

OFFICE OF THE DIRECTOR
OF POLICE ACCOUNTABILITY

May 20, 2022

To: Police Accountability Board
From: Katherine J. Lee, Interim Director of Police Accountability
On behalf of the PAB Regulations Subcommittee
Re: Draft Permanent Regulations for Handling Investigations and Complaints –
issues for full Board discussion

This memo accompanies the Draft Regulations agendized for your May 25, 2022 meeting as Item #10.a. and appearing beginning on page 15 of the agenda packet. The Draft Regulations are the product of nine months of diligent work of the Regulations Subcommittee, consisting of Board members Mike Chang (Subcommittee Chair), Kitty Calavita, Julie Leftwich, and Cheryl Owens, and public member Kitt Saginor. The Subcommittee also benefitted from the input and expertise of PAB Investigator Byron Norris, and of Lt. Dan Montgomery, assigned to represent the Police Department at Subcommittee meetings.

The Subcommittee reached consensus on most provisions, but a few matters were particular thorny, and the Subcommittee agreed to flag these for the full Board to discuss. Board members not on the Subcommittee should feel free to ask questions about other provisions not on this list.

You will see on the draft several issues flagged for the City Attorney (some of which also appear below); a separate memo is going to the City Attorney's Office.

1. Investigations and Subpoenas. Does the Board have a role in directing or performing investigations? Does the subpoena power extend to the PAB during the Findings & Recommendations stage? See Draft Regulations Section II.C.6. (p. 6) and Section II.J.2. (p. 16), and Charter Sections 3(a)(5) and 20(c). Does the Charter allow for additional investigatory work after Findings and Recommendations (F&R) are presented but before or during a hearing? See Regs. Sec. II.E.5.a. (p. 9).
2. Deciding when a hearing is needed. Under the Interim Regulations currently in effect, after F&R are brought to the Board, if the Board agrees with the DPA, they are sent to the Chief; if the Board decides further fact-finding is needed, the Board may hold a confidential personnel hearing. Due to the lack of clarity of Charter Section 18(i), interpretation of that provision has posed one of the greatest

challenges to ODPa staff and the Board, and the police union is not satisfied with the implementation of Section 18(i) as reflected in the Interim Regulations.

The Regulations Subcommittee proposes for the permanent Regulations that whenever the DPA or PAB sustains a finding, or the PAB determines that it wishes to have a hearing, that a hearing will be held. See Draft Regs. Sec. II.E.5.a. (p. 9). This ensures that subject officers have an opportunity to be heard anytime a finding of "sustained" is recommended, and preserves the opportunity for the Board to call a hearing, even in the absence of sustained finding.

3. Evidence presented at F&R stage. Related to the above issue is the type of evidence staff presents to the Board. Draft Regs. Sec. II.E.5. (p. 9) states that body-worn camera video will not be shown at the initial consideration of F&R. The Subcommittee was convinced by Lt. Montgomery pointing out that body-worn camera video is seen and perceived viscerally, and could shape strong opinions that may not be overcome by a subject officer's representative raising aspects of the incident not caught on video, in a hearing a month later. This also relieves staff of the task of selecting what video to show during F&R, as it is usually not practical to show all the relevant footage. Of course, staff's written report can refer to what it saw on BWC video.
4. Relaying findings to the Chief. A last, relatively minor issue in Draft Regs. Sec. II.E.5. (subsections b. and c.), concerns wording about sending the findings. A Subcommittee member is arguing for "the Board shall send its findings" to the Chief. While the Director agrees that the findings "belong" to the Board, the act of sending them is performed by the Director or ODPa staff.
5. Post-hearing: If Hearing Panel modifies DPA's F&R. Following a hearing, if the Hearing Panel decides on findings that are different from the Director's, the Director writes them up and the Hearing Panel must approve or modify them. The Subcommittee did not discuss the alternate language found in Draft Regs. Section II.K.4.b. (p. 18). Please see the notes on that page. Part of the challenge is that the F&R are due to the Chief within 15 days of the hearing.
6. Board-initiated investigations. The Subcommittee proposes a new provision (Draft Regs. Sec. IV. (p. 21) allowing the Board to initiate an investigation (as opposed to complaint), so that staff may gather preliminary information and the Board may then initiate a formal complaint. It is unclear whether a Board-initiated investigation is authorized under the Charter.

Police Police Accountability

Give input on the next Berkeley Police Chief

Use survey to identify qualities sought in a new chief, your top priorities for policing, and how a chief could further strengthen relationships in Berkeley.

Published: May 17, 2022

Last Updated: May 17, 2022

If you live, work, study, or spend time in Berkeley, give input via a brief survey on qualities you would like to see in the next Berkeley Police Chief.

We're also interested in knowing what you believe should be the top priorities for the chief and what they can do to continue building effective police department relationships with the community.

The survey will be used by a recruitment firm to strengthen the outreach strategy and candidate profile for the nationwide search.

Please complete [the brief survey](#) by 5:00 pm on May 30 and share it with others.

SEARCH FOR A CHIEF TO MATCH COMMUNITY NEEDS, VALUES

The survey will add to qualities already known to be a need.

Berkeley's Police Chief needs to be a unifying force to lead efforts to treat all people fairly in creating a safe city. The chief will need to know how to navigate complex issues, such as simultaneous concerns about overzealous policing and inadequate safety.

Berkeley Police have a community-oriented approach that requires working with people and other public safety agencies, as well as civilian oversight. The next chief must be a supportive leader in the department, work with empathy, and have the presence to influence change.

The search firm will be looking for a chief with strong ethics, extensive experience in implementing community policing initiatives, and a track record of good relationships with residents, other agencies, and police unions.

COMPLETE SURVEY AND SHARE WITH OTHERS

As this process starts, input from the community can help shape the qualifications and attributes for a prospective police chief.

Add your voice to the mix.

Fill out [our survey](#) – and spread it to others whose voices can help identify qualities you'd like to see in Berkeley's Police Chief.

Keep up with City of Berkeley news via our [news page](#), [email](#), or on [Twitter @cityofberkeley](#).

Media Contact

Matthai Chakko

City Communications Director

(510) 981-7008

communications@cityofberkeley.info

News



Berkeley Police Department would like to announce a new Transparency Hub



Give input on the next Berkeley Police Chief



\$50K Reward offered for information about suspects in Tobias "Toby" Eagle's murder

Police

Berkeley Police Department would like to announce a new Transparency Hub

In an effort to promote trust and accountability, the department is publishing its data in easily accessible dashboards for the public.

Published: May 25, 2022

Last Updated: May 25, 2022

The Berkeley Police Department would like to announce a new Transparency Hub we have created to share information with the Berkeley community.

Over the past few years our organization has placed an increased emphasis on expanding our data and analysis capacity. I recognize that data transparency is a foundational piece to a police department's trust and legitimacy. Therefore, I directed our Data & Policy Analysis Team to create this Transparency Hub, with the goal of building/increasing community engagement, trust and legitimacy.

In its current design, the Transparency Hub includes data on our Calls for Service, Use of Force, as well as the information collected as part of the California Racial and Identity Profiling Act (RIPA). The following link will bring you to the BPD Transparency Hub.

I encourage you to visit the Transparency Hub, and interact with the data. My goal is to provide you, our community, with tools and information to better understand and visualize the public safety work that the department undertakes within our community.

With respect,

Chief Jen Louis

Media Contact

Jessica Perry

Berkeley Police Department

(510) 981-5780

BPDPPIO@cityofberkeley.info

News



Berkeley Police Department would like to announce a new Transparency Hub



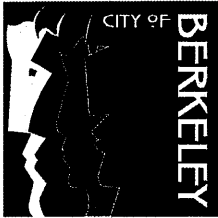
Give input on the next Berkeley Police Chief



\$50K Reward offered for information about suspects in Tobias "Toby" Eagle's murder



Suspect arrested after an armed robbery in West Berkeley



Office of Mayor Arreguin

**REVISED
AGENDA MATERIAL
for Supplemental Packet 2**

Meeting Date: May 24, 2022

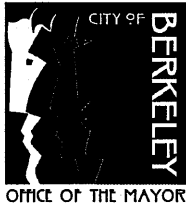
Item Number: 19

Item Description: Revisions to Section 311.6 Warrantless Searches of Individuals on Supervised Release Search Conditions of the Berkeley Police Department Law Enforcement Services

Submitted by: Mayor Arreguín and Vice Mayor Harrison

This supplemental proposes an alternative approach to addressing the authors' concern that Council- adopted policy precludes BPD from utilizing the warrantless search provision to search a sex offender on probation or parole.

The recommended language creates a carve out making it clear that policy 311.6 does not apply to registered sex offenders on probation or parole consistent with their special assigned status under California Penal Code 290.



To: Honorable Members of the City Council
From: Mayor Jesse Arreguin and Vice-Mayor Kate Harrison
Subject: Alternative Revisions to Section 311.6 Warrantless Searches of
Individuals on Supervised Release Search Conditions of the Berkeley
Police Department Law Enforcement Services Manual

RECOMMENDATION

Amend Section 311.6 Warrantless Searches of Individuals on Supervised Release Search Conditions of the Berkeley Police Department (BPD) Law Enforcement Services Manual to **enable officers of the Berkeley Police Department to conduct detentions and warrantless searches of registered sex offenders on parole/probation consistent with and supportive of the provisions in the probationer's/parolee's release conditions. The proposed language maintains the current policy in Section 311.6 but *adds additional language clarifying that this policy does not apply to registered sex offenders, consistent with their special status under California Penal Code 290.***

See the full proposed language below, additions are shown in underline:

In accordance with California law, individuals on probation, parole, Post Release Community Supervision, or other supervised release status may be subject to warrantless search as a condition of their probation. Officers shall only conduct probation or parole searches to further a legitimate law enforcement purpose. Searches shall not be conducted in an arbitrary, capricious, or harassing fashion.

Officers shall not detain and search a person on probation or parole solely because the officer is aware of that person 's probation or parole status. The decision to detain a person and conduct a probation or parole search , or otherwise enforce probation or parole conditions, should be made, at a minimum, in connection with articulable facts that create a reasonable suspicion that a person may have committed a crime, be committing a crime, or be about to commit a crime.

Notwithstanding this general policy, consistent with the special status assigned to sex offenders specified in California Penal Code 290, officers may search registered sex offenders on probation or parole as otherwise permissible by law.

BACKGROUND

Process and Rationale for Developing Policy 311.6

On May 11, 2022, the Police Accountability Board (PAB) sent a letter to the City Council (Attachment 1), including background submitted by the PRC subcommittee on Probation and Parole Searches summarized in the September 9th, 2020 packet (Attachment 2). This background was not included in the original item but provides important context as to how and why this policy was formulated.

On April 24, 2018, the Berkeley City Council agreed on consent to "Review and Update BPD Policy Surrounding Inquiries to Parole and Probation Status" triggering a review of these policies by the Police Review Commission (PRC). Policy 311, Section 311.6 was the product of 18 months of work and collaboration between the former PRC and the Berkeley Police Department. The policy was later adopted by the Police Department and later affirmed by the Mayor's Working Group on Fair and Impartial Policing and the Council as part of its acceptance of the Fair and Impartial Policing Working Group's report. The PRC gathered evidence, reviewed the legal and scholarly literature, and received input from practitioners and experts, including the Alameda County Assistant Chief of Probation.

The PRC initially recommended differentiating between violent and non-violent offenders, similar to Oakland's policy. However, this approach was deemed too burdensome by BPD and thus Chief Greenwood proposed the language that was ultimately adopted by BPD with the support of the PRC (Attachment 3).

Concerns with Policy Committee Recommendation

The proposal to revise Section 311.6 does not adequately consider the original purpose, process, and concerns that led to the creation of this policy narrowing the scope of warrantless searches by the Berkeley Police Department. The April 24, 2018, Council Action was in response to the PRC's report to "Achieve Fairness and Impartiality". The reason for initiating this policy change was concern that suspicionless searches of persons who are on supervised release are a factor contributing to racial disparities. The disparate impacts of this policy are in part a result of the upstream systemic racism in our criminal justice system. Blacks and Latinxs are 71% of Alameda County's probationers making people of color disproportionately impacted by a change to this policy. Any change to this policy needs to contend with the broader racial disparate impact of its implementation.

Policy 311.6 does not prohibit searches of individuals on supervised release, just *suspicionless searches*, a critical distinction. The reasonable suspicion standard is a lower threshold, not "nearly equal" to the standard of probable cause required to search an individual that is not on probation or parole. Additionally, a non-parolee can only be searched in a much more restricted manner, a pat-down, whereas a probationer/parolee can be subjected to a much more invasive search.

Berkeley is not alone in restricting these types of searches. Oakland has a policy, General Order R-02 that limits warrantless searches of individuals and distinguishes between violent and

non-violent offenders. Moreover, California is one of only nine states that allows these types of searches at all. It is not clear that Berkeley will be safer or achieve more equitable policing outcomes by adopting the policy committee recommendation.

The Supreme Court has long affirmed the application of 4th Amendment protections to people of all statuses, including supervised release, absent individualized suspicion (See *Griffin v. Wisconsin* [1987]; *U.S. v. Knight* [2001]). Deviating from this principle, the Court in *Samson v. California* (2006) found California's practice of police searches of people on supervisory release to be constitutionally permissible, given California's interest in suppressing its high recidivism rate. However, legal scholars argue that the *Samson* opinion is a radical departure from precedent and violates the constitutional protections of the 4th Amendment, and criminologists note that law enforcement's ability to do random searches of people on supervised release has not reduced California's recidivism rate. In fact, the City Council has received letters from distinguished scholars expressing deep concern for revising the policy to allow suspicionless searches.

Vincent Southerland, Assistant Professor of Clinical Law and Co-Faculty Director of the Center on Race, Inequality and the Law at the New York University School of Law, noted that California's policy was upheld by the Supreme Court in *Samson v. California* based on the assumption that suspicionless search of people on supervised release would reduce California's above average recidivism rate (Attachment 4). This decision is contrary to the spirit of the Fourth Amendment that safeguards from unreasonable searches and seizures by the government apply to all people, regardless of race, sex, national origin or criminal status.

On May 22, 2022 the City Council received a letter from Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley School of Law, perhaps the most respected constitutional scholar in the country, urging the City Council to retain the current policy. Chermerinsky notes the danger of allowing police to stop individuals without at least having reasonable suspicion, and that in his view, California's permission of suspicionless stops, and thus the proposed revision back to that standard, likely violates the Fourth Amendment (Attachment 5).

RATIONALE FOR RECOMMENDATION

We are in agreement with many of the points laid out in the letter from the PAB. There is no compelling evidence to support a complete rollback of Section 311.6. In particular, such a rollback could set back important progress toward fair and impartial policing.

However, given the unique concerns surrounding sex offenders, we are compelled to have a carve-out that waives the applicability of Policy 311 Section 311.6 with respect to registered sex offenders on probation or parole.

ALTERNATIVES CONSIDERED

The City Council could refer the policy back to the Police Accountability Board for a more thorough discussion on the legal and public safety considerations. This process could unpack

the role of probation and parole officers, as well as their capacity to enforce the release conditions of their clients.

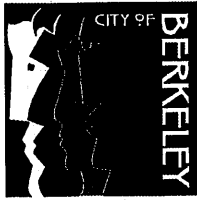
Alternatively, the City Council could adopt a standard in place in Alaska and North Carolina, which only allow warrantless searches of individuals on supervised release at the request of their probation or parole officer.

FINANCIAL IMPLICATIONS

Asking officers to supplement the duties of Parole and Probation Officers can drive up costs and stretch police staff time that is already thin.

Attachments:

1. May 11, 2022, Police Accountability Board Letter
2. September 9, 2020, Police Review Commission Agenda Packet
3. September 23, 2020, Police Review Commission Agenda Packet
4. May 9, 2022, Letter from Vincent Southerland, Assistant Professor of Clinical Law and Co-Faculty Director of the Center on Race, Inequality and the Law at the New York University School of Law
5. May 22, 2022, Letter from Erwin Chemerinsky, Dean and Jesse H. Chopper Distinguished Professor of Law at the University of California, Berkeley School of Law



OFFICE OF THE DIRECTOR
OF POLICE ACCOUNTABILITY

May 11, 2022

To: Honorable Mayor and Members of the City Council

From: Michael Chang, Chairperson, Police Accountability Board

Re: Revisions to Berkeley Police Department Policy 311, Section 311.6, *Warrantless Searches of Individuals on Supervised Release Search Conditions* – agendized for the May 24, 2022 City Council meeting

The Police Accountability Board (PAB) has evaluated the proposal from Councilmembers Droste and Taplin to modify Berkeley Police Department (BPD) Policy 311, Section 311.6, *Warrantless Searches of Individuals on Supervised Release Search Conditions*, and voted unanimously to support retaining the current version of Section 311.6.

Policy 311, *Search and Seizure*, was the product of 18 months of work and collaboration between the former Police Review Commission (PRC) and the BPD. The policy was later incorporated into the Mayor's Working Group on Fair and Impartial Policing recommendations that Council passed on February 23, 2021. The PRC gathered evidence, reviewed the legal and scholarly literature, and received input from practitioners and experts, including the Alameda County Assistant Chief of Probation. The following summarizes the information gathered by the PRC and, subsequently, by the PAB.

- **California is one of only nine states that allow police officers without limitation to search individuals on community supervision.** A divided U.S. Supreme Court decision issued in 2006, *Samson v. California*, did not find the practice unconstitutional, and it remains part of the state Penal Code. That said, Berkeley's current policy brings it closer to that of most other jurisdictions in the United States.
- **In 2015, the U.S. Supreme Court in *Rodriguez v. United States* found that police officers may not prolong traffic stops absent reasonable suspicion longer than necessary to process the traffic infraction.** Given the longstanding value that Berkeley places on constitutional policing, the City will want to ensure that its probation and parole search practices subsequent to traffic stops are consistent with *Rodriguez*.
- **Probationers and parolees are subject to search by their Probation and Parole Officers (PO's), who classify their clients according to risk**

assessments. Those at high risk of re-offending are subject to intensive supervision and search by their PO's. The California Division of Adult Parole Operations subject sex offenders and other "special cases" to the highest level of supervision and search by their PO's.

- **The reasonable suspicion standard in Policy 311.6 is a relatively low threshold.** At a recent training conducted for PAB members, BPD training officers underscored the distinction between "reasonable suspicion" and "probable cause," and provided examples of the relatively low level of suspicion currently required to conduct a parole and probation search.
- **Probationers and parolees in California are disproportionately people of color, with 71% of Alameda County probationers either Black or Latinx people.** They are therefore disproportionately subject to these searches.
- **The empirical evidence suggests that police officer parole and probation searches are not associated with crime reduction.** Of the nine states that allow unlimited probation and parole searches by police officers, six have crime rates higher than the national average. In Berkeley, Part One violent crimes were down slightly from 2020, while property crimes increased by 2.2%. This increase in Berkeley's crime rate in 2021 is lower than in jurisdictions that allow these police searches. For example, in neighboring San Francisco, overall crime was up 12.8% and in Richmond 9%. The Pew Charitable Trust, in a 2020 report of its Public Safety Project, found from their exhaustive review of available research that intensive probation and parole interventions and searches are not correlated with reduced crime.
- **Evidence also suggests that allowing police officers to do suspicionless probation or parole searches does not reduce recidivism.** The average 3-year recidivism rate across the United States is 39%. Five of the nine states that allow police officers unlimited searches of people on probation or parole have rates higher than that, with California's 50% rate substantially higher than average.
- **Evidence suggests these searches are not cost effective.** They take time from police officers to supplement the duties of Parole and Probation Officers during a period of already costly police overtime. Further, they may uncover technical violations of parole or probation, with related cost increases. Nationally, 30-40% of state prison admissions are for technical violations of probation or parole conditions, such as traveling more than 50 miles from home or violating curfew. Nationwide, states spend about \$3.1 billion annually to re-incarcerate people for technical probation or parole violations. The Pew Charitable Trust Report concluded that subjecting low-risk individuals to intensive supervision "drives up costs and runs counter to what the evidence recommends."
- **There is no evidence that intensive supervision of probationers and parolees facilitates rehabilitation.** A *Washington Post* article last year summarized Pew's Public Safety Project, "A supervision system meant to encourage rehabilitation outside of prison often stands in the way of its own goal." This is in part

because of the message of disrespect that these suspicionless searches send. Further, as Prof. Michelle Phelps suggests in her Princeton University dissertation, even the brief periods of incarceration associated with technical violations “cause enough disruption to destabilize family relationships and employment,” which are critical for rehabilitation.

In sum, the evidence suggests that allowing police officers to search individuals on supervisory release without suspicion does not reduce crime, is associated with higher recidivism, drives up costs, and may be an obstacle to rehabilitation. And, since people of color are more likely to be on probation or parole, they are more likely to be subject to these searches.

The PRC originally recommended the current Section 311.6 of Policy 311 based on these empirical data, and it is in its commitment to evidence-based policing that the PAB unanimously and respectfully recommends retention of this policy. The vote to send a letter to the Council recommending against the proposed change to Section 311.6 and keeping the policy as is, was made at the PAB’s April 13, 2022 meeting. Moved/Second (Calavita/Leftwich): Ayes – Calavita, Chang, Harris, Leftwich, Levine, Mizell, Moore, Owens, and Ramsey; Noes – None; Abstain – None; Absent – None.

cc: Jennifer Louis, Interim Police Chief
Police Accountability Board Members

May 9, 2022

City Council
City of Berkeley
2180 Milvia St.
Berkeley, CA 94704
council@cityofberkeley.info

Dear Berkeley City Council Members,

I am writing in light of your consideration of Berkeley Police search policy which currently requires that officers have reasonable suspicion to justify a search of a person on probation or parole. I was disheartened to learn that the Berkeley City Council is considering a rollback of policies meant to curtail the suspicionless search of people on supervision by Berkeley Police. Given the serious implications of these practices on Fourth Amendment rights and racial equity, I strongly urge City Council to leave the current limits on police authority in place.

I am an Assistant Professor of Clinical Law and co-Faculty Director of the Center on Race, Inequality, and the Law at the New York University School of Law. My expertise centers on the intersection of race and the criminal legal system, as well as criminal law and procedure. Prior to joining NYU School of Law, I was an Assistant Federal Defender with the Federal Defenders for the Southern District of New York, where I represented individuals in federal criminal proceedings and during post-conviction supervised release. My time as a federal defender was preceded by nearly a decade at the NAACP Legal Defense and Educational Fund and several years as a state public defender in New York.

The Fourth Amendment safeguards our fundamental right to be secure from unreasonable searches and seizures by the government.¹ It ensures that law enforcement cannot intrude upon our privacy without at least individualized, reasonable suspicion. This basic requirement is “the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment.”² The Fourth Amendment’s safeguards apply to all people, regardless of race, sex, national origin, or for that matter, criminal status. As the Supreme Court has long recognized, people on supervised release, just like any other class of people, merit the Fourth Amendment’s protections.³

¹ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” CONST. AMEND. IV

² *Samson v. California*, 547 U.S. 843, 866 (Stevens, J. dissenting).

³ See *United States v. Knight*, 534 U.S. 122 (2001) (holding that there must still be reasonable suspicion of wrongdoing to justify warrantless search of people on supervised release); *Griffin v. Wisconsin*, 483 U.S. 868, 876-77 (1987) (holding that warrantless searches carried out by probation officers as part of individualized counseling and monitoring may give rise to special needs justifying departure from the Fourth Amendment’s strictures); *c.f. Samson*, 547 U.S. 843 (2006).

Yet, contrary to the spirit of the Fourth Amendment, California is one of only nine states to allow warrantless, suspicionless searches by law enforcement of those on probation or parole.⁴ Although California's arcane policy was upheld by the Supreme Court in *Samson v. California*,⁵ the state's justifications for the measure emanated from the assumption that the suspicionless search of people on supervised release would reduce California's above-average recidivism rate. This assumption was flawed in 2006, when *Samson* was decided, and remains erroneous today. In *Samson*, the Court overlooked the fact that California's recidivism rate was driven by the state's system-wide failure to provide people in prison with vocational education, mental health treatment, and related services upon release,⁶ combined with "lockup quotas" that perversely incentivized the violation of parolees to fill bed space in the state's prisons.⁷ These shortcomings resulted in California returning more people on supervised release to its custody than in 39 states combined.⁸ As recently as 2019, the state has admitted its failure to adequately support the re-entry of people in its custody.⁹ The suspicionless search of people on supervised release bolsters the falsehood that people on supervised release are inherently suspicious and therefore less entitled to the law's fundamental protections. Such policies vest police with the sort of unbridled authority that resulted in a national outcry over policing in the wake of George Floyd's death.

In response to that outcry, the Berkeley City Council made significant strides to promote racial justice within its criminal legal system. Among the policies adopted were measures restricting law enforcement's ability to inquire about a person's supervised release status and limiting warrantless searches of people on supervised release to only those instances where there are "articulable facts that create a reasonable suspicion" that the individual was involved in criminal activity.¹⁰ The regulation restored the protections enshrined in the Fourth Amendment—that touchstone requirement for government searches to be based not on a person's status, but on some individualized, reasonable suspicion of wrongdoing.

⁴ See Cal. Penal Code Ann. § 3067(a) (West 2000).

⁵ *Samson*, 547 U.S. 843 (2006).

⁶ W. David Ball, *Mentally Ill Prisoners in the California Department of Corrections and Rehabilitation: Strategies for Improving Treatment and Reducing Recidivism*, 24 J. of Contemporary Health Law & Policy 1.2 (2007), Marvin Mentor, *Supreme Court: California's Law Permitting Suspicionless Police Search of Parolees Does Not Violate Fourth Amendment*, Prison Legal News (June 15, 2007), <https://www.prisonlegalnews.org/news/2007/jun/15/supreme-court-californias-law-permitting-suspicionless-police-search-of-parolees-does-not-violate-fourth-amendment/> (detailing how California prisons failed to adequately screen inmates for mental illness during intake, offer special programming or housing, provide basic treatment, and to address special needs upon release, resulting in "mentally ill prisoners get sicker, stay longer, suffer more, and wind up back in prison soon after their release."); Opinion, *California Reinvents the Wheel*, N.Y.T. (Apr. 16, 2004), <https://www.nytimes.com/2004/04/16/opinion/california-reinvents-the-wheel.html> (noting that despite California laws requiring that people be provided remedial education while in prison, fewer than 10% of prisoners were enrolled in academic programs).

⁷ Marvin Mentor, *Supreme Court: California's Law Permitting Suspicionless Police Search of Parolees Does Not Violate Fourth Amendment*, Prison Legal News (June 15, 2007), <https://www.prisonlegalnews.org/news/2007/jun/15/supreme-court-californias-law-permitting-suspicionless-police-search-of-parolees-does-not-violate-fourth-amendment/>; see also *Criminal: How Lockup Quotas and "Low-Crime Taxes" Guarantee Profits for Private Prison Companies*, In the Public Interest (Sept. 2013), <https://www.inthepublicinterest.org/wp-content/uploads/Criminal-Lockup-Quota-Report.pdf>

⁸ Mentor, *supra* note 7.

⁹ California Dept. of Corrections and Rehabilitation, *Several Poor Administrative Practices Have Hindered Reductions in Recidivism and Denied Inmates Access to In-Prison Rehabilitation Programs*, Report 2018-113 (Jan 2019), <https://www.bsa.ca.gov/pdfs/reports/2018-113.pdf>.

¹⁰ Berkeley Police Department Law Enforcement Service Manual § 311.6

In passing these reforms, City Council acknowledged that California's authorization of suspicionless searches aggravated racial disparities endemic to the criminal legal system. Black, Latinx and other people of color are disproportionately policed and prosecuted, and therefore—predictably—more likely to end up on supervised release. Although Black Californians make up less than 8% of the general population, they represent 22.9% of those on state supervised release.¹¹ Black people who often live in heavily policed neighborhoods are also more likely to be stopped by law enforcement. The Berkeley Police Department's own data reveals that Black residents are not only more likely to be stopped than white residents, but also four times more likely to be searched following a traffic stop.¹² By restoring law enforcement authority to search Berkeley residents on the sole basis of their supervision status, the contemplated rollbacks invite gratuitous and discriminatory police contact, which in turn threatens to compound these stark racial disparities and undermines community well-being.

Restoring Fourth Amendment protections to people on supervised release made Berkeley stand out as a beacon committed to advancing racial equity and civil rights. Rolling back this progress would be a grave step in the wrong direction.

Sincerely,



Vincent Southerland
Assistant Professor of Clinical Law
Director, Criminal Defense and Reentry Clinic
Co-Faculty Director, Center on Race, Inequality, and the Law
New York University School of Law
245 Sullivan Street, 629
New York, NY 10012
Tel.: (212) 998-6882
vincent.southerland@nyu.edu

cc: Mayor Jesse Arreguín

¹¹ Mia Bird, Justin Goss, Viet Nguyen, *Recidivism of Felony Offenders in California*, Public Policy Institute of California, (June 2019), <https://www.ppic.org/wp-content/uploads/recidivism-of-felony-offenders-in-california.pdf>.

¹² Malini Ramaiyer, *Berkeley police stop and search Black residents more often*, *Police Review Commission finds*, THE DAILY CALIFORNIAN (March 12, 2018), <https://www.dailycal.org/2018/03/12/berkeley-police-stop-search-black-residents-often-police-review-commission-finds/>.

May 22, 2022

Mayor Jesse Arreguin
Members of the Berkeley City Council
council@cityofberkeley.info
jarreguin@cityofberkeley.info
clerk@cityofberkeley.info

Re: Proposal to revise Berkeley Police Department Policy 311, Section 311.6

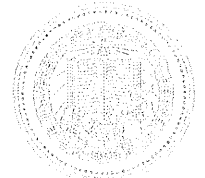
Dear Mayor Arreguin and Members of the Berkeley City Council,

I understand that the Berkeley City Council is scheduled to consider, at its meeting on May 24, a proposal to revise Berkeley Police Department Policy 311, Section 311.6, *Warrantless Searches of Individuals on Supervised Release Search Conditions*. I am writing to urge that you retain the current policy, which requires “reasonable suspicion” for individuals on probation and parole.

I am Dean of the University of California, Berkeley School of Law and the Jesse H. Choper Distinguished Professor of Law. I regularly teach a course on policing and the Fourth Amendment, Criminal Procedure: Investigations. My most recent book – *Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights* (Liveright 2021) – focuses on this topic.

The current Berkeley policy requires that the police have reasonable suspicion before searching those who are on probation and parole. This is not a demanding standard, but it is one that requires some basis before a police officer can stop and search a person who is on probation or parole. The Supreme Court has explained that reasonable suspicion requires more than a hunch, but less than probable cause.

Every police search is degrading and stressful. Each has the possibility of escalating. Moreover, countless studies have shown the danger of allowing police to stop individuals without at least having reasonable suspicion: the power often is used in a racially discriminatory manner. In the case of probation and parole searches, this is inevitable since the vast majority of those on probation or parole in California are people of color.



Nor is there any evidence that allowing suspicionless stops enhances effective law enforcement. Indeed, many studies conclude that intensive probation and parole searches are not correlated with a decrease in crime.

California is one of the few states that allows police to search individuals on community supervision without a requirement for reasonable suspicion. I believe that this likely violates the Fourth Amendment, despite the Supreme Court's finding in *Samson v. California*.

Therefore, I urge the City Council to retain the current policy. The police only should be able to search a person if there is at least reasonable suspicion. Eliminating this requirement will do little to enhance public safety, but it will cause great harms and is likely unconstitutional.

Thank you for considering my views.

Sincerely,

s/

Erwin Chemerinsky

