



February 4, 2015

Via Electronic Mail

Police Commission Office
Thomas J. Cahill Hall of Justice
850 Bryant Street, Room 505
San Francisco, California 94103-4603
Email: sfpd.commission@sfgov.org

Re: SFPD's arrest on Tuesday January 27 of Deputy Public Defender Jami Tillotson

Dear Commissioners:

I am writing you on behalf of the American Civil Liberties Union of Northern California ("ACLU"). We have serious concerns with the actions of officers of the San Francisco Police Department in arresting Jami Tillotson, a Deputy Public Defender, who was trying to represent her client. We believe that this incident, as captured on video, raises issues that go beyond the criminal charge pending against Ms. Tillotson, and that are within the core jurisdiction and purview of this Commission.

On Tuesday, January 27, 2015, many San Franciscans were shocked by the news reports and video showing Ms. Tillotson being arrested outside a courtroom and being led away in handcuffs for doing her job –advising her client of his rights, and verbally protesting the actions of the police in questioning and photographing him and his companion in the courthouse corridor. Ms. Tillotson had just represented her client in court, and was in another courtroom when she was informed about the police actions. She immediately came outside to insure that his rights were being respected.

The actions of the officers, and in particular Sergeant Stansbury who was taking the photographs and appeared to be in charge, call into question whether the officers were adhering to long-standing SFPD policies and fundamental constitutional standards. From a broader perspective, the spectacle of two African American young men being targeted by the police within a public space inside a courthouse without their lawyer present, and then having that lawyer handcuffed and carted away for trying to advise them, raises the specter that other young men of color are being similarly targeted for intrusive investigations and photographing in the community where attorneys are not on the scene.

The San Francisco Police Department has a documented history of racial profiling¹. We recognize that there have been proactive and commendable measures taken by SFPD and this Commission to address and ameliorate this problem, and in some of these efforts, there has been a productive collaboration between SFPD and the ACLU. But, as Ferguson reminds us, this country and this City have a long way to go to overcome the community distrust and fear of the police that are prevalent in certain communities. The actions of the police last Tuesday have an appearance of police overreaching and racial profiling. Therefore, it is important that the Commission review this matter to see whether additional policies or guidelines are needed to guide the discretion of police officers in these situations.²

The following are some of specific legal and policy considerations that we believe merit the attention of the Commission:

1. **SFPD General Order 5.03.** The police actions may violate the letter and the spirit, of SFPD General Order 5.03 (a copy of which is attached). That General Order was part of a 1986 federal court consent decree that is still in effect. (*John Crew v. Gary Delagnes*, N.D. Cal., #C85-6630). The case arose out of police overreaching under circumstances similar to this case. An ACLU attorney was observing the police actions in Hallidie Plaza in which homeless persons were being questioned and told to move on. The police officer ordered Mr. Crew to identify himself and he refused. He was then placed under arrest and charged with violating Penal Code § 148, the same charge that has been levied against Ms. Tillotson. The settlement of the federal civil rights lawsuit that followed was a damages award plus the adoption of General Order 5.03. The Order provides clear and concrete limits to the police use of investigatory detentions. Even a brief detention for questioning or to request identification is only permissible if the officer “has a reasonable suspicion that the person’s behavior is related to criminal activity.” And the Order makes it clear that a person’s refusal to identify themselves is not unlawful and within that person’s rights.

¹ See, e.g., Center on Juvenile and Criminal Justice Report, [San Francisco’s Arrest Rates of African Americans for Drug Felonies Worsen](http://www.cjcj.org/uploads/cjcj/documents/Drug_Policy_2012_in_SF.pdf), April 2012: http://www.cjcj.org/uploads/cjcj/documents/Drug_Policy_2012_in_SF.pdf, see also, ACLU of Northern California Report, [A Department in Denial: The San Francisco Police Department’s Failure to Address Racial Profiling](https://www.aclunc.org/publications/department-denial-san-francisco-police-departments-failure-address-racial-profiling), October 2002: <https://www.aclunc.org/publications/department-denial-san-francisco-police-departments-failure-address-racial-profiling>.

² Limiting discretion and providing specific guidelines for officers in General Orders, and assuring that they are properly implemented, is a charter-mandated duty of this Commission. Some of the policies that have been instituted as a result go beyond the Constitution in protecting the rights of San Franciscans. It is part of the uniqueness of San Francisco that in some cases these guidelines have been proactively embraced by the Police Chief, including Chief Suhr. A perfect example of that is General Order 8.10, which establishes guidelines for the investigation of First Amendment activity, and is on the agenda for tonight’s Commission meeting.

The situation that Ms. Tillotson walked into in the corridor was anything but clear. The officers had not made it clear to her that the two men were being detained or what was the reasonable suspicion that would justify a detention. If the men were not being detained, they were free to walk away and to avoid being photographed. In this murky situation created by the police, Ms. Tillotson had every right, and even duty, to advise her client of his rights and to question Sergeant Stansbury as to his actions in targeting her client.

2. Fourth Amendment. Constitutional rights are also at risk in this video. The presence of five officers (four uniformed) outside a courtroom is an intimidating presence, and one clearly meant to convey coercive authority. Did the officers take any steps to clarify why the men were detained or even if they were detained? Without specific and articulable facts that could provide the basis of reasonable suspicion, the General Order and the Fourth Amendment prohibit imposing restraints on the men to allow the police to engage in such questioning and photographing, much less to arrest their lawyer who is peacefully seeking to clarify the situation to be able to advise them of their rights.

Media accounts reveal some confusion in SFPD on these critical constitutional boundaries. In the S.F. Examiner on January 28th, Officer Albie Esparza defended Sgt. Stansbury: ...“it was the sergeant’s duty to detain and question the man if he thought that he was of interest to an investigation”.³ However, a “person of interest” is **not** the standard set by the General Order (or the Fourth Amendment) as to who can be subjected to a detention. Officer Esparza’s comment in itself should raise a red flag to this Commission as to whether policer officers are adhering to SFPD policies and constitutional limits in these situations, and whether there is a need for further clarification of current SFPD policies.

3. First Amendment. Ms. Tillotson had a First Amendment right to question and even protest the police actions on the scene, a right that was supplemented by her ethical duties as a lawyer. *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16, (1973). Just advising them of their rights and verbally challenging the police actions, without any physical interference or obstruction, cannot support a charge of PC §148. Whether the police were acting constitutionally in their investigation of the two men is directly relevant to the criminal charge against Ms. Tillotson, as Penal Code §148 only prohibits obstruction of a “lawful” police activity. *Smith v. City of Hemet*, 394 F.3d 689, 695 (2005), *Nuno v. Cnty. of San Bernardino*, 58 F. Supp. 2d 1127, 1133 (1999).

³ Rob Nagle, *Adachi blasts deputy public defender’s arrest; police say arrest was lawful*, S.F. Examiner, Jan. 28, 2015, available at <http://www.sfexaminer.com/sanfrancisco/adachi-blasts-deputy-public-defenders-arrest-police-say-arrest-was-lawful/Content?oid=2918182>

The Commission has the responsibility to hold the Police Department to the highest standards and to assure that constitutional limits are being followed. The ACLU calls on the Commission to address the following questions:

- Does SFPD have a policy and practice of questioning and photographing persons as they are leaving courtrooms? If so, are these persons (and their attorneys if present) being informed if they are detained and the reasons for the detention?
- Does SFPD policy and practice with respect to photographing persons in and around courtrooms take into account the potential intimidating effect of conducting investigative detentions and photo lineups of persons involved in the criminal justice system as witnesses, friends of the defendant, or of the person charged with an offense? Will this have a chilling effect on a person's willingness to come to court and to participate in the criminal justice system?
- Do the policies and practices of SFPD draw a sufficiently clear and specific line as to whether a lawyer who may be present during such an encounter has the right to question and even criticize the actions of the police and to advise the client of their rights?
- What are the practices of the SFPD with respect to photographing individuals who are "persons of interest"? Can they be questioned and photographed without reasonable suspicion of their involvement in criminal activity?

There is a broader issue involved. Given the actions taken by Officer Stansbury and his team within the confines of a courthouse and with an attorney present, this incident and the video are going to raise questions and concerns about how SFPD operates on the streets. Are young men of color being stopped and questioned without reasonable suspicion of criminal activity? In the age of the cellphone, photography has become pervasive. Are young men having their pictures taken, perhaps because they are present in the "wrong neighborhood" or because they are wearing garments of the "wrong color"? Are these kinds of practices generating the same kind of community hostility and fear that surfaced in Ferguson?

Because the practice of investigative detentions can be abused, General Order 5.03 was adopted to guide the discretion of the police. The Order specifies that only with reasonable suspicion can the police request identification from a person. A similar rule applies to taking photographs of people on the streets – they should not have to fear they will end up in a police file or photo lineup based on "a mere suspicion" or "hunch". The Commission should consider whether there is a need for additional policy guidance that addresses the questions raised by this incident.

Sincerely,



Alan L. Schlosser
Legal Director

INVESTIGATIVE DETENTIONS

This order establishes policies and procedures regarding investigative detentions.

I. POLICY

- A. DETENTIONS.** It is the policy of the San Francisco Police Department that every person has the right to use the public streets and public places so long as he/she does not engage in criminal activity. Factors such as the person's race, sex, sexual orientation, gender, gender identity, gender presentation, age, dress, unusual or disheveled or impoverished appearance do not alone justify even a brief detention, a request for identification, or an order to move on, nor do general complaints from residents, merchants or others.
- B. REASONABLE SUSPICION.** A police officer may briefly detain a person for questioning or request identification only if the officer has a reasonable suspicion that the person's behavior is related to criminal activity. The officer, however, must have specific and articulable facts to support his/her actions; a mere suspicion or "hunch" is not sufficient cause to detain a person or to request identification.
- C. LENGTH OF DETENTION.** A detention must be brief and limited to the amount of time reasonably necessary to conduct the investigation.
- D. REQUESTS FOR IDENTIFICATION.** The refusal or failure of a person to identify himself or herself or to produce identification upon request of a police officer cannot be the sole cause for arrest or detention, except where the driver of a motor vehicle refuses to produce a driver license upon the request of an officer enforcing the Vehicle Code or the Traffic Code. Except in the case of a driver of a motor vehicle, a person's refusal or failure to produce identification is not unlawful, and an officer may not threaten a person with arrest solely for his or her refusal to identify himself or herself.
- E. ORDERS TO MOVE ON.** Officers do not have the authority to order persons to "move on" absent probable cause to believe an offense has occurred, or absent articulable facts requiring movement for public safety. Also see DGO 5.07, Rights of Onlookers.
- F. WARRANT CHECKS (POLICY).** See DGO 6.18, Warrant Arrests.

II. PROCEDURES

A. CERTIFICATE OF RELEASE/INCIDENT REPORT/DUTIES OF DETAINING OFFICER

1. BRIEF DETENTIONS. If you briefly detain a person where you stop him/her, or move a person a short distance for safety, convenience, or privacy, the person is not considered arrested or taken into custody. When releasing the person, you need not issue a Certificate of Release or prepare an incident report.
2. PROLONGED DETENTIONS. If, however, you release a person after he/she has been moved a substantial distance or has been detained a significant length of time, you must issue the person a Certificate of Release and prepare an incident report justifying the movement or the length of detention. Title the incident report "Investigative Detention," list the person as "D" detained, and include the reasons) the subject was detained such a long tune or why he/she was moved.
3. PHYSICAL RESTRAINT. If you take the detained person to a police facility or physically restrained the person, issue a Certificate of Release.
4. UNDER THE INFLUENCE. If you arrest a person solely for being under the influence of a narcotic, drug or restricted dangerous drug and take him/her to a facility or hospital for treatment and no further proceedings are desirable, issue the person a Certificate of Release.
5. QUESTIONABLE SITUATIONS. If there is doubt as to whether you should issue a Certificate of Release, always resolve the doubt by issuing the form.
 - b. FORM PREPARATION AND FILING. Complete the Certificate of Release form in duplicate. Give the. original to the person being released and forward a copy to the Records Section, Room 475, Hall of justice.

References

Penal Code Section 849(b)