Office of the Sheriff

Charles County, Maryland

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Kevin B. Karpinski, Esq.
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Sun Trust Building
120 East Baltimore Street, Suite 150
Baltimore, MD 21202-1617

Re: IA #22-032 Lt. [redacted]

Dear Mr. Karpinski:

The Sheriff's Office has received and reviewed the Administrative Charging Committee's ("ACC") disposition of the above internal affairs investigation. The investigation was forwarded to the ACC on March 14, 2023. The ACC's disposition report and notice of charges were received by the Sheriff's Office on June 13, 2023. As required by law, the Sheriff offered the ACC's discipline to Lt. [redacted]. Lt. [redacted] has declined the offered discipline. The County Attorney and the Police Accountability Board have been notified of the need for a trial board.

I am directed to advise the ACC of the position the Sheriff's Office will take at the hearing.

The ACC has charged Lt. [redacted] with violating AOM 1-136, "Performance of Duty." Lt. [redacted] was one of several officers investigating a stolen Dodge Durango at the La Plata Wal-Mart on August 31, 2022. Two citizens, Mr. [redacted] and Mr. [redacted], were detained during the investigation. The officers determined that Mr. [redacted] and Mr. [redacted] were not connected to the Durango and were released. The ACC's statement of Lt. [redacted]'s misconduct is: "The investigation reveals that Lieutenant [redacted] failed to take appropriate investigative steps to ensure that Messrs. [redacted] and [redacted] were actually the individuals who exited the Durango. The failure to do so resulted in Messrs. [redacted] and [redacted] being detained without legal justification."

The Sheriff's Office's position is that the ACC's factual conclusion ("failed to take appropriate investigatory steps") is not supported by a preponderance of the evidence and its legal conclusion (caused the men to be "detained without legal justification") is contrary to the holdings of the United States Supreme Court, the Fourth Circuit and Maryland appellate courts in the more than fifty years since *Terry v. Ohio*, 392 U.S. 1 (1968).

A driver of the stolen Dodge Durango had engaged police in a high speed chase the night

before Mr. [redacted] and Mr. [redacted] were detained. On August 31, a captain saw the Durango in La Plata and ultimately followed it to the Wal-Mart parking lot. Meanwhile, patrol officers responded to the parking lot. PFC Miller saw the Durango, now parked, and saw two men about thirty feet from the Durango walking toward the entrance. PFC Miller saw nobody else in the area. PFC Miller took steps to confirm the description of the two men he had seen by reviewing video inside Wal-Mart. Mr. [redacted] and Mr. [redacted] were identified as the two men he had seen.

Mr. [redacted] and Mr. [redacted] were detained for roughly ten minutes. During that time, PFC Miller returned inside Wal-Mart to watch additional surveillance. As soon as he determined that two *other* males had exited the Durango, Mr. [redacted] and Mr. [redacted] were released.

Lt. [redacted] himself arrived at the Wal-Mart and participated in the detention.

The ACC's position – that the Sheriff's Office would have to prove by a preponderance of the evidence before the trial board – is that Lt. [redacted] "failed to take appropriate investigatory steps" before the gentlemen were detained. Neither the charging document nor the disposition report explain what the "appropriate investigatory steps" should have been other than a conclusion that Lt. [redacted] "should have insisted that the surveillance video be reviewed to confirm that [redacted] and [redacted] were the two individuals who exited the vehicle."

With the benefit of hindsight, reviewing *more* of the Wal-Mart video would have been an appropriate additional step; in fact, that is precisely what occurred after the detention. However, that conclusion fails to take into consideration the tense and rapidly unfolding situation confronted by the officers at the time. PFC Miller believed the two men he had observed were associated with a stolen motor vehicle (a felony, and the vehicle had been reported stolen in the District of Columbia, another jurisdiction) and had failed to obey police commands to stop just the day before. The officers did not have the luxury of deliberating for hours. As Lt. [redacted] explained during the event, waiting to act would have increased the likelihood the suspects would make it outside the store where apprehension would be much more problematic. As the United States Supreme Court has put it, "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished," but that does not make the police actions unreasonable. *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985). In the Sheriff's Office's view, that a reviewing person or body would have done things differently is not an appropriate standard to determine if misconduct occurs.

Under the holding of *Terry v. Ohio*, *supra*, a police officer may detain a person if the officer has "reasonable suspicion" that the person is, has, or is about to be engaged in criminal behavior. Officers have reasonable suspicion "when they can point to specific and articulable facts which, taken together with reasonable inferences from those facts, evince more than an inchoate and particularized suspicion or hunch of criminal activity." *United States v. Howell*, ___F.4th ____, slip op. at 10 (4th Cir. June 22, 2023) (cleaned up). "Reasonable suspicion exists somewhere between unparticularized suspicions and probable cause." *In re D.D.*, 479 Md. 206, 230 (2022). The Supreme Court of Maryland has repeatedly explained "'the level of suspicion necessary to constitute reasonable, articulable suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence and obviously less demanding than that for probable cause.'" *Id.* at 231 (quoting *Graham v. State*, 325 Md. 398, 408 (1992)). Significantly, reasonable suspicion "'can arise from information that is less reliable than that required to show probable cause.'" *Id.* (quoting *Alabama v. White*, 496 U.S. 325 (1990)). There is absolutely no requirement that an officer's suspicion be *correct*. Indeed, the function of a "*Terry* stop" is for an officer to confirm *or dispel* his suspicion of wrongdoing.

Here, the involved officers articulated these factors prior to stopping Mr. [redacted] and Mr. [redacted]:

- The Dodge Durango had been reported stolen through the Metropolitan Police Department.
- The Dodge Durango had led officers in a high-speed chase the night before.
- Captain Carlson saw the stolen Durango and followed it to the Wal-Mart parking lot.
- PFC Miller saw the Durango in the parking lot immediately thereafter.
- PFC Miller saw two men walking from the area of the Durango and gave a brief description.
- *Nobody else was seen in the area of the Durango.*
- PFC Miller reviewed surveillance video to confirm the description of the men he had seen.
- The two men were about to leave the store when they were detained.

The officers had far more than a "hunch" that criminal activity was afoot: they had probable cause to believe a felony motor vehicle theft offense was occurring. That Mr. [redacted] and Mr. [redacted] were connected to the Durango was also more than a hunch; they were seen coming from the direction of the Durango within minutes (at most) of the Durango being parked and there were no other people seen. That last fact means that the officers' suspicion was *particularized* as to both Mr. [redacted] and Mr. [redacted]. In the Sheriff's Office view, that information is sufficient to establish reasonable suspicion.

At a hearing, though, the burden would not be on Lt. [redacted] to show there *was* reasonable suspicion, but on the Agency to show there was *not*. The Agency is unable to meet that burden.

Once a stop has occurred, officers must diligently pursue a means of investigation "'likely to confirm or dispel their suspicions quickly.'" *Howell*, *supra*, slip op at 16 (quoting *Sharpe*, 470 U.S. at 686)). The officers here did precisely that. PFC Miller immediately returned to Wal-Mart, watched more of the video, and the gentlemen were released.

In its disposition report (but not in the actual charging document), the ACC expressed concerns about the handcuffing of Mr. [redacted] and Mr. [redacted]: "...there were inadequate investigatory steps taken in order to ascertain whether and Minor were the two individuals who exited the Durango in order for them to be handcuffed and detained." Handcuffs are not an automatic part of a *Terry* stop. Use of handcuffs may elevate a stop into an arrest, *Longshore v. State*, 399 Md. 486, 509 (2007), but use of handcuffs to prevent flight or to effectuate reasonable law enforcement needs does not. *Trott v. State*, 138 Md.App. 89, 118-121 (2001). Here, every single officer interviewed (including officers from a different agency) articulated why handcuffs were reasonable based on the information known at the time. To reiterate – the Durango had been stolen from another jurisdiction, and the occupant(s) had already eluded capture. Lt. [redacted] himself provided this articulation:

> Lt. [redacted] said based on his twenty-four years of experience, when people are involved in crimes, many times they flee on foot or in a vehicle when approached by the police. He indicated his intentions were to ensure officers did not endanger any citizens if [redacted] and [redacted] were to flee on foot through a crowded parking lot or maybe even make it to a vehicle. He indicated the chase the previous day played a factor in his decision as well. He knew the suspects were never identified the previous day and officers suspected [redacted] and [redacted] were possible connected to the Durango. Inv.Rep. at 76.

Nobody disputes that from *Mr.* [redacted]*'s* and *Mr.* [redacted]*'s* perspectives, both the stop and the handcuffs were unreasonable. The question, though, is not whether Mr. [redacted] and Mr. [redacted] were reasonably upset by what occurred. The question is did *Lt.* [redacted] engage in police misconduct.

The answer, in the Sheriff's Office, is a very clear "no." There is certainly not a preponderance of the evidence to prove otherwise.

An analogous, but far more upsetting, situation was recently described by the Tenth Circuit in *Hemry v. Ross*, 62 F.4th 1248 (10th Cir. 2023). The Hemry family (husband, wife, and seven year old daughter) were innocent campers visiting Yellowstone Park. Police from multiple states were looking for a man who had murdered three women in Idaho. A park employee (erroneously) reported to park rangers that Mr. Hemry was the wanted fugitive and gave a description of the Hemry car. Rangers detained the Hemry parents at gunpoint, handcuffed them, and held them for about twenty minutes – all in the presence of their young daughter. The Tenth Circuit dismissed the Hemrys' lawsuit against the rangers. The rangers had reasonable suspicion that they were confronting a "fugitive triple-murderer." The rangers' use and display of force were reasonable components of a *Terry* stop.

Finally, in more broad terms, the ACC has charged Lt. [redacted] with violating AOM 1-136, "Performance of Duty," but does not identify any agency policy that specifies the "duty" Lt. [redacted] failed to perform.

For these reasons, the Sheriff's Office will not be presenting any evidence regarding Lt. [redacted]'s alleged misconduct to the trial board.[1]

Sincerely,

Jerome R. Spencer
General Counsel

[1] As part of the same disposition report, the ACC sustained a finding of police misconduct against Cpl. [redacted], for violating AOM 1-110, "Courtesy." Although the Sheriff's Office reached a different conclusion, the Sheriff's Office acknowledges that there is some evidence to support that charge.