International Municipal Lawyers Association

Policing in America:

What Cities Can Do Right Now To Make it Better

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WILMERHALE

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Agenda

- **Avoid becoming the next Ferguson. Getting your city and police department in shape -- What every city lawyer should know.**

- **Bridging the gap with City Hall and getting a strategic plan together. Adopting national best practices. Engaging the community.**

- **What to prepare for and expect from a DOJ civil rights investigation or review. They're from the government, but are they here to help? -- How can you get them to help you?**

- **Crisis management -- What to do if a crisis erupts.**

Recent Police-involved Killing Controversies

- **New York** - Eric Garner/Akai Gurley
- **Ferguson** - Michael Brown
- **Chicago** - Laquan McDonald
- **Cleveland** - Tamir Rice
- **North Charleston** - Walter Scott
- **Baltimore** - Freddie Gray



Police Practices/Law That Create Tension

- **"21-Foot Rule"**
  - "Danger zone" where an attacker presents a clear threat to an officer.
- **"Bring down the bad guy" mentality**
- **Officer's subjective perception of danger**
- ***Graham v. Connor*, 490 U.S. 386 (1989)**
  - Supreme Court established "objective reasonableness standard" in excessive force police cases.

Reasons For Renewed Focus

- Prevalence of cameras causes society to grapple more directly with police involved shootings
- Changing community attitudes towards policing
- National crime trends
- Political pressure
- Community activism
- Legal decisions establishing new precedent
  - *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst* (Fourth Circuit)



Stakeholders' Point-of-View

- **Minority Communities' Perspectives**
  - Want and need public safety and law enforcement protection like other communities.
  - Some policing tactics erode community relations.
  - Seek a positive relationship with the police built on respect and trust.

- **Law Enforcement Community Perspectives**
  - Policing is a dangerous and stressful job that involves split second life and death judgments.
  - Broad responsibilities for responding to all situations where other institutions fail.
  - Rank and file on front lines confronting issues raised by leadership.

Stakeholders' Point-of-View Cont'd

- **Politicians' Perspectives**
  - Want to work with law enforcement and community leaders.
  - Embrace public safety rhetoric, but pressure to recalibrate as crime falls and public reacts to aggressive policing tactics.
  - City Hall doesn't have a lot of visibility into PD.

- **Department of Justice's Perspectives**
  - DOJ called upon to respond after major use of force events.
  - Work with police departments to update their policing practices to better achieve 21st century policing tactics.
  - DOJ view is similar to Peel's Principles.

Peel's Principles – London, 1829

- **Trust Principle:**
  - "The police must secure the willing cooperation of the public in voluntary observance of the law to be able to secure and maintain public respect."

- **Legitimacy Principle:**
  - "The ability of the police to perform their duties is dependent upon *public approval* of police existence, actions, behavior and the ability of the police to secure and maintain *public respect."*

- **Equality and Community Principles**:
  - "The police seek to preserve public favor…by ready offering of individual service and friendship to all members of society without regard to their race or social standing…"
  - "The police are the public and the public are the police."

Role of DOJ – COPS Collaboration

- COPS = Office of Community Oriented Policing Services
  - Distinct division of Justice Department
  - Does not have authority to sue if recommendations are not implemented
  - Engages in collaborative reform process

- Cities can request COPS to perform collaborative investigation to implement reforms.

- Investigations may be shorter and focused on discrete issues.

Role of DOJ – P or P Investigations

- Congress passed 42 U.S.C. § 14141 in the wake of the Rodney King beating.
- Enables DOJ to file lawsuits seeking injunctive relief against a “pattern or practice” of unconstitutional conduct.
- DOJ has conducted over 50 investigations to date.
- Current administration has concluded no fewer than 16.
- Investigations are often targeted at major police departments, but have also been used to investigate smaller departments or offices.

What is a Pattern or Practice?

- Words reflect their ordinary, common-sense meaning.
- May be found where incidents of violations are repeated and not isolated instances.
- Does not require “a specific number of incidents.”
  - DOJ relies on officer and community interviews, ride-alongs with officers, departmental documents, data and reports where available, and input from interest, faith, and other community groups.
  - DOJ uses statistics if available, but may reach a finding without a statistical analysis.
- Standard is nebulous because cases are rarely litigated.

Phases of P or P Investigation

1. **Investigation of Department:**
   - Police experts
   - Document requests
   - Department visits and interviews
   - Engagement with community stakeholders and political leaders

2. **Findings Report:**
   - Comprehensive and lengthy report summarizes DOJ findings.
   - Recent reports (e.g., Cleveland, Ferguson, Newark) have found a pattern or practice of constitutional misconduct.

3. **Concluding the investigation**:
   - DOJ investigations have been resolved through either a **consent decree or an agreement** whereby a city/jurisdiction commits to implement numerous reforms.

Core Reform Team



Why Reform - Economics of Police Reform

1. Settlements/Judgments After Alleged Misconduct

- From 2010 to 2014, U.S. cities with the ten largest PDs paid a combined $1.02 billion; $248.7 million in 2014 alone.
- Freddie Gray settlement in Baltimore: $6.4 million.
- Eric Garner settlement in New York City: $5.9 million.
- Laquan McDonald settlement in Chicago: $5 million.
- Walter Scott settlement in North Charleston: $6.5 million.

2. Consent Decree and Monitoring

- Cleveland: upfront investment of $11 million, recurring costs of $7 million a year.
- Seattle: $12.8 million spent in 2014.
- New Orleans: recurring cost of $7.5 million a year.

3. Body Cameras Reduce Complaints and Use of Force

- Cleveland: Body cameras reduced citizen complaints by 40%.
- San Diego: Complaints fell by 40.5%; use of force reduced by 46.5%.

How to Reform?

1. **Promote proactive reform**
   1. Benchmark current practices against best practices.
   2. Revise PD policies and general orders.
   3. Encourage PD to reassess or expand training.
   4. Facilitate response plan between City Hall and PD.

2. **Validate leadership with DOJ**

3. **Provide a "third way"**
   - DOJ has been criticized for taking too long and coming up with expensive remedies.
     - Some consent decrees last for years, maybe even decades.
     - Detroit consent decree lasted 11 years.
   - Some cities choose to fight the consent decree instead.

Ways Stakeholders Can Help Implement Reforms

- **Local government**
  1. Create listening opportunities with the community.
  2. Allocate government resources to implementation.

- **Law enforcement**
  1. Review and update policies, training, and data collection on use of force, and engage community members and police labor unions in the process.
  2. Increase transparency of data, policies, and procedures.

- **Communities**
  1. Engage with local law enforcement; participate in meetings, surveys, and other activities.
  2. Call on state legislators to ensure that the legal framework does not impede accountability for law enforcement.

Positive Results are Norm after Investigations

"Every policy was custom-made and then approved by the independent monitors. The outcome was a greater degree of policy and practice clarity for our personnel, which we think is contributing to crime reduction."
- Deputy Chief Hank Stawinsky, Prince George's County, MD

"The Detroit Police Department is a better police department as a result of the consent decree."
- Commander James White, Detroit, MI

"Prior to the consent decree in Cincinnati, we paid out $10 to $11 million to settle a number of lawsuits. But since the consent decree, the ACLU has not sued the Police Department. That is a tremendous savings."
- Retired Chief Thomas Streicher, Cincinnati, OH

"When DOJ comes and announces that a police department has a problem, it can create a very difficult environment in which to negotiate, because the involvement of DOJ and the investigation itself creates a great deal of political and media pressure."
- Carl Marqardt, Counsel, Mayor's Office, Seattle, WA

But Need to Ensure Durable Reforms

- Leadership commitment to reforms.
- Continued training on best practices.
- Continued reporting of all levels of force used.

Recent Pushback?

The Opinion Pages | EDITORIAL

Ferguson Turns Its Back on Justice

By THE EDITORIAL BOARD FEB. 12, 2016



Recent Pushback?

Department of Justice files appeal in discrimination case against Alamance County Sheriff

POSTED 6:49 PM, OCTOBER 3, 2015, BY WEB STAFF

FACEBOOK TWITTER GOOGLE PINTEREST REDDIT EMAIL

ALAMANCE COUNTY, N.C. – The U.S. Department of Justice plans to appeal a federal ruling that dismissed its case against Alamance County Sheriff Terry Johnson.



Alamance County Sheriff Terry Johnson

The judge in the case found that the Department of Justice did not prove its case against Sheriff Johnson who had been accused of racially profiling Latinos in Alamance County.

Do Not Wait For Tragedy

- Cities and Police Departments can engage in proactive reforms before DOJ is involved.
- **NOW** is the critical moment to make changes and adopt reforms.

"This is a defining moment for us in policing." – ***Charles Ramsey, former Chief of Philadelphia Police***

"We need to raise the bar for all police departments." – ***Chuck Wexler, Executive Director of Police Executive Reform Committee***

How to Reform Proactively

- **Return to Peel's First Principles**
  - Put sanctity of human life at heart of all PD actions.
  - Hold PDs to higher standard than required by law.
  - Forge discussion between community groups, police departments, and city leaders.
  - Constitutional and community supported policing is effective policing.
  - Encourage transparency in wake of use of force incidents.
  - Re-enforce accountability.

How to Reform Proactively Cont'd

- **Consider Areas that May Need Improvement:**
  - Use of force policies
  - Ongoing and enhanced training
  - Technology
  - Accountability
  - Community engagement

Best Practices

1. Use of Force
2. Stops and Detentions
3. Crisis Intervention
4. Systems of Accountability

Use of Force Principles

1. **Weapons-Specific Policies**
   - Firearms
   - Conductive Energy Devices (i.e. Tasers)
   - Oleoresin Capsicum Spray (“OC Spray”)
   - Impact Weapons
2. **Reporting**
3. **Training**
4. **Accountability**

New Trends in Policing

- Increased use of body cameras
- Increased use of non-lethal weapons, e.g., Tasers
- New training techniques/policing philosophy
  - Focus on De-escalation techniques
  - New standards:
    - Police Executive Research Forum (PERF) Principles
    - The President's Task Force on 21st Century Policing
    - Peel's Principles
- Increased liability based on expanding view of *Graham v. O'Connor*

De-Escalation

- Distance and cover
- Tactical repositioning
- Slowing down
- Calling for assistance
- Use least amount force that is appropriate

De-Escalation in Practice



Stops and Detentions

1. Police departments must ensure their officers are complying with the *Terry* standard.

2. Stop receipts should be easy to complete yet detailed enough to maintain an accurate database.

3. It must be clear to officers when they are required to provide a stop receipt.



(COMPLETE ALL CAPTIONS)

STOP, QUESTION AND FRISK REPORT WORKSHEET
PD344-151A (Rev. 11-02)

Pct.Serial No. | Date | Pct. Of Occ.

Time Of Stop | Period Of Observation Prior To Stop | Radio Run/Sprint #

Address/Intersection Or Cross Streets Of Stop

☐ Inside ☐ Outside | ☐ Transit ☐ Housing | Type Of Location Describe:

Specify Which Felony/P.L. Misdemeanor Suspected | Duration Of Stop

What Were Circumstances Which Led To Stop?
(MUST CHECK AT LEAST ONE BOX)

- ☐ Carrying Objects In Plain View Used In Commission Of Crime e.g., Slim Jim/Pry Bar, etc.
- ☐ Fits Description.
- ☐ Actions Indicative Of "Casing" Victim Or Location.
- ☐ Actions Indicative of Acting As A Lookout.
- ☐ Suspicious Bulge/Object (Describe)
- ☐ Other Reasonable Suspicion Of Criminal Activity (Specify)
- ☐ Actions Indicative Of Engaging In Drug Transaction.
- ☐ Furtive Movements.
- ☐ Actions Indicative Of Engaging In Violent Crimes.
- ☐ Wearing Clothes/Disguises Commonly Used In Commission Of Crime.

Name Of Person Stopped | Nickname/ Street Name | Date Of Birth

Address | Apt. No. | Tel. No.

Identification: ☐ Verbal ☐ Photo I.D. ☐ Refused ☐ Other (Specify)

Sex: ☐ Male ☐ Female | Race: ☐ White ☐ Black ☐ White Hispanic ☐ Black Hispanic ☐ Asian/Pacific Islander ☐ American Indian/Alaskan Native

Age | Height | Weight | Hair | Eyes | Build

Other (Scars, Tattoos, Etc.)

Did Officer Explain Reason For Stop ☐ Yes ☐ No | If No, Explain:

Were Other Persons Stopped/ Questioned/Frisked? ☐ Yes ☐ No | If Yes, List Pct. Serial Nos.

If Physical Force Was Used, Indicate Type:

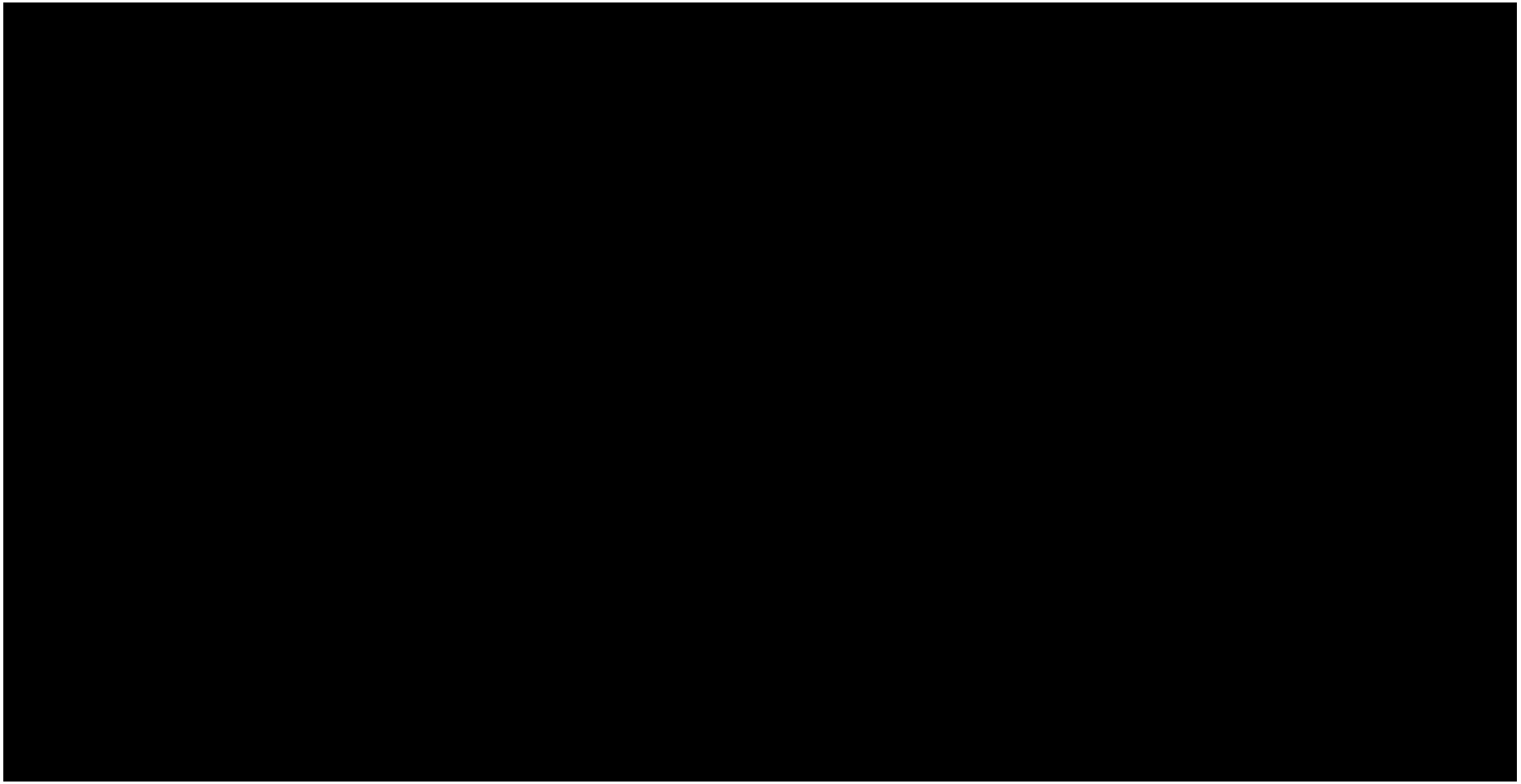
- ☐ Hands On Suspect
- ☐ Suspect On Ground
- ☐ Pointing Firearm At Suspect
- ☐ Handcuffing Suspect
- ☐ Suspect Against Wall/Car
- ☐ Drawing Firearm
- ☐ Baton
- ☐ Pepper Spray
- ☐ Other (Describe)

Was Suspect Arrested? ☐ Yes ☐ No | Offense | Arrest No.

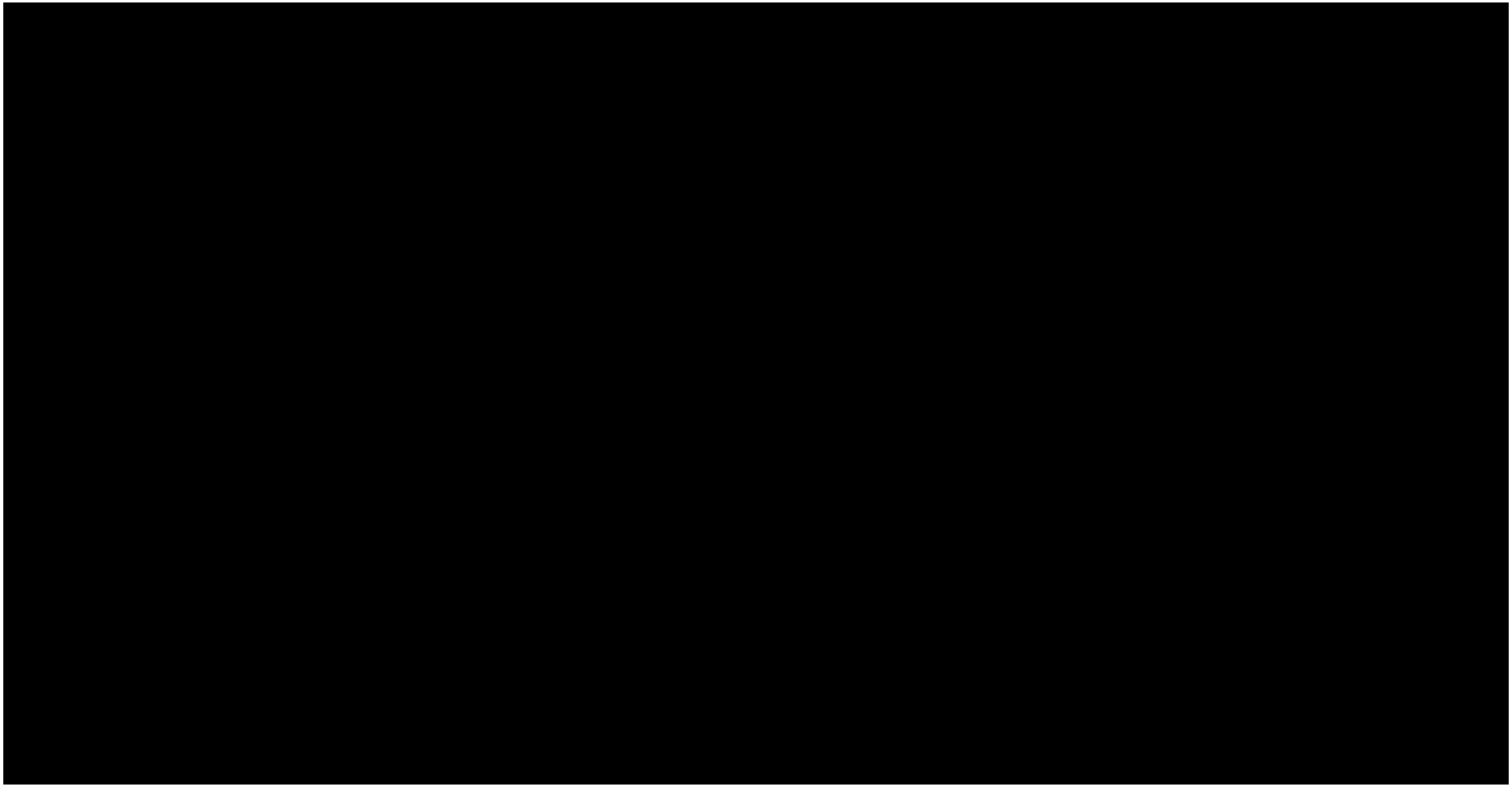
Was Summons Issued? ☐ Yes ☐ No | Offense | Summons No.

Officer In Uniform? ☐ Yes ☐ No | If No, How Identified? ☐ Shield ☐ I.D. Card ☐ Verbal

Crisis Intervention - Memphis Model



Crisis Intervention - Memphis Model



Systems of Accountability

- Maintain good systems of accountability.
- Ensure that system tracks use of force.
- Maintain sufficiently detailed reports on use of force.
- Periodically audit records.

The Benefits of Cooperation

Puerto Rico

- ✓ Letter from Shanetta Y. Cutlar, then-Chief of the Special Litigation Section, expressed "appreciation to [Superintendent Pedro Toledo Davila] and [his] staff for [their] cooperation and hospitality during [DOJ's] tour"
- ✓ Agreement noted it was "the result of extensive cooperation and consultation between PRPD and the Department of Justice ("DOJ") and builds on reform initiatives begun by PRPD."
- ✓ Agreement noted that "PRPD welcomed the investigation and pledged cooperation, and has worked in partnership with DOJ to establish the reforms in this Agreement."
- ✓ "The Agreement is the product of a serious cooperative effort built upon the Parties' mutual commitment to constitutional effective law enforcement."

East Haven

- × Findings letter noted DOJ had "grave concerns that Department leadership is creating a hostile and intimidating environment for anyone seeking to provide relevant information in [its] investigation."
- × Findings letter described situation in which "[a]t a late evening meeting, officers warned DOJ staff and a police practices consultant that they could not guarantee their safety during ride-alongs with officers, a highly unusual statement given the nature of our ride-alongs and the relatively low violent crime rate in East Haven. We have continued to receive subsequent reports of hostility and intimidation by EHPD officers and police union representatives. These recent reports caused us to advise the Mayor. . .of his obligation to prevent retaliation."

Questions?

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