



BERKELEY CITY COUNCILMEMBER
TERRY TAPLÍN
DISTRICT 2

SUPPLEMENTAL AGENDA MATERIAL

For Supplemental Packet 2

Meeting Date: 7-12-22

Item Number: 18

Item Description: Revisions to Section 311.6 Warrantless Searches of Individuals on Supervised Release Search Conditions of the Berkeley Police Department Law Enforcement Services Manual

Submitted by: Councilmember Taplin

Amendments contained herein would mirror the Oakland Police Department's General Order R-02: Searches of Individuals on Probation, Parole, Mandatory Supervision and PRCS (Postrelease Community Supervision).

In 2019, Oakland adopted the attached policy "to enhance the effectiveness of Officers when coming into contact with those individuals on Supervised Release and to provide clear guidelines for the use of Supervised Release searches." R-02 limits warrantless searches of individuals on Supervised Release for Non-Violent Offenses and requires officers to "consider, articulable facts which demonstrate that the individual is connected in some way to criminal activity or that the individual is an Imminent threat to officer or citizen safety" while allowing for the search of individuals on Supervised Release for Violent Offenses pursuant to the terms of condition for Supervised Release. Moreover, R-02 prohibits searches for capricious, arbitrary purposes or the purpose of harassment.

Although the Oakland Police Department is under a federal consent decree whereas the Berkeley Police Department is not, Council may remedy the public safety concerns raised by

the original item while maintaining our commitment to fair and impartial policing by adopting the Oakland policy.



Lori Droste
Councilmember, District 8

Consent Calendar
Tuesday, March 22, 2022

To: Honorable Mayor and Members of the City Council

From: Councilmembers Lori Droste

Subject: Revisions to Section 311.6 *Warrantless Searches of Individuals on Supervised Release Search Conditions* of the Berkeley Police Department Law Enforcement Services Manual

Recommendation

Revise Section 311.6 *Warrantless Searches of Individuals on Supervised Release Search Conditions* of the Berkeley Police Department (BPD) Law Enforcement Services Manual to enable officers of the Berkeley Police Department to conduct detentions and warrantless searches individuals on parole/probation consistent with and supportive of the provisions in the probationer's/parolee's release conditions. The proposed revisions are shown in strikethrough and double-underline below:

Officers shall not detain and search a person on probation or parole solely because the officer is aware of that person's probation or parole status. **Individuals contacted or detained who are found to be on searchable Supervised Release for Violent Offenses¹ may be searched pursuant to the terms of their Supervised Release conditions.** ~~The decision to detain a person and conduct a probation or parole search, or otherwise enforce probation or parole conditions, should be based upon articulable facts that support a need to enforce and/or confirm compliance with probation or parole conditions.~~ **The decision to detain a person and conduct a probation or parole search for those on supervised release for nonviolent crimes²** should be made, at a minimum, in connection with articulable facts ~~that create a reasonable~~

¹ Offenses involving the use of force, the threat of force, the use or possession of a weapon, sexual violations against the person of another, human trafficking, and the use of force or threats to public safety. Battery on a Peace Officer (Penal Code § 243(b)), Reckless Evasion in a Vehicle (Vehicle Code § 2800.2(a)), or a violent felony as defined in Penal Code § 667.5(c)., fall into the categories of violent crimes, weapons offenses, sex crimes and/or crimes involving threats to public safety in accordance with state law.

² "Non-Violent Offenses" are defined as offenses in which violence or use of a weapon or threat to life safety is not a factor.

~~suspicion that a person may have committed a crime, be committing a crime, or be about to commit a crime~~ **which demonstrate that the individual is connected in some way to criminal activity or that the individual is an imminent threat to officer or citizen safety.** ~~have committed a crime, be committing a crime, or be about to commit a crime.~~ In the conduct of all such detentions and searches, officers shall consciously avoid the application of bias, shall not use such detentions or searches as a means to harass or annoy, and shall not conduct such detentions and searches in a manner that targets or is discriminatory toward any protected class.

Problem or Summary Statement

Existing provisions of the BPD Law Enforcement Services Manual do not permit BPD officers to conduct warrantless searches and seizures of probationers/parolees in a manner that would be consistent with the conditions of their release. The restrictiveness of these provisions places those on probation/parole on nearly equal footing with respect to Fourth Amendment rights as those not on probation/parole. Not only is this circumstance at odds with the nature and purpose of probation/parole, it also prevents officers from effectively implementing the conditions of release imposed by sentencing judges. This limits officers' ability to proactively address recidivism and therefore presents a potentially significant risk to public safety.

Background

Probation/parole is a prison/jail sentence that is suspended on the condition that the offender follow certain prescribed rules and commit no further crimes. As part of these terms, individuals released on probation/parole are often required to waive all or a portion of their Fourth Amendment rights (which would otherwise normally guard against unreasonable search and seizure) in order to secure their release.

Fundamentally, these waivers reflect the fact that for a probationer/parolee, the full term of what would otherwise have been an incarceration is not yet complete. More practically, courts often impose these waivers as a condition of probation/parole because they recognize that both in general and for the individual in question, there may be a higher likelihood of recidivism or additional crimes, which must be guarded against.

When determining the extensiveness/intrusiveness of such Fourth Amendment waivers, sentencing justices will usually consider the nature and severity of the crime. Probation is typically issued with terms that allow for an individual's: 1) person; 2) property; 3) residence; and/or 4) vehicle to be searched at any time. Allowing only for a search of the person only would constitute a "one-way" search clause, whereas allowing for all four would constitute a "four-way" search clause. In extreme cases, an offender's terms may include these terms and an additional term allowing for the search of any/all of the individual's electronic devices, resulting in a "five-way" search clause. This is considered the most complete and intrusive of search terms.

Current Situation and Its Effects

Currently, an individual on probation or parole in Berkeley would be on nearly equal footing as someone who is not on probation or parole when it comes to search and seizure. This would, for example, mean that someone with a history of crimes involving firearms could not have their person or vehicle searched by BPD officers unless there were “articulable facts” that could be given to indicate that the individual had committed, was committing, or would commit a crime. In the case of a crime involving a firearm, such articulable facts would likely come only after a serious threat to public safety had already manifested. Although such risks would rightly not normally be sufficient to justify a search and seizure, in the case of probation and parole, courts typically recognize both a heightened risk and a diminution of Constitutional rights associated with a provisional release.

To give another particularly disturbing example, there is currently a sex offender residing in Berkeley whose crimes were so severe that the judge deemed that a “five-way” search clause was necessary in the offenders probation/parole conditions. Moreover, the court imposed a number of heightened restrictions on the individual in recognition of the seriousness of their offense, including prohibitions on the possession of images of children and on sleeping in any dwelling where children were present. Under current section 311 policies, BPD would not be permitted to search the individuals’ electronic devices to ensure that the judge’s order was being followed.

Criteria Considered

Effectiveness

This policy would apply only to searches and seizures involving individuals on probation or parole; the Fourth Amendment rights of others would not be affected. With regard to individuals on probation or parole, however, BPD would be able to more easily and effectively enforce the conditions of those individuals release, and guard against recidivism.

Fiscal Impacts

By potentially averting crimes, this policy change could serve to reduce policing costs since crime prevention is typically less costly than after-the-fact investigation, remediation, etc. Additionally, by serving to reduce recidivism, this policy could reduce overall costs to the criminal justice system.

Environmental Sustainability

The proposed policy would not result in any appreciable impacts with respect to environmental sustainability.

Equity

Regardless of whether this policy change is adopted, it will remain incumbent upon the Berkeley Police Department to respect the Fourth Amendment rights of individuals who are not on probation or parole; and for those on probation or parole, to limit such intrusions to those that

are explicitly noted in the conditions of their release. BPD will also remain responsible for exercising its authority and responsibilities in a manner free of discrimination or bias. Since the practice of this revised policy would be no more or less likely than the existing policy to suffer from the effects of bias, this proposal is not anticipated to have any appreciable negative impacts on equity as it relates to BPD conduct. Additionally, impacts from crime tend to fall disproportionately on lower-income communities and people of color. If the fuller use of court-ordered avenues for search and seizure succeed in averting crimes, this proposed policy change could have the effect of promoting greater equity with respect to impacts from crime.

Attachments

Current Berkeley Police Department Law Enforcement Services Manual



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Councilmember, District 8

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