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**MONITORING REPORT AND COMMENTS BY THE PARTNERSHIP FOR CIVIL JUSTICE FUND TO THE DISTRICT DEFENDANTS' SECOND SIX MONTH REPORT ON THE IMPLEMENTATION OF REQUIRED CHANGES TO POLICIES AND PRACTICES UNDER THE BARHAM CLASS ACTION SETTLEMENT AGREEMENT  
(Issued September 23, 2011)**

*The class action settlement agreement in Barham v. Ramsey, Civil Action No. 02-00283, assigned monitoring responsibilities to the Partnership for Civil Justice Fund and imposed reporting requirements upon the District of Columbia regarding measures to implement changes to policies and practices to ensure evidence preservation and to prevent recurrence of the evidence loss and/or destruction that was identified by the PCJF in the course of litigation.*

*"This is an oversight and reporting function that is intended to assure plaintiffs, the Court, and the public that the Document Management, Retention and Preservation goals of the Settlement Agreement are, in fact, advanced and achieved." Joint Motion for Final Approval of Proposed Class Settlement and Payment Distributions, Supporting Memorandum at 38 (Docket Entry No. 629).*

*This is the second of six periodic reporting comments by the PCJF, as required during a mandatory three year reporting period. Pursuant to the Court's Final Approval Order, the District of Columbia is required to provide an advance copy of its report to the PCJF. "The District shall consider the comments by Class Counsel. The comments or response of Class Counsel, if any, shall be incorporated as an included attachment or exhibit and published in the final report. The reports shall be transmitted to Judge Emmet G. Sullivan, as well as made publicly available." (Docket Entry No. 640 at 7)*

*During the first six months of the implementation period and as reflected in the PCJF's first report, a document management system and protocol were initiated to create integrity in the maintenance of evidence.*

*As more fully discussed in the accompanying comments, due to ongoing concerns and new disclosures<sup>1</sup> regarding loss, destruction and tampering of evidence involving the D.C.*

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<sup>1</sup> Counsel for the Barham Plaintiffs are aware of the document placed in the public record by this Court on Friday, September 16, 2011, and the related motions practice that is occurring in the related Chang case. In this report, Counsel is referencing only that which has been published by the *Washington Post* and available to the public for the last several days and to date.

*Metropolitan Police Department's Office of General Counsel (OGC), the Partnership for Civil Justice Fund recommends that a referral be made for criminal investigation and prosecution to the Department of Justice for action by the Public Integrity Division, the Civil Rights Division or whichever special attorney or specialized division is deemed most suitable by the U.S. Attorney General; or for the appointment of special counsel consistent with the statutory authority provided in 28 U.S.C. § 515.*

*The District agrees the threshold for a criminal investigation and potential prosecution has been met, but has sought for any investigation to be undertaken by the Washington Field Office of the FBI.*

*The PCJF believes that the FBI WFO is conflicted out of any investigation into evidence destruction or tampering by the OGC. As also discussed in the accompanying comments, there are prior incidents of evidence loss and withholding by the OGC including related to specific activities of the Washington Field Office of the FBI in connection with the Bolger v District of Columbia matter also handled by counsel at the PCJF. In light of the inextricably entwined joint actions of the FBI WFO with the MPD in connection with mass demonstrations including joint operations in the September 27, 2002 Command Center, and such other reasons as stated, the PCJF believes that the Washington Field Office of the FBI is conflicted out of performing such investigation.*

*The PCJF Counsel further recommends to the District that any personnel implicated in this matter in the Office of General Counsel be suspended pending investigation to protect the integrity of evidence that is processed by or through the OGC.*

*The District of Columbia has refused to include the PCJF's comments and recommendations as an included attachment or exhibit to be published in the second report submitted to the Court, as required by the Settlement Agreement and the Court's Final Approval Order of the class action settlement.*

*The PCJF's second monitoring reporting comments follow herein.*

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The District has made satisfactory progress implementing the mechanical obligations of establishing an audit trail and evidentiary management system.

Regardless, the system may be circumvented, and the requirements of an effective document management system and procedure required under the Settlement Agreement of this matter cannot be effectuated, if there are persons in the chain of evidence custody or in the MPD Office of General Counsel who deliberately secrete, destroy or otherwise disappear evidence before it can be entered into the system. This is a matter that was uncovered and raised in the course of the underlying litigation and which the Court ordered to be further pursued as an investigatory matter as it affects the interests of justice beyond any specific case.

The *Washington Post* has recently published information that contains disturbing new information regarding actual or alleged misconduct involving secretion or destruction of evidence handled by the highest rank of attorneys in the MPD's Office of General Counsel.

New information and allegations in the statement of D.C. Metropolitan Police Department Officer John Strader and the accompanying letter from Fraternal Order of Police Chairman Kristopher Baumann are alarming and suggest - - consistent with the evidentiary record previously presented by Class Counsel - - that the secretion, loss or destruction of evidence in this case and potentially other cases may involve the highest level of attorneys in the MPD Office of General Counsel. Del Quentin Wilber, *The Washington Post*, Pershing Park Evidence Uncovered ([http://www.washingtonpost.com/blogs/crime-scene/post/pershing-park-evidence-uncovered/2011/09/20/gIQAWSqkiK\\_blog.html](http://www.washingtonpost.com/blogs/crime-scene/post/pershing-park-evidence-uncovered/2011/09/20/gIQAWSqkiK_blog.html)) (hereinafter “Post article”)<sup>2</sup>.

The Pershing Park case does not stand alone and is not aberrational. This has appeared to have happened in no less than three of the police misconduct cases that counsel at the Partnership for Civil Justice Fund has handled, as discussed below. If this can occur repeatedly in these relatively high-profile civil matters, what is happening in the many cases where persons may not have the resources to uncover evidence tampering, and most critically in matters where a liberty interest is at stake? It poses a great threat to the people of the District of Columbia and the judicial system that the General Counsel’s Office of the D.C. Metropolitan Police Department may be engaged in unlawful evidence tampering, withholding or destruction.

The information presented by Strader is significant, as it directly involves MPD General Counsel Terrence Ryan. Strader states that in 2009 he found a book labeled “JOCC Activation Running Resume” which he caused to be delivered to Mr. Ryan. *Id.* According to *The Washington Post*, Strader thereafter observed the book in the possession and the office of Mr. Ryan. *Id.* (“A few weeks later [Strader] was summoned to the office of Terrence Ryan, the department’s general counsel, where he was shown the book he had discovered.”).

At that time period, renewed demands and efforts to locate the running resume in hard copy form were being ordered and undertaken under this Court’s oversight. In the fall of 2009, retired U.S. District Court Judge Stanley Sporkin, along with two investigators, was conducting an internal investigation that encompassed the disappearance or location of the JOCC Activation Running Resume and included interviews with top officials, including Terrence Ryan and Ronald Harris. (Docket Entry No. 575-1, Report of Stanley Sporkin on Certain Discovery Issues Emanating from Litigation Arising Out of the Pershing Park Incident of September 27, 2002 at 3).

Ryan and Harris denied to Judge Sporkin ever seeing the running resume, also known as the JOCC Activation Report. *Id.* at 6, 10 n.1, 15. Judge Sporkin’s report issued in December, 2009.

According to *The Washington Post*, Strader received no further relevant communication from the OGC about the book labeled “JOCC Activation Running Resume” until nearly two years later at which time Strader was summoned to Ryan’s office. *See Post* article. There,

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<sup>2</sup> Counsel for the Barham Plaintiffs are aware of the document placed in the public record by this Court on Friday, September 16, 2011, and the related motions practice that is occurring in the related Chang case. In this report, Counsel is referencing only that which has been published by the *Washington Post* and available to the public for the last several days and to date.

Strader was shown another, different, book and apparently was asked to identify it as the book he had found. Strader insisted that there was “no way shape or form” that the book was the same one he had previously turned over and had seen in Ryan’s possession. Id.

According to a complaint sent by Fraternal Order of Police Chairman Kristopher Baumann, as reported in the *Post* article, “At that meeting Mr. Ryan and representatives from the District made several attempts to convince Officer Strader to misidentify the document he found and to alter his statements about the document.” Id.

Throughout this litigation, Class Counsel has observed and reported that the paths of evidence destruction or misdirection frequently run through the MPD Office of General Counsel, handled by the top attorneys in the OGC as well as others. The chain of custody of the missing evidence, and subsequent cover up, has frequently returned to the OGC.

In 2003, in response to a subpoena from the D.C. Council in the investigation into the Pershing Park matter, it was MPD General Counsel Terrence Ryan and Ronald Harris who misrepresented that a similar formatted document produced to the Council was, in fact, the September 27, 2002 JOCC running resume when it was not. Had these attorneys so advised the Council that all electronic and paper copies of the running resume were missing (as they would later claim), there would have been a demand for an immediate search and recovery effort. Their misrepresentation and misdirection was a substantial measure in the cover up of the disappearance, intentional secretion and/or destruction, of this critical data record.<sup>3</sup>

Complete copies of the recorded police radio channel communications at issue in this matter were transferred from the MPD Communications Division to Assistant General Counsel Ronald Harris. The copies that have since left the OGC are of disputed integrity and upon careful review by Barham class counsel were found to have characteristics consistent with editing. Harris chose to not direct the preservation of the original recorded media, which was destroyed.

As above, these are not instances of first impression.

General Counsel Terrence Ryan failed to acknowledge or to produce key evidence that had been delivered to him by a Lieutenant in connection with the savage beating of protestors in the face with batons in Becker v. District of Columbia, Civil Action No. 01-00811 (PLF) (April, 2000 IMF/World Bank protests). For five years the MPD denied possessing any information or knowledge of the beating that involved a full platoon of officers and resulted in protestors’

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<sup>3</sup> By October 25, 2010 Minute Order, the Court ordered that the District access the Groupware or Group Systems running resume system to recover its running resume. In response, the District said it would seek to recover the E-Teams system, which may have been running as a test system for future full implementation, but declined to extract information from the Group Systems running resume system because those files appeared to require forensic extraction. The District stated that “though still possible, extraction of information from this [group Systems] server would prove to be a much more costly and time-consuming endeavor.” Chang Docket No. 718. Barham Class Counsel had previously established through deposition and discovery that to search for the actual complete Running Resume the Group Systems would need to be accessed. There is no doubt that the Group Systems was the primary operating system for the Spring, 2002 IMF protests; and there is testimony that it was the primary system for the Pershing Park events.

broken noses and teeth. After five years, a breakthrough discovery by plaintiffs led to the identification of the platoon leader as Lieutenant Linda Gilmore. When Gilmore gave her sworn statement, she attested that at the time of the events she learned of a video tape of her platoon, obtained a copy, and - - recognizing its legal significance - - personally delivered the tape to General Counsel Terrence Ryan. The tape had never been produced in discovery. Yet, Gilmore had personally delivered the tape to Ryan at the time of the underlying events.<sup>4</sup>

In Bolger v. District of Columbia, the District was sanctioned nearly \$100,000 after the Office of General Counsel repeatedly - and falsely -- denied the existence of the April, 2002 JOCC Running Resume. Plaintiffs counsel at the PCJF was able to recover the Running Resume in that matter after extensive and contentious litigation leading to the deposition testimony and efforts of Sergeant Douglas Jones.

Officer Strader's newly released narrative, which involves events occurring between 2009 and 2011, events that are relatively recent and current, reinforces the need for institutional change to impose accountability on an individual basis.

The Partnership for Civil Justice Fund recommends that a referral be made for criminal investigation and prosecution to the Department of Justice, for action by the Public Integrity Division, the Civil Rights Division or whichever special attorney or specialized division is deemed most suitable by the U.S. Attorney General; or for the appointment of special counsel consistent with the statutory authority provided in 28 U.S.C. § 515.

The District has, itself, now conceded that the threshold has been met for a federal criminal investigation and potential prosecution. The District is correct in this respect.

However, the District itself has opted to make its request to the Washington Field Office of the FBI. That is an inappropriate office to conduct such investigation. The Washington Field Office of the FBI establishes joint inter-agency teams with the MPD and its Intelligence Unit to take actions in the context of protests.

It is the view of counsel at the PCJF that the FBI WFO is conflicted from being able to investigate the loss of evidence where that office was itself involved in inter-agency activities in connection with the September 27, 2002 protests, including by and with former Detective Neil Trugman who is deeply involved in the controversies involving the loss and attempted destruction of the running resume.<sup>5</sup> Trugman, who partnered directly with the WFO of the FBI as part of his Intelligence Office duties, was identified in the Sporkin report as follows:

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<sup>4</sup> See Plaintiff's Opposition to Defendant District of Columbia's Motion for Partial Summary Judgment (Becker Docket No. 300) at 6; Attachment 4 (From the MPD Force Investigation Team Report: "Lieutenant Gilmore also reported that later that evening she learned of a video-tape that was taken of her platoon earlier in the day. Lieutenant Gilmore reported that she obtained a copy of the video-tape and delivered the tape to Terry Ryan in the Office of General Counsel.").

<sup>5</sup> In his role as consultant, Trugman described his responsibilities with the MPD concerning demonstrations and protests as being "to coordinate intelligence information from different agencies and also to assist in the managing of the Joint Operation Command Center," of which the Washington Field Office was a part. (source:

Sgt. Jones said that Neil Trugman, his superior at the time, came to him around October or November 2002 and asked for the file location for the Running Resume, how to access the system, and the username and password. Trugman further asked that the information not be emailed.

Sgt. Jones found this to be unusual because no one had asked in the past for such directions. Sgt. Jones believes (but is not certain) it was at this time he provided Mr. Trugman with a hard copy of the September 27, 2002 Running Resume along with the requested directions.

Report of Stanley Sporkin on Certain Discovery Issues Emanating from Litigation Arising Out of the Pershing Park Incident of September 27, 2002 at 6 (Docket Entry No. 575-1).

In the above referenced Bolger case, where the Running Resume was also disappeared, the key information it contained was proof the FBI Washington Field Office (WFO) agents had been on the scene of a mass false arrest questioning demonstrators about their political associations, activities and even religious views. The FBI and the MPD had denied during the course of this litigation that this had occurred or that the FBI had been present until the PCJF was able to uncover the document. See Editorial, The Washington Post, A Black Mark: D.C. Police and the FBI Need to Explain Their Actions in a 2002 Protest Incident, April 17, 2007, A14 (<http://www.washingtonpost.com/wp-dyn/content/article/2007/04/10/AR2007041001568.html>).

The underlying incident in the Bolger case directly involved the joint action of the Washington Field Office of the FBI with the MPD in violating the constitutional rights of protestors, followed by a cover up of the incident in which the Office of General Counsel - - which was in possession of the running resume - - denied its existence and failed to produce it in discovery. When produced, the running resume proved that the FBI WFO intelligence agents were actually reported and documented in the running resume as being on the scene and interrogating the arrestees. All the while the OGC denied the running resume existed and - - along with the Washington Field Office - - denied that the FBI was even on the scene. Yet, the running resume was proven to have been in the possession of the Office of General Counsel, including by Assistant General Counsel Ronald Harris while attorneys denied its existence.

The *Washington Post* described these circumstances as follows:

A federal judge said yesterday he was 'deeply concerned' about newly revealed evidence that FBI intelligence agents interrogated war protesters about their political views at a Washington rally in April 2002 and was seriously considering sanctioning D.C. government lawyers for insistent for three years that they had no record of the FBI's involvement.

The D.C. attorney general's office surprised the court March 23 by reporting that it had found a D.C. police log from the day of the rally - - the same log city

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November 20, 2003 interview of Neil Trugman by Special Counsels Mary M. Cheh and John Hoellen at 35 - 36). He served as the liason for the federal and other agencies who would be in the Command Center. *Id.* at 89 - 90.

attorneys had repeatedly said did not exist since protesters sued the D.C. police in 2003. The heavily redacted document confirmed that FBI intelligence officers were with D.C. police at a downtown parking garage April 20, 2002, and were directly involved in the questioning of 23 protesters later arrested for trespassing.

Yesterday, U.S. District Judge John D. Bates ordered the city to explain within the next week why it took so long to find a log that the police department routinely maintains during protests and why several attorneys had said it didn't exist. He also ordered the FBI to immediately begin looking more deeply for records of its presence and role in the incident. . . .

The judge said the log provided "credible evidence" that intelligence agents from the FBI's Washington field office interviewed the protesters that day, and he questioned why the FBI repeatedly told him that the bureau also had no record of the incident. . . .

The mystery surrounding the log's discovery deepened yesterday with the revelation that a D.C. police technician said he had alerted police lawyers to the log more than three years ago. The police sergeant, who helped maintain logs for protests, said in a sworn deposition March 26 that he forwarded copies of the April 2002 logs to the D.C. police's legal department [the MPD Office of General Counsel] in December 2003 and again in February 2006, both times in response to requests for documents related to the protesters' lawsuit.

Carol D. Leonnig, *The Washington Post*, Judge Weighs Punishing City Lawyers Over Delay on Protest Log, April 13, 2007 (<http://www.washingtonpost.com/wp-dyn/content/article/2007/04/12/AR2007041202269.html> ).

The FBI WFO is completely conflicted from being able to investigate the Office of General Counsel's disappearance, sequestration, destruction and/or loss of evidence, including the running resume.

The WFO, which partners its agents with MPD intelligence agents for major demonstrations, has taken no apparent action on the MPD-self-referred investigation. There is no reason to believe that it possesses the institutional interest to mount or prioritize such an investigation into the MPD and its top attorneys, setting aside its conflicts of interests, particularly where most of its human resources are now dedicated to what are identified as anti-terrorism assignments.

An investigation into police corruption and destruction of evidence, the scope of which will necessarily encompass or require inquiry of high level attorneys and police officials, requires specialized resources with an institutional directive to be aggressive and accountable to the public and the public interest. There can be no actual or even appearance of conflict of interest, or involvement with the underlying mass demonstrations and events or command center operations.

The Partnership for Civil Justice Fund, as Class Counsel, has emphasized throughout that the goal of recurrence prevention, making sure that what has occurred in the evidence tampering and cover up in the Pershing Park litigation, requires civil equitable relief and criminal enforcement components. The civil equitable relief has resulted in the creation of an unprecedented computer-based system, accompanied by policy dictates, that creates an audit trail of evidence once it is entered into the system.

The Partnership for Civil Justice Fund has, concurrently, emphasized the need for criminal enforcement and prosecution to impose accountability and deter MPD or District of Columbia officials or attorneys who might ever consider secreting or destroying evidence from doing so. The substantial achievements of the equitable relief and reform, including as reflected in the Barham settlement agreement, must be complemented by an aggressive, open and transparent, conflict-free investigation and criminal prosecution by a federal agency with the expertise and institutional purpose of enforcing the law, including when the violators come from within the ranks of D.C. law enforcement.

## **RECOMMENDATIONS**

For these reasons, there should be initiated a referral for criminal investigation and prosecution to the U.S. Attorney General for assignment in the discretion of the U.S. Attorney General to the most appropriate division of the Department of Justice or the appointment of special counsel consistent with the statutory authority provided in 28 U.S.C. § 515.

Counsel further recommends to the District that any personnel implicated in this matter in the Office of General Counsel be suspended pending investigation to protect the integrity of evidence that runs through the OGC. The system that has been established, including through settlement terms, for imposing litigation holds and for tracking and managing evidence can be effective only if evidence reaches the entry point.

The District, as represented in its status report, continues to satisfy the obligations to have implemented an appropriate hold policy and the establishment of an evidence management system. That work, however, risks being fundamentally undermined so long as action has not been undertaken to hold accountable persons within the Office of General Counsel regarding whom there is cause to believe have secreted or destroyed evidence.