or more private setting to conduct a Strip Search.**

Recommendation 5: Prohibit cross-gender strip searches of youth, except for youth who identify as male and prefer a cross-gender search for health or safety reasons.

As noted in the policy, the intrusiveness of strip searches is intensified for adolescents. A cross-gender strip search can be especially traumatizing for youth and pose unique concerns both with regard to mental well-being and safety.

Suggested language: In Conducting a Strip Search, add the following:

> **3.2 Under *no circumstances* may a strip search of a person who identifies as female and who is under the age of 18 be conducted cross-gender. A person who identifies as male and who is under the age of 18 may only be subject to a cross-gender strip search if the youth expresses a preference for a cross-gender search for health or safety reasons. The gender identity of the youth should be determined by asking the youth what their gender identity is.**

III. Policy 1106 – Warrantless Arrest Procedures and Probable Cause Standard

Recommendation 1: Make clear that the legal requirements for arrests apply equally to juveniles and adults.

While, under the consent decree, separate policies are expected to be developed for police interactions with youth, this policy should explicitly state that it is applicable to all suspects, regardless of age. In our experience, there is a misperception among many officers that juveniles are held to a different standard with respect to arrests. In particular, several officers have suggested that they believe all juvenile suspects must be arrested and that the prohibition of a warrantless arrest for a misdemeanor not committed in the presence of the member does not apply to youth. These perceptions are wrong and violate the constitutional rights of our young clients and Baltimore youth generally. Officers should be discouraged from trying to assess a suspect's age and juvenile/adult status during the course of arrest, and treating suspects differently based on this analysis. The constitutional principles underlying this policy must be applied to everyone, regardless of age.

Suggested language: In the Policy section add the following language:

> **The principles underlying this policy, and the directives contained within, apply to all warrantless arrests, regardless of the age or status of the suspect. Arrests of juveniles are subject to the same requirements.**

Recommendation 2: Include a definition for arrest that helps clarify when detention constitutes arrest.

Knowing when a stop becomes an arrest is critical to encouraging the legality of warrantless arrests. OPD has had numerous clients who were stopped, handcuffed, and not permitted to leave, but nonetheless told they were "not being arrested, just detained." In at least one instance, a client was placed in a police car, handcuffed, and still told he was only being detained and it was not (yet) an arrest. This specific language has been used with sufficient regularly to suggest that it is commonly believed, at least by some officers, that they can prohibit a suspect from leaving and not consider it an arrest.

To clarify when the circumstances of an investigative stop result in an arrest, the policy should define arrest and use clear descriptive language (rather than using the more permissive language of "may").

Suggested language: In the Definitions section, add:

> **Arrest -- the taking, seizing or detaining of a person by any act that indicates an intention to take the person into custody and that subjects the person to the actual control and will of the member making the arrest. An arrest is effected (1) when the arrestee is physically restrained or (2) when the arrestee is told of the arrest and submits. In addition, a person is seized within the meaning of the Fourth Amendment when, "in view of all the circumstances surrounding the incident, a**

reasonable person would have believed that he was not free to leave."[3] Detention alone can constitute an arrest.

Revise the first sentence of Directives, Probable Cause Standard ¶ 7 as follows:

> **What begins as a**n investigative stop **likely** ~~**may**~~ become**s** an arrest when the scope of the detention goes beyond the basis for it. …

Recommendation 3: More clearly distinguish between Probable Cause to Arrest and Reasonable Articulable Suspicion.

As Probable Cause and Reasonable Articulable Suspicion require similar analysis, with different levels of support required, they can easily be confused. To help clarify the distinction, the definitions should make clear the higher standard for Probable Cause and provide illustrative examples.

Suggested language: Revise the definitions for Probable Cause to Arrest and Reasonable Articulable Suspicion as follows:

> Probable Cause to Arrest — Where facts and circumstances taken as a whole, known to the member at the time of the arrest, would lead a reasonable member to believe that a particular person has committed, is committing or is about to commit a crime. ~~**As with Reasonable Articulable Suspicion (see below),**~~ Probable Cause is based upon an objective assessment of the facts and circumstances presented to the member **and requires a higher level of evidence than Reasonable Articulable Suspicion (see below). For example, a member responding to a call regarding a robbery may have reasonable articulable suspicion to stop someone who matches a description of the perpetrator, but would not have probable cause to arrest until obtaining some evidence, such as an identification by the victim or proceeds from the robbery.**
>
> ***
>
> Reasonable Articulable Suspicion (RAS) ─ A well founded suspicion based on specific, objective, articulable facts, taken together with the member's training and experience, that a subject has committed, is committing, or is about to commit a crime. **RAS required to justify a stop is a lower standard than the Probable Cause required for arrest. For example, an officer who suspects a driver is intoxicated may have RAS for a vehicle stop based on observations that the car is serving across lanes, and would have probable cause for arrest if the driver failed a breathalyzer test.**

[3] Wiegmann v. State, 118 Md. App. 317, 330–31 (1997), aff'd, 350 Md. 585, 714 A.2d 841 (1998); Timms v. State, 83 Md.App. 12, 17 (quoting Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988)); see also Little v. State, 300 Md. 485, 509–10, 479 A.2d 903 (1984); Barnhard, 325 Md. at 611, 602 A.2d 701; (citations and internal quotations omitted), cert. denied, 320 Md. 801, 580 A.2d 219 (1990).

Recommendation 4: The discussion of the least intrusive response should include what is not permitted and emphasize the accountability for knowingly conducting illegal arrests.

The discussion of least intrusive responses, both in the Core Principles and the Directives notes that the least intrusive response is the most appropriate one to take. However, the language describing what that may entail is generally permissive, noting that circumstances may encourage a just warning, or a citation, rather than an arrest. This is particularly problematic, as some BPD member have repeatedly arrested OPD clients for misdemeanors not committed in their view purely as a means of harassing known clients. The policy should specify when an arrest is not permitted and note the consequences for intentionally conducting a prohibited arrest.

Suggested language: In the Core Principles section, add the following language:

> **Except in limited circumstances, a member may not make a warrantless arrest for a misdemeanor not committed in his/her presence or a misdemeanor or citation with a maximum penalty of ninety days or less.[4] In no circumstances may a member make an arrest for marijuana possession or a misdemeanor or citation that does not carry a term of imprisonment.**
>
> **NOTE: A member making an arrest prohibited by law in an effort to harass or otherwise target a person will be referred to the Office of Professional Responsibility for administrative or criminal investigation.**

After Directive ¶5, add the following:

6. Members are prohibited from making an arrest in the following circumstances:

> **6.1. A misdemeanor that was not committed in their presence, except for specific offenses and circumstances listed in CP 2-202 (see Appendix B).**
>
> **6.2 A misdemeanor or citation that does not carry a term of imprisonment**
>
> **6.3. A misdemeanor or citation that carries a maximum term of imprisonment of 90 days or less, except for the offenses CP 4-101.**
>
> **6.4 Possession of marijuana under CL 5-601.**

7. Members are further encouraged under CP-401 to issue a citation, rather than make an arrest, for sale of an alcoholic beverage to an underage drinker or intoxicated person, malicious destruction of property valued at less than $500, and misdemeanor theft.

Add the following to Required Actions After Warrantless Arrests, Supervisor ¶ 7.4:

[4] Crim. Proc. §§ 2-202, 4-101.

NOTE: An arrest that is prohibited by law, such as a misdemeanor not committed in view of the member, shall be reviewed for possible harassment or other inappropriate intent, and, if appropriate, referred to the OPR.

Recommendation 5: Detail the documentation that the member is required to complete after a warrantless arrest.

While the draft policy requires the member to complete a Statement of Probable Cause to document an arrest, it does not specify any documentation for an arrest in which the member subsequently discovers that Probable Cause does not exist. Documentation of improper arrests is particularly important to allow for appropriate supervision, to monitor the extent of the problem (both for the individual member and as a broader practice trend), and to allow for accountability and other follow-up.

Suggested language: Amend Required Actions After Warrantless Arrest, Member ¶1 as follows:

> If a member arrests a subject but then discovers that Probable Cause to Arrest does not exist, the member shall immediately release the subject if they are in the custody or control of BPD. **The member must complete an Incident Report, form 8, detailing the arrest and a Supplemental Report, form 7,[5] upon the subject's release.**

Recommendation 6: Gather and analyze data from the State's Attorney for cases that are not charged or are nolle prossed based on an illegal arrest.

The audit section of the draft Policy recognizes the value of reviewing data from arrests that did not lead to a trial or plea. However, it only relies on District Court Commissioner data for this analysis. The State's Attorney makes critical decisions whether to charge or prosecute that also warrant attention. The internal audit should prioritize gathering and reviewing this data as well.

Suggested language: Add the following to the Internal Audits, Assessments and Inspections Section:

> **BPD will gather information from the State's Attorney's Office for all arrests which resulted in refusal to charge or nolle prosequi based on the Assistant State's Attorney's assessment of an illegal arrest. BPD will review the ASA's assessment and the Probable Cause determination to assess what, if any, appropriate action may be needed. This review will not be performed by a supervisor who previously reviewed the Probable Cause determination. Following this review, BPD will take any appropriate action, which may include recommending training or other non-disciplinary corrective action for the involved member(s) and/or referring incident(s) for administrative or criminal investigation.**

[5] OPD presumes that these would be the appropriate forms to document an arrest lacking probable cause. If there is another form better tailored for this issue, OPD would encourage its use.

Recommendation 7: Develop a policy for the return of property seized upon arrest.

When an individual is arrested, the property on their person is seized with no assurance that it will be returned. BPD members have told individuals, and our clients have experienced, that they will not get their phone back even if the arrest does not ultimately result in charges or conviction. An explicit policy is needed that provides guidance and requirements to ensure the prompt return of personal property.

Suggested action: Develop and implement a policy to ensure the prompt return of personal property and cross-reference this policy in the arrest and search policies. This policy should include a time period specifying when the property must returned as well as guidance on how to effectively return the property (e.g. bringing the property bag to the trial date dismissed).

IV. Policy 1109 – Warrantless Searches

Recommendation 1: Require members to more fully explain consent prior to seeking to conduct a search.

Coercion and retaliation by BPD members is a significant issue that underlain the need for the consent decree. Interactions relating to consent and voluntariness therefore require special attention and explanation. For consent to truly be voluntary, the person needs to not just know that they can refuse consent, but that doing so will not be used against them, and the potential effect of consent given.res

Suggested language: Amend Consent Searches, Required Action ¶ 2 as follows:

> Prior to a consent Search, the member shall provide a Permission to Search, Form 29 (see Appendix A), to the person whose person or property they wish to Search and shall explain the purpose of the form. The member shall affirmatively explain that the person has a right to refuse, limit, and revoke consent at any time**, that the person will not be punished or detained longer if they refuse, and that any evidence recovered can and will be used against them in a court of law.**

Recommendation 2: Ensure that the rights of children are equally protected in the consent to Search.

When multiple people have authority over the property to be searched, the draft policy rightly resolves this conflict in favor of protecting the rights of the person(s) who refuse consent. The policy should make clear that this is equally applicable when the conflict is among parents and children.

Suggested language: Add the following language to Consent Searches, Required Action, ¶ 4:

If two or more people with equal apparent authority over the property are present and disagree about permission to Search, the consent Search shall not be conducted. **This includes scenarios in which a parent gives permission but a child refuses permission to search areas of the home which are in control of the child, such as the child's room, closet, or bags stored in the home**.

Recommendation 3: Require consent searches to be documented the same as other searches.

Establishing and requiring documentation for police action is one of the most important underpinnings of the consent decree. Documentation is necessary to improve transparency, provide accountability, encourage internal and external oversight, and assist court proceedings for any subsequent prosecution. All searches should require complete documentation. By exempting consent searches from any documentation aside from the Permission for Search, Form 29, critical information about when and how these searches are conducted, including whether the totality of circumstances establish that they are truly voluntary, cannot be gathered or assessed.

Suggested action: Add a section entitled documentation that includes:

1. **Members must to complete an Incident Report, Form 8, for all searches, using specific and individualized descriptive language to describe the nature of the search, including:**
   - **1.1 The events giving rise to RAS for a search**
   - **1.2 If the search was voluntary, how consent was obtained**
   - **1.3 How the search was conducted**
   - **1.4 The location of any contraband or evidence that was discovered, and the name of the member who found and seized the evidence.**
   - **1.5 What, if anything, was recovered from the search**
   - **1.6 Whether the search resulted in an arrest**

Recommendation 4: More clearly highlight what is not sufficient to establish RAS or probable cause, including with respect to anonymous tips.

Beyond defining legal standards, such as reasonable articulable suspicion and probable cause, examples of what does and does not meet these standards are critical to appropriate implementation. Illegal searches are often based on vague descriptions and/or anonymous tips that do not meet even the lesser RAS standard. More clearly highlighting these pitfalls would help emphasize their impropriety.

Suggested language: Revise Searches ¶4 as follows:

4. Reasonable Articulable Suspicion and Probable Cause should be founded on specific and objective facts or observations about how a person behaves, what the person is seen or heard doing, and the circumstances or situation in regard to the person that is either witnessed or known by the member. Accordingly, Reasonable Articulable Suspicion and

Probable Cause must be based on facts or observations about a particular person's actions or the particular circumstances that a member encounters.

4.1 The physical characteristics of a person, **including generic clothing descriptions,** are never, by themselves, sufficient. Instead, those characteristics must be combined with other factors, including a specific non-general description matching the suspect or the observed behaviors of the person.

4.2 A mere hunch or suspicion is not enough.

4.3 An anonymous tip must be sufficiently detailed and the totality of circumstances must provide indicia of the tip's reliability to give rise to RAS. Mere allegation that a person is carrying a gun is not sufficient. Neither is a very general description based on race and clothing.

Recommendation 5: Emphasize that searches must be conducted lawfully.

As we recommended for the proposed Search and Seizure Warrants Policy (Policy 1007, recommendation 3), the general provisions here should ensure that, while seeking to minimize damage, police conduct remains lawful and minimally intrusive

Suggested language: Revise General ¶ 6 as follows:

In order to minimize property damage and the need for forcible entry, and where doing so would not place BPD members at heightened risk, members shall attempt to **lawfully** obtain keys, combinations or access codes when a search of locked property is anticipated.

Recommendation 6: More clearly state what needs to be recorded on a member's body-worn camera (BWC).

Often, BWC footage begins at the time that a suspect is stopped or searched, without recording anything related to the justification for the stop. The language in the draft policy cross-references the Body-Worn Camera policy but should otherwise more clearly define when the BWC should be activated.

Suggested language: Revise Directives, Required Actions ¶ 3 as follows:

Since all Searches are investigative in nature, members shall record every Search on their BWC. ~~**Additionally,**~~ BPD members shall ~~**attempt to**~~ record the activity on which they base their reasonable suspicion on their BWC, to the extent practicable and safe. **Consistent with the BWC policy, members must activate their BWC at the onset of any call. Similarly, if observing a suspect from a safe distance to assess whether probable cause or a reasonable suspicion exists, those observations should be recorded.** See Policy 824, *Body Worn Camera.*

Recommendation 7: Add an audit provision that includes gathering and analyzing data from the State's Attorney's Office and other sources.

As noted above with regard to arrests (Policy 1106, recommendation 6), the State's Attorney can provide valuable data for internal oversight of and accountability. BPD should review searches as it does arrests, and gather information that may be available regarding legal conclusions of their validity.

Suggested language: Provide for an internal assessment with SAO data as follows:

> **BPD will gather information from the State's Attorney's Office for all searches which were determined by the Judge or the Assistant State's Attorney's to violate the Fourth Amendment, and resulting in one of the following actions: (1) refusal to charge or nolle prosequi; (2) prosecutorial determination not to introduce evidence; (3) judicial determination to suppress of evidence or dismiss case; (4) judicial determination to admit evidence based on an exception to suppression rule (attenuation, independent source, inevitable discovery); or (5) acquittal due to rejection of evidence. BPD will review the determination to assess what, if any, appropriate action may be needed. This review will not be performed by a supervisor who previously reviewed the Probable Cause determination. Following this review, BPD will take any appropriate action, which may include recommending training or other non-disciplinary corrective action for the involved member(s) and/or referring incident(s) for administrative or criminal investigation.**

V. Policy 1112 – Field Interviews, Investigative Stops, Weapons Pat-Downs & Searches

Recommendation 1: Revise the definition of "arrest" consistent with our proposed language for the arrest policy, to make clear that detention generally amounts to arrest.

The definition of arrest provided does not clearly encompass all forms of arrest. As noted in our comments on the draft policy for Warrantless Arrests (Policy 1106, recommendation 2), many officers believe that a suspect can be detained in a manner that prevents them from leaving, but still not consider it an arrest. The definition of arrest provided in this policy should be the same as the one used there.

Suggested language: Revise the definition of Arrest as follows:

> The taking**, seizing or detaining** of a person **by any act that indicates an intention to take the person** into custody by a BPD member **and that subjects the person to the actual control and will of the member making the arrest. An arrest is effected (1) when the arrestee is physically restrained or (2) when the arrestee is told of the arrest and submits." In addition, a person is seized within the meaning of the**

Fourth Amendment when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[6] Detention alone can constitute an arrest. An arrest requir**es Probable Cause that a crime was committed, is being committed, or is about to be committed.**

Recommendation 2: Require members to inform the subject of a field interview that they are free to leave.

The draft policy rightfully makes clear that the essence of a field interview is that the person is free to end the interview and leave at any time. However, the extent to which members need to inform people of their rights is less clear. Given the history of coercive tactics, and the priority of improving community relations, field interviews should be considered analogous to interrogations and include Miranda-type warnings, requiring the member to letting the person know they are free to leave and do not need to respond to questions.

Suggested language: Revise the definition for Field Interview as follows:

> Field Interview ─ A consensual, non-hostile Voluntary Contact during which a member may ask questions or try to gain information about possible criminal activity, **while informing that they are free to leave and are not obligated to answer any questions and** without indicating or implying that a person is not free to leave or is obligated to answer the member's questions.

Revise Field Interviews ¶¶ 2.2 as follows:

> 2.2 **Before asking any questions, i**ntroduce themselves by name and rank**, and inform the person that they are not obligated to answer any questions and are free to leave without consequences,** unless exigency circumstances require gathering information immediately.

Recommendation 3: Make clear that weapons pat-downs are to be conducted with an open palm and require suspicion of a weapon.

Consistent with best practices, and necessary to minimize the likelihood of inappropriate contact, pat-downs should always be conducted with an open palm, and the policy should require this proper form. In addition, as a pat-down is specifically a search for weapons, the suspicion of a violent crime should be clarified to require suspicion of a violent crime involving a weapon.

[6] Wiegmann v. State, 118 Md. App. 317, 330–31 (1997), aff'd, 350 Md. 585, 714 A.2d 841 (1998); Timms v. State, 83 Md.App. 12, 17 (quoting Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988)); see also Little v. State, 300 Md. 485, 509–10, 479 A.2d 903 (1984); Barnhard, 325 Md. at 611, 602 A.2d 701; (citations and internal quotations omitted), cert. denied, 320 Md. 801, 580 A.2d 219 (1990).

Suggested language: Revise the definition of Weapons Pat-Down as follows:

> Weapons Pat-Down ─ A brief, non-probing running of the hands over the outside of a person's clothing feeling for a weapon **with an open palm**. A Weapons Pat-Down is authorized when the member reasonably suspects the person is armed. This can include situations in which the member reasonably suspects that the person has committed, is committing, or is about to commit a violent crime **with a weapon** or when the member observes something on the person that they reasonably suspect is a weapon. A Weapons Pat-Down may not be conducted to discover evidence or the proceeds or instrumentalities of a crime. A member cannot "pat-down" a bag or item of personal property unless the member has a reasonable suspicion that the person is armed and the bag or item could contain a weapon and is within the person's reach.

Revise Weapons Pat-Downs, Required Actions ¶ 1.3 as follows:

> Prior knowledge of the person's history of carrying deadly weapons or committing crimes of violence **with a weapon**.

Recommendation 4: Make clear that all pretext stops are prohibited, not just stops for loitering and trespass.

Loitering and trespass are the charges identified as prohibited for a pretextual stop, which suggests that other infractions can serve as a pretext basis. The policy should make clear that all pretext stops are prohibited and rely on a braoder range of charges to serve as examples.

Suggested language: Revise Prohibited Actions ¶2 as follows:

> Conducting Pretext Stops in which the pretext justification is **based on any infraction that is not the true basis for the investigation**~~**loitering or misdemeanor trespass**~~. This does not prohibit stops that are not pretextual, such as a stop in response to a call for service concerning **a specific infraction, such as** loitering or misdemeanor trespass.

Recommendation 5: Clarify the distinction between a voluntary contact and a field interview.

As both voluntary contacts and field interviews allow for the person to refuse to answer questions and leave, the distinction between the two may not be apparent. To ensure that members activate their BWC and provide written documentation when soliciting information about a suspected crime, the policy should make clear that these interactions are field interviews.

Suggested language: Add the following to Voluntary Contacts:

> **5. If the officer is seeking information about a suspected crime, the voluntary contact becomes a field interview.**

Recommendation 6: Clarify the running away from a field interview is not an appropriate basis for a stop, pat-down, search or arrest.

The Foot Pursuits policy (Policy 1505) rightly notes that flight alone cannot justify a foot pursuit. While the proposed policy here similarly states that walking away cannot be the basis to extend the encounter, it leaves open how a member may interpret when the person runs away. The policy should make clear that both forms of flight are equally permissible and cannot give rise to a higher level of interaction.

Suggested language: Edit Field Interviews, Required Actions ¶ 3 as follows:

> If a person refuses to answer questions during a Field Interview, they must be permitted to leave. A person's failure to stop, refusal to answer questions, decision to end the encounter, or decision to walk **or run** away, cannot be used as the basis to extend the encounter or further intrude on the person through an Investigative Stop, Weapons Pat-Down, Search, or Arrest of the person.

Recommendation 7: Require early and consistent use of BWC for investigative stops.

As noted with respect to warrantless searches (Policy 1109, recommendation 6), BPD members often do not activate their BWC until they have determined they have reasonable suspicion, resulting in a lack of footage to provide the full context for their actions. This policy should likewise cross-references the Body-Worn Camera policy and clearly define when the BWC should be activated.

Suggested language: Revise Investigative Stops, Required Action ¶ 2.1 as follows:

> Activate BWC **at the onset of the observation or activity on which they base their reasonable suspicion, to the extent practicable and safe**, and shall not deactivate BWC until the completion of the Investigative Stop. **See Policy 824, *Body Worn Camera.***

Recommendation 8: Require the reporting regarding consent searches to include how any consent to a search was secured.

The Warrantless Searches policy (Policy 1109) requires documentation of how conset to a voluntary search was secured – either in writing on Form 29 (Permission to Search), verbally as documented on BWC, or for members without BWC, verbally with refusal to sign documented on Form 29. The Stops' documentation should likewise require this information in its section regarding consent searches.

Suggested language: Revise Investigative Stops, Documentation Requirements ¶ 2.2.9 as follows:

Whether member(s) asked any person(s) to consent to a Search, ~~**and**~~ whether such consent was given**, and in what form. See Policy 1109, *Warrantless Searches*;**

Revise Vehicle Stops, Required Actions ¶ 2.11 as follows:

Whether members asked any person(s) to consent to a Search, and whether such consent was given**, and in what form. See Policy 1109, *Warrantless Searches*;**

Recommendation 9: Explicitly prohibit stops that are illegal and/or counter BPD's community policing efforts.

In addition to pretext stops, the policy should also address other types of stops that are known to be conducted by BPD officers but are legally problematic and exacerbate community distrust of the police. In particular, 'jump outs,' in which a group of officers (usually in plain clothes) jump out of an unmarked police car to see who runs, is rarely justifiable legally but is sufficiently common to warrant mention. Likewise, targeting of certain individuals, who become "frequent flyers" in the criminal justice system, for surveillance or oversight based on a drug addiction should be prohibited.

Suggested language: Add to Investigative Stops, Prohibited Actions:

3. Taking action intended to create RAS without previous particularized facts to justify action, such as a jump out.

4. Targeting treatment facilities and prior arrestees for CDS possession, based solely on knowledge of drug addiction,

Recommendation 10: Specify that the documentation for a stop include a complete, detailed description of the person.

Often, a stop is justified, at least in part, based on the person matching description provided to the police. However, the documentation required only includes demographic information. A complete description should be provided, with the policy laying out the characteristics that should be included.

Suggested language: Add the following to Investigative Stops, Documentation Requirements (and renumber accordingly):

2.2.3. A complete description of the person, including height, weight, hair color, eye color, skin tone, identifying features (e.g. tattoos, scars), clothing type and color, and any other notable features or descriptors relevant to RAS.

Recommendation 11: Require the Statement of Probable Cause to list all documentation created and for the BPD to submit these documents to the State's Attorneys' Office within five days.

Because knowledge of the police is imputed on the prosecution,[7] the BPD is obliged to provide the State's Attorney with the documents mandated for disclosure. Nonetheless, Assistant State's Attorneys in Baltimore repeatedly justify their noncompliance with discovery obligations is that they are unaware of, and never received, any materials from the BPD. In addition to negatively impacting prosecutions and the criminal litigation process, this lack of coordination between the two agencies thwarts the judicial process' critical role in providing transparency and accountability for police activity.

The BPD must ensure that case-related documents are readily available to the State's Attorneys' Office so that the Assistant State's Attorney can review for compliance with discovery and disclosure obligations. The BPD should further be required to provide these documents in time for the prosecutor to meet its deadlines. In juvenile cases, discovery must be provided within five days; while in adult cases discovery must be provided in thirty days.[8] To establish a consistent process that will meet all deadlines, the BPD should be required to turn all materials over to the SAO to meet the five day deadline.

Suggested action: In the Superiors' Responsibilities for Field Interviews, Vehicle Stops, Investigative Stops, Weapons Part-Downs and Searches section, require that all documents related to an investigation resulting in an arrest or citation be provided to the State's Attorneys' Office. The policy should designate which superior is charged with turning over these materials and a clear deadline for them to do so that will allow for the SAO to meets its discovery deadline in all cases, including juvenile proceedings which require disclosure within five days from the appearance of defense counsel or waiver of counsel.

VI. Policy 1505 – Foot Pursuits

Recommendation 1: Clearly articulate that the RAS must precede any flight.

In order for this policy to be meaningful, and consistent with the proposed policy for Field Interviews, Investigative Stops, Weapons Pat-Downs & Searches (Policy 1112), running by itself cannot serve as grounds for Reasonable Articulable Suspicion. This policy should also make that explicit and more clearly distinguish *Wardlaw v. Illinois*.

Suggested language: Revise Policy ¶1 as follows:

> Justified Pursuits. It is the policy of the Baltimore Police Department (BPD) that members may engage in Foot Pursuits with suspects only when there **was** Reasonable Articulable Suspicion (RAS) **prior to any flight** to believe that the suspect has committed, is committing, or is about to commit a crime. **Members are prohibited from basing an Investigative Stop only on a person's response to the presence of police,**

[7] Md. Rule 4-263 (h)(1) (adult Circuit Court proceedings); 11-109 (a)(7) (juvenile proceedings).
[8]

such as a person's attempt to avoid contact with a member or flight See Policy 1112, *Field Interviews, Investigative Stops, Weapons Pat-downs, and Searches.*

Revise Directives, Decision to Pursue ¶¶ 2, 3 as follows:

2. Members may engage in Foot Pursuits with suspects only when there is RAS **prior to any flight** to believe that the suspect has committed, is committing, or is about to commit a crime (with the exception of those instances identified below under prohibited actions) and when members reasonably believe that there is a valid law enforcement need to detain the suspect that outweighs the threat to safety posed by pursuit. The decision to initiate or continue such a Foot Pursuit, however, must be continuously re-evaluated in light of the circumstances presented at the time.

…

3. Mere flight by a person who is not suspected of criminal activity shall not serve as justification for engaging in a Foot Pursuit without the presence of RAS regarding the person's involvement in **specific** criminal activity. In *Illinois vs. Wardlow*, the court concluded that flight in a high crime area does not necessarily create RAS, **but can be considered as part of the totality of ~~though it could, based on the specific~~** circumstances. **Members are prohibited from basing an Investigative Stop only on a person's response to the presence of police, such as a person's attempt to avoid contact with a member or flight. See Policy 1112, *Field Interviews, Investigative Stops, Weapons Pat-downs, and Searches.***

Recommendation 2: Include safety concerns for suspect.

The policy notes the safety of BPD members and the public are primary concerns with language that does not make clear that the suspect is also a member of the public. Their safety should be of equal importance.

Suggesting language: Revise Directive ¶ 1 as follows:

> The safety of BPD members**, the suspect,** and the public should be the primary consideration when determining whether a Foot Pursuit should be initiated or continued. Members must be mindful that immediate apprehension of a suspect is rarely more important than the safety of the public**, the suspect,** and BPD members.

Recommendation 3: Use a better example to distinguish when a foot pursuit may be appropriate.

The priority for apprehending a suspect is most appropriate for crimes that are likely to result in hot pursuit or otherwise pose an immediate danger. The example of a 'sex offender' is a status rather than a specific crime, which does not inherently pose an immediate danger and can encompass lower level offenses. This should be a changed to a more applicable example of a specific violent offense that often involved pursuit, such as armed carjacking.

Suggested language: Revise the Note after Directives, Decision to Pursue ¶ 2 as follows:

> Although Foot Pursuits are permissible under the above circumstances, members are expected to weigh the seriousness of the offense against the immediate need to apprehend and the consideration of member and public safety. For example, the need to immediately apprehend a curfew violator is minimal, while the need to **apprehend an armed carjacking suspect** ~~**bring a sex offender to justice**~~ is more significant given the danger they pose to the public.

Recommendation 4: More clearly specify when factors weigh against a foot pursuit.

The Pursuit Guidelines suggest provide factors for considering alternatives to a Foot Pursuit that should more clearly dissuade this option. In particular, ¶ 1.8, where the danger of pursuit outweighs the objective of immediate apprehension, should more strongly preclude a foot pursuit.

Suggested language: Revise Pursuit Guidelines ¶1 as follows:

> ~~**Members should consider alternatives to engaging in or continuing a Foot Pursuit when:**~~ **The following factors should weigh against Members engaging in a Foot Pursuit:**

Move Pursuit Guidelines ¶ 1.8 to ¶ 3 and revise it as follows:

> 3. A member shall not initiate and/or continue a Foot Pursuit if**:**
>
> **3.1 T**he member knowingly loses possession of their firearm, radio, or other essential equipment which may endanger the member or public if recovered by another person.
>
> **3.2 The member reasonably believes that the danger to the pursuing members or public outweighs the objective of immediate apprehension.**

Recommendation 5: Require that the radio broadcast by the initiating member include detailed descriptions of the suspects.

The policy emphasized the importance of early communication and what that initial broadcast should include. To ensure that the suspect information is sufficiently particularized to minimize the likelihood of additional pursuits of other individuals, the policy should require a detailed description, and explain what that should include.

Suggested language: In Responsibilities in Foot Pursuits, Initiating Member Responsibilities, insert the following Note after ¶ 3.4:

> **NOTE: The physical description of suspects must include sufficient information to allow for the pursued individual to be identified and distinguished from other**

members of the public. To the extent possible, it should include height, weight, hair color, eye color, skin tone, identifying features (e.g. tattoos, scars), clothing type and color, and any other notable features.

Recommendation 6: Define barricaded person for when the SWAT Unit should be summoned.

The policy calls for the SWAT Unit to be summoned when the suspect meets the definition of a barricaded person, but there is no definition provided for this term. A definition should be inserted that is consistent with Policy 7602 (Hostage/Barricade/Sniper Incidents),

Suggested language: Append the Note after Responsibilities for Foot Pursuits, initiating Member Responsibilities ¶ 6 as follows:

> NOTE: The SWAT Unit shall always be summoned in cases where the suspect is believed to be armed and has taken a defensive posture which would meet the definition of a barricaded person**, i.e., when the suspect occupies a position that delays or prevents police entry by means of fixed structures or objects, obstacles (natural or manmade), and/or intentional fortifications.**

* * *.

The draft policies available for public comment are just one piece of a larger puzzle in reforming the culture and practices of the BPD to ensure compliance with constitutional law and principles. Even on the specific matters related to stops, arrests, pat-downs and searches, these policies alone do not address all of the guidance needed. In particular, transparency and accountability measures, which will inform the implementation, compliance, and impact of the proposed policies here, require dedicated attention. Likewise, training will be critical to how these policies are implemented and interpreted.

Our comments above do not fully address these areas. Our understanding is that policies focused on accountability measures will be drafted once the policies on basic police activities are in place. We look forward to participating in that process, both through subsequent public comment periods and providing insights and recommendations based on our expertise and experience in other ways that the BPD and its partners would find useful. We are particularly committed to ensuring that monitoring and accountability occurs throughout the chain of command: linking any inappropriate conduct by members to the supervisors who allow for clear violations to nonetheless result in criminal charges and move forward to prosecution.

OPD also urges BPD to develop dedicated policies related to documentation and/or to more consistently detail documentation requirements as a dedicated section within each policy. The six draft policies presented for this public comment period provide different levels of detail and explanation for how its activities should be documented. As examples, the Warrantless Searches policy (Policy 1109) provides no mention of documentation needed beyond the consent obtained

for a voluntary search; while the Field Interviews, Investigative Stops, Weapons Pat-Downs & Searches policy (Policy 1112) has titled subsections for documentation required with examples of the relevant forms provided in the appendices. While some aspects of documentation can be cross-referenced to minimize repetition, each policy should provide guidance and emphasize the importance of reporting on its activities.

Distinct documentation policies can also ensure that information not inherently within any policy, but highly relevant to police misconduct, is gathered at the level needed for oversight and review. For example, BPD should be required to document whenever a person is arrested and released without charge, a search or stop is determined to be unconstitutional, and discipline is imposed on a member.

A dedicated policy is further needed to ensure compliance with retaining and disclosing documentation to appropriate entities, such as the State's Attorney and Civilian Review Board. OPD suggests establishing a process for BPD documentation to be centrally available so that timely and effective disclosure can consistently be realized.

Finally, in considering its oversight and auditing to ensure proper accountability, the BPD should establish policies that leverage its relationship with relevant stakeholders who can provide useful information. As discussed above (Policy 1106, recommendation 6; Policy 1109, recommendation 7), the State's Attorney's office has valuable information based on its review of the lawfulness of police activity in individual cases. The BPD should establish a process for it to obtain and review information about cases that were not prosecuted, prosecuted despite the inadmissibility of key police-derived evidence or the ASA's unwillingness to call key police witness(es), and other concerns by members of the State's Attorney's Office. Likewise, we would be eager to help establish and implement a process whereby public defenders and members of the private bar can safely and effectively report concerns directly to the BPD.