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Consult Hardesty
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Testimony, Fairness Hearing – USA v City of Portland Case No. 3:12-cv-02265-SI

> Society has "decided that rather than solve those problems of racism and poverty, we will cede them to the criminal justice system. It shouldn't be the case that the biggest building and most resourced entity in a poor neighborhood is the courthouse – not the schools, hospitals or conflict resolution organizations, but the courthouse." - Robin Steinberg, founder, Bronx Defenders; from *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities In the Criminal Justice System*, Oct 2012; hosted by the Foundation for Criminal Justice, Brennan Center for Justice, and New York County Lawyers' Association.

May it please the Court ~

We at Consult Hardesty believe – ultimately - it is the responsibility of The People, to protect our civil liberties. We come today to speak to a proposed Settlement Agreement, negotiated in secret, without benefit of community influence. My previous testimony on this document, (RDH 1, 5 November 2012), was by order of the accused City of Portland, limited to 120 seconds … on a document we had not seen. This truncation of free speech and right of redress is but one example of a long and sustained pattern of exclusionary practices the alleged perpetrators engage in. There is no record that anyone advocated for a restoration of our civil rights in these rushed, behind-the-scenes negotiations. We know that no deliberative body publicly amended any feature of the Agreement. We are grateful for today's opportunity, and know your work will be influenced by direct testimony from victims of what the DoJ has called a 'self-defeating accountability system.' An immense body of knowledge exists within the community; resident among The People are the abilities to protect ourselves from illegal use of force, as well as unwarranted search and unequal opportunities in the application of law.

We observe, by broad analysis, that the Agreement before us is police-centric. We are reminded of the duplicity of employing a City Attorney to simultaneously protect the City from fiduciary harm; while also relying on fact-finding by that office, when discovery of misconduct might contravene the other role. By relying solely on the DoJ, whose other goals (intelligence gathering, prosecutions) require mutual cooperation with the accused, the results have not been leavened by a worthy process of including civil demands from the victim class.

The bargain before us makes perpetrators largely responsible for remedy. This is unjust. Given the plenitude of resources available outside PPB, it is unreasonable. We are shocked that delivery of services to those who've been beaten, humiliated, and misdirected into the criminal justice system (FINDINGS, pp. 12-13, 16-18, elsewhere) for mental health challenges is hereby made the responsibility of police. Their long record of abuse makes this an unreasonable choice. A simple analysis demands that, to ably protect victims, intervention must now be carried out by those with more appropriate skill sets. Police detain us; firemen protect us from harm; paramedics - by character and training - nurture those in need.

For these and other reasons we'll enumerate, we plead with the Court that this Agreement between collaborators be rejected. Consult Hardesty would rather see an application of justice that results from a trial between adversaries. In this separation of allegiances may be found a solution that is more victim-centric. In envisioning a remedy to patterns and practices of constitutional violations, Consult Hardesty stands prepared to offer a model that draws on civilian authority in the face of government repression by illegal use of force. The Civilian Compliance & Reform Authority (CCRA, JAH 1) is offered for the public's review and input. It has drawn creative response. Victim-centric proposals include converting

camera-equipped mass transit into mobile 'reporting centers,' capable of delivering prompt reports of police misconduct. Given the value of of civilian recording of police encounters, such an authority might maintain a digital 'drop-box,' where deposited evidence might become available to those filing misconduct complaints. Now under DoJ influence, IPR has no current plans to improve outreach.

We find it imperative to plead that The People's aspirational channels not be restricted by the narrow tasks law enforcement seeks to impose by this Agreement. My 2012 testimony indicates our initial concerns that the DoJ artificially confined civil rights protections to a small, but highly vulnerable population. When the AMA Coalition for Justice and Police Reform demanded an audit (RDH 2, A & B, AMA investigation request) they supplied evidence of racially disparate policing, compiled by the City itself. We contend it is then wholly unreasonable for the DoJ, when confronted by evidence of 14th Amendment violations, to declare investigation into such beyond the scope of their inquiry (FINDINGS, pg. 38).

Should you overlook the numerous deficiencies The People will today present, we plead that any approval of this Agreement benefit from rulings to guide the parties where the plea deal is ambiguous. We must preserve our aspirational channels, to pursue remedy not on offer. AMA Counsel was unable to opine whether the collaborators will simply deflect all civil rights remedy that is outside the bargain. We plead for your direction: will the COAB have the same freedom to "follow the facts" as Ass't AG Tom Perez claimed, even as he set upon this narrow field of investigation?

The Agreement (Sec. 92, pg 36) states "ABHU will manage the sharing and utilization of data that is subject to lawful disclosure between PPB and Multnomah County, or its successor. PPB will use such data to decrease law enforcement interactions ..."

Suppose the COAB finds the BHU is engaged in unconstitutional privacy violations (RDH 3, BHU Newsletter, October 2013). Without your guidance, we are firm in the belief that 'protocols' confining COAB to mere oversight and advice will inhibit any reform not authorized in the Agreement.

Imagine the subsequent DoJ investigation. After The People discern illegal, warrant-less data tracking, we're likely to see a proposal that the City hire 28 additional police … and put them in charge of delivering internet services.

While the Findings (pg. 31) address a '48-hour rule' that allows officers time to concoct testimony and unfairly subvert justice. It states, "PPB should not hinder investigation of a potentially criminal action with this officer-specific delay." This remedy is not mandated by the Agreement. Criminal justice advocates know the perpetrators did not bargain for an end to such unequal treatment provisions in the PPA contract, negotiated last month. Conducted in secret we don't know whether anyone even negotiated for their removal.

In public hearing, preceding unanimous adoption – without amendment - of the PPA contract, City staff informed Commissioners it would require six months to obtain rulings from the state's Employee Relations Board (ERB) before elimination of the 48-hour rule could be pursued. Audacious, the perpetrators then approved a 5-year contract extension. This devastated The People's long-held aspirations ... that we would be empowered by partnering with the DoJ.

The DoJ & US Atty for Oregon rarely fail to miss an opportunity to extol the benefits of a partnership they now extend to The People. It is inadequate that our 'partners' failed to influence this act, a legalism contrary to the DoJ's expressed concerns. They made no subsequent statement of the bad faith evident in carrying on practices they failed to require in an Agreement that has already proved itself inadequate.

Following passage of the Agreement, PPB Chief Reese stated, "Finally, what we are talking about today is processes and systems-**not about our Police Officers.** The men and women, who took an oath to

uphold the Constitution of the United States, are not to blame." (RDH 4) We contend, by practices revealed in the Findings, that this is a lie. Sworn officers may not be parties liable in an Agreement that inadequately attributes sanctions for non-compliance, but their misconduct is – and of right ought to be – culpable. All The People now require are the means, such as that to compel testimony, to investigate and … for the first time in Portland's history … make such a case.

On 17 December 2012, five days after Reese demonstrated his failings, by the above statement, as a cultural change agent in a time of intended reform, US Atty Amanda Marshall stated, "I look forward to a continued partnership with the city, Chief Reese and the community in the implementation of this historic agreement. The reforms required by this settlement agreement provide the building blocks for a stronger and safer Portland." (RDH 4, Reese Statement) Marshall did not contest Reese's outlandish contentions. The DoJ's building blocks of community partnership did not extend to forums, designed to build and engage broad participation today, nor even to share their experience of best practices for testimony in Federal court.

We contend the proposed, police-centric partnership is inadequate, when set beside The People's aspirations for independent, civilian-led authority. We know that, by sending the parties to trial, you provide the DoJ an opportunity to prove the Auditor, City Commissioners, their attorneys and sworn officers *have* violated their oaths to defend the Bill of Rights. Consult Hardesty feels any proposed remedy to grow out of this contest of ideas, in open and transparent processes, better preserve an indigenous, aspirational channel for reform.

(JAH 3 Monitoring Performance of Police Oversight Agencies) As a pattern, City strategies to avoid exposing themselves to risk, while protected populations risk tremendous bodily and psychological harm, are unfair … and yet codified in the process now seeking your approval. Despite being mentioned several times as loci for reform in the Agreement, never did community bodies seek public input. Not during the collection of facts, and not during an analysis of their competency to perform, has the Office of Equity and Human Rights, the Human Rights Commission, or the Community Police Relations Committee ever held a public hearing to ascertain the will of The People. We urge the Court to call upon the risk-adverse City Attorney, to see whether the public has been denied representatives of these bodies' participation in this very Hearing. It is unfair to proceed without an understanding of the capacity and intent of these bodies to perform assigned duties.

Beyond that, we know unwritten 'protocols' are designed to inhibit members of these bodies (including CRC, TAC, BHUAC and other 'advisory' boards) from openly relating to constituencies advocating reform. Background checks and a police-vetting process remain in place in this inadequate, police-deferential Agreement. We urge the Court to inquire about the absolute absence of community-wide outreach by these insular organs, now deemed to have failed. We urge the Court to inquire of the Auditor about burn-out rates among those who've served, for they are indicators that any Agreement that shortens deliberative cycles and places greater stress on these bodies are likely to be unreasonable. (RDH 5, A & B, Screen Captures) We have deep compassion for community members serving the perpetrators on these bodies. They bear tremendous responsibility following the unjust killing of a community member. An audit of existing conditions would reveal members' perceived futility in the task, and attitudes towards increasing demands to be made on uncompensated, volunteers. Speaking to a member of the initial IPRB, who now assists CRC, we heard the word, "Sham," associated with the disagreeable task of applying standards which deny an individual the inability to apply their own logic in their deliberations of what is just, in favor of signing off on the feasibility of perpetrator's self-exonerating conclusions (Agreement, pg. 18, relating to standards). This Agreement codifies an inadequate reliance on The People's inherent right to pursue justice. It is objectively unreasonable.

An honest, dispassionate analysis of inherent, deep dysfunction indicates to us that the IPRB is merely waiting to be dismantled. The Court is well-suited to deliberate on the merits of any particular means of

finding fact. We here plead that you refute collaborator's plans to keep – for five years or more – the pursuit of justice confined to the hackneyed IPRB. It is unreasonable to deny our aspirations for replacing a system that has failed us by perpetuating police self-exoneration. We hear submit features we would look for in methodologies we deem more likely to be adequate to The People's needs at this time (RDH 6, Personnel Performance Evals). A review of victim-centric remediation includes phrasing including 'accountability, meeting customer needs, continual improvement. Oettmeir & Wycoff's Appendix, has us realizing that this Agreement; lacking public forums, specified performance measurement systems, meaningful performance evaluation criteria and correlation to discipline; would need to pass by the DoJ Office of Community Oriented Policing to be considered adequate to the People's needs. "Managers must begin directing their attention toward the qualitative aspects of service-delivery processes and outcomes," declare the authors.

We anticipate the Court will be troubled by accepting an Agreement documenting failed implementation. Sec. 89, pg 33 states, "89. The United States expects that the local CCOs will establish, by mid-2013, one or more drop-off center(s) for first responders and public walk-in centers for individuals with addictions and/or behavioral health service needs." Cross-examination of the collaborators will reveal they've not met this obligation. Victims, by this Agreement actually face a deterioration of services. The DoJ did not influence, nor comment on, the City's decision to withdraw ongoing funding of the robust and intelligently designed Multnomah County Crisis Assessment and Treatment Center (MCATC), developed as specific remedy following the PPB homicide of James Chasse. As further evidence that you consider this Agreement a police-centric response, we testify PPB has all along refused to collaborate with these 'community social service partners' (RDH 8 B *Oregonian,* 30 April 2013). A victim-centric response would have mandated the provision of wrap-around services on offer <u>before</u> the DoJ took an interest; it would have included sanctions for failure to *raise* the level of care for our vulnerable populations.

In 2010, *prior* to DoJ involvement, PPB Chief Sizer and two City Commissioners recommended funding MCATC (RDH 8 C, Reccomended Action Items). In <u>addition</u> they indicated drop-in centers as a complimentary response. Current plans, being carried out under DoJ's watchful eye, have allowed the perpetrators to pivot from what was once deemed optimal by health care providers ... to systems law enforcement seeks to engage with. This retrograde in service delivery is inadequate by 2010 standards.

In addition to sanctions and instilling leadership committed to culture change, benchmarks & evaluations are indicators of wise policy implementation. As Mayor Adams explained, when seeking dashboard metrics in the roll-out of the Police Plan to Address Racial Profiling, "You get what you measure for." Since they are absent in mission critical areas in this bargain, we assert the Agreement is inadequate.

The community's long history of sustained pressure for adherence to constitutional protections informs us that, for any Agreement to be just, it must be overtly coercive. We plead for a ruling that both preserves The People's aspirational channel to seek redress, via the AMA Coalition and COAB, but also provides clear guidance on what the Court considers non-compliance. Benchmarks and evaluations will provide triggers, as well as initiative.

Sec. 143 calls upon the City to provide COAB with 'administrative support' to perform only "duties and responsibilities identified in this Agreement." Compare this with Introduction language (pg. 2), where the City agrees to "provide PPB the fiscal support (elsewhere support and resources) necessary to rapidly and fully implement a complete state-of-the-art management and accountability system." We look for an Agreement as enthusiastic about resources allocated to The People's need to be protected from government intrusion into their liberties.

To be adequate, we plead that the Court rule that aspirational channels we expect from COAB are not confined. Sec. 141, pg 51, authorizes COAB to 'make recommendations' to the Parties and the COCL on additional actions. Because we observe that this language is clearly inadequate to founding principles that

The People have inherent the power and authority to demand redress, we call for the Court's rejection of the Agreement. Language that grants authority to demand report and institute change are now required, for any remedy to be considered fair.

The Agreement references “trends in hazards officers are encountering,” and “latest law enforcement trends” (Sec. 79, pg 28.) Lightning fast in its negotiation, long in its trail to this Hearing, the Agreement fails to address emerging contemporary trends in The People's regard for surveillance and 'stop & frisk.' We think it unfair to enter a long-term Agreement which now fails to follow from broadening consensus.

But, plaguing Oregon since it's formation as a white homeland, carried on to modern times is racial prejudice. Portland operates its Gang Enforcement Team (GET) as white slave patrollers of old, moving in packs, demanding 'freedom papers' of people of color (RDH 7 A, diagram). To leave these civil rights violations untouched is eminently unfair. The DoJ investigation failed to understand how benchmarks alone have fail to obtain compliance with an agreement's intent. The Technical Assistance Report (RDH 7 B) informs us that, prior to the City's adoption of a Police Plan to Address Racial Profiling (2009) police failed to identify the race of less than 7% of drivers stopped. Data released in 2010, the last figures available despite a plan to release data annually, shows the 'unknown' category has risen to nearly 30% (RDH 7 C, 2010 Stop Data). Any Agreement that does not tie benchmarks to intended targets is inadequate. To be effective, a program guiding intended change must have well-defined consequences for not meeting targets. Language in the Agreement does not set easily perceived trigger points for non-compliance. This is unreasonable.

17% of exonerations of Americans found to be wrongly accused of crime had actually pleaded guilty to a crime they did not commit (RDH 7 D, *NY Times*). SCT provisions, that those in need of services such as chemical dependency treatment, must plead prior to obtaining mental health care, are problematic. We plead that the Court investigate these provisions (Sec. 93, pg. 36) before agreeing that they be implemented. We are concerned the Court is about to codify a means whereby those in mental health crisis are actually scooted past judicial review, to participate in their own incarceration (RDH 3). Another trend that failed to frame this Agreement is the implementation of the Affordable Care Act. Care facilities are guaranteed compensation for detention without trial. For this Agreement to be deemed fair, the Court must ascertain for itself that it is not approving of extrajudicial incarceration.

The Livability Crime Enforcement Offender List, codified in this Agreement, is kept from public review. There are no judicial safeguards prior to being so designated. As with Gang Designation Records, it The People have no authority to remove themselves from improper or expired eligibility. Data collection and management is solely within the realm of police, with the perpetrators' generally accepted practice of preventing civilian review or correction. There are no sanctions for incorrect listings. These features are patently unfair, if not outright illegal. The DoJ failed to meet The People's needs for oversight and accountability, by letting enshrining these civil rights violations in their Agreement.

We are troubled by any agreement that places police personnel in charge of assessing who has mental health needs. We know they lack quantifiable standards by which GET identifies gang members. Rather than expanding this interventionist role, it would be reasonable to refrain in favor of addressing shortcomings. The CCRA model seeks to engage broad segments of the community (academia, professional associations) to set 'best practices' in place.

We provide the transcript of Officer Foote, relating his contention that Mr. Keaton Otis was perceived to be a gang member, and thus required GET intervention prior to his homicide at their hands. (RDH 7 F, Statement Transcription) We provide the review by City consultants (RDH 7 G, OIR Report) which downplays the initial cause for engagement. They never cite the fact that Otis had never been involved with gangs, a troubling mis-assessment that resulted in a killing. We simply want the Court to know the nature of the City's reinforcing mechanisms that, combined with a lack of intellectual curiosity, allow

racial profiling to persist without identification, let alone remedy. We contend that, under the Agreement's current provisions; police, trained observers who increasingly fail to perceive the race of drivers stopped and searched; will also fail to recognize or ascertain the needs of those in need of mental health care. It is unreasonable to expect so.

As the parties proceed to trail in USA v. The City of Portland, the DoJ can continue to seek the dynamism of a parallel pursuit of justice within Oregon's mental health infrastructure, as described in the Agreement (Sec. 88, pp. 32-33). The DoJ reports limited progress in their separate agreement (RDH 8 A, DoJ Interim Report, State of Mental Health, Oregon). A comprehensive convergence, once the separate Agreement is entered into, is likely to be more adequate.

We hope we've demonstrated that the proposed Agreement under the Court's consideration is unreasonable. Negotiated milestones have been missed. Worse, this under-performance illustrates a deterioration in remedies offered victims *prior* to its anticipation. We think it also highlights deficiencies among collaborators: this effort to impart accountability actually lacks accountability provisions and concomitant sanctions. For this, the Agreement is inadequate.

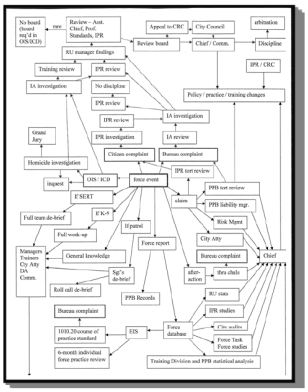
In that this Agreement is set to focus huge amounts of attention on a small subset of transgressions, we anticipate it will actually be injurious to any broad attention to civil rights violations by the perpetrators. Thrice has the State Supreme Court rejected the City of Portland's 'sit-lie' ordinances as unconstitutional, yet they now persist with plans to press against protections offered those experiencing houselessness.

The initial call for remedy against race-based deprivation of civil liberties is likely to be set aside in deep deliberation of how long and how often cattle prods should be employed against another protected class.

It is our fervent hope that you let the DoJ duke it out with local government in a legal arena. This confining Agreement is too dangerous to The People's aspirations for a broader application of justice. We cannot afford to be wrangled into a side alley for any extended period.

We rely on the Court's value of fact-finding and adjudication. We think it wise not to further codify the IPRB and all the ancillary, reinforcing mechanisms.

Best regards,



Use-of-force chart included in Sep 2012 Findings, in which the US Dept. of Justice declares Portland's 'Independent' Review Board a 'self-defeating accountability system,' when it comes to holding cops accountable. Pg 27.

Having found Portland Police violate our civil rights, the DoJ wants the City of Portland to sign a federal agreement.

They want to shorten the length of some arrows & to put 32 new employees in the boxes.

Demand civilian-led oversight, and a means to hold police accountable.

Make sure some of these arrows point bad cops to the exit!

Ultimately,
it is the responsibility
of the people
to ensure that our
Constitution is enforced.

$26,000,000 for police; not a parking space for community members.