



June 15, 2007

Robert N. McDonald
Chief Counsel
Opinions and Advice
Office of the Attorney General
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Dear Mr. McDonald,

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I write in response to Governor O'Malley's May 8, 2007 letter to Attorney General Gansler, requesting a formal opinion regarding the lawfulness of the practice in Baltimore City whereby the State's Attorney's Office (SAO) reviews all charges in warrantless arrests by the Baltimore City Police Department (BPD) prior to the initial appearance before a court commissioner.

We write to make clear that there is nothing improper, under either Maryland or federal law, with the procedure currently employed. Our interest in the matter stems from the fact that the statistics maintained by the SAO in the course of its review have served to highlight improprieties in Baltimore's police practices -- improprieties which are the subject of a class action lawsuit in which we are co-counsel, and in which the Governor is a named defendant (relating to acts taken while he was Mayor of the City of Baltimore.) *Maryland State Conference of NAACP Branches et al. v. Baltimore City Police Department, et al.*, No. CCB-06-1863 (D. Md., filed June 15, 2006). In the event that the legal assertions in the Governor's letter merit a response, we discuss them below. A bit of background, however, is helpful in understanding the context in which the issues arise.

The practice of SAO review arose in Baltimore due to significant overcrowding problems at the Central Booking and Intake Facility (CBIF), and overloaded dockets in the City's District Court. As discussed in then-Mayor O'Malley's 2000 crime fighting strategy document, it was thought by Mayor O'Malley and others that having early prosecutorial review would "afford[] the opportunity for the State's Attorney's office to prevent cases without probable cause from ever entering the system. Additionally, misdemeanor cases of minor consequence may also be concluded at this point by use of diversion, community service, drug treatment placement, mental health referrals, alcoholism counseling, and homelessness and employment counseling." Mayor Martin J. O'Malley, *Stop the Killing Start the Healing 2* (Feb. 23, 2000) (Attachment E to Patricia C. Jessamy's June 8, 2007 letter to Robert McDonald, "Jessamy Letter").

Following Mayor O'Malley's call, precisely such a system of review was established in July of 2000. In practice, as noted in the State's Attorney's letter dated June 8, 2007, the police officer enters a statement of probable cause into the State's Arrest Booking System at CBIF, but does not "lock in" the Statement of Charges. The Statement of Charges is finally entered into the computer system only after the SAO's review. If the SAO declines to pursue charges, the person is Released Without Charge (RWOC'd), and the person's criminal history record reflects only the fact of an arrest, but no criminal charge (and no disposition).

This system, ultimately agreed to by both the SAO and the BPD, accomplished Mayor O'Malley's goals in significant part. Since SAO review has been instituted, literally tens of thousands of cases each year (generally constituting between one quarter and one third of all warrantless arrests by the BPD in any given month) have been declined prosecution -- the vast majority of which are arrests for so called "quality of life" offenses. See Attachments H, I to Jessamy Letter; Testimony of Patricia C. Jessamy, Baltimore City Senate and House Delegation Hearing on Law Enforcement Strategies 2 (January 4, 2006 (attached)).¹

Though the SAO does not make an explicit probable cause determination when reviewing cases, the statistics kept and released by the SAO have helped to highlight a real problem in the Baltimore City Police Department. Though not every case declined by the SAO is an arrest without probable cause, complaints the ACLU has received from citizens who were unlawfully arrested -- as well as evidence concerning the nature of the offenses not prosecuted, the Department's practices, and pressures to increase arrest statistics -- lead us to conclude that a significant number of such arrests are, in fact, improper. In June of 2006, we filed a class action lawsuit against the Baltimore Police Department, the City of Baltimore, and several city and police officials, alleging a pattern of unlawful arrests. That suit is pending and is in discovery; Last Fall, Judge Catherine Blake of the U.S. District Court summarily rejected the City's motion to dismiss. It is this suit to which we believe the Governor's letter obliquely refers, in stating that "the exercise of prosecutorial discretion not to pursue a case is often confused with an alleged absence of probable cause, which is then spun as a supposed 'false arrest.'"

Indeed, it is precisely because the statistics maintained by the SAO have helped to shine a spotlight on improper police practices in Baltimore that Mayor O'Malley previously called for removing the SAO from the charging process. In January 2006, the Mayor made the suggestion while testifying before the Baltimore City legislative delegation at a special hearing on City law enforcement practices. However, we presume that the City and BPD were, and remain, free at any time to end the agreement by which the SAO is involved in the charging process. They have not done so because of the political firestorm that would likely result from any attempt to obscure evidence of the significant problems in the Baltimore Police Department, and because ending the early review would lead to even more severe overcrowding problems at CBIF (because more people would have to remain there for a longer time), with attendant delays in presenting defendants before a court commissioner.

While the decision not to prosecute such a high percentage of arrests by the BPD is not, in and of itself, conclusive evidence of the impropriety of each of those arrests, the fact that so many arrests are not and cannot be prosecuted is indicative of underlying problems in the BPD.² Not only are large numbers of persons being improperly arrested, but we believe that police resources are being wasted on fruitless arrests that do not and cannot result in prosecution. An arrest that cannot (or will not) be prosecuted does nothing to incapacitate or deter lawbreakers, and diverts

¹ Despite the early culling of cases by the SAO from 2000 through 2005, the staff at CBIF consistently failed to ensure that detainees appeared before a Court Commissioner within 24 hours of arrest, as required by Md. R. 4-212(f), resulting in a lawsuit brought by the Office of the Public Defender. *Richard Rodney, et al. v. Susan Murphy*, No. 24-C-05-004405 (Balt. City Cir. Ct., filed April 22, 2005). The lawsuit was voluntarily dismissed by the plaintiffs following a TRO, and significant reforms in the booking process which appear to largely have solved the problem.

² Apart from a tiny number of isolated disagreements in high profile cases, we are not aware that City or police officials have ever suggested that the State's Attorney is improperly dismissing cases that should be prosecuted (and the career prosecutors' reasons for doing so would be hard to fathom).

police attention from more serious and more productive pursuits. Moreover, in the significant number of cases of improper arrests for charges like loitering, failure to obey, and disorderly conduct (like those of our clients), the arrests saddle innocent people with criminal records, with attendant consequences on employment, housing, and community trust, among other ill effects.³ Eliminating the SAO review would do nothing to address these problems, though it might serve to help hide evidence of improper arrests.

Turning to the merits of the claimed impropriety, the Governor suggests in his May 8, 2007 letter that the SAO's review of charges prior to presentment to the Court Commissioner violates Maryland Rules 4-212(f) and 4-216(a), both of which require that a criminal defendant be presented before a Court Commissioner within 24 hours of arrest for a determination of probable cause, and [fill in]. SAO review violates neither rule for the simple reason that the rules contemplate (and properly require) a probable cause determination only when a "defendant" is in fact being prosecuted. Contrary to the Governor's suggestion, there is no legal or logical reason to conclude that a person who has been arrested continues to be a "defendant" requiring a probable cause determination after the decision has been made not to pursue the charges. Were this not the case, and were the fact of an arrest sufficient in and of itself to render a person a "defendant" requiring a probable cause determination by a magistrate, the police themselves could never release a person, after they realized, for example, that they had the wrong individual, or if the sergeant reviewing the arrest (as is supposed to happen in every case in Baltimore City) determines that there was not probable cause, or that no crime was committed. This is plainly not the law.

The Governor also suggests that the practice of dismissing charges and releasing detainees prior to presentment somehow violates the detainees' due process rights. Nothing could be further from the truth. It is certainly true that the mandate that a neutral magistrate review the probable cause for a warrantless arrest within 24 hours serves to effectuate the Fourth Amendment rights recognized in cases like *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). And, in fact, every person actually prosecuted in Baltimore City now receives such a review.

We certainly recognize that these are vitally important rights, and the ACLU filed an *amicus* brief in *McLaughlin* urging recognition of the Fourth Amendment rights at issue. But we are aware of no case, including *Gerstein* or *McLaughlin*, which has even suggested, much less held, that an arrestee must be (or can be) held *after* charges are dropped so that a magistrate can determine whether there was probable cause for the arrest. Indeed, the act of holding such a person would likely itself violate due process rights. We can imagine no justification for such further detention, since the determination of probable cause would serve no useful purpose to the arrestee whose rights are at issue, and who should already be free to go with the termination of the criminal charges. Further, we also know of no case that has even suggested that a prosecutor's decision to decline prosecution must itself await a magistrate's probable cause determination (resulting in a longer detention). Were that the law, the myriad jurisdictions outside of Maryland in which prosecutors review charges prior to arraignment (such as New York City) would all be acting unconstitutionally. Yet to our knowledge, no one has ever suggested that this is the case. In addition, if the Governor's assertion is correct, Cts. & Jud. Proc. § 2-608 is itself unconstitutional. That provision *requires* SAO review of charging documents accusing a law enforcement officer of a crime prior to presentment to a Court Commissioner, which is precisely what the Governor now suggests violates due process rights.

³ These harms led the Maryland General Assembly to pass legislation this year, signed into law by the Governor, that requires that all persons released without charge have their arrest record automatically expunged. *See* 2007 Laws of Maryland Ch. 63 (HB 10).

For all the foregoing reasons, we urge you to reject the suggestion that there is some impropriety in SAO review of charges prior to presentment before a Court Commissioner. If you have any questions, please do not hesitate to call.

Sincerely,

David Rocah
Staff Attorney

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