

## **Proposal to PRC to form a subcommittee to examine whether to recommend revising policy on probation and parole searches of pedestrians and motorists**

Submitted by Commissioner Kitty Calavita

### Background for proposal:

1. African American motorists in Berkeley are 6.5 times more likely to be stopped than Whites and when stopped 4 times more likely to be searched. We'd don't know for sure the details of why this happens, but my guess is that it is the result not of explicit or deliberate race hostility but some form of implicit bias.
2. In California, three kinds of permissible searches of motorists and cars: Reasonable suspicion of criminal activity; consent; and "4<sup>th</sup> waiver" search, which means simply that a person on probation or parole has signed a waiver of their 4<sup>th</sup> amendment privacy assumption and can be searched. So, a person known to be on P or P can be searched even absent any suspicion of criminal activity engagement.
3. The California penal code includes the possibility of such parole searches, but prohibits "arbitrary, capricious, or harassing searches."
4. A California Supreme Court case in 1998 allowed for these 4<sup>th</sup> waiver searches, reversing a longstanding requirement for reasonable suspicion. The US Supreme Court in 2006 (*Samson v. California*) in a decision written by Clarence Thomas, affirmed the constitutionality of what dissenters Stevens, Breyer and Souter called "an entirely suspicionless search unsupported by any special need."
5. While these 4<sup>th</sup> waiver searches are legally permissible, it is up to the individual officer whether to ask a motorist if they are on probation or parole, and if they are, whether to initiate a search even absent suspicion.

6. It is very possible that use of this discretion contributes to the disparities we see in searches of motorists' cars. And, we know that the inquiry about whether a person is on probation or parole, because it implies that an officer imagines the person might have a criminal history, is offensive to people of color and contributes to adversarial attitudes and a loss of trust between those communities and the police.
7. Much has been made recently of the concept of procedural justice and its importance to the police retaining legitimacy in the communities they patrol. One of the 4 criteria for procedural justice is "RESPECT" and for many people of color this parole/probation question signals disrespect.
8. Nothing in the BPD General Orders (specifically T-3) mentions asking about P and P in traffic stops, and a recent document from the Alameda County DA Office specifies only that in traffic stops, the officers should establish the driver's identity; inspect license, registration, and insurance status; do a DMV check of license and registration; and inspect the VIN # on dash. Again, no mention of P and P inquiry.
9. Many other states allow for parole searches **only** when there is some level of articulable suspicion that a motorist is involved in criminal activity.
10. The Oakland Police Commission recently voted unanimously to recommend new policies about searches and P and P inquiries. The bottom line is: "Officers shall refrain from immediately asking whether a person is on probation or parole unless there is an immediate threat to the safety of officers or others." Further, if a person is on P or P, any search "shall be conducted in consideration of the totality of the circumstances." And, "the mere fact that a person is on P or P is not in itself a connection to criminal activity."
11. Finally, one year ago, in April 2018, the Berkeley City Council agreed on consent the acceptance of our PRC report, "To Achieve Fairness and Equity in Policing", and at same time referred to the City

Manager the possibility of reviewing and updating the BPD policy on asking people about their P or P status.

**Therefore, I move that we form a subcommittee to examine current best practices in the field with regard to probation and parole inquiries and related searches, in order that we may recommend possible changes to BPD procedures and potentially urge the City Manager to follow up on the CC's referral of one year ago.**