**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**WESTERN DIVISION**

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| ACLU OF TENNESSEE, Inc. | ) | |
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| | ) | |
| | ) | |
| Intervening Plaintiff, | ) | |
| v. | ) | No. 2:17-cv-02120-jpm-DKV |
| | ) | |
| THE CITY OF MEMPHIS, | ) | |
| | ) | |
| Defendant. | ) | |

**DEFENDANT'S NOTICE OF SERVICE OF EXPERT DISCLOSURE AND REPORT TO INTERVENING PLAINTIFF**

Notice is hereby given that Defendant, City of Memphis, served Intervening Plaintiff, ACLU of Tennessee, with the Expert Disclosure and Report of Eric Daigle via email on April 6, 2020. The written report of the expert is attached as Exhibit A.

Respectfully Submitted,

BAKER, DONELSON, BEARMAN,
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s/ Bruce McMullen

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of April, 2020, a copy of the attached pleading was filed electronically. Notice of this filing will be served by operation of the Court's electronic filing system to all counsel of record.

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# EXHIBIT A

# EXPERT REPORT

*ACLU of Tennessee, Inc. v. The City of Memphis*
Case No. 2:17-CV-2120-JPM-egb

# Policing in a Digital Age:
## Contemporary Law and Modern Policing

*Report Prepared for: City of Memphis*

ERIC P. DAIGLE, ESQ.
APRIL 6, 2020


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IMPROVING POLICE OPERATIONS, EFFECTIVENESS AND MANAGEMENT

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## I. INTRODUCTION/ BACKGROUND

1. My name is Eric Daigle, Esquire. I am an active consultant in law enforcement operations and currently a certified Connecticut Law Enforcement Officer/Instructor. I have been actively involved in police practices and law enforcement operations in municipal, state and military law enforcement since 1989. For the past nineteen years, I have been an instructor in a wide range of law enforcement subjects. I have conducted training at multiple police academies. I provide recruit and in-service law enforcement training in the following areas relevant to this assignment:

- Fourth Amendment – Search and Seizure
- Civil Liability – Constitutional and Statutory Law
- First Amendment – General Application
- First Amendment – Crowd Management and Operational Response
- First Amendment – Recording, Seizing and Storing Intelligence
- First Amendment – Social Media and Use of Social Media

2. I also participate in law enforcement seminars throughout the United States where I instruct officers, commanders, agency administrators and the attorneys representing these agencies on a number of liability and investigative related subjects, including the following areas:

- Use of Force and Deadly Force Issues
- Investigative Procedures and Supervision
- Investigation of Officer-Involved Shootings, Use of Force and Pursuits
- Managing Internal Affairs and Use of Force Investigations
- Tactical Operations
- Police Discipline
- Policy and Procedure Development
- Liability Management
- Management and Supervisory Techniques

3. My law enforcement experience includes service as a State Trooper for the Connecticut State Police, Military Police Officer and I currently maintain my certification as a supernumerary police officer for the Southington Police Department in Connecticut.

4. I have reviewed the following materials to date regarding this case:

- *Kendrick* Consent Decree
- (124) Motion for Relief from Judgement or Order – Final Form 4837 – 0702 – 1168 v. 1
- [124-1] City's Motion for Relief from Consent Decree
- [149] ACLU-TN's Response in Opposition to the City's Motion for Relief from Judgment or Order
- [151] Court's Order Finding City in Contempt

- [227-1] MIS in Support of Motion for Immediate Modification of the Consent Decree
- [268] Notice of Filing City's Proposed Social Media Policy 4851-5120-0687 v.1
- Trial Transcript
  - 082018 Volume 1 – PDF
  - 082018 Volume 2 – PDF
  - 08218 Volume 3 – PDF
  - 08218 Volume 4 – PDF
  - 08218 Volume 5 – PDF
  - 08218 Volume 6 – PDF
  - 08318 Volume 7 – PDF
- 2019.10.11 - Letter to Bruce McMullen re. Response to RFA (2) 2 photos
- Ch XIII Sec 15 Body-Worn Video Recording Devices
- Contact Card
- Email 03/23/2020 From Jennie Silk: RE Memphis Examples
- Exhibit A – Fwd: Request re: On-Site COVID testing
- Guidelines for Delegation of Authority Under Section G - Blue lined with Monitor's Suggestions
- Interim Authorization Form 4847-1954-9082 v.1
- Introductory Kendrick Consent Decree Training - Monitor's Suggestions
- Item #1 Revised DR 138 - Redlined with Monitor's Suggestions1
- Item #3 Policy re: Authorization to Conduct Investigation Under Section G - Redlined August 2019
- Letter Judge McCalla - Social Media Policy
- SEALED Motion for Immediate Relief from Kendrick Consent Decree 4845-5531-8178 v.2
- The Real Time Crime Center (RTCC) Standard Operating Procedure (SOP) 2019 (2)
- Training Plan - Redlined with Monitor's Suggestions Aug 2019

## II. METHODOLOGY

5. This report is based upon the materials provided to date. I recognize that there may be additional documentation as the case progresses. In the event that additional material is produced, I shall be prepared to supplement this report.

6. The below listed opinions were formulated based on my experience, training and knowledge of police practices, as well as my continued research and national work with law enforcement. In addition, these opinions are based on my education in the law enforcement field and the standard of care recognized by law enforcement organizations and officials throughout the United States as the custom and practice for the administration, management and supervision of police agencies and personnel. Furthermore, the opinions are based on my knowledge of law enforcement training and my knowledge of the written standards and materials generally available for training and guiding law enforcement officers in their everyday assignments. The opinion provided below is an analysis of information provided, utilizing the standard of what other law enforcement agencies and other well-trained law enforcement officers would do in

situations like the standards present in this case.

7. There is a large body of knowledge and literature regarding the practices and standards that modern, reasonably managed and administered law enforcement agencies should follow and apply to their operations. These generally accepted practices have developed over time to encourage and assist law enforcement agencies to deliver law enforcement services to communities that are professional, reasonable, effective, and constitutionally and legally sound. These generally accepted practices are in response to reported cases of police misconduct and liability and a desire by law enforcement to create a system to ensure that police conduct remains within acceptable legal and constitutional bounds. I am familiar with this body of knowledge and, through my continuous training and audits, assist law enforcement agencies in meeting the requirement to provide reasonable law enforcement response to field incidents for continued improvement.

8. The terminologies I use in this Expert Report are not meant to encroach upon the authority of any court or the final determination of the jury. I use these terms in my training of law enforcement officers and law enforcement supervisors when instructing on Laws of Arrest, Search & Seizure, Constitutional Law and Civil Liability. These references stem from a continued review of case law and law enforcement policies, which guide a reasonable police officer or a reasonable police supervisor in the performance of his/her duties. These terms include: reasonable, investigation, intelligence, jurisdiction, probable cause, and reasonable suspicion.

9. Attorney Jennie Vee Silk requested that I review the documents associated with the *Kendrick* Decree litigation, including the above-listed materials, to determine if the standards implemented by the *Kendrick* Decree and the Monitors interpretation of that Decree were reasonable and consistent with legal and general industry standards. Specifically, the areas of concern allegedly implicate First Amendment protections of Memphis citizens regarding the Police Department's use of social media to conduct intelligence gathering and criminal investigations. In addition, issues were raised regarding the recording of citizens by the Police Department in public places during First Amendment events. Finally, I was asked to analyze and discuss the need for the Memphis Police Department to participate in Joint Task Forces without a limitation on the sharing of information. Pursuant to my engagement on March 3, 2020, I conducted a review and analysis of the events in the above-referenced matter, as provided in the materials.

## III. BACKGROUND AND PROCEDURAL HISTORY

10. In 1976, a group of plaintiffs brought a civil action for declaratory and injunctive relief against the City of Memphis ("the City") in *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978). The *Kendrick* plaintiffs alleged, *inter alia*, that the Memphis Police Department ("MPD") investigated and maintained files on persons engaged in non-criminal, constitutionally protected First Amendment activities. (*Kendrick* Comp. ¶ 7, ECF No. 33-1). The *Kendrick* plaintiffs claimed this conduct on the part of MPD had a chilling effect upon their First Amendment rights. *Id.* at ¶ 16.

11. On September 14, 1978, the Court entered a Consent Order and Decree (the "Consent

Decree") in *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978). (*See* Consent Decree, ECF No. 151, Page IDs 6280-86). The Consent Decree prohibited the City of Memphis "from engaging in law enforcement activities which interfere with any person's rights protected by the First Amendment to the United States Constitution including, but not limited to, the rights to communicate an idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and publicly for any lawful purpose." (ECF No. 151, PageID 6281). The provisions of the Consent Decree are directly at issue in the underlying litigation in this case.

12. In an Order entered August 10, 2018 (ECF No. 120), the Court granted summary judgment in part to the Intervening Plaintiff, the American Civil Liberties Union of Tennessee, Inc. ("ACLU-TN"), finding that the City had violated the Consent Decree in several respects (ECF No. 120 at PageIDs 4880-4882, 4886). The Court also, however, observed that in the event that the Consent Decree "is outdated due to a change in legal or other circumstances, the City is free to file a motion to modify the Consent Decree" (*Id*. at 4877). The Court noted that if the City intended to file a Motion to Modify the Consent Decree, it should do so under Fed. R. Civ. P. 60(b) (*Id.* at 4877).

13. On August 16, 2018, the City filed a Motion for Relief from Judgment or Order and accompanying Memorandum of Law in Support of Motion to Modify and/or Vacate Judgment. ("Motion to Modify") (ECF No. 124). After a trial on the merits, the Court found the City in contempt of additional portions of the Consent Decree. S*ee* October 26, 2018 Opinion and Order (ECF No. 151) ("October 26, 2018 Order").

14. The City filed its Motion to Modify, pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, to modify the Decree by vacating or significantly modifying Section I of the Decree, as interpreted by the Monitor, because it unduly burdens legitimate investigative activities and creates restrictions that are unnecessary for the protection of First Amendment rights. The City has interpreted this Section to prohibit it from using other agencies or persons as "surrogates" to do indirectly what it could not do directly. The City argues Section I should be modified because it does not directly protect any federal right; moreover, the City argues that the law and circumstances surrounding surveillance and the First Amendment have changed significantly since the time of the original *Kendrick* lawsuit. In addition, the City claims that the instant Motion relates only to modification of Section I of the Consent Decree, but the City does not waive its right to modify other provisions of the Consent Decree at a later date.

## IV. OPINION

15. It is my *opinion to a reasonable degree of professional certainty* that the restrictions placed on the Memphis Police Department by the *Kendrick* Decree are unduly burdensome to the effective operation of the Memphis Police Department in its attempt to ensure the safety of the public and effectively investigate criminal matters in 2020. While the provisions of the Consent Decree were directly at issue in the underlying litigation in the Kendrick Matter in 1976, in 2020 the changing landscape of technology, expectation of privacy, ideas of open source information and First Amendment clearly established law makes the Decree unnecessary and ineffective to ensure the protection of Citizen's First and Fourth Amendment constitutional rights. To be clear,

all parties do not want law enforcement practices across this Country to infringe on protected constitutional rights, which make up the foundation of this Country.

16. It is my *opinion to a reasonable degree of professional certainty* that there is a legitimate need for law enforcement to use social media when conducting criminal investigations and surveillance. It is my opinion that the need to obtain approval from the Director of the Memphis Police Department is not necessary to protect First Amendment rights during a criminal investigation. Finally, it is my opinion that refusing to allow the Memphis Police Department to participate in joint task forces with other agencies results in ineffective policing and may put the safety of Memphis citizens at risk. On one side of the argument, social media provides valuable resources and intelligence to help police prevent criminal activity. On the other side is the Plaintiff's concerns over potential violations of constitutionally protected First Amendment Rights. The goal of this report is to demonstrate how proper police operational standards will allow the Memphis Police Department to use social media as an investigative and intelligence gathering tool without violating First or Fourth Amendment rights.

17. It is my *opinion to a reasonable degree of professional certainty* that the use of video restrictions placed on the Memphis police Department by the *Kendrick* Decree are unduly burdensome to the effective operation of the Memphis Police Department in that it attempts to preclude the recording of citizens, who are assembling in public spaces, through the use of video recording devices. The changing landscape of technology, the expectation of privacy associated with the use of video-based recording, and clearly established First Amendment jurisprudence makes the Decree unnecessary and ineffective to ensure the protection of a citizen's First and Fourth Amendment constitutional rights.

18. My opinion will provide an operational analysis, and the supporting legal standards utilized in developing effective operational policies and instructing law enforcement on proper constitutional standards. The issues that I will examine can be summarized into two areas that include subsections:

A. The use of open source research for intelligence gathering and criminal investigations

1) Open source searching of social media for intelligence gathering and criminal investigations.
2) Unreasonable standard of seeking authority from the Director of Police
3) Use of social media sites for overt and covert investigations by officers.
4) The need for Memphis to participate in Joint Task Forces for the safety of the citizens of Memphis.

B. The recording of citizens in public areas by law enforcement

1) Video recording by surveillance, body-worn cameras or in-car cameras of gatherings that could be considered First Amendment gatherings (e.g., protests, flash mobs or planned events)

19. It is my *opinion to a reasonable degree of professional certainty* that it is the responsibility of the Memphis Police Department to protect and serve its citizens. Memphis Police Department operations are guided by clearly established law and industry standards, which protects the constitutional rights of Memphis citizens in a manner more effective than the *Kendrick* Decree. The world has changed in many ways since the *Kendrick* Consent Decree was formed in 1976, and MPD must change how it polices to keep up with the changing times. If MPD is not permitted to revise its operational standards, it will be at a severe disadvantage and will inevitably lose its foothold over crime and violence in its City. As stated in *ACLU of Tennessee, Inc. vs. THE CITY OF MEMPHIS*, "Modification of a consent decree is appropriate: (1) "when changed factual conditions make compliance with the decree substantially more onerous," (2) "when a decree proves to be unworkable because of unforeseen obstacles," or (3) "when enforcement of the decree without modification would be detrimental to the public interest." The goal of this report is to show the need to sunset the *Kendrick* Decree and, at a minimum, explain the need to modify the *Kendrick* Consent Decree in a way that results in strong and effective police work, while also adhering to the protection of citizens' First Amendment rights.

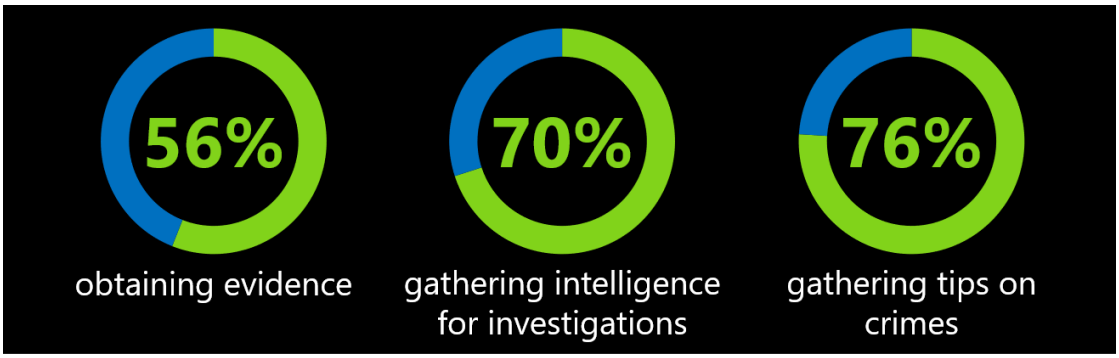
20. It is my *opinion to a reasonable degree of professional certainty* that the *Kendrick* Decree is outdated and is not serving to protect the citizens of Memphis as it was intended to do. In fact, it is causing them increased harm and a substantial decrease in overall safety. My experience includes working on independent monitoring teams and also as a contractor for police agencies attempting to comply with the requirements of an Agreement, Having worked on projects involving police departments under Consent Decrees and Settlement Agreements I have witnessed how ineffective and burdensome the standards within the Agreements and Decrees become when they are not continually modified to keep up with changing legal and operational landscapes. In addition, I have witnessed how individuals assigned as Monitors can interpret the terms of the agreement in a manner that causes it to become continually ineffective and burdensome. It appears the *Kendrick* Decree permits the Monitor to define the law as he sees fit, rather than allowing the law to define the operation of MPD.

## V. LEGITIMATE NEED OF LAW ENFORCEMENT USE OF SOCIAL MEDIA IN CRIMINAL INVESTIGATIONS AND INTELLIGENCE GATHERING

### C. The Changing Scope of Policing on the Internet

21. Much has changed in the world since 1976 and the ruling in *Kendrick*. Technology is moving faster than we are in most cases and police officers need to have the capability to keep up with the times. Social media and online platforms are now intrinsically interwoven into society's everyday lives. In the past, a law enforcement officer could talk to a person and get a "tip" on someone just from going to a town square or city center; that is no longer the case. Arguably, the planning or mechanics of criminal activity is more likely to happen on social media or online, rather than openly on a public street. If someone casually perusing the internet can be privy to this type of information, why should a police officer not be afforded that same opportunity, particularly when it is their job to detect and prevent criminal activity?

22. Law enforcement use of social media is not a novel concept. In fact, a survey conducted by the International Association of Chiefs of Police (IACP) in 2016 revealed that 56% of law enforcement agencies contacted a social media company to obtain information that could be used as evidence; 70% used social media for the purpose of gathering intelligence for investigations; and 76% used social media to gather tips on crimes.[1]




D. Open Source Searching

23. The Gathering Tips on Crimes statistic (76%) demonstrates just how many law enforcement agencies use social media to actively work to prevent crime. This use of social media involves searching various on-line sources like any other person with access to the internet or a social media site. This is commonly referred to as "open source searches," and law enforcement, like society in general, can obtain valuable information and tips to prevent crimes by just perusing the internet. In gathering these tips (and any other information online), it is important to remember the balance between open source content versus a reasonable expectation of privacy. This balance is clearly applicable to the protection of a civilian's First Amendment and Fourth Amendment rights, and whether such rights have been violated.

24. To better understand the concept of open source content, as that term is used in this report, the definition from the Berkeley Police Department's *Intelligence Procedures for First Amendment Activities*[2] is illustrative:

a. Open Source: Any source of news or information that could normally be accessed by any member of the public. Examples include the television news, newspapers, speeches at any public gathering or event, the Internet, the public in the form of casual conversations and information brought forward during routine contacts, the radio, billboards, and flyers. Open source information does not include meetings, such as planning meetings or closed-door meetings, where First Amendment protected activities are involved, unless the officers are in uniform and have been invited or are otherwise in a place, they have a lawful right to be.

[1] Law Enforcement Use of Social Media Survey, International Association of Chiefs of Police (2016).
[2] Berkeley Police Department's Policy 430 *Intelligence Procedures for First Amendment Activities* (2018/10/12) https://www.cityofberkeley.info/uploadedFiles/Police/Level_3_-_General/430%20Intelligence_Procedures_for_First_Amendment_Activities.pdf

25. Generally, how law enforcement uses social media can be broken down into several categories: for instance, law enforcement agencies may: (a) "follow" or monitor certain individuals, groups or affiliations online in connection with criminal investigations; (b) use an informant, friend of a target or an undercover account to obtain information relative to a criminal investigation; (c) use analytical software to generate data regarding individuals, groups, associations or locations in connection with criminal investigations; and (d) utilize social media to develop situational awareness in order to prepare for events in their communities.

26. With respect to criminal investigations, social media provides law enforcement with a treasure trove of information, resources and tips. Social media can assist law enforcement in: revealing the location of a suspect, establishing motive, identifying personal relations, proving or disproving alibis, helping in searching for evidence, identifying witnesses, examining photographs and videos for evidence and identifying relatives, friends, associates, and connections.

27. Social media is not, however, completely occupied and controlled by law enforcement. In fact, many individuals utilize social media to perpetrate crimes or further their criminal agenda. With the boom of social media there been a noticeable and marked increase in crimes perpetrated online; consider the following examples:

- In Ortonville, Michigan, threats made on the "After School" app caused the attendance at the high school to drop so low that the school day could not be counted as an official day of school. An 18-year-old student was arrested as a result of this incident.[3]

- Backpage.com was seized and shut down by the FBI after the site founders ignored warnings to stop running advertisements which promoted prostitution. The site founders were also indicated on charges accusing them of publishing advertisements that depicted children who authorities believed to be sex trafficking victims.[4]

- Sarasota County Sheriff detectives arrested 25 people during a four-day initiative focused on protecting Sarasota County children from online predators and human trafficking.[5]

- Madison County Sheriff's Office arrested two individuals after they received a gunfight-themed mannequin challenge video posted on Facebook. Those individuals were charged on gun and drug charges, and the Sheriff's Office seized four guns, body armor, marijuana, and ammunition.[6]

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[3] "Teen arrested for using app to threaten classmates," CBS News (Dec. 11, 2014), https://www.cbsnews.com/news/michigan-teen-arrested-for-using-app-to-threaten-classmates/

[4] Tom Porter and Reuters, "Backpage Website Shut Down, Founder Charged with 93 Counts by FBI in Sealed Indictment," Newsweek (Apr. 7, 2018), https://www.newsweek.com/sex-ads-website-backpagecom-co-founder-charged-after-fbi-raid-876333

[5] "25 suspected child predators arrested in Sarasota County sting," News Channel 8 (Jul. 26, 2019), https://www.wfla.com/news/sarasota-county/25-men-arrested-in-4-day-human-trafficking-sting-in-sarasota/

[6] Tribune Media Wire, "'Mannequin Challenge' Video Leads to Arrests for Guns, Drugs at Alabama Home," ABC 16 (Dec. 7, 2016), https://www.wnep.com/article/news/local/mannequin-challenge-video-leads-to-arrests-for-guns-drugs-at-alabama-home/523-e27aa62f-bac6-407b-b1b6-136087745b6f

- One man was arrested and charged with being a convicted felon in possession of a firearm after his girlfriend posted a picture on his Facebook page depicting a firearm, cash, and electronic devices.[7]

- A man was charged with posting threats after he posted a photograph on his Facebook page of a gunman shooting at a NYPD patrol car, along with symbols showing a gun pointed at an officer's head and a caption with his local precinct's number and, the word "next."[8]

28. A fair portion of criminal behavior on social media can generally be reduced to what is known as "contemporary performance crimes." The core element of contemporary performance crimes is that they are created for distribution over social media and involve both willing and unwilling participants. In that sense, there are informed consent performance crimes and uninformed, unwitting performance crimes.

29. In informed consent performance crimes, the actors are aware of the "production," and in some instances record the performance themselves. These actors usually support, to some degree, the distribution of the performance online. However, with respect to uninformed, or unwitting performance crimes, the actor is unaware that they are an "actor" in a "production", and they are recorded in a production similar to that of a nature documentary. For instance, on April 16, 2017, Steve Stephens uploaded to Facebook a cellphone video of himself shooting and killing 74-year-old Robert Lee Godwin, Sr. in Cleveland, Ohio. This event spotlighted the rise of the performance crime phenomenon on social media.

30. There are many opportunities for law enforcement to utilize social media in conducting criminal investigations and surveillance. While some avenues require "traditional" use of social media (e.g. law enforcement personnel combing through information like any private citizen), there are other technological advancements and methods in which law enforcement may use social media. Certain electronic interception platforms permit law enforcement to conduct electronic surveillance, and in a relatively short period of time they can gather copious amounts of data and information. Similarly, agencies may utilize social media monitoring software which can covertly monitor, collect and analyze social media activity and data. Such software applications have gained frequent attention recently; for instance, in *ACLU of Illinois v. City of Chicago*, Case no. 2018-CH-07758 (Cook County, 6/21/2018), the ACLU filed suit against the City of Chicago, seeking to obtain documents related to the agency's use of social media monitoring software.

31. During my informational gathering process, I analyzed certain factual circumstances or activities addressed by the Memphis Police Department. The following circumstances were

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[7] Esteban Parra, The News Journal, "Friending undercover cop on Facebook does not violate guarantee against illegal searches," Delaware Online (May 30, 2018), https://www.delawareonline.com/story/news/crime/2018/05/30/friending-undercover-cop-facebook-does-not-violate-fourth-amendment-guarantee-against-illegal-search/653653002/

[8] Joseph Stepansky, "Teenager made 'terroristic threats' against cops on Facebook hours after 2 NYPD officers were shot dead in Brooklyn: police," New York Daily News (Dec. 22, 2014), https://www.nydailynews.com/new-york/nyc-crime/teen-made-terroristic-threats-nypd-cops-police-article-1.2054027

identified as matters in which the *Kendrick* Decree limited the investigator's ability to effectively respond to the incident, and arguably required MPD to obtain authority from the Director of Police, which they did not request. A summary of these incidents includes:

- February 2020 (Valentines weekend): An 18-year-old female was attacked with a machete and murdered by an unidentified suspect. The suspect had also caused serious injury to the mother by cutting off a portion of her arm. A name was identified, but a search of law enforcement systems provided no identifying information for the suspect. An open source search of Facebook located a page and photo of the suspect. The photo was provided to the media and a BOLO was issued, leading to the capture of the suspect.

- April 10, 2019: A BOLO was put out by dispatch based on an NLETS message regarding a kidnapping from Missouri, and the suspect was allegedly heading to Memphis. A Patrol Lieutenant searched the nickname "Munch Mayfield Jr." on his personal Facebook profile. He located the page of "Munch" and identified that one of his friends was a retired Memphis police officer. He contacted the officer and identified necessary information to obtain positive identification of the suspect and identification of his cellular phone number. He provided that information to the out of state department that led to the tacking and locating of the suspect by the Arkansas State Police. The kidnapping victim was located unharmed.

- August 5, 2019: A robbery occurred when a blue 2014 Toyota Scion pulled up next to a female, grabbed her purse from her shoulder, and dragged her to the ground causing a deep laceration to her head. Later that day a uniform officer saw the vehicle and recognized the female passenger from a dating application. The dating app and the information on the dating app was used to locate and take the suspect into custody. The arrest of the suspects and seizure of the vehicle lead to additional arrests for other robbery cases.

- December 26, 2019; Someone tweeted a possible threat to the Wolfchase Galleria Mall: "Ok So Who Shooting Up Wolfchase This Year". This information was obtained by Mall Security through their monitoring of social media. The information was provided to Memphis Police and the investigators searched social media and were able to locate the originator of the post. Contact was made with the suspect and his parents.

32. These cases demonstrate a clear and legitimate need for Memphis police officers to use open source media searches to obtain basic information to solve significant crimes. I would classify this as good police work. The *Kendrick* Decree and its interpretation creates an unreasonable double standard. The average citizen can search social media for readily available information, but a Memphis police officer may not? There is simply no way to reconcile this concept, and it can only be described as unreasonable and ridiculous. The incident summaries above illustrate how the 1976 standards are no longer applicable to effective policing, and the Decree should be modified. The police officers' actions in the incidents provided above do not violate any First or Fourth Amendment rights and/or clearly established law, but may have been prohibited under the current provisions of the *Kendrick* Decree.

E. Seeking Authority from the Director of Police

33. The Kendrick Decree requires that:

> *Any police officer conducting or supervising a lawful investigation of criminal conduct which investigation in the collection of information about the exercise of Frist Amendment rights, or interfere in any way with the exercise of such First Amendment rights, must immediately bring such investigation to the attention of the Memphis Director of Police for review and authorization.*

34. In my opinion, there is no clearer evidence than this excerpt to demonstrate how the terms of the *Kendrick* Decree are not practicable or reasonable when evaluating the use of technology in 2020. Just like one looks to the intent of a statute or law, I believe it is necessary to evaluate the intent of this requirement. After reviewing this Decree, I concluded that in 1976 the Court wanted to preclude officers from initializing criminal investigations against those citizens who were participating and/or exercising their First Amendment rights. The Monitor has taken the position that if officers conduct a search on social media, or the internet as a whole, they could learn about persons exercising their First Amendment rights, and as a result, violate the terms of the Decree. Based on my understanding, the incidents identified in paragraph 31required permission from the Director, and not obtaining that permission violates the Decree. I would, however, classify the actions of MPD in those incidents as good and effective police work for which the officers should be commended. Those officers effectively performed their jobs and utilized necessary investigative techniques to solve serious criminal cases. I am sure there are an abundance of these examples occurring every day across this Country, and we simply refer to them as "good police work."

35. The requirements to receive authorization from the Director of Police for every search of social media or the internet is unbelievable, unnecessary, and simply not feasible. The Memphis Police Department is one of the largest police departments in the South. The 2,080 officers patrol over 300 square miles, which can host over one million people. The crime rate for Memphis has been identified as the Top 5 in the Country for the most violent crime and property crime. Memphis is third on the Uniform Crime Report for violent crime in the Country. Data received identified 190 murders in 2019, 10,000 violent crimes, and 50,000 part one crimes. One cannot reasonably believe that the intent of the *Kendrick* Decree was that every officer investigating a criminal act, who wants to use a social media platform, must first obtain authority from the Director of Police. As such, the *Kendrick* Decree should be modified to remove this provision.

F. Use of Social Medial for Overt and Covert Investigations

36. There is a substantial need for law enforcement to utilize social media for overt and covert investigation. Industry standards and clearly established law allow law enforcement to use social media during criminal investigations and surveillance. With respect to law enforcement use of social media in criminal investigations and surveillance, three categories are

most prevalent: apparent/overt use, discrete use, and covert use. These uses have been best described as follows:[9]

> **Apparent/Overt Use—**In the Apparent/Overt Use engagement level, law enforcement's identification does not need to be concealed. Within this engagement level, there is no interaction between law enforcement personnel and the subject/group. This level of access is similar to an officer on patrol. Information accessed via this level is open to the public (anyone with Internet access can "see" the information). Law enforcement's use and response should be similar to how it uses and responds to information gathered during routine patrol. An example of Apparent/Overt Use would be agency personnel searching Twitter for any indication of a criminal-related flash mob to develop a situational awareness report for the jurisdiction.
>
> Apparent/Overt Use is based on user profiles/user pages being "open"—in other words, anyone with Internet capabilities can access and view the user's information. For instance, if an officer searches for a criminal subject's Facebook page and determines that a profile, which appears to be that of the subject, has the account privacy settings set to "public" (meaning the information can be viewed by everyone), then the use of that information would be considered Apparent/Overt Use.
>
> The authorization level for Apparent/Overt Use may be minimal, as this level of engagement is considered part of normal, authorized law enforcement activity (based on the law enforcement purpose).
>
> **Discrete Use—**During the Discrete Use engagement level, law enforcement's identity is not overtly apparent. There is no direct interaction with subjects or groups; rather, activity at this level is focused on information and criminal intelligence gathering. The activities undertaken during the Discrete Use phase can be compared to the activities and purpose of an unmarked patrol car or a plainclothes police officer. An example of Discrete Use is an analyst utilizing a nongovernmental IP address to read a Weblog (or blog) written by a known violent extremist who regularly makes threats against the government. Bloggers (those who write

[9] *Developing a Policy on the Use of Social Media in Intelligence and Investigative Activities: Guidance and Recommendations*, Global Justice Information Sharing Initiative (February 2013), https://it.ojp.gov/documents/d/Developing%20a%20Policy%20on%20the%20Use%20of%20Social%20Media%20in%20Intelligence%20and%20Inves....pdf (This project was supported by Grant No. 2010-MU-BX-K019 awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, in collaboration with the Global Justice Information Sharing Initiative.

> or oversee the writing of blogs) may use an analytical tool to track both "hits" to the blog and IP addresses of computers that access the blog, which could potentially identify law enforcement personnel to the blogger. This identification could negatively impact the use of the information and the safety of law enforcement personnel, who would not want to reveal that they are accessing the blog for authorized law enforcement purposes. In many cases, direct supervisory approval may not be necessary within this level of engagement, but written policy should address agency protocol.
>
> **Covert Use—**During the Covert Use engagement level, law enforcement's identity is explicitly concealed. Law enforcement is engaging in authorized undercover activities for an articulated investigative purpose, and the concealment of the officer's identity is essential. An example of Covert Use is the creation of an undercover profile to directly interact with an identified criminal subject online. Another example is an agency lawfully intercepting information from a social media site, through a court order, as a part of authorized law enforcement action. Clear procedures should be identified and documented on the use of social media in this phase, since there are many privacy, civil rights, and civil liberties implications associated with Covert Use. Agencies should also review social media sites' information for law enforcement authorities and terms of service for additional information on undercover profiles.
>
> Authorization levels for Covert Use activities should be clearly identified and could be compared to authorization levels needed for any undercover investigative activity (such as undercover narcotics investigations).

No matter what form of use of social media law enforcement avails itself, there are certain legal considerations. Most prevalently, from a federal perspective, are the implications of the First Amendment, Fourth Amendment, and Criminal Intelligence Systems Operating Policies under 28 CFR Part 23. There is need for covert use for multiple reasons including the credibility protection of undercover operatives, the tracking and investigation of predators on the internet looking for children, sex trafficking, elder abuse, identity theft, intentional harm and much more.

G. Participation in Joint Task Forces

37. After analyzing the data, it also is clear that the *Kendrick* Decree should be modified to remove restrictions regarding joint operations. The Decree states:

> I. Restriction on Joint Operations

> The defendants and the City of Memphis shall not encourage, cooperate with, delegate, employ or contract with, or act at the behest of, any local, state, federal or private agency, or any person, to plan or conduct any investigation, activity or conduct prohibited by this Decree.

38. Based on the information received, this provision is having a detrimental effect on the operation of the department and clearly limits the Memphis Police Department from receiving viable public safety information from legitimate legal sources simply because they are provided from a third party. Let's begin with a look at the significant differences in policing in 1976 and 2020. The effectiveness of a police agency often relies upon an effective collaboration with other agencies. Collaboration between different agencies, however, was not always strong in this Country. Departments, including local, state and federal, operated independently and often ineffectively. Examples of ineffective collaboration includes the Ted Bundy murders and the 9/11 attacks on New York. In the 1970s, investigators of the Ted Bundy serial killer (an individual who kidnapped, raped, and murdered numerous young women) suffered from a lack of collaboration between police agencies, which ultimately hampered their ability to effectively identify and locate Bundy. Investigators learned that he would kidnap in one jurisdiction, kill in another jurisdiction, and dump the body in yet a third jurisdiction. When carrying out his crimes, Bundy relied on the fact that each department would hold information close and not share with agencies in other jurisdictions. Since that time, agencies have worked towards improving the collaboration and sharing of information to more effectively performs their jobs and better protect citizens. The use of technology is a major facet of that collaboration.

39. The Decree creates unnecessary challenges for MPD, in that it prohibits officers from receiving vital intelligence information from other law enforcement or even third parties, which interferes with MPD's ability to effectively foster public safety. It is my understanding that information received from social media searches and or a third-party law enforcement agency cannot be used by the Memphis Police Department because it has not been vetted on how it was obtained. It is inconceivable that the drafters of the *Kendrick* Decree had this intent in mind. Society operates on the sharing of information, and police agencies rely on this sharing of information to effectively perform investigations, whether it be from the crime-stopper hotline the "See Something Say Something" campaign, or the use of anonymous tips or information received from a third party forms the basis for the initiation of many criminal investigations. Participation in joint taskforces, information sharing, acceptance of third party or anonymous information is normal and necessary in contemporary law enforcement in 2020.

A clear example of how the inability to share information adversely impacts not only the safety of Memphis police officers and the City of Memphis, but also corporate entities that expect MPD to advise them of safety concerns, is illustrated in the following incident. In emails dated October 4, 2019 and October 10, 2019, Memphis City Attorney, Bruce McMullen, informed the Monitor that a personal friend and fellow attorney had shared with him information overheard at a restaurant, specifically that "two activists discuss[ ] their plan to shut down a grizzlies game and stage a protest." Attorney McMullen's October 4th email requested permission to share this information with MPD and inquired as to whether MPD could share this information with the Grizzlies. The monitor denied both requests, claiming they violated the *Kendrick* Decree. At

some point the safety of the Memphis citizens must be a pinnacle point of concern, but clearly this is not the case. What if the protest occurred and, since neither MPD nor the NBA were provided any warning to allow the opportunity to properly prepare for a such an event, property was destroyed, or citizens were injured or killed? The challenge in this Report is trying to find the reasonableness in the Consent Decree's prohibition on sharing of information when there is none. The reason the Monitor denied the City Attorney's request was because the information overheard included "personal information" regarding the activists, e.g. a photograph of the two individuals and a partial physical description of one. Every law enforcement entity in the Country would have readily accepted that information and, at the very least, conducted a reasonable investigation to gather intelligence to further the safety of Memphis citizens and those in attendance at the identified event. Have we already forgotten that a complete and total failure to share information between entities contributed to the catastrophic events of 9/11? Does the ACLU wish to take on the responsibility of deciding whether the MPD and the City of Memphis can provide full and proper protection to its citizens in the face of a potential threat to that safety? Information in any form, anonymous, third-party and even hearsay, is used by law enforcement every day to prevent harm and as the precursor of criminal investigations. In this instance, the Monitor's interpretation of the Decree, which precludes inter-agency sharing of this type of information, is likely the proper interpretation of the plain language of the Consent Decree, but it makes it clear that the Consent Decree simply does not provide for modern policing and the concept of thorough police work.

40. It appears the intent of this provision of the Decree was to prevent MPD from using others to do "intelligence surveillance" that may infringe upon a citizen First and Fourth Amendment Right. In other words, to do what they could not. Fourth Amendment established law, however, identifies clearly established standards on how and when law enforcement can use anonymous and third-party information. The question of who will protect the Memphis citizens from constitution deprivations if we remove this provision from the Decree is an easy one, the law will. Any improper or illegal use of that information will lead to the dismissal of any criminal charges and a Fourth Amendment violation. When this occurs, citizens can file a 42 U.S.C. §1983 civil rights action against the officer(s) and department for damages resulting from that deprivation. In 2020, there is no need for a Decree to protect citizens' rights, the law and effective operation of the department does that already.

F. Applicable Legal Principals for Social Media

1. FIRST AMENDMENT

41. The First Amendment of the United States Constitution provides that

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

42. Although the framers of the Constitution likely did not contemplate the existence of the internet and social media, such applications fall within the ambit of the First Amendment. In fact, in 2017 the U.S. Supreme Court held in *Packingham v. North Carolina*, that a state statute making it a felony for registered sex offenders to access social media sites impermissibly restricts lawful speech in violation of the First Amendment. *Packingham v. North Carolina*, 582 U.S. ___, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017). In that case, the Supreme Court recognized that:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.... While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace--the "vast democratic forums of the Internet" in general, and social media in particular.

*Packingham*, 137 S.Ct. at 1735. Essentially, as the *Packingham* decision illustrates, social media platforms are the new "public square" and access to them is protected by the First Amendment. As a result, it is entirely reasonable to believe that how law enforcement uses social media may be controlled by the First Amendment.

43. The degree to which the First Amendment controls law enforcement use of social media, however, is still being developed. Unsurprisingly so, Chief Justice Marshall's oft-cited phrase, "It is a constitution we are expounding," rings particularly true today despite its origination over 200 years prior. *See McCulloch v. State of Maryland*, 17 U.S. 316 (1819). In the absence of a definitive ruling on this particular issue from the U.S. Supreme Court, however, it is possible to theorize, based upon prior jurisprudence, how the First Amendment applies to modern law enforcement use of social media.

44. One of the preliminary cases in the jurisprudential path is that of *Laird v. Tatum*, 408 U.S. 1 (1972). In Laird, the U.S. Supreme Court ruled upon the constitutionality of certain governmental investigative and data-gathering activities. Prior to its being called upon in 1967 to assist local authorities in quelling civil disorders in Detroit, Michigan, the Department of the Army had developed only a general contingency plan in connection with its limited domestic mission under 10 U.S.C. § 331. In response to the Army's experience in the various civil disorders it was called upon to help control during 1967 and 1968, Army Intelligence established a data-gathering system, which respondents described as involving the "surveillance of lawful civilian political activity." The Supreme Court ruled that "the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose" does not unconstitutionally chill the lawful exercise of one's First Amendment rights.

45. The Third Circuit also dealt with the issue of retaliatory government surveillance in *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997). In that case, Anderson, a former police officer for the Virgin Islands Police Department, filed a lawsuit against the Government of the Virgin Islands alleging employment discrimination. One day after the local newspaper reported the lawsuit, the Virgin Islands Police Department commenced an investigation and surveillance of

both Anderson and his attorney. Anderson and his attorney filed for an injunction, claiming that the investigation and surveillance unconstitutionally infringed on their First Amendment rights. The district court granted the injunction and the Government appealed to the Third Circuit.

46. In *Anderson*, the Third Circuit acknowledged that government surveillance of individuals in public places does not, by itself, implicate the Constitution. *See Philadelphia Yearly Meeting of Religious Society of Friends v. Tate*, 519 F.2d 1335, 1337-1338 (3d Cir. 1975 (police surveillance of public meetings, by itself, was "legally unobjectionable" and that the subjective chill from surveillance is no substitute for a claim of "specific present harm" or "threat of specific future harm"). The Government argued that the instant matter was akin to that in *Laird* and *Philadelphia Yearly*, but the Third Circuit disagreed, finding that

> Unlike Laird and Philadelphia Yearly, this case involves a pre-existing complaint, lodged with the EEOC, that was reported to be the precursor to an employment discrimination lawsuit that was potentially embarrassing to the defendants. In addition, this case also involves a finding by the district court, unchallenged on appeal, that the Government's surveillance operation was targeted at two individuals, Anderson and his attorney Ms. Rohn, and was initiated solely in response to Anderson's lawsuit. Thus, this case differs greatly from Laird and Philadelphia Yearly because the harm alleged is more specific and less speculative than the "chilling effect" alleged in those cases.

As a result, the Third Circuit concluded with respect to this issue, that "[u]nlike the plaintiffs in *Laird* and *Philadelphia Yearly*, Anderson has articulated a 'specific present harm,' which is the Government's retaliation in response to his exercise of protected activity under the First Amendment."

47. Thereafter, fast-forwarding several years, the Third Circuit had occasion to rule on the City of New York's surveillance program in *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015). After the terror attacks on September 11, 2001, the New York City Police Department initiated a surveillance program targeting Muslim communities in New York City and the surrounding areas. The program extended to Muslims in New Jersey and included surveillance of mosques, private schools, Muslim-owned business establishments and at least one Muslim student group. The program continued for over a decade until it was exposed in 2011 by the Associated Press. The fallout of this disclosure to the public had far-reaching consequences including, but not limited to a stigmatization of Muslims, specific defamatory statements targeting those who were surveilled, financial harm, and a negative impact on worship and religious activities. In October of 2012, a group of Muslims and organizations who had been targeted by this surveillance filed suit alleging violation of their rights. The trial court ruled against the plaintiffs, finding that the NYPD could permissibly target the Muslim community as a proxy for "Muslim terrorist activities."

48. Again, the standing, and more particularly, the injury-in-fact to the plaintiffs, was one of the primary issues addressed by the Third Circuit. The Third Circuit reversed the trial court,

ruling that a showing that the surveillance is racially based or undertaken in retaliation for the exercise of First Amendment rights is sufficient to grant standing. The Third Circuit also clarified that allegations of overt hostility and prejudice are not required in order to make out claims under the First Amendment.

49. More recently, Black Lives Matter filed suit against the Town of Clarkstown, the Police Department, the then-Chief, and the then Sergeant in charge of the department's Strategic Intelligence Unit in the U.S. District Court for the Southern District of New York. *Black Lives Matter v. Town of Clarkstown*, No. 17-cv-6592 (11/14/2018). The suit alleged that police positioned snipers on rooftops during Black Lives Matter rallies and conducted electronic surveillance on individual members. The Black Lives Matter group was placed into the same surveillance categories as "terrorism," "gangs," and "violence." The Court ruled on a motion to dismiss that although the Black Lives Matter organization lacked standing to pursue this claim, the individual plaintiffs as members of the organization had the requisite standing. The Court determined that the injury alleged by the plaintiffs was not like that in the Laird case, in that the plaintiffs in this instant matter had sufficiently alleged a concrete and actual injury: the chilling of their First Amendment freedom of speech and association "caused by Defendants' surveillance and Defendants activity at the July rally which included Defendant aiming a red laser from a sniper rifle at" one of the plaintiffs.

50. The result of these cases is to illustrate that there are clearly established law related to First Amendment implications involved where law enforcement utilizes social media to: (a) follow or watch individuals or groups online; (b) utilize informants, friends, and undercover accounts; and (c) generate data from analytical software.

2. FOURTH AMENDMENT

51. The Fourth Amendment of the United States Constitution provides that

> *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.*

52. Again, it is unlikely that the framers of the Constitution could have conceived the exact contours of the Fourth Amendment at the time of its writing, and how the U.S. Supreme Court has continued to expound upon its meaning for nearly 200 years. Nevertheless, jurisprudence reveals that as society, technology, and investigations evolve, so too does the Fourth Amendment.

53. There are certainly Fourth Amendment considerations involved with respect to how law enforcement utilizes social media to: (a) gather information through the use of informants, friends of targets, or undercover accounts; or (b) generate data and dossiers on individuals and groups through use of analytical software. One of the most applicable Fourth Amendment

doctrines to this utilization of social media is that of the "third-party doctrine." The underlying principle of this doctrine is that a person who voluntarily provides information to a third party has no reasonable expectation of privacy in that information.

54. This doctrine was explored further by the U.S. Supreme Court in *Hoffa v. United States*, 385 U.S. 293 (1966). In *Hoffa*, the petitioners were convicted under 18 U.S.C. § 1503 for endeavoring to bribe members of a jury in a previous trial of petitioner Hoffa, for violating the Taft-Hartley Act, which resulted in a hung jury. Substantial information and evidence were given in the prosecution by Partin, a paid government informer, who, throughout the Taft-Hartley trial, was repeatedly in Hoffa's company, in Hoffa's hotel suite, the hotel lobby, and elsewhere. The Court of Appeals affirmed the convictions, and the Supreme Court granted certiorari on the question whether the use of evidence furnished by the informer rendered the convictions invalid. The Supreme Court ruled that no rights under the Fourth Amendment were violated by the failure of Partin to disclose his role as a government informer. When Hoffa made incriminating statements to or in the presence of Partin, his invitee, he relied not on the security of the hotel room, but on his misplaced confidence that Partin would not reveal his wrongdoing.

55. Nearly ten years later, the Supreme Court had occasion to again rule on the issue of the third-party doctrine in *United States v. Miller*, 425 U.S. 435 (1976). There, the respondent, who had been charged with various federal offenses, made a pretrial motion to suppress microfilms of checks, deposit slips, and other records relating to his accounts at two banks, which maintained the records pursuant to the Bank Secrecy Act of 1970. He contended that the subpoenas *duces tecum* pursuant to which the material had been produced by the banks were defective, and that the records had thus been illegally seized in violation of the Fourth Amendment. Following denial of his motion, respondent was tried and convicted. The Court of Appeals reversed, having concluded that the subpoenaed documents fell within a constitutionally protected zone of privacy. The Supreme Court disagreed, ruling, among other things, that: (1) respondent possessed no Fourth Amendment interest in the bank records that could be vindicated by a challenge to the subpoenas, and the District Court therefore did not err in denying the motion to suppress; (2) the subpoenaed materials were business records of the banks, not respondent's private papers; and (3) there was no legitimate "expectation of privacy" in the contents of the original checks and deposit slips, since the checks are not confidential communications, but negotiable instruments to be used in commercial transactions, and all the documents obtained contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The Court further clarified that "[t]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confident placed in the third party will not be betrayed."

56. Based upon these cases, the various Circuit Courts and federal District Courts have taken up the issue of the third-party doctrine and its applications to newer technology. For instance, in *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001), the Sixth Circuit Court of Appeals considered the application of the doctrine to a computer bulletin board system. In 1995, the Hamilton County, Ohio, Regional Electronic Computer Intelligence Task Force (RECI) was investigating on-line obscenity and seized two computer bulletin board systems. The first system seized was the Cincinnati Computer Connection Bulletin Board System (CCC BBS). Several users of the

system filed a class action on behalf of subscribers against RECI, the sheriff, and his department alleging violations of the First and Fourth Amendments, the Electronic Communications Privacy Act (ECPA), and the Privacy Protection Act (PPA), and setting out state law and common law claims. The second system seized in the same general investigation was the Spanish Inquisition Bulletin Board System (SI BBS). The system's users, operator, and computer owner brought suit against the same defendants alleging the same violations as in the CCC BBS suit. The Sixth Circuit ruled that subscribers to an "online bulletin board system" had no legitimate expectation of privacy because they have voluntarily disclosed the information to the bulletin board's system operator.

57. Likewise, in *United States v. Meregildo*, 883 F. Supp. 2d 523 (S.D.N.Y. 2012), the U.S. District Court for the Southern District of New York considered the application of the doctrine to Facebook. As part of a grand jury investigation in the Southern District of New York, the Government applied for a search warrant for the contents of Colon's Facebook account. Magistrate Judge Frank Maas found probable cause existed to obtain the contents of Colon's Facebook account and issued the warrant. Colon does not contest the magistrate judge's finding of probable cause. Instead, he attacks the propriety of the Government's method of collecting evidence to support that probable cause determination. More specifically, Colon presents a Fourth Amendment challenge to the Government's use of a cooperating witness who was one of Colon's Facebook "friends" and gave the Government access to Colon's Facebook profile. The Court ruled that Colon's reasonable expectation of privacy was extinguished by sending information over the internet and by email. "Whether the Fourth Amendment precludes the Government from viewing a Facebook user's profile absent a showing of probable cause depends, *inter alia*, on the user's privacy settings."

58. Apart from the third-party doctrine, there is but another series of cases that may help illustrate the Fourth Amendment applications to how law enforcement uses social media. That series of cases begins with the U.S. Supreme Court decision in *Katz v. United States*, 389 U.S. 347 (1967), where the Court ruled on the Fourth Amendment applications of eavesdropping. Katz was convicted under an indictment charging him with transmitting wagering information by telephone across state lines in violation of 18 U.S.C. § 1084. Evidence of Katz's end of the conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the telephone booth from which the calls were made, was introduced at the trial. The Court of Appeals affirmed the conviction, finding that there was no Fourth Amendment violation, since there was "no physical entrance into the area occupied by" petitioner. The Supreme Court disagreed, however, finding that such eavesdropping violated Katz's privacy upon which he relied while using the phone booth. The Court clarified that although Katz was in a telephone booth partly constructed of glass so that he was visible while inside, "what he sought to exclude when he entered the booth was not the intruding eye – it was the uninvited ear."

59. Several years later, the Supreme Court opined on law enforcement use of beeper signals to monitor a target in *United States v. Knotts*, 460 U.S. 276 (1983). Minnesota law enforcement officers believed that Armstrong was purchasing chloroform to be used in the manufacture of illicit drugs. Police arranged with the seller to place a beeper (a radio transmitter) inside a chloroform container that was sold to Armstrong. Officers then followed the car in which the

chloroform was placed, maintaining contact by using both visual surveillance and a monitor which received the beeper signals, and ultimately tracing the chloroform, by beeper monitoring alone, to Knotts' secluded cabin in Wisconsin. Following three days of intermittent visual surveillance of the cabin, officers secured a search warrant and discovered the chloroform container, and a drug laboratory in the cabin, including chemicals and formulas for producing amphetamine. After his motion to suppress evidence based on the warrantless monitoring of the beeper was denied, Knotts was convicted in the federal District Court for conspiring to manufacture controlled substances in violation of 21 U.S.C. § 846. The Court of Appeals reversed, holding that the monitoring of the beeper was prohibited by the Fourth Amendment.

60. On appeal, the U.S. Supreme Court ruled that monitoring the beeper signals did not invade any legitimate expectation of privacy on Knotts' part, and thus there was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment. The Court found the following particularly probative in the analysis: (i) the beeper surveillance amounted principally to following an automobile on public streets and highways; (ii) a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements; (iii) while Knotts had the traditional expectation of privacy within a dwelling place insofar as his cabin was concerned, such expectation of privacy would not have extended to the visual observation from public places of the automobile arriving on his premises after leaving a public highway, or to movements of objects such as the chloroform container outside the cabin; (iv) the fact that the officers relied not only on visual surveillance, but also on the use of the beeper, did not alter the situation since nothing in the Fourth Amendment prohibited the police from augmenting their sensory faculties with such enhancement as science and technology afforded them in this case; and (v) there was no indication that the beeper was used in any way to reveal information as to the movement of the chloroform container within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin.

61. The Court did, however, include some "cautionary" language, perhaps foreshadowing that this type of analysis may differ as technology advances. In the Court noted that Knotts raised the argument that this ruling will allow twenty-four-hour surveillance of any citizen in the country without judicial knowledge or supervision. The Court responded that, "if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."

62. One year later, in *United States v. Karo*, 478 U.S. 705 (1984), the Supreme Court considered yet another situation similar to that in *Knotts*. After a DEA agent learned that respondents had ordered 50 gallons of ether from a Government informant, who had told the agent that the ether was to be used to extract cocaine from clothing that had been imported into the United States, the Government obtained a court order authorizing the installation and monitoring of a beeper in one of the cans of ether. With the informant's consent, DEA agents substituted their own can containing a beeper for one of the cans in the shipment. Thereafter, agents saw Karo pick up the ether from the informant, followed Karo to his house, and determined by using the beeper that the ether was inside the house, where it was then monitored. The ether then moved in succession to two other houses, including Horton's, before it was moved first to a locker in one commercial storage facility and then to a locker in another such facility. Both lockers were rented jointly by Horton and Harley. Finally, the ether was removed from the

second storage facility by respondent Rhodes and an unidentified woman and transported in Horton's truck, first to Rhodes' house and then to a house rented by Horton, Harley, and respondent Steele. Using the beeper monitor, agents determined that the beeper can was inside the house, and obtained a warrant to search the house based in part on information derived through use of the beeper. The warrant was executed, and Horton, Harley, Steele, and respondent Roth were arrested, and cocaine was seized. Respondents were indicted for various offenses relating to the cocaine. The District Court granted respondents' pretrial motion to suppress the seized evidence on the grounds that the initial warrant to install the beeper was invalid, and that the seizure was the tainted fruit of an unauthorized installation and monitoring of the beeper. The Court of Appeals affirmed, except with respect to Rhodes, holding that a warrant was required to install the beeper in the can of ether and to monitor it in private dwellings and storage lockers, that the warrant for the search of the house rented by Horton, Harley, and Steele, and the resulting seizure, were tainted by the Government's prior illegal conduct, and that therefore the evidence was properly suppressed as to Horton, Harley, Steele, Roth, and Karo.

63. On appeal, the Supreme Court ruled the installation of a tracking device into a container, with the permission of the original owner, did not constitute a seizure within the meaning of the Fourth Amendment when the container was delivered to a buyer having no knowledge of the tracking device. Essentially, the informant's consent was sufficient to validate the installation and the transfer of the beeper-laden can to Karo was neither a search nor a seizure, since it conveyed no information that Karo wished to keep private and did not interfere with anyone's possessory interest in a meaningful way.

64. The U.S. Supreme Court has also provided two additional cases which shed further light on the Fourth Amendment applications of law enforcement use of social media. In *United States v. Jones*, 565 U.S. ___ (2012), the Supreme Court was asked to rule on whether the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violated Jones' Fourth Amendment rights. In *Jones*, the Government obtained a search warrant permitting it to install a GPS tracking device on a vehicle registered to Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D.C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

65. The U.S. Supreme Court ruled that the Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. The Court further rejected the argument that there was no reasonable expectation of privacy in a person's movement on public thoroughfares and emphasized that the Fourth Amendment provided some protection for trespass onto personal property. However, perhaps the more interesting part of the *Jones* case is the concurring opinion authored by Justice Sotomayor. In it, Justice Sotomayor explains that

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. ... The Government can store such records and efficiently mine them for information years into the future. ... And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility." ...

Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society." ... I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on. I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. ... I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent "a too permeating police surveillance."...

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. ... This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and

> medications they purchase to online retailers. ... I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. ...

66. More recently, the U.S. Supreme Court had occasion to rule cell-site records within the context of the Fourth Amendment in *Carpenter v. United States*, 585 U.S. ___ (2018). In *Carpenter*, after the FBI identified the cell phone numbers of several robbery suspects, prosecutors were granted court orders to obtain the suspects' cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter's phone, and the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days—an average of 101 data points per day. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

67. The Supreme Court ruled that the Government's acquisition of Carpenter's cell-site records violated his Fourth Amendment right against unreasonable searches and seizures. In so arriving at this conclusion, the Court's analysis is particularly probative to better understanding how it would look upon law enforcement's use of social media as noted above. According to the Court, there are "guideposts" that help guide the Court in determining the meaning of unreasonable searches and seizures within the Fourth Amendment context. "First, that the Amendment seeks to secure 'the privacies of life' against "arbitrary power." *Boyd v. United States*, 116 U. S. 616, 630 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U. S. 581, 595 (1948)." The Court explained that:

> We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U. S. 27, 34 (2001).

68. With respect to the third-party doctrine under the Smith and Miller cases, the Court held that

> We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.

69. The Court's explanation also further suggests that as technology advances so too, should the Court be cautious about the Fourth Amendment implications involved, particularly with respect to how law enforcement uses that technology.

> A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. ... Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." ... For that reason, "society's expectation has been that law enforcement agents and others would not— and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." ...
>
> Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the timestamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." ... These location records "hold for many Americans the 'privacies of life.'" ... And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.
>
> In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in

> Jones. Unlike the bugged container in Knotts or the car in Jones, a cell phone—almost a "feature of human anatomy," ...—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. ... Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.
>
> Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation— this newfound tracking capacity runs against everyone. Unlike with the GPS device in Jones, police need not even know in advance whether they want to follow a particular individual, or when.
>
> Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

(Internal citations omitted). The Court was careful, however, to qualify the extent of its ruling, stating that

> Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering

> new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future." *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 300 (1944).

70. The purpose of citing these cases is to illustrate that there are also Fourth Amendment implications involved where law enforcement utilizes social media to: (a) follow or watch individuals or groups online; (b) utilize informants, friends, and undercover accounts; and (c) generate data from analytical software.

3. 28 CFR PART 23

71. While not constitutional in nature, another particularly important federal regulation as applied to law enforcement use of social media in criminal investigations and surveillance is 28 CFR Part 23 – Criminal Intelligence Systems Operating Policies. The stated purpose of this regulation is "to assure that all criminal intelligence systems operating through support under the Omnibus Crime Control and Safe Streets Act of 1968, are utilized in conformance with the privacy and constitutional rights of individuals." (Internal citations omitted).

72. These regulations set forth certain basic operating principles for the operation of criminal intelligence systems. As a result, agencies must be cautious to adhere to the operational requirements of 28 CFR Part 23 and should implement the appropriate policies and procedures to address each of those requirements.

## VII. USE OF CAMERAS AND THE RECORDING OF VIDEO IN OPEN AREAS

73. The *Kendrick* Decree includes a prohibition against Electronic Surveillance for Political Intelligence. The Monitor interprets the Decree "electronic surveillance" as preventing the City from recording citizens in open, public areas when those citizens are participating in conduct such as assembling for the purpose of exercising their First Amendment rights. Like most law enforcement departments, Memphis Police Department uses video in the performance of their law enforcement function. The use of video recording includes the use of cameras in the Real Time Crime Center, Body-worn Cameras, and In-Car cameras systems. Since 2009, Memphis Police has instituted a Real Time Crime Center, which monitors 2800 cameras across the City. The cameras are in approximately 700 locations, including areas in which public demonstrations my occur. Approximately, 700 cameras have a pan/tilt/zoom function that allows the RTCC to enhance the view for identification purposes. In addition, the MPD deploys approximately 1800 Body-Worn Cameras on its officers and approximately 500 In-Car Cameras. It is clear, cameras are integrated into the operation of providing safety to Memphis citizens.

74. Over the last decade society has seen an increased use of video devices, which has resulted in a clarification of the law surrounding a citizen's legal right to record police officers in the performance of their duties, discussed below, and the use of video recording by law enforcement to enhance transparency of operation. Eleven Circuit Court of Appeals across the Country have clarified the constitutional rights of citizens to record police officers in the performance of their duties. As such, it is my *opinion with a reasonable degree of professional*

*certainty* that the right to record individuals, for the transparency of operation, also applies to law enforcement. The clearly established law in this country cannot only apply one-way. A police officer recording a citizen must be afforded the same protection for the same reason – the transparency of conduct. Just as a camera may record improper or inappropriate conduct by an officer, it may also record improper or inappropriate conduct by citizens in public forums. The goal of law enforcement, the Courts, and hopefully the ACLU, is to seek an appropriate balance between protecting police officers, enabling those officers to perform their duties without interference, and ensuring a degree of transparency to enable the public to retain their confidence in those whose sworn duty is to serve and protect.

75. Clearly, in 2020, the use of recording equipment is the norm in society. This includes video recording, social media recording, and apps that society uses for the purposes of recording video, like Snapchat and Tic Toc. What causes great concern is the claim that video taken by either a citizen or law enforcement officer, in an area with no expectation of privacy, is a constitutional violation. It is simple, citizens can record police officers and police officers can record citizens when either is in a public place. We will review below clearly established legal standards and applicable policy guideline set by the Court, which are more effective than the overly broad standard set forth in the *Kendrick* Decree. Let's be absolutely clear, there is no expectation of privacy for activities performed in a public forum, whether those activities are performed by law enforcement or a citizen.

76. In Section F2 above, I extensively discussed the legal standards and clearly established case law clarifying First and Fourth Amendment rights, and the protection of those rights, with regard to the actions of law enforcement officers. Almost 2000 years ago Juvenal asked: "*Sed quis custodiet ipsos custodes?*" which means "Who will watch the keepers themselves." This is still a question of critical importance, and the need for a proper solution is never more acute than when the rights of individual citizens are involved. A declared purpose of the U. S. constitution is to "'secure the Blessings of Liberty' to the people and their posterity, and under our philosophy of government the rights guaranteed by the constitution of the people are jealously guarded. Curtailment of them is to be permitted only to the extent necessary to maintain the fine balance between the rights of the individual and the rights of society."[10]

77. The standards applicable to video recording of police officers were first addressed in a case out of Boston Massachusetts, and decided by the First Circuit Court of Appeals in 2011. The Court's decision was later followed by ten additional Circuit Courts of Appeal. (See, *Glik v Cunniffe*, 655 F.3d 78 (1st Cir. 2011)). Massachusetts is a two-party wiretap state that requires consent of both parties to record. The *Glik* Court concluded, however, that when a person is lawfully present in a public space, that person has the right to record anything that is in plain view.

78. The facts of the *Glik* case are as follows: On October 1, 2007, Simon Glik was walking past the Boston Common when he saw three police officers arresting a young man. After hearing another bystander say something like, "You are hurting him, stop," Glik thought the officers

[10] State v. McCray, 297 A.2d 265, 266 (Md. Ct. App. 1972) (citing *Juvenalis Et Persius*, published by Gulielmus Pickering, London, 1835, *Satira*, VI, p. 140, line 347. Juvenal (Decimus Iunius Iuvenalis), a Roman satirist and poet, circa A.D. 60-140; Preamble to the Constitution of the United States) (footnotes omitted).

were using excessive force to effect the arrest and, standing about ten feet away, began recording the arrest on his cell phone. An officer then approached Glik and asked him whether he was recording audio. When Glik said that he was, the officer handcuffed him and arrested him for, among other things, violating the Massachusetts' wiretapping statute. While the police booked Glik, they confiscated his phone and a computer flash drive, and held them as evidence

79. As a result of his recording, Glik was eventually charged with violating the wiretapping statute, disturbing the peace, and aiding the escape of a prisoner. The Commonwealth later acknowledged the lack of probable cause for the aiding the escape charge and dropped it. The Boston Municipal Court granted Glik's Motion to Dismiss the other charges for lack of probable cause. After the case against him was dismissed, Glik filed an internal affairs complaint with the Boston Police Department, but his complaint was not investigated, and no disciplinary action was taken against the arresting officers.

80. In 2010, Glik filed a § 1983 action against the officers for violation of his First and Fourth Amendment rights, as well as state law claims under the Massachusetts Civil Rights Act, and for malicious prosecution. The officers moved to dismiss Glik's claims, arguing that they were entitled to qualified immunity "because it is not well-settled that [Glik] had a constitutional right to record the officers." The trial court denied the motion, concluding that "in the First Circuit . . . this First Amendment right publicly to record the activities of police officers on public business is established." The officers then appealed.

81. The First Circuit explained that the First Amendment issue was a "fairly narrow" one: "Is there a constitutionally protected right to videotape police carrying out their duties in public." Citing basic First Amendment principles, as well as case law from other jurisdictions, the Court answered the question in the affirmative. The Court explained that it was of no significance that this case involved a private individual who was gathering information about a public official, such as a police officer. The Court also explained that it was significant that the information was gathered in a "peaceful" manner, as "the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions."

82. The Court identified that "The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." With regard to whether the right to film was "clearly established," the court noted that the issue does not require case law directly on point as the issue "speaks to the fundamental and virtually self-evident nature of the First Amendment's protections in this area." Ultimately, the Court explained that, "though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment." Thus, the trial court did not err in denying qualified immunity to the officers with regard to the First Amendment claim.

83. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting "the free discussion of governmental affairs." The public's right of access to information is **coextensive** with that of the press. Where once we said to our officers "almost everyone has a

cell phone," now we can clearly say, "everyone has a cellphone." In fact, some people have two, and almost every cellphone has a camera.

84. What does that mean? Well, Courts have stated: "In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment right. The First Amendment protects the significant amount of verbal criticism and challenge directed at police officers." "The same restraint demanded of law enforcement officers in the face of provocative and challenging speech must be expected when they are the subject of videotaping that memorializes without impairing their work in public spaces."

85. What's the thought process of the court? "Such peaceful recording of an arrest in a public space that does not interfere with the police officer's performance of their duties is not reasonably subject to limitation." Court also recognized "the fundamental and virtually self-evident nature of the 1st Amendment's protections" of the "right to film government officials or matters of public interest in public space."

A. Law Enforcement Right to Record in Public Places

86. The *Kendrick* Decree does not take into consideration law enforcement's right to record citizens, probably because in 1976 video recording was not a part of everyday life. In 1976, recording a video required the use of bulky equipment and was time consuming. That is not the world in which we now live. Just as most citizens have cellphones and the ability to record activities at any time, so too does law enforcement. With the use of body-worn cameras, dash cameras, and even cameras used by real-time crime centers, an officer's ability to record activities around him has also become the norm, not the exception. Above we analyzed the citizens right to record police, but what about law enforcement's right to record? We believe that the ruling in Glik, supported by Circuit Court of Appeals around the Country, supports the use of cameras by law enforcement. This begs the question - if citizens have the right to record in public places, does law enforcement not have the same right?

87. What history has demonstrated is that the effective use of body-worn cameras ensures the protection of citizens' rights and rights of law enforcement. Interestingly, prior to 2015 the ACLU was very vocal regarding the benefits of outfitting officers with body-worn cameras. For example, in October 2013, the ACLU presented the following article - Police Body-Mounted Cameras: With Right Policies in Place, a Win for all.[11]

88. In fact, just after the shooting of Michael Brown in Ferguson Missouri, the ACLU spent years encouraging the use of recording devices to ensure the transparency of police function, with no concern or limitation directed at the act of assembling. In 2014, the ACLU prepared an article "Strengthening Community Based Policing with the Use of Body-Worn Cameras".[12] The Article stated:

[11] "Police Body-Mounted Cameras: With Right Policies in Place, a Win for all" ACLU (J. Stanley, October 2013) https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all
[12] "Strengthening Community Based Policing with the Use of Body-Worn Cameras." ACLU June 2014) https://www.aclu.org/other/strengthening-cbp-use-body-worn-cameras

Cameras: A Law Enforcement Best Practice

The use of body-worn cameras is increasingly considered a best practice among law enforcement. Police departments across the country are using cameras as a means of reducing the number of incidents in which force is used and as an important tool to protect officers from baseless allegations of abuse. According to the Department of Justice, the use of cameras by law enforcement improves the judicial process by providing effective video evidence and increases officer safety by deterring violent behavior and helping to convict those who attack officers. In a study by the International Association of Chiefs of Police, 93% of prosecutors called video evidence an effective tool, and a majority reported reduced time spent in court. Moreover, 93% of police-misconduct cases where video was available resulted in the officer's exoneration; 50% of complaints were immediately withdrawn when video evidence was used; and 94% of citizens supported the use of video. Body-worn cameras in particular provide important benefits that vehicle-mounted or other stationary cameras cannot, by going wherever officers go and capturing incidents that take place away from the patrol vehicle.

89. What we have seen in the last few years, however, is that after an intense push to arm every officer with cameras, the ACLU has begun to change its opinion. The ACLU's current position appears to now focus on privacy and alleged violations of citizens' privacy rights. It is my opinion, after multiple years of recordings by both the citizens and the police, that when an interaction was fully recorded, the protections purportedly afforded to the police regarding false allegations were defeated. It is my opinion, that video is beneficial to all, providing actual evidence to support or defeat allegations of police misconduct and constitutional violations. I believe video recordings protect both the citizen and police. For the last decade there has been an increase in the perception of rampant police misconduct. Do police officers not deserve the same right to protect themselves, just as the Court has given citizens the right to protect their constitutional rights?

90. This leads to an interesting question? Why has the ACLU changed its opinion on recording? An ACLU article in 2017 asked "Should we Reassess Police Body Cameras?[13] Why is something that was the future of transparency just a few short years ago, now concerning due to privacy issues? The article stated that the reason for the reassessment was that cameras had no statistical effect on use of force incidents and civilian complaint records. Basically, arguing that the cost of cameras was a waste of money. What was not evaluated was the benefit of the video evidence to confirm or deny whether an allegation had occurred. My experience in use of force cases shows that the body-worn camera footage is beneficial because it shows the entirety of the interaction, rather than years ago when there was only a short cell phone video clip from a bystander. The use of body worn cameras now shows the physiological responses and human factors that have benefited law enforcement, just as the article above clarified. The clearly established law provided above supports the conclusion that the expectation of privacy landscape

[13] Should we Reassess Police Body Cameras? ACLU (November 2017) https://www.aclu.org/blog/privacy-technology/surveillance-technologies/should-we-reassess-police-body-cameras-based

has significantly changed and continues to rapidly change. Courts have begun to evaluate convenience of technology versus the protection afforded communications. As society continues to demand more convenience, will the expectation of privacy diminish even further?

B. It's not about the Recording it's about the Policies

91. One of the basic principles of agency policy development is that policies and procedures shall reflect and express the agency's core values and priorities, and provide clear direction to ensure that officers lawfully, effectively, and ethically carry out their responsibilities. That being said, agencies should have a policy to detail how they will utilize social media. For the most part, social media should be viewed as just another tool in the law enforcement toolbox and should be subject to the same policies and guiding principles as other investigative methods and tools. However, the way in which the agency utilizes social media in criminal investigations and surveillance must be specifically addressed. For instance, such a policy should take into account First and Fourth Amendment considerations and address the operational principles of 28 CFR § 23.20, along with other applicable state laws.

92. A social media policy should also acknowledge that although technology may advance, the foundational elements for accessing social media remain consistent, such as accessing social media for an authorized law enforcement purpose. The Policy should be crafted in such a way as to take into account the inevitability of technological advancements. Specifically, however, with respect to specific elements that should be addressed whn developing a policy on law enforcement use of social media in criminal investigations and surveillance, the Global Justice Information Sharing Initiative offered the following recommendations:[14]

1) Articulate that the use of social media resources will be consistent with applicable laws, regulations, and other agency policies.

2) Define if and when the use of social media sites or tools is authorized (as well as use of information on these sites pursuant to the agency's legal authorities and mission requirements).

93. The 2017 ACLU article concluded that "we think the cameras are ok if deployed with good policies in place."[15] So, should that same opinion not apply to the Memphis Police Department and the legal right to record those that assemble for purposes of protest? The analysis should include a discussion of what occurs with that video or "intelligence" after the recording. Specifically, what are the storage capacities, who has the right to view and when, including when and with whom video can be shared? The mere act of recording video of citizens by the police is not a constitutional violation. In fact, from security cameras, to cell

[14] *Developing a Policy on the Use of Social Media in Intelligence and Investigative Activities: Guidance and Recommendations*, Global Justice Information Sharing Initiative (February 2013), https://it.ojp.gov/documents/d/Developing%20a%20Policy%20on%20the%20Use%20of%20Social%20Media%20in%20Intelligence%20and%20Inves....pdf (This project was supported by Grant No. 2010-MU-BX-K019 awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, in collaboration with the Global Justice Information Sharing Initiative.

[15] Should we Reassess Police Body Cameras? ACLU (November 2017) https://www.aclu.org/blog/privacy-technology/surveillance-technologies/should-we-reassess-police-body-cameras-based

phones, to Ring doorbells, there is a ridiculous amount of recorded video. In fact, it is estimated that an average American consumer has their image recorded more than 50 times a day in this country.[16] The ACLU has continued to argue that video recording has a chilling effect on the American people, but does it really? We are a society that records everything, often posting it to one public site or another. The test set forth in Katz found that for a privacy rights violation, a citizen must have an expectation of privacy, and it must be one that society finds as reasonable. In 2020, any citizen in a public place has the expectation that they may be recorded in one form or another, as compared to the expectations of a citizen in 1976

94. With regard to recorded video, law enforcement operational practices and industry standards provide for the issuance of a policy that establishes procedures as to who can view that video, what actions can be taken with that video, and how long the video can be stored. Since 1976, the law has clarified that distributing video without a legitimate legal reason for doing so could deprive the person depicted of their Constitutional rights. The Court should consider that current industry standards have been developed and should be accepted as the practice of the Memphis Police Department.

95. My Curriculum Vitae is attached as Exhibit "A," my Fee Schedule and Agreement signed by the retaining firm is attached as Exhibit "B," and my current consultation list is attached as Exhibit "C." and provided expert opinions during depositions. I have not testified as an expert at trial as a police consultant prior to this case.

This report is signed under penalty of perjury on this 6th day of April 6, 2020, in Southington, Connecticut.

Eric P. Daigle, Esq.

[16] Americans Vastly Underestimate Being Recorded on CCTV (Brian Kara, May 2016) https://ipvm.com/reports/america-cctv-recording

EXHIBIT A

# Eric P. Daigle

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## EXPERIENCE:

**DAIGLE LAW GROUP, LLC,** Southington, CT May 2010 to Present

***Attorney- Managing Member***

Area of Practice includes

- Civil litigation in federal and state court, with an emphasis on municipalities and public official's specifically municipal clients in civil rights actions, including police misconduct litigation and employment actions as well as premises and general tort liability cases.
- Provide legal advice and consultation to law enforcement operations across the country.
- Providing legal advice in the areas of legal liability, policy development, use of force, Internal Affairs, employment issues, and search and seizure, criminal investigations. Review and develop sound policies for multiple agencies.
- Served as a member of the Oakland California and formerly Niagara New York Independent Monitoring Team and works with Law Enforcement Agencies who are under investigation or under a Consent Decree by the Department of Justice Civil Rights Litigation.
- Conduct Internal Affairs investigations, Management Audits, staffing studies and oversight for Law enforcement organizations,
- Conduct training, investigations and reconstructions of officer-involved shooting incidents reconstruction, crime scene reconstruction, officer-involved critical incident investigations, and in-custody death investigations
- General Counsel for FBI-Law Enforcement Executive Development Association. as well as a member of their training faculty- conducting Internal Affairs training, supervisory liability.
- General Counsel for the National Internal Affairs Investigators Association (NIAIA).
- Conduct legal use of force training regarding use of force standards, managing use of force, deadly force investigations and tactical liability.
- Provide consultation and analysis to Law Enforcement agencies on deadly force incidents, use of force, Internal Affairs, management oversight, including standards necessary for effective and constitutional policing.
- Development and analysis of Police, Corrections and Fire Policies and Procedures.
- Certified instructor for CT Police Officer Standard and Training Council.

**NEW ENGLAND TACTICAL OFFICER'S ASSOCIATION** May 2010 to Present

***Executive Director / General Counsel***

- Facilitated organization and operation of NETOA.
- Organized training seminars and conferences for Tactical Command Staff and Operators.
- Conduct training, oversight, policy and SOP development for New England Tactical teams.

- Maintain Association interaction and relationship with National Tactical Officer's Association. Member of NTOA national policy development committee.

**HALLORAN & SAGE LLP**, Hartford, CT December 2001 to May 2010

***Attorney- Senior Associate, Government and Municipal Liability***

- Area of Practice includes
  - Civil litigation defense in federal and state court, with an emphasis on defending municipalities and public officials specifically defending municipal clients in civil rights actions, including police misconduct litigation and employment actions as well as premises and general tort liability case.
  - Provide legal advice to law enforcement command staff and officers in the areas of legal liability, policy development, employment issues, use of force, and search and seizure.
  - General Counsel for FBI-Law Enforcement Executive Development Association. as well as a member of their training faculty- conducting internal affairs training, supervisory liability and grant writing training.
  - Conduct legal use of force training regarding use of force standards, managing use of force, deadly force investigations and tactical liability.
  - Grant research and writing
- Conduct operation and liability studies of public safety operations. To include analysis of policies, procedures, equipment and organizational strengths.
- Conduct corporate investigations to include sexual harassment, fraud, larceny, computer crimes and embezzlement.
- Retain and supervise teams of experts to conduct investigations and secure evidence in product liability cases and fatal accident litigation
- Certified instructor for Police Officer Standard and Training Council.

**SOUTHINGTON POLICE DEPARTMENT**

Southington, CT March 2005 to Present

***Officer – Reserve Officer***

- Conduct grant writing, monitoring and maintaining grant awards.
- Conduct policy to include commencing development and revision to update the department policies and procedures.
- Conduct new hire background investigations

**CONNECTICUT STATE POLICE**, Hartford, CT June 1992 to January 2002

- Retired with ten years vested state service

***Detective, Central District Major Crime Squad*** September 1997 to January 2002

- Conduct felony investigations and act as lead detective, process crime scenes for the collection of forensic evidence, prepare cases for prosecution.

***Trooper, Department of Corrections Liaison Officer*** July 1995 to September 1997

- Responsible for facilitating and maintaining a State Police relationship with six correctional facilities and the Department of Corrections command staff.
- Conducted all criminal investigations within six different correctional facilities.

- Supervision of correction officials to include command staff and officers in the preparation of criminal cases and preservation of evidence.

***Trooper, Troop I, Bethany*** January 1993 to July 1995
- Conducted accident investigations, criminal investigations, and community relations
- Field Training Officer

## EDUCATION:

**QUINNIPIAC COLLEGE SCHOOL OF LAW,** Hamden, CT
Juris Doctorate Degree, May 2001
**Awards:** Christopher Bannerman Memorial Award,
Service to the Community and Classroom Performance Awards

**CENTRAL CONNECTICUT STATE UNIVERSITY**, New Britain, CT
Bachelor of Arts, Sociology, June 1997

**CONNECTICUT STATE POLICE TRAINING ACADEMY**, Meriden, CT
State Police Officer Certification, January 1993

## MILITARY:

**UNITED STATE ARMY RESERVES**, New Haven, CT May 1988-May 1994
***Sergeant, 344 Military Police Company***
Military Police Officer, -squad leader, assistant squad leader,
- Served in Operation Desert Shield/ Operation Desert Storm,

## PUBLICATIONS:

I have drafted hundreds of articles since 2004 that are contained on the DLG website. I routinely publish in the FBI-LEEDA Insighter Magazine, The NTOA magazine, and weekly legal updates.

## INSTRUCTOR/ LECTURES:

- Connecticut Law Enforcement Officers, Certified Instructor (2004 – Present)
  Police Academy Training Instructor, In-service Training
  Topic Areas: Constitutional Law; Civil Liability; Connecticut Criminal Law; Laws of Evidence; Laws of Arrest; Search &Seizure; Search Warrant Preparation; Use of Force; Courtroom Testimony & Demeanor; Supervisory Liability; Managing Police Discipline, Managing Internal Affairs and social networking/current trends in supervision.

- International Association of Chiefs of Police,
  Tactical Operations Liability, San Diego, CA. November 9, 2008.
  Electronic Control Weapon Liability, Orlando, FL. October 23, 2010
  Dealing with the Agitated Subject, Chicago, IL October 23, 2011
  How to Protect More with Less, San Diego, CA. September 2012
  Crowd Control, DOJ Investigations, Philadelphia, PA, October 2013
  Tactical Operations Liability, Orlando, FL, October 2014
  Wearing a Camera and a Badge, Orlando, FL, October 2014

Use of Force Investigation – Policy, Practice and Oversight, Chicago 2015
Body Worn Cameras – Legal Issues and Implementation –October 2016
Crowd Control – Operational Updates – October 2017
Use of Force Policy Development and Current Trends – October 2017
De-Escalation and Use of Force – October 2018
Psychological Section Legal Update PTSD – October 2019
Use of Force Current Trends – October 2019
Crowd Control – Operational Update – October 2019

- Connecticut Chiefs of Police Association,
  Department of Justice grants and grant writing, April 1, 2009.
  Excited Delirium response, September 2014
  Wearing a Camera and a Badge- Body Worn Cameras, October 2014
  Crowd Control Protecting First Amendment Rights, October 2015
  Social Media and protecting First Amendment Rights, July 2018
  Use of Force and OIS Investigation, May 2019

- FBI-Law Enforcement Executive Development Association,
  Department of Justice grants and grant writing, Tampa, FL. April 8, 2009.
  Body Worn Cameras – Legal Issues and Implementation, Memphis TN May 2016
  Law Enforcement Operations Post Ferguson DOJ Investigation, Memphis TN May 2016
  Body-Worn Camera Operations Jacksonville FL May 2017
  Use of Force Policy Development, Birmingham AL May 2018
  De-Escalation and Use of Force, Virginia Beach, VA 2019

- New England Chiefs of Police Association,
  TASER Liability, Hampton Beach, NH. September 14, 2009
  Conducting Internal Affairs Investigations, October 12, 2010
  Crowd Management and First Amendment Protection, September 2012
  Officer Involved Shooting investigation, September 2013
  Technology Pitfalls in Law Enforcement, September 2014
  Use of Force Current Trends, September 2015, September 2016
  Mental Illness Response, September 2017
  Crowd Control, September 2018
  Firs Amendment September 2019

- Rhode Island, Department of Public Safety,
  Use of Force, TASER Liability, Managing Use of Force
  Providence, RI, November 12, 2009
  Conducting Internal Affairs Investigations, Social Networking, October 2013

- Massachusetts Chief of Police Association,
  TASER Liability, Wrentham, MA, December 14, 2009
  Agency Liability- Contemporary Legal Issues, 2014
  Officer Involved Shooting Response – May 2015

- Maine Chief of Police Association,
  Use of Force, TASER Liability, Managing Use of Force

Wells and Bangor, ME, December 15, 16, 2009
Agency Liability – Contemporary Legal Issues, February 2014

- Americans For Effective Law Enforcement (March 2010 – Present)
  Adjunct Instructor:
  TASER Liability/ Tactical Operations Liability
  Las Vegas, NV- March 2010, October 2011, October 2012, October 2013, Spring 2017, 2018, 2019
  Contemporary Issues in Use of Force
  Las Vegas, NV – March 2013, March 2014, March 2015, March 2016, Spring 2017, 2018, 2019
  Developing Use of Force Policies – March 2015, March 2016, April 2017, Spring 2017, 2018, 2019
  Internal Affairs Investigation – Current Trends and Liability Issues, October 2017, 2018 and 2019

- New England Tactical Officers Association (March 2011 – Present)
  Tactical Operation Liability – March 2011
  Crowd Control and Protecting First Amendment Rights – March 2012
  Rules of Engagement – April 2013
  Crowd Control and Protecting First Amendment Rights – September 2014

- National Tactical Operators Association
  Legal and Operational Training, May 2017
  Tactical Operations and Force Investigations, August 2019

- Municipal Police Institute (September 2009 – Present)
  Adjunct Instructor:
  Supervisory Liability, Use of Force, TASER Liability, E911 Dispatch Liability, Active Shooter / Hostage Negotiations Response, Dealing with Difficult People Search and Seizure for the Active Officer

- CT POSTC (January 2013 – Present)
  - Civil Liability – Recruit Training
  - Search and Seizure for the Active Officer
  - Internal Affairs Investigations
  - Use of Force/ Conducting Force Investigations
  - Supervisory Liability

- National Association for Civilian Oversight of Law Enforcement
  Electronic Control Device…The Good, The Bad and the Ugly, September 14, 2011
  Pitfalls of Officer Involved Shootings – October 2012
  Technology Pitfalls in Law Enforcement – September 2013
  Use of Force – Contemporary Issues – September 2014
  Crowd Control Operational - September 2016

- National Association of Internal Affairs Investigators

Contemporary Issues in Law Enforcement - Use of Force Investigations, September 2013
Current Trends in Internal Affairs Investigation, August 2017, September 2018, September 2019

- Use of Force Summit – Daigle Law Group, LLC 2012-2019
- First Amendment Summit – Daigle Law Group, LLC 2019
- DLG Internal Affairs – Managing Internal Affairs Training
- Liability, Use of Force and Supervision training- Across the Country

## CERTIFICATIONS:

- **Force Science Advanced Specialist** September 2017
- **Fair and Impartial Policing Instructor** March 2015
- **Certified Practitioner of Oversight** March 2014
- **Force Science Certification Course** April 2013
- **TASER Instructor Certification** July 2012
- **Certified Litigation Specialist- AELE** January 2011

## PROFESSIONAL ORGANIZATIONS:

- **FBI- Law Enforcement Executive Development Assoc.** January 2007 – Present
  - General Counsel
  - Instructor- Internal Affairs, Online Training, Supervisory Liability, Grant writing
- **International Association of Chiefs of Police** January 2004 - Present
  - Chairman – Legal Officers
  - Civil Rights Committee
- **National Tactical Officers Association** May 2010 - Present
  - Legal Section Chair - May 2018
- National Association of Internal Affairs Investigators
- **New England Chiefs of Police Association** September 2013
  - Life Membership
- **Connecticut Chiefs of Police Association** January 2003 – Present
  - Board of Directors - Associate Member since 2012
  - Connecticut Police Foundation- Board of Directors
- **Americans for Effective Law Enforcement** January 2009 – Present
  - Board of Directors
  - Instructor
    - Investigation, Management or Use of Force

TASER Liability, Tactical Operation, Use of Force
- Public Safety Employee Discipline and Internal Investigations
  New Developments and Best Practices
  Civil Liability from Disciplinary Systems

- **The National Association for Civilian Oversight of Law Enforcement (NACOLE)**
  - Certified Practitioner of Oversight

- **Connecticut Bar Association** November 2001- Present

- **New Britain Bar Association** January 2002 – Present
  President- 2005, 2006.

EXHIBIT B

**Eric P. Daigle, Esq.**
*Consultant and Trainer*
P.O. Box 123, Southington, CT, 06489, Office Phone (860) 270-0060

**FEE SCHEDULE AGREEMENT**

ACLU of TN v. The City of Memphis, N0. @:17-cv-02120-jpm-DKV

CASE REVIEW AND CONSULTATION

A complete review of all materials furnished will be done on a timely basis, and consultation will be conducted as requested. A review of materials provided will be performed at the rate of $250 per hour with a minimum of 30 hours ($7,500.00) required in advance of commencement of the review. The $7,500 fee is non-refundable and is the minimum fee for all case file reviews. The fee must accompany this signed Fee Agreement acknowledging Attorney Eric Daigle's participation in the case as a consultant.

All work performed including document review, analysis of evidence, conferences, site inspections and report will be assessed at a rate of $250 per hour. All materials must be sent in an agreed upon manner. These documents should be indexed to clarify receipt of same.

TRIAL TESTIMONY

This agreement does not include trial testimony as the consultant in this matter. A thorough preparation will be done prior to trial and billed at a rate of $250.00 per hour. Attorney Daigle will reserve the agreed upon trial day and travel to the trial site for a fee of $2,500.00, plus all travel expenses as outlined below, for each day or portion of a day testifying. Any standby days/portions of a day awaiting trial will be assessed at $1,500.00 per day.

DEPOSITIONS

Depositions at a location selected by Attorney Daigle or in the State of Connecticut, will be billed for a fee of $1,500.00 for a four-hour minimum plus any incurred expenses. If a deposition exceeds more than four hours, any additional hours, or parts thereof, will be billed at the hourly rate of $250.00, with a maximum of seven hours of testimony per day. The retaining firm shall represent the above deposition fees and payment policies to opposing counsel before the deposition and, in the event of any disagreement as to the amount; the firm retaining Attorney Daigle shall pay the difference or, if necessary, the full amount, in accordance with this deposition fee schedule, prior to the commencement of the deposition. Video Depositions will be billed at the same rate as trial testimony ($2,500.00).

If a case settles within 48 hours prior to the scheduled deposition date, a $1,500.00 cancellation fee will be assessed. Failure of either party to provide payment of the fees prior to deposition will result in cancellation of deposition with the cancellation fee of $1,500.00 assessed. The cancellation fee will be charged as a separate expense, independent of any future deposition fee, which will be billed in accordance with this agreement. Fees are due within 15 days of cancellation or settlement. Deposition preparation and review of case materials will be billed at a rate of $200.00 per hour. Deposition and Trial fees are

required to be paid three (3) days in advance of expected testimony or Attorney Daigle reserves the right to not appear.

SITE INSPECTION AND INVESTIGATION OR CONFERENCE REQUESTS

Attorney Daigle agrees to travel to the site of the incident in question, if requested, and complete a thorough investigation or meet for conference, if necessary to prepare for trial. An inspection, investigation, or conference (including in CT) day fee is a flat $1,500.00 per day (or any part of a day), plus all travel expenses. These fees shall be paid upon arrival, or at the time of conference.

TRAVEL EXPENSES

Attorney Daigle will request that airline, hotel, and car rental reservations be booked by his travel agent to facilitate coordination of his schedule. Travel expenses will be estimated, including air fare, vehicle rental, hotel accommodations, meals, taxi, and airport parking in Connecticut, and will be required in advance of commencement of travel. An unrestricted coach ticket with a small fee for first class upgrade under the frequent flyer plan will be requested for all air travel.

PAYMENT TERMS:

Any remaining fees or expenses not covered by the retainer will be invoiced on a per month basis, and payment is expected 30 days upon receipt of invoice. A 10 % late fee will be assessed and compounded for each month the account is outstanding thereafter.

**Remit with fee to**:

Daigle Law Group, LLC. 960 S. Main Street, Plantsville, CT 06479 (FIN 27-2315632)

I HAVE READ THIS FEE SCHEDULE IN ITS ENTIRETY AND AGREE TO THE TERMS HEREIN.

E. P. Daigle
Eric Daigle

Jennie Silk 3-3-2020
Signature of Retaining Attorney Date

Jennie Vee Silk
Typed or Printed Name of Attorney Retaining

**PLEASE COPY AND RETURN ORIGINAL**



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EXHIBIT C

# EXPERT CONSULTATION
## Eric P. Daigle, Esq.

1. ***Elizabeth Rodruguez v. Patrick Jobes, et al. (Docket No. 3:09-cv-01723-JCH)***
   Retained 6/17/2010 Santos &Seeley, PC CT
   (Plaintiff matter- False arrest, police procedures- Report Issued-)

2. ***Brian Litwin v. Ryan Kiely, et al (Docket No. HHD CV 90-6005823S)***
   (Plaintiff matter- Pursuit case - Consulted)

3. ***Dorotheia Glover v. City of Wilmington and Gerald Connor, (Docket# C.A. No. 11-431RBK)*** Retained 3/14/2012 Norman Law Firm DE- Report issued
   (Plaintiff matter – false arrest, excessive force and police procedures)

4. ***Kunbi Alabi-Shonde v. Matthew Patterson, et al., Civil Action No. 11-CV-00608-LPS***
   Retained 3/14/2012 Norman Law Firm DE – Report issued
   (Plaintiff matter – false arrest, police procedures)

5. ***Arthur w. Schofield, et al, v. Town of Manchester, et al, Docket# 3:12-CV-0533 (JBA)***
   Retained 8/10/2012 The Legal Diva CT – Report issued, deposition conducted
   (Plaintiff matter – illegal seizure, excessive force, police procedures)

6. ***Lisa Sheehan, et al. v. City of Lynnwood, et al. Case No: 13-2-07571-5***
   Retained 9/4/2014 Christie Law Group, PLLC WA. Report Issued
   (Defendant matter – false arrest, excessive force, police procedures)

7. ***Peasley v. City of South Portland, Arbitration Case No. 15-BAC-11***
   Retained 2/27/2014 Attorney Robert Bower, Jr. Norman, Hanson & DeTroy, LLC
   (Management expert - labor disciplinary hearing- Use of Force -No report, no testimony)

8. ***Jesus Ferreira v. City of Binghamton, et al. No. 3:13-CV0107-TJM-TAB***
   Retained 4/24/2015 Attorney Brian Seachrist Binghamton Corporation Counsel
   (Defendant Matter – Tactical Operations, Officer Involved Shooting – Report Issued)

9. ***Kim Swilling, et al. v. Officer Abella, et al. No. 6:16-cv-00082-JMC-JDA***
   Retained 3/09/2016, Attorney Clark Price Roe Cassidy Coates & Price
   (Defendant Matter – Deadly Use of Force, Officer Involved Shooting – Report Issued)

10. ***Rose, et al. v. City of Utica, et al. No. 6:14-cv-1256-BKS-TWD***
    Retained 5/26/2016, Attorney Zachary C. Oren, Utica Assistant Corporation Counsel
    (Defendant Matter – Deadly Use of Force, Officer Involved Shooting – Report Issued)

11. ***Turczyn v. Shanley, et al. Civila Action No.: 6:13-CV-1357 (GLS/ATB)***
    Retained 9/14/2016, Attorney Zachary C. Oren, Utica Assistant Corporation Counsel
    (Defendant Matter –Police Practices and Duty of Care Domestic Violence- Report Issued)

# EXPERT CONSULTATION
# Eric P. Daigle, Esq.

12. ***Port Authority PBA v. The Port Authority of New York and New Jersey***
Retained 9/8/2016, Attorney Jason Stanevich, Littler Mendelson P.C.
(Management Matter – Interest Arbitration – IA National Standards)
Issued Report and Testified in Arbitration as recognized Expert

13. ***Miceli v. Mehr et al.*** **No 3:17-cv-00029-VAB**
Disclosed 11/01/2017, Attorney Michael Rose, Ford Harrison LLP
(Defendant Matter – Implications of False Statements by Police Officers)
Deposition as fact witness and expert- No Expert Report

14. ***Monsanto v. State of Rhode Island, et al.*** **Docket No. 1:16-cv-00147**
Retained 11/20/2017, Attorney Rebecca Tedford Partington, State of Rhode Island, Civil Division Office of the Attorney General.
(Defendant Matter – RISP Monell Liability, Supervisory Liability, Traffic Stop)
Issued Report

15. ***Leroy Tennart et al v. City of Baton Rouge, et al.*** **Case No. 2:17-cv-00179**
Retained 11/21/2017, Attorney Celeste Brustowicz, Burglass and Tankersley, LLC
(Defendant Matter – LSP Protest Baton Rouge – Operations, Arrest and Use of Force)

16. ***Shonta Jackson, On Behalf of Her Minor Daughter, A.R. v. City of Baton Rouge, et al.*** **Case No. 3:17-cv-438**
Retained 11/21/2017, Attorney Celeste Brustowicz, Burglass and Tankersley, LLC
(Defendant Matter – LSP Protest Baton Rouge – Operations, Arrest and Use of Force)

17. ***Lisa Batiste-Swilley, v. City of Baton Rouge, et al.*** **Case No. 3:17-cv-00443**
Retained 11/21/2017, Attorney Celeste Brustowicz, Burglass and Tankersley, LLC
(Defendant Matter – LSP Protest Baton Rouge – Operations, Arrest and Use of Force)

18. ***Nikole Smith, et al. v. State of Louisiana, et al.*** **Case No. 3:17-cv-436**
Retained 11/21/2017, Attorney Celeste Brustowicz, Burglass and Tankersley, LLC
(Defendant Matter – LSP Protest Baton Rouge – Operations, Arrest and Use of Force)

19. ***Blair Imani, et al. v. City of Baton Rouge, et al.*** **Case No. 3:17-cv-00439**
Retained 11/21/2017, Attorney Celeste Brustowicz, Burglass and Tankersley, LLC
(Defendant Matter – LSP Protest Baton Rouge – Operations, Arrest and Use of Force)

20. ***Max Geller v. City of Baton Rouge, et al.*** **Case No. 3:17-cv-00324**
Retained 11/21/2017, Attorney Celeste Brustowicz, Burglass and Tankersley, LLC
(Defendant Matter – LSP Protest Baton Rouge – Operations, Arrest and Use of Force)

21. ***Jason Walker v. City of San Diego, et al. Civil Action No.: 17cv2118-LAB(MDD)***
Retained 05/25/2018, Attorney Mara W. Elliot, City Attorney San Diego
(Defendant Matter – False Arrest, Excessive Force, Policy and Training)
Report Issued

# EXPERT CONSULTATION
## Eric P. Daigle, Esq.

22. ***Estate of Marcus Brown v. City of Waterbury, et al.*** **Docket No. UWY-CV-13-6021577S**
Retained 12/12/2018, Attorney Joseph A. Mengacci, Corporation Counsel City of Waterbury CT
(Defendant Matter – Use of Force, Search and Seizure, ECW, Death – Policy, Training, Tactics

23. ***Grand Jury of Corporal Derek Colling,*** **County of Albany, State of Wyoming**
Retained 12/18/2018, Attorney Peggy Trent, Albany County & Prosecuting Attorney
(Criminal Matter – Use of Force and Deadly Force Analysis)
Report Issued and Testified at Grand Jury 1/9/2019

24. ***Estate of Timothy Gene Smith, et al v. City of San Diego, et al,*** **Case # 16CV2989(WQH)**
Retained 01/13/2019, Attorney Tia Ramirez, City of San Diego
(Defendant Matter – Use of Force- OIS)

25. ***McNally, Gregory S. v. Daniel Riis*****, Case # USDC 18cv1150JLS (AGS)**
Retained 2/13/2019, Attorney Mara W. Elliott, City of San Diego
(Defendant Matter – Use of Force)

26. **Grand Jury Salt Lake County, Utah**
Retained2/15/2019, Jeffrey Hall, Chief Deputy District Attorney
(Criminal Matter - SWAT Officer Shooting)

27. ***Amaral, Marco v. City of San Diego*** **Case No: 17cv2409 L (JMA)**
Retained 9/23/2019, City of San Diego
(Defendant Matter – Use of Force)

28. ***Suazo v. Emery and City of Lynn*****, 1:18-cv-10228-JCB**
Retained 10/18/2019, James F. Wellock, Assistant City Solicitor Lynn MA
(Defendant Matter – Use of Deadly Force, Police Practices)

29. **A*CLU of Tennessee, Inc. v. The City of Memphis* Case No. 2:17-CV-2120-JPM-egb**
Retained 3/5/2020, Jennie Vee Silk, Esq. City of Memphis
(Defendant Matter – First Amendment)