

**IN THE  
COURT OF APPEALS OF MARYLAND**

---

SEPTEMBER TERM, 2019

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**MISC. NO. 6**

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**BALTIMORE CITY POLICE DEPARTMENT, et al.,**

**Appellants,**

**v.**

**IVAN POTTS,**

**Appellee.**

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**ON CERTIFIED QUESTION FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF MARYLAND**

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**APPELLANTS' BRIEF**

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**APPELLANTS' BRIEF**

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**STATEMENT OF THE CASE**

This Court's resolution of this case will decide whether the citizens of Baltimore City will have to pay for the egregious and despicable acts of criminal co-conspirators who just happened to be officers of the Baltimore City Police Department ("BPD"). Former BPD officers Wayne Jenkins, Evodio Hendrix, and Maurice Ward (the "Co-Conspirators"), were

convicted in federal court of racketeering, racketeering conspiracy, and robbery. During and in furtherance of that criminal conspiracy, the Co-Conspirators committed crimes against Appellee Ivan Potts, including planting a gun on him and committing perjury in order to ensure that he went to jail on false charges. It is hard to imagine a more flagrant violation of public trust, or a more radical departure from legitimate police work. Although the multitude of overt acts encompassed by the conspiracy of which the Co-Conspirators were convicted did not include the specific crimes against Potts, such serendipity does not preclude this Court from ensuring that they do not evade financial liability by improperly foisting on taxpayers the costs of their criminally tortious conduct. The Maryland General Assembly could not possibly have intended to permit such a gross evasion of responsibility by gangster cops.

The sole question before this Court is whether the Co-Conspirators were acting within the scope of their employment when they committed the intentional and willfully malicious crimes against Potts using their police status and equipment as mere disguises. Potts obtained a judgment against the Co-Conspirators in the United States District Court for the District of Maryland; he then filed an enforcement action against Appellants BPD and the Mayor and City Council of Baltimore (collectively, the “City”).



Pursuant to the Local Government Tort Claims Act (the “LGTC”), the City must indemnify judgments against employees “for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government.” Md. Code, Cts. & Jud. Proc. § 5-303(b). A Memorandum of Understanding between the City and the Fraternal Order of Police contains a mirror provision. The federal district court certified to this Court the question of whether, under the LGTC, the Memorandum of Understanding, and the undisputed material facts in this case, the Co-Conspirators were acting within the scope of their employment when they committed their torts against Potts.

They were not.

The crimes against Potts were part and parcel of the broader criminal conspiracy to which these criminals pled guilty in federal court. The crimes/overt acts against Potts constituted the very same type of crimes/overt acts captured in the Co-Conspirators’ plea agreements. More importantly, the crimes against Potts enabled the broader criminal conspiracy precisely because his arrest appeared, on the surface and as presented by the Co-Conspirators to BPD, to be legitimate.

Independent of the broader criminal conspiracy laid out in the federal plea agreements, however, the criminally tortious acts against Potts –

including assault, planting a gun, and perjury – were, in and of themselves, outside the scope of the Co-Conspirators’ employment. Both Maryland case law and common sense dictate this result. Criminals who commit willful felonies against and terrorize members of a community, in furtherance of a personally motivated criminal conspiracy, and in contravention to the interests of their employer, cannot ever be said to be acting within the scope of their employment. Accordingly, the City should not have to expend taxpayer dollars to pay judgments entered against convicted criminals who committed the most outrageous and heinous torts, simply because the tortfeasors happened to be employed by the BPD.

### **CERTIFIED QUESTION**

Whether, in light of the undisputed facts in the record, the Local Government Tort Claims Act, and the Memorandum of Understanding between the City and the Fraternal Order of Police, the three former Baltimore City police officers named in this action are entitled to indemnity for the judgments entered against them herein; that is, whether, as a matter of law, the judgment sought to be enforced by Potts is based on tortious acts or omissions committed by the officers within the scope of their employment with the City.

### **STANDARD OF REVIEW**

This Court has agreed to answer the question above pursuant to the Maryland Uniform Certification of Questions of Law Act, Maryland Code, Courts & Judicial Proceedings §§ 12-601–12-613. “Under the Certified

Questions of Law Act, this Court’s statutorily prescribed role is to determine only questions of Maryland law, not questions of fact.” *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 681 (2000). Accordingly, the Court must accept the facts submitted by the certifying court, *e.g.*, *Price v. Murdy*, 462 Md. 145, 147 (2018), and “confine [its] legal analysis and final determinations of Maryland law to the question[] certified,” *Parler & Wobber*, 359 Md. at 681.

## STATEMENT OF FACTS

The parties’ twenty-nine-page Stipulated Statement of Undisputed Material Facts, with accompanying exhibits, appears on pages 272 through 502 of the joint record extract. Below are some of the more salient facts.<sup>1</sup>

### A. Legal and procedural background

2. Momodu Bondeva Kenton Gondo, **Evodio Calles Hendrix**, Daniel Thomas Hersl, **Wayne Earl Jenkins**, Jemell Lamar Rayam, Marcus Roosevelt Taylor, **Maurice Kilpartrick Ward**, and Thomas Allers (at times hereinafter referred to jointly and severally as “co-conspirators”) are former officers of the BPD, members of the so-called Gun Trace Task Force (“GTTF”) all of whom were indicted by the Office of the United States Attorney for the District of Maryland for their knowing and willful participation in a wide-ranging, years-long racketeering conspiracy, as described in detail below.

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<sup>1</sup> Numbered paragraphs are reproduced verbatim from the Stipulated Statement of Undisputed Material Facts. Bold font is used to add emphasis.

3. [A]ll of the co-conspirators have either pled guilty or were found guilty of their crimes following trial.
4. The Baltimore City Lodge #3 of Fraternal Order of Police, Inc. (“FOP”) is a nonstock corporation and a labor organization that is the sole authorized collective bargaining representative for rank and file BPD police officers (including sergeants and lieutenants).
5. The Memorandum of Understanding (“MOU”) described *infra* at paragraph 8 was negotiated by the FOP on behalf of BPD officers; the co-conspirators are and remain beneficiaries of such MOU and any predecessor and successor MOU.
6. The indemnification provision of the Local Government Tort Claims Act (“LGTC”), codified at Md. Code, Courts & Jud. Proc. Art., sec. 5-303(b) provides: “Except as provided in subsection (c) of this section, a local government shall be liable for any judgment against its employee for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government.”
7. Both the City and the BPD are deemed “local governments under the LGTCA but the City alone maintains a “suits and judgments account” for the payment of settlements and judgments arising out of police-involved litigation and, exclusive of the BPD, makes disbursements therefrom on behalf of the BPD, whose personnel are afforded indemnification under sec. 5-303(b), whereby the City, via its use of the “suits and judgments account” (an account within the City’s General Fund), customarily satisfies judgments up to (and sometimes above) the statutory cap that are entered against BPD personnel when same are found to arise out of actions committed within the scope of their employment as provided by the LGTCA.

8. The current labor agreement between the FOP and the BPD is memorialized via the MOU between the BPD and the Baltimore City Lodge No. 3, Fraternal Order of Police, Inc. Unit I, Fiscal Years 2018-2020. Article 15 (“Protection Against Liability”) of the MOU provides in part:

[L]egal counsel will be provided in any civil case when the plaintiff alleges that an employee should be held liable for acts alleged to be within the scope of his employment and/or his official capacity. The City will provide indemnification to any member of the unit who is made a defendant in litigation arising out of acts with the scope of his/her employment that results in a monetary judgment being rendered against the employee.

9. The allegations in the indictments against the co-conspirators, and the additional criminal wrongs not included in the indictment, but as to which the co-conspirators have pled guilty or were found guilty following trial, demonstrate **actions that are dramatically at odds and contrary to the customary and normal duties of legitimate law enforcement**, including officers of the BPD.
10. No duty of indemnification is imposed under the relevant sections of the LGTCA or the MOU for liability incurred based on acts and conduct that are without the scope of employment of BPD officers.

(E. 273–75).

### **B. The Co-Conspirators’ crimes against Potts on September 2, 2015**

33. Hendrix, Jenkins, and Ward were on duty on September 2, 2015, when Mr. Potts was walking from his home to a grocery store. He was at all times engaged in lawful conduct and lawfully permitted to be walking at that given location. As he was doing so, the co-conspirators jumped out of an unmarked car and stopped Mr. Potts.

Prior to stopping Mr. Potts, the co-conspirators **lacked reasonable suspicion that he was engaged in criminal activity and likewise did not have probable cause that he had committed a crime or was about to do so.** When Mr. Potts declined to allow the co-conspirators to stop and search him, they became incensed, seized him, **slammed him to the ground, and began kicking him** with their shod feet. Mr. Potts tucked into a fetal position to protect himself, but the assault continued. One of the co-conspirators pulled out his **police baton and began assaulting him while he was helpless on the ground.** The two remaining co-conspirators raised no objection and made no effort to prevent this unlawful use of force.

34. When no contraband was found, and with Mr. Potts bleeding and injured, the co-conspirators incriminated him **by planting false evidence on him, namely, the co-conspirators produced a handgun which did not belong to Mr. Potts and which he had never seen.** Jenkins attempted to put the gun in Mr. Potts's hands (which were handcuffed) to get his fingerprints onto the gun. When Mr. Potts resisted, co-conspirators Ward and Hendrix again began **punching and kicking him.** The beating produced a huge gash on Mr. Potts's leg, bruises on his ribs and head injuries. The co-conspirators **beat him so badly that the BPD booking unit refused to accept him** until the co-conspirators first took him to the hospital for treatment.
35. The co-conspirators then perpetuated the unlawful detention of Mr. Potts by providing **knowingly false statements to a magistrate** so as to falsely incriminate him and prevent him from obtaining bail. The co-conspirators then **manufactured a series of police reports** which falsely claimed that Mr. Potts was in possession of a gun at the time of the arrest and assault. In making these false statements, **the co-conspirators knowingly misled prosecutors in the Baltimore City State's Attorney Office** with regard to the events of September 2, 2015 in a manner specifically targeted at

encouraging prosecutors to pursue a criminal conviction against Mr. Potts. **Based on the false statements/evidence** manufactured by the co-conspirators, the Baltimore City State's Attorney charged Mr. Potts in a six-count indictment. Mr. Potts proceeded to trial, maintaining his innocence. However, **each of the co-conspirators falsely testified under oath that the handgun was recovered from Mr. Potts, who was convicted** on this false evidence on March 2, 2016 in the Circuit Court for Baltimore City and sentenced to a term of eight years in prison, five without the possibility of parole. Plaintiff was then incarcerated at various Maryland State prison facilities, and held there until his conviction was vacated on April 12, 2017, on motion of the Baltimore City State's Attorney.

37. Mr. Potts's false arrest, assault, and fraudulent conviction (*i.e.*, the events of September 2, 2015 and all subsequent matters related thereto) were not part of the indictments and criminal prosecution of the co-conspirators as described *supra* in Paragraphs 2, 3, and 9-31; the factual bases for the guilty pleas and/or guilty verdicts of the co-conspirators involved victims other than Plaintiff.
38. Mr. Potts was not interviewed by federal investigators or prosecutors, nor was he called as a witness in the joint trial of co-conspirators Hersl and Taylor; none of the events of September 2, 2015, the day of Mr. Potts's arrest or any subsequent incidents involving him, were included in any stipulation of fact, plea agreement, pre-sentence report or other document relating to the co-conspirators' federal prosecution.

(E. 278–81).

### **C. The Co-Conspirators' broader criminal conspiracy**

15. The indictment charged [Gondo, **Hendrix**, Hersl, **Jenkins**, Rayam, Taylor, and **Ward**] with knowing and intentional participation in a vast criminal conspiracy,

encompassing willful and intentional criminal activity that included false arrest, malicious prosecution, assault and battery, robbery and extortion of citizens and visitors to Baltimore City, deprivations of civil and constitutional rights, **time and attendance fraud against the BPD in order to obtain salary and overtime pay for time not actually worked**, and other offenses too numerous to name. See Exhibit B, at Paragraph 16 (a)-(h). The indictment further stated that the “purposes of the defendant[s] included violating the legitimate purposes of the BPD in order to enrich themselves through illegal conduct, including extortion, robbery and time and attendance fraud.” Id., at Paragraph 14.

19. In their respective plea agreements, Gondo, Hendrix, Jenkins, Rayam, and Ward agreed that “[t]he purposes of [the individual Defendant] and his co-defendants included violating the legitimate purposes of the BPD in order to enrich themselves through illegal conduct, including extortion, robbery and **time and attendance fraud.**” See Exhibits D, E, F, G and H.
20. The offenses to which the co-conspirators pled guilty demonstrate actions and omissions and various forms of conduct that grossly depart from any authorized or legitimate police conduct.
23. The crimes of which the co-conspirators were found guilty demonstrate actions and omissions and various forms of conduct that grossly depart from any authorized or legitimate police conduct.
24. The underlying actions comprising the criminal acts described in the indictments and plea agreements **failed to serve any legitimate purpose of the City’s or BPD’s business** as a municipal government entity or the principal public safety agency of that government or did so only coincidentally.



25. The underlying actions comprising that criminal activity are **not ones recognized, supported, or otherwise authorized** by any of BPD's training provided to law enforcement officers.
26. The underlying actions comprising that criminal activity are **not ones recognized, supported, or otherwise authorized** by any of BPD's policies, standard operating procedures, general orders, or guidelines.
27. The actions of the co-conspirators were performed **during and in furtherance of their outrageous criminal conspiracy** and in pursuit of their **own pecuniary self-interests**.
28. The co-conspirators **purposefully and willfully and regularly deviated from the legitimate law enforcement aims of the BPD's mission** in order to enrich themselves through their illegitimate and illegal conduct.
29. The co-conspirators **accomplished this by concealing their illegitimate and illegal conduct** from City officials and from their superiors.
30. The co-conspirators would sometimes intentionally avoid attending and would intentionally fail to appear for scheduled court proceedings related to individuals they had falsely arrested so as not to be questioned regarding their illegal activity of extorting and robbing citizens and fabricating evidence against such falsely arrested persons.
31. The co-conspirators **conspired with each other** and coached each other in order to better lie to internal investigators to **cover up and conceal their wrongdoing**.

(E. 275–78).

#### D. The Co-Conspirators' admissions under oath

In Jenkins's plea agreement, he admitted that on April 28, 2010, he submitted a

false Statement of Probable Cause in which he claimed that drugs had been recovered from U.B.'s car, even though JENKINS knew that the drugs were planted in the car; thereafter, JENKINS failed to correct his false statement during U.B.'s incarceration, which lasted until September 9, 2013.

(E. 486–87) (Exhibit H (Hendrix's plea agreement)), Attachment A

("Statement of Facts") ¶ 72).<sup>2</sup> *See also id.* at ¶ 73 (same, as to the co-occupant, B.M.). Jenkins also admitted that he

discussed carrying BB gun pistols so that he could plant them on a suspect if he could not find a firearm on the suspect. When JENKINS and other members of the GTTF were arrested, BB gun pistols were recovered from their vehicles.

*Id.* at ¶ 70.

In addition to these illegal acts, which are identical to the conduct at issue in the instant case, the Stipulated Statement of Undisputed Material Facts details the following:

39. The following twenty-eight specific incidents admitted to under oath by the co-conspirators, **among many others the precise nature, date of occurrence, and character of which are unknown**, demonstrate the co-conspirators' illegal, illegitimate and egregious criminal conduct and craft a vivid picture of the nature and character and

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<sup>2</sup> The Co-Conspirators' plea agreements are incorporated into the stipulated statement of undisputed facts. (E. 276) (¶ 17).

duration of the conspiratorial agreement into which all the co-conspirators knowingly and willfully entered and remained through the date of their indictment.

156. On or about February 4, 2016 **Jenkins, Ward and Hendrix** were involved with an incident involving a citizen bearing the initials M.S. (the “February 4, 2016 incident”).
157. The co-conspirators initiated a traffic stop of citizen bearing the initials M.S., and during same seized approximately \$1500 to \$2,000 from citizen M.S.’s vehicle.
158. The co-conspirators did not report to BPD the seizure of the sum of money.
159. **Jenkins** pled guilty to the criminal activity associated with this incident. *See* Exhibit H.
185. In or about the spring of 2015, **Jenkins, Taylor and Ward**, interrupted the sale of a large amount of marijuana at the location of the Belvedere Towers apartment building, located in Baltimore City, Maryland (the “Spring 2015 incident”).
186. **Jenkins** seized a bag containing approximately 30 pounds of marijuana from the would-be seller of the marijuana and a bag containing approximately \$15,000 in U.S. currency.
187. **Jenkins** lied to the parties to the drug sale that he was a Drug Enforcement Administration agent, and that he was exercising his discretion to not charge or arrest the parties to the drug sale.

188. **Jenkins** took Taylor and **Ward** to a secluded area and gave each of them \$5,000; **Jenkins** never reported the seizure of the U.S. currency or the drugs to the BPD.
189. **Jenkins** later provided the drugs to a third party to sell, so he could obtain all of the profits from same.
190. **Jenkins** pled guilty to the criminal conduct associated with this incident. *See* Exhibit H.

(E. 281, 293, 296–97).

### **E. The Co-Conspirators’ federal indictment and conviction**

On February 23, 2017, and November 30, 2017, the Co-Conspirators were among eight BPD officers indicted on charges of violating the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. §§ 1961–1968, and committing RICO conspiracy, among other federal offenses. (E. 329). On July 21, 2017, Hendrix and Ward pled guilty to racketeering conspiracy. (E. 412, 425). On January 5, 2018, Jenkins pled guilty to racketeering, racketeering conspiracy, and robbery. (E. 461). The Co-Conspirators are currently incarcerated in federal prisons. (E. 273–76) (¶¶ 3, 16–19).<sup>3</sup>

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<sup>3</sup> The other BPD officers charged in the federal indictment are also in prison. In October and December 2017, Rayam, Gondo, and Allers pled guilty to racketeering conspiracy. (E. 374, 391, 438). On February 12, 2018, a jury found Hersl and Taylor guilty of racketeering, racketeering conspiracy, and robbery. (E. 488).

## **F. Procedural history of this litigation**

On September 19, 2016, Potts filed this action *pro se* in the United States District Court for the District of Maryland against the Co-Conspirators (and later, by second amended complaint and supplemental complaint, the BPD and the Mayor and City Council of Baltimore, respectively). Potts alleged that, on September 2, 2015, the Co-Conspirators detained and beat him without cause or provocation, planted a gun on him, and then falsified arrest paperwork and committed testimonial perjury in his prosecution for possession of the firearm; as a result, Potts alleged, he was wrongly convicted, and incarcerated by the State of Maryland until April 12, 2017, when his conviction was vacated.<sup>4</sup>

On July 17, 2019, Potts accepted the Co-Conspirators' offer of judgment in the amount of \$32,000, inclusive of costs and attorney's fees, in full satisfaction of his claims against the Co-Conspirators, jointly and severally. (E. 203). On July, 20, 2019, the district court entered the judgment, and, on July 27, 2019, Potts filed his supplemental complaint, joining, by consent, the City as an additional defendant in the action. (E. 211). The parties entered into the Stipulated Statement of Undisputed Material Facts and filed cross-motions for summary judgment. (E. 216,

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<sup>4</sup> In due course, Potts retained counsel, who filed an amended complaint and has represented him since September 2017.

503). Shortly thereafter, the district court granted the parties' joint motion to certify the question of law now pending before this Court. (E. 525).

### **ARGUMENT**

**The Co-Conspirators' outrageous, personally motivated, willfully criminal acts were outside the scope of their employment.**

To fall within the scope of employment, an employee's tortious conduct must be in furtherance of the employer's business and authorized by the employer. Neither requirement is satisfied here. Beating up Potts, planting a gun on him, falsifying his arrest papers, and lying in open court to assure his conviction were quite outrageous and willfully criminal acts, whether viewed independently or as part of the larger criminal conspiracy among the GTTF members. Public policy considerations, informed by manifest legislative intent, further compel the conclusion that the outrageous conduct here was not within the scope of employment of a sworn law enforcement officer.

**A. To be within the scope of employment, an employee's actions must be in furtherance of the employer's business and authorized by the employer.**

"The general test set forth in numerous Maryland cases for determining if an employee's tortious acts were within the scope of his employment is whether they were in furtherance of the employer's business

**and** were ‘authorized’ by the employer.” *Sawyer v. Humphries*, 322 Md. 247, 255 (1991) (emphasis added). “By ‘authorized’ is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to him by the [employer], even though in opposition to his express and positive orders.” *Hopkins Chem. Co. v. Read Drug & Chem. Co.*, 124 Md. 210, 214 (1914), *quoted in Sawyer*, 322 Md. at 255.

In applying this test, the Court has taken into account “various considerations.” *Sawyer*, 322 Md. at 255. These include factors from the Restatement of Agency, which provides that “conduct must be of the same general nature as that authorized, or incidental to the conduct authorized,” to “be within the scope of the employment.” Restatement of Agency § 229 (1933), *quoted in Sawyer*, 322 Md. at 256.

In determining whether or not the conduct, although not authorized, is nevertheless so **similar to or incidental to the conduct authorized** as to be within the scope of employment, the following matters of fact are to be considered:—(a) whether or not the act is one **commonly done** by such [employees]; (b) the time, place and purpose of the act; (c) the previous relations between the [employer] and the [employee]; (d) the extent to which the business of the [employer] is apportioned between different [employees]; (e) whether the act is outside the enterprise of the [employer] or, if within the enterprise, has not been entrusted to any [employee]; (f) whether or not the [employer] **has reason to expect** that such an act will be done; (g) the similarity in quality of the act done to the act authorized; (h) whether or not the instrumentality by which the harm is

done has been furnished by the [employer] to the [employee]; (i) the extent of departure from the normal method of accomplishing an authorized result, and (j) **whether or not the act is seriously criminal.**

*Sawyer*, 322 Md. at 256 (emphasis added), *quoting* Restatement of Agency § 229.

In *Sawyer*, this Court confronted the scope of employment question in the context of a police officer who threw rocks at a vehicle, physically assaulted the driver, and subsequently tried to arrest the driver with no legitimate reason. 322 Md. at 250–51. In finding the officer’s actions outside the scope of his employment, the *Sawyer* Court set forth several guiding principles. First,

[p]articularly in cases involving intentional torts committed by an employee, this Court has emphasized that where an employee’s actions are **personal, or where they represent a departure from the purpose of furthering the employer’s business, or where the employee is acting to protect his own interests, even if during normal duty hours and at an authorized locality**, the employee’s actions are outside the scope of his employment.

*Id.* 256–57 (emphasis added). *Accord Carroll v. Hillendale Golf Club*, 156 Md. 542, 545–46 (1929) (“Where there is not merely deviation, but a total departure from the course of the master’s business, so that the servant may be said to be on a ‘frolic of his own,’ the master is no longer answerable for the servant’s conduct.”). Second,



[w]here the conduct of the [employee] **is unprovoked, highly unusual, and quite outrageous**, courts tend to hold that **this in itself is sufficient** to indicate the motive was a purely personal one.

*Sawyer*, 322 Md. at 258 (cleaned up) (emphasis added). Third, even if an officer is on duty, that fact

does not lead to the conclusion that the officer is always acting in furtherance of the State's business of law enforcement and that all conduct is incidental to police work.

*Id.* at 259–60.

Applying these principles to the undisputed facts here leads to only one conclusion: The Co-Conspirators' tortious conduct against Potts was well outside the scope of their employment.

**B. The Co-Conspirators' torts against Potts were committed during and in furtherance of their criminal conspiracy, not enforcing the law, and BPD did not authorize the Co-Conspirators to beat Potts, plant a gun on him, falsify arrest paperwork, or provide perjured testimony.**

The Co-Conspirators' crimes against Potts are the very paradigms of the "unprovoked, highly unusual, and quite outrageous" conduct that this Court has previously found to fall outside the scope of employment.

*Sawyer*, 322 Md. at 257. The tortious conduct did not further the business of the BPD, nor did the BPD authorize such depraved behavior. **Indeed, far from furthering the BPD's interests, the commission of these crimes**

**directly conflicted with those interests.** Planting a gun on an innocent person, lying in arrest paperwork, and committing perjury in open court to ensure the innocent person's conviction are antithetical to legitimate police work. Such criminal deception not only fails to advance any legitimate law enforcement purpose, but also perniciously undermines the trust and respect between the police and the community necessary for a police force to effectively accomplish its beneficial purpose. That the Co-Conspirators committed these crimes against Potts during, and in furtherance of, an elaborate and far-reaching racketeering conspiracy confirms that the Co-Conspirators were acting far outside the scope of their employment.

**1. The Co-Conspirators were not acting in furtherance of the BPD's business when they committed their torts against Potts.**

Not one of the undisputed material facts gives rise to an inference that the Co-Conspirators' acts against Potts, at any point in time, were motivated even partially by an effort to serve the interests of BPD. The purpose of a police department is to enforce the laws, not violate them, and to protect members of the public by working to incarcerate those who break the law, not those whom police officers know to be innocent of any wrongdoing.

In stark contrast to these legitimate goals of law enforcement, the Co-Conspirators beat Potts, planted a gun on him, falsified paperwork, and

committed testimonial perjury. The sheer outrageousness of such conduct is “sufficient to indicate [the Co-Conspirators’] motive was a purely personal one.” *Sawyer*, 322 Md. at 258. “[C]ausing [an] innocent [person] to be subject to” a mere “**accusation** of crime and putting [him] in fear that it **might** come passes the bounds of conduct that will be tolerated by a civilized society and is, therefore, outrageous conduct.” *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 307 (5th Cir. 1989) (emphasis added). In this case, the Co-Conspirators went much further, not only raising the specter of criminal prosecution but fabricating evidence and lying under oath to ensure the conviction of an innocent man. Such depraved acts are unquestionably outrageous. *See, e.g., Washington v. Amatore*, 781 F. Supp. 2d 718, 721 (N.D. Ill. 2011) (concluding that, if a police officer “planted a bag of marijuana in [a citizen’s] car, his conduct could properly be deemed extreme and outrageous”) (internal quotation marks omitted); *Chancellor v. City of Detroit*, 454 F. Supp. 2d 645, 663 (E.D. Mich. 2006) (recognizing that “the average citizen would characterize . . . as outrageous” police officers’ “plant[ing] [of] evidence and [lying] in their police reports” to cause someone to be “indicted and incarcerated for a lengthy period before the charges were dismissed”). The outrageous nature of this conduct is, by itself, enough to establish that the Co-Conspirators were furthering their

own interests, not the BPD's, when they committed their torts against Potts. *See Sawyer*, 332 Md. at 258.

Further proof of the Co-Conspirators' personal motivation is the fact that the torts against Potts were part of the larger criminal conspiracy for which the Co-Conspirators were federally convicted. The actions underlying that conspiracy inarguably "failed to serve any legitimate purpose of the City's or BPD's business," as the Co-Conspirators were acting "in pursuit of their own pecuniary self-interests." (E. 276–77).

That the crimes/overt acts perpetrated against Potts were not specifically enumerated in the federal indictments is of no moment. The Co-Conspirators' good fortune in evading detection for their particular crimes against Potts does not somehow divorce those crimes from the broader criminal conspiracy. *Cf. United States v. Ramirez-Rivera*, 800 F.3d 1, 44 (1st Cir. 2015) (noting that, when the scope of a racketeering conspiracy includes murder as a tool to further the enterprise, a murder is still relevant to prove the existence and nature of the racketeering enterprise and conspiracy, even when a defendant is not charged with a particular murder); *United States v. Dowdell*, 306 F. App'x 16, 20–21 (4th Cir. 2009) (per curiam) (recognizing that, "[a]lthough [a] particular transaction was not charged in [an] indictment" for conspiracy to commit wire fraud

“and did not itself include a wire transfer, it reflect[ed] the general conspiracy charged in the indictment”).

The crimes/overt acts perpetrated against Potts indisputably occurred during the pendency of the conspiracy laid out in the federal indictments and in furtherance thereof. Manifestly, the crimes/overt acts perpetrated against Potts were of the very same character as those described in the plea agreements as exemplifying the criminal conspiracy: planting evidence (a gun) and lying in arrest paperwork.<sup>5</sup> (E. 279–80) (¶¶ 34, 35). As stated in the plea agreements, “[a]mong the means and methods by which [the Co-

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<sup>5</sup> Examples of GTTF members planting evidence are abundant. For example, on February 27, 2019, former BPD Officer Keith Gladstone was indicted for conspiracy to deprive civil rights for assisting Jenkins in planting a BB gun on an individual whom Jenkins had deliberately run over on March 26, 2014. Jenkins then authored and approved a false statement of probable cause. *United States of America v. Gladstone*, CCB-19-094, ECF No. 1 at ¶¶ 7–10, 13 (D. Md. 2019). Gladstone pled guilty on or about May 13, 2019. *Id.*, ECF No. 19. Former BPD Officer Carmine Vignola was likewise indicted for his participation in the Jenkins/Gladstone BB gun incident and for lying to the grand jury about it. He later waived indictment and proceeded by criminal information. *United States v. Vignola*, CCB-19-0431, ECF Nos. 1, 9 (D. Md. 2019). He pled guilty on or about September 3, 2019. *Id.*, ECF No. 11. In addition, at co-conspirator Hersl’s criminal trial, Herbert Tate testified that Hersl was involved with planting heroin (also called “blue and whites”) on him. *United States v. Hersl*, CCB-17-106, ECF No. 358 pages 20–23. The Court may take judicial notice of these incidents, which are set forth in court records accessible via the Internet, such as Public Access to Court Electronic Records (PACER). *See, e.g., Marks v. Criminal Injuries Compensation Bd.*, 196 Md. App. 37, 78 (2010) (recognizing that “[i]t is widely accepted that judicial notice of court records extends to records that are accessed through the Internet”).

Conspirators] [] and others pursued their illegal purposes” was “author[ing] false incident and arrest reports.” (E. 476–77; *see also* E. 421–22, 434–35). Jenkins specifically admitted to planting evidence on an innocent person and falsifying the accompanying arrest paperwork, which resulted in the false arrest and conviction of two people. (E.485–87). Jenkins also “discussed carrying BB gun pistols **so that he could plant them** on a suspect if he could not find a firearm on the suspect.” (E. 486) (emphasis added). As it turned out, “[w]hen Jenkins and the other members of the GTTF were arrested BB gun pistols were recovered from their vehicles.” *Id.* Thus, the criminally tortious conduct against Potts falls neatly within the parameters of the federal indictment, and the conduct unquestionably was part, i.e., overt acts in furtherance of, the broader criminal conspiracy.

The very nature of the crime of conspiracy confirms that the torts against Potts were part of the broad criminal enterprise for which the Co-Conspirators were convicted. A conspiracy is “a partnership in crime,” and a single conspiracy may have a multiplicity of objects. *Pinkerton v. United States*, 328 U.S. 640, 643–44 (1946). Furthermore, “[t]he crime of conspiracy is perhaps the classic example of a ‘continuing offense.’” *Khalifa v. State*, 382 Md. 400, 428 (2004).

Once a conspiracy is shown to exist, which in its nature is not ended merely by lapse of time, it continues to

exist until consummated, abandoned or otherwise terminated by some affirmative act. Every act in furtherance of the conspiracy is regarded in law as a renewal or continuance of the unlawful agreement, and the conspiracy continues so long as overt acts in furtherance of its purpose are done.

*United States v. Rucker*, 586 F.2d 899, 906 (2d Cir. 1978).

In this case, until the date of their arrests, the Co-Conspirators were partners in a plot to enrich themselves at the expense of Potts, other Baltimore City residents, and visitors to the city (as well as the integrity of the BPD and the City). As part of this broader conspiracy, the torts against Potts “were performed . . . **in pursuit of their own pecuniary self-interests.**” (E. 277) (emphasis added). *See also* (E. 276) (stipulating that “[t]he purposes of [the Co-Conspirators] included violating the legitimate purposes of the BPD in order to enrich themselves . . . .”). Planting evidence on innocent individuals (including Potts) and faking legitimate arrests (including the arrest of Potts) provided cover for the Co-Conspirators to “conceal[] their illegitimate and illegal conduct from City officials and from their superiors.” (E. 278) (¶ 29). *See also id.* at ¶ 31 (“The co-conspirators conspired with each other and coached each other in order to better lie to internal investigators to cover up and conceal their wrongdoing.”). Incidents like the one at issue here were the “front” the Co-Conspirators used to continue their conspiracy. By hauling in Potts, and “producing” a gun, they

could hold themselves out as legitimate officers who were “cleaning up” the streets. Of course, in reality, the gun they “seized” from Potts was already in their possession. And they did not get a “bad guy” off the streets, they simply brutalized and locked away an innocent man.

With respect to Potts in particular, the parties have stipulated that, “[b]ased on the false statements/evidence manufactured by the co-conspirators . . . and the co-conspirators falsely testif[ying] under oath . . . [Potts] was convicted on this false evidence on March 2, 2016 . . . [and] then incarcerated . . . until his conviction was vacated on April 12, 2017 . . .” (E. 279–80). Because the Co-Conspirators’ criminal partnership was in full effect during this period, and because the torts against Potts furthered the mission of that partnership, the torts here unquestionably were part of the broader criminal conspiracy for which the Co-Conspirators were indicted and convicted. *See, e.g., Khalifa*, 382 Md. at 428; *Rucker*, 586 F.2d at 906. *Cf. Ramirez-Rivera*, 800 F.3d at 44; *Dowdell*, 306 F. App’x at 20–21. Moreover, the connection to the larger conspiracy confirms that the Co-Conspirators were furthering only their own interests, not those of the BPD, when they carried out their heinous acts against Potts.

In short, the criminally tortious conduct supporting the underlying judgment at issue in this case was outside the scope of the Co-Conspirators’



employment, because the acts were not in furtherance of their employer's business (law enforcement) but, rather, furthered the Co-Conspirators' personal, pecuniary interest, to the detriment and at the expense of their employer's business of legitimate law enforcement. The sheer outrageousness of the conduct establishes the Co-Conspirators' personal motivation. The torts' connection to the larger criminal conspiracy set forth in the federal indictments provides further confirmation that the Co-Conspirators were acting out of self-interest, not in furtherance of their employer's business. Accordingly, the tortious acts fell outside the scope of employment.

**2. The willfully criminal nature of the torts makes clear that the BPD did not authorize them.**

Another reason the torts against Potts were not within the scope of employment is that the BPD did not authorize those deplorable acts. *See, e.g., Sawyer*, 322 Md. at 255 (recognizing that only those acts "authorized" by the employer are within the scope of employment). To the contrary, the Co-Conspirators' actions against Potts were in direct and unequivocal opposition to BPD's mission of law enforcement.

The torts' connection to the larger, federally indicted conspiracy confirms that the BPD in no way authorized the Co-Conspirators'

despicable acts against Potts. The stated goal of the conspiracy, by the Co-Conspirators' own admissions and as revealed in the stipulated facts, was to subvert and "violat[e] the legitimate purposes of the BPD." (E. 276). The conspiracy "**grossly depart[ed] from any authorized or legitimate police conduct**" (E. 277) (emphasis added), and "failed to serve any legitimate purpose of the City[] or the BPD[]," *id.* The Co-Conspirators admitted that the "underlying actions comprising [the] criminal activity" were "not ones recognized, supported, or otherwise authorized" by the BPD. (E. 277). In fact, the Co-Conspirators went to great lengths to **hide** their wrongdoing from their superiors and City officials. (E. 278). Both case law and common sense compel the conclusion that acts committed during and in furtherance of a criminal conspiracy, the purpose of which is to undermine the interests of the employer, are outside the scope of employment as a matter of law.

The willfully criminal nature of this vast conspiracy further confirms that the Co-Conspirators were acting outside the scope of their employment. *See Sawyer*, 322 Md. at 256 (noting that "whether or not the act is seriously criminal" informs the scope-of-employment issue); *Wright v. City of Danville*, 675 N.E.2d 110, 118 (Ill. 1996) ("Serious crimes are generally unforeseeable because they are different in nature from what employees in a

lawful occupation are expected to do.”). The Co-Conspirators were convicted under the RICO statute, which “was intended to bring only the most serious, broad-based frauds into the federal courts.” *Allen ex rel. Allen v. Devine*, 726 F. Supp. 2d 240, 248 (E.D.N.Y. 2010). Indeed, Congress enacted the statute “to seek the eradication of organized crime in the United States.” *United States v. Turkette*, 452 U.S. 576, 589 (1981) (citing Pub. L. No. 91-452, 84 Stat. 922, 923 (1970)). Racketeering activity is statutorily defined to mean

any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled dangerous substance or listed chemical [] which is chargeable under State law and punishable by imprisonment for more than one year[.]

18 U.S.C. § 1961.

Jenkins also pled guilty to robbery under the Hobbs Act, 18 U.S.C. § 1951, which defines robbery as

the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property.

18 U.S.C. § 1951(b)(1). Without doubt, this is a “serious violent felony.”

*United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016).

The seriousness of the crimes encompassed by the federally indicted conspiracy undermines any suggestion that the BPD authorized the Co-

Conspirators' acts. Racketeering and robbery – two of the most serious crimes imaginable – are antithetical to the business of law enforcement. Accordingly, the torts against Potts certainly fell outside the scope of employment.

This is true, even if one views those torts independently of the broader criminal conspiracy. Considering only the acts taken against Potts, the Co-Conspirators unquestionably committed both perjury and misconduct in office when they planted evidence, lied in arrest paperwork, and gave perjured testimony, causing Potts to be convicted on entirely false evidence. “Misconduct in office, a common law misdemeanor, consists of corrupt behavior by a public officer while in the exercise of official duties or while acting under color of law.” *Dundan v. State*, 282 Md. 385, 387 (1978).

Maryland cases have recognized that the corrupt behavior can be characterized in various ways such as the doing of an act which is wrongful in and of itself, malfeasance, the doing of an act otherwise lawful in a wrongful manner, misfeasance, or omitting to do an act which is required by the duties on the office, nonfeasance.

*Leopold v. State*, 216 Md. App. 586, 598 (2014). Testimonial perjury is a statutory offense encompassing the common law definition of perjury. *See Hourie v. State*, 53 Md. App. 62, 67 (1982).

It strains credulity beyond all rational boundaries to imagine that intentional lying and willful malfeasance in office, which are demonstrably

incompatible with the business and purposes of the BPD, is nevertheless within the scope of employment. Indeed, there can be no clearer example of unauthorized activity occurring outside the scope of employment than the egregious and pervasive criminality at issue in this case.

To summarize, the torts committed against Potts were outside the Co-Conspirators' scope of employment because the acts were neither authorized by BPD nor in furtherance of its business. (To be within the scope, they must be both.) Whether considered independently or in the context of the broader, federally-indicted racketeering conspiracy, the acts of beating up Potts, planting a gun on him, falsifying paperwork, and committing willful testimonial perjury were quite outrageous and seriously criminal. As such, they cannot have been within the scope of employment.

**C. The singular nature of police work, which afforded the Co-Conspirators the capacity to commit the torts against Potts, does not bring their outrageous, personally motivated, willfully criminal acts within the scope of their employment.**

That the Co-Conspirators were police officers who abused their power to commit their torts does not change the analysis. “[T]he same basic principles and considerations, applicable to employees generally, are used to determine whether police officers. . . are acting within the scope of their employment.” *Sawyer*, 322 Md. at 258 (internal quotation marks omitted),

*citing, inter alia, Cox v. Prince George's County*, 296 Md. 162, 170–71 (1983). Thus, while a police officer “may be ‘on duty’ 24 hours a day,” “[t]hat does not . . . lead to the conclusion that the officer is always acting in furtherance of [his employer’s] business of law enforcement and that all conduct is incidental to police work.” *Sawyer*, 322 Md. at 258–59. *Cf. id.* at 259–60 (observing that, “in virtually all of the cases in which this Court has held that an assault by an employee was outside the scope of employment, the assault occurred at a time when the employee was ‘on duty’”), *citing Henley v. Prince George's County*, 305 Md. at 320, 330 n.2 (1986); *LePore v. Gulf Oil Corp.*, 237 Md. 591 (1965); *Carroll*, 156 Md. 542; *Steinman v. Laundry Co.*, 109 Md. 62 (1908); *Central Railway Co. v. Peacock*, 69 Md. 257 (1888).

To be sure, the Co-Conspirators could not have committed their torts but for their status as police officers. But this Court has already rejected the notion that a “but for” test can determine the scope-of-employment question. In *Wolfe v. Anne Arundel County*, the Court considered whether a police officer’s rape of a motorist following a traffic stop was within the officer’s scope of employment; specifically, the Court had to decide whether a lawsuit to recover damages for that rape constituted “litigation arising out of acts within the scope of [the officer’s] employment.” 374 Md. 20, 30–31

(2003). In arguing for an affirmative answer, the plaintiff asserted that “‘but for’ [the officer’s] position as a police officer making the traffic stop, the rape and battery would not have occurred.” *Id.* at 31. But the Court rejected this argument, finding that “[t]he litigation arose out of the ‘act’ of raping [the plaintiff] and not out of the ‘act’ of the traffic stop.” *Id.* at 36. The Court further noted that the rape was criminal and “neither authorized nor permitted” by the officer’s employer. *Id.*

Much as in *Wolfe*, the harm caused to Potts in this case was not a direct result of a legitimate stop but, rather, the unauthorized, willful criminal conduct of the Co-Conspirators.<sup>6</sup> On duty or not, the Co-Conspirators had a gun ready to plant on an innocent person, and Potts fit the bill. While their employment as police officers may have enabled them to commit their crimes against Potts, it does not follow that their outrageous abuse of power and perversion of their duties was within the scope of their employment. *Cf. Wright v. City of Danville*, 675 N.E.2d 110, 119 (Ill. 1996) (holding that city commissioners’ criminal official misconduct and conflict of interest were not within the scope of their employment because, “[w]hile the commissioners’ . . . public employment provided the opportunity for

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<sup>6</sup> In fact, the stop of Potts was unlawful from its inception, as the Co-Conspirators knew that they had no reasonable suspicion or probable cause to stop him. (E. 278–79).

their misconduct, by no stretch of the imagination could their actions be deemed an extension of their legitimate functions as elected officials”). The Co-Conspirators’ criminally tortious acts were personally motivated, quite outrageous, and seriously, willfully criminal.

The use of BPD-issued equipment does not transform these personal pursuits into acts within the Co-Conspirators’ scope of employment. As the Court of Special Appeals explained in *Clark v. Prince George’s County*, if the “employee’s actions are personal, or when they represent a departure from the purpose of furthering the employer’s business, or when the employee is acting to protect his own interests, the actions are outside the scope of employment.” 211 Md. App. 548, 577 (2013) (internal quotation marks omitted). Thus, a police officer who used his service weapon to shoot deliverymen in his home was acting outside the scope of his employment, because the officer testified that “he shot them to protect himself, just as any homeowner with a gun would do.” *Id.* See also *Brown v. Mayor*, 167 Md. App. 306, 324–25 (2006) (holding that an officer was acting outside the scope of his employment when he shot his wife’s paramour, because the fact that he was wearing his uniform at the time of the shooting and used his service weapon “did not transform an otherwise personal act into one that was furthering his employer’s business”). *Cf.*



*Prince George's County. v. Morales*, 230 Md. App. 699, 729 (2016)

(holding that an officer's use of excessive force could be within the scope of employment when engaged in the legitimate public purpose of crowd control and where the officer was cleared of any criminal charges).

Other courts have similarly concluded that police officers act outside the scope of their employment when, as here, they act for their own personal reasons and not in furtherance of their employers' law enforcement function. Illustrative is *Snell v. Murray*, 284 A.2d 381 (N.J. Super. Ct. Law Div. 1971), which the *Sawyer* Court cited with approval. In *Snell*, a New Jersey court concluded that a police officer was not acting within the scope of his employment when he "extorted money from gamblers, shooting one of them in the process." *Sawyer*, 322 Md. at 260 (summarizing the decision in *Snell*). This, despite the extortion being "performed during [the officer's] duty hours." *Snell*, 284 A.2d at 385, *aff'd*, 296 A.2d 538 (N.J. Super. Ct. App. Div. 1972). The *Snell* Court reasoned that the officer, "by his gunpoint extortion, not only abandoned his duty, but betrayed his trust as a police officer" "to further his own illegal ends." *Id.* As a result, the officer "was clearly not acting within the scope of his authority, but rather was engaged in active misfeasance of any authority he may have had." *Id.*

Applying similar logic, the Pennsylvania Supreme Court recently

affirmed a jury’s finding that a police officer was not acting within the scope of his employment when, after stopping a motorist for a broken taillight and a suspended license, he forcibly wrestled the motorist into handcuffs “for the purpose of involuntarily removing her from behind the protection of [a roadside] barrier so that she could be transported elsewhere.” *Justice v. Lombardo*, 208 A.3d 1057, 1060–61 (Pa. 2019). The court emphasized that the officer “us[ed] language that suggested personal animus,” the motorist was not under arrest for any crimes, and she was not being detained because of suspicion of criminal activity. *Id.* at 1069–70, 1075. On these facts, the court concluded, the jury could have reasonably found that the officer’s use of force “departed drastically from . . . authorized and expectable conduct” and was “actuated in such a manner so as to evince entirely personal motives rather than a professional purpose”; thus, the jury reasonably concluded that he acted outside the scope of his employment. *Id.* at 1071–72, 1076. *See also id.* at 1078 (Dougherty, J., concurring) (noting that, when “the use of force by a police officer is attenuated from any imminent threat to safety and not incident to an arrest, such force may be considered ‘unexpected,’ and is less likely to fall within the scope of employment”).

Still other courts have recognized that a tortfeasor's status as a police officer does not necessarily mean that his torts were within the scope of employment. *See Primeaux v. United States*, 181 F.3d 876, 882 (8th Cir. 1999) (holding that a police officer was not acting within the scope of employment when he committed a sexual assault, because the crime was "so unusual [and] startling" and "simply too remote and tenuous to be foreseeable to his employer"); *City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 202 (5th Cir. 1965) (holding that a police officer's assault and rape of a citizen were outside the scope of his employment, because the assault bore "no relation to the real or apparent scope of his employment or to the interest of his employer"); *Desotelle v. Cont'l Cas. Co.*, 400 N.W.2d 524, 529–30 (Wis. Ct. App. 1986) (holding that a trier of fact reasonably concluded that a sheriff's deputy was acting outside the scope of his employment when he falsely imprisoned a woman in his squad car and sexually assaulted her, because his conduct "did not conform with that required and expected of a police officer," and was "extraordinary and disconnected from the type of services ordinarily contemplated"), *abrogated on other grounds by Kruckenberg v. Harvey*, 694 N.W.2d 879 (Wis. 2005). *Cf. Morris v. City of Detroit*, 2019 WL 5205986, at \*2 (6th Cir. Oct. 16,

2019)<sup>7</sup> (recognizing that, “when determining whether a person acted under color of state law, “[t]he fact that a police officer is on or off duty, or in or out of uniform is not controlling,” because “[i]t is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law”) (internal citations omitted).

Returning to the Restatement factors in the scope-of-employment analysis, neither committing perjury nor planting weapons on innocent people is “commonly done” by police officers, nor are these acts “incidental” to police work. *See* Restatement of Agency § 229 (listing, as a factor to consider, “whether or not the act is one commonly done by such [employees]”). Police officers are supposed to recover illegal guns, not plant them on innocent people. Furthermore, BPD had no “reason to expect” that its sworn officers would plant guns and commit perjury in order to ensure that innocent people go to jail. *See id.* (listing, as another factor in the analysis, “whether or not the [employer] has reason to expect that such an act will be done”). As already noted, *see supra* p. 25, the Co-Conspirators routinely lied to their superiors in an effort to conceal their

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<sup>7</sup> The United States Court of Appeals for the Sixth Circuit “permits citation of any unpublished opinion, order, judgement or other written disposition.” Local Rule 32.1(a), United States Court of Appeals for the Sixth Circuit.

crimes. (E. 278) (§§ 29, 31). This is not a garden variety false arrest or excessive force case. This is an extreme outlier involving alarming moral depravity. Neither BPD nor society “reasonably expect[s]” police officers to plant guns and commit perjury.

In sum, there is nothing inherent about policing that would put BPD or the City on notice that officers would misuse their positions to plant guns, commit perjury, gratuitously stop and beat innocent people, and otherwise terrorize the very people they were hired to protect and serve. The Co-Conspirators here used the tools of the trade as a cover, and as a means to commit personally motivated, intentional, and egregious crimes against Potts. These acts were wholly unrelated to their duties as police officers, and wholly irreconcilable with furthering legitimate police work (the only interest of the BPD). Therefore, based on the application of settled legal principles to the stipulated facts of the case, the Co-Conspirators were acting outside the scope of their employment.

**D. Public policy considerations, including evident legislative purpose, support the conclusion that the Co-Conspirators were acting outside the scope of their employment.**

Finally, public policy, informed by evident legislative purpose, compels the conclusion that the outrageous conduct in this case was far outside the scope of employment of police officers. The dual purpose of the

LGTCGA is to provide certain relief to those injured by local government employees acting in good faith while, at the same time, cabining local governments' financial exposure. The statute strikes this balance by ensuring that governments are liable only for those judgments involving employees' conduct that was authorized, reasonably foreseeable, and in furtherance of the governments' interests. *See, e.g., Espina v. Jackson*, 442 Md. 311, 327 (2011) (noting that an “overarching purpose of the [LGTCGA] was to bring stability to what was perceived as an escalating liability picture for local governments by containing their exposure while guaranteeing payment to tort victims of judgments against employees of local government entities *in certain situations.*”) (emphasis added); *Moore v. Norouzi*, 371 Md. 154, 165–67 (2002) (noting that the LGTCGA imposes financial liability on a government “responsible for the public employee’s actions,” measured by whether the conduct was within the scope of employment); *Williams v. Prince George’s County*, 112 Md. App. 526, 552–53 (1996) (noting that one purpose of the LGTCGA is “to limit the liability of local governments”).

A holding that as a matter of law the facts here establish conduct within the scope of employment would disrupt this balance and threaten the financial security of the City and every other local government in this State. Counties and municipalities would have to flirt with bankruptcy in order to

avoid the costs of the malignancies that sometimes infect law enforcement agencies despite the best efforts of leaders committed to integrity and constitutional policing. Baltimore City alone faces the prospect of dozens – perhaps more than one thousand – more LGTCA cases involving the criminal acts of the federally convicted GTTF members. Baltimore State’s Attorney Marilyn Mosby has asked the Circuit Court for Baltimore City to throw out nearly 800 criminal cases handled by twenty-five city police officers, including the eight convicted in the Gun Trace Task Force scandal. Twenty plaintiffs have brought actions related to one or more of these GTTF officers, and sixty other potential plaintiffs have already filed notices of intent to sue. Hundreds more may sue in the months and years ahead.

The Co-Conspirators’ participation in the conspiracy has thus caused untold damage to the BPD and the citizens of Baltimore. A conclusion that the Co-Conspirators’ conduct was within the scope of their employment would compound that harm. Moreover, it would make a mockery of the LGTCA, allow rogue police officers to willfully and intentionally commit heinous crimes, plead guilty to those crimes, and force the City to pay for their crimes. In other words, police officers would be given “magic pens”

they could use to write unlimited checks on the City taxpayers' account.<sup>8</sup>

After all, if the outrageously criminal torts here were within the scope of police work, it is hard to imagine what conduct would not be.

Although the facts of each victim's case may need to be independently examined, this Court should not set forth a rule that would compel the citizens of Baltimore to pay for crimes borne out of the GTTF conspiracy. Instead, the Co-Conspirators should be held financially accountable to the victims of their crimes. Otherwise, the people of Baltimore will find themselves twice-cheated: once by the Co-Conspirators who betrayed them, and once by a ruling that makes them pay for the Co-Conspirators' willful betrayal. The City does not wish to condone the Co-Conspirators' intentional, seriously criminal behavior by indemnifying it, and neither should this Court.

To summarize, the undisputed facts here establish that the Co-Conspirators' torts against Potts were perpetrated outside the scope of their

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<sup>8</sup> Tellingly, under the LGTCA, a local government must cover the costs of officers' defense counsel, including, among other costs, air travel to far off federal prisons to meet with their clients (as the City incurs in this and all of the GTTF cases) merely on the basis of an *allegation* that claims arise within the scope of the officers' employment. In other words, there is no escape for the imposition of those costs on local governments. Clearly, *actual proof that crimes were committed within the scope of an officer's employment* is an entirely different matter from the work done by a mere allegation. The General Assembly surely knew the difference.



employment. Beating up Potts, planting a gun on him, falsifying his arrest papers, and lying in open court to assure his conviction did not further the interests of BPD, and the department in no way authorized such heinous acts. The conduct was quite outrageous and willfully criminal, whether viewed independently or as part of the larger criminal conspiracy among the GTTF members.

### **CONCLUSION**

For the foregoing reasons, the City respectfully requests that the Court hold on the undisputed facts in the record that, as a matter of law, the Co-Conspirators were not acting within the scope of their employment when they committed their torts against Potts.

Respectfully submitted,

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**CERTIFICATION OF WORD COUNT  
AND COMPLIANCE WITH RULE 8-112**

I hereby certify that:

1. This brief contains 10,032 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

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KARA K. LYNCH  
Chief Solicitor

## PERTINENT AUTHORITY

### *Statutes*

#### **18 U.S.C. § 1961**

##### § 1961. Definitions

As used in this chapter--

(1) “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons),<sup>1</sup> sections 1831 and 1832 (relating to economic

espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of

financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) “person” includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) “pattern of racketeering activity” requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) “unlawful debt” means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) “racketeering investigator” means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) “racketeering investigation” means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) “documentary material” includes any book, paper, document, record, recording, or other material; and

(10) “Attorney General” includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

## **18 U.S.C. § 1951**

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

- (3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
- (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

### **Maryland Code, Courts & Judicial Proceedings § 12-601**

#### **§ 12-602. Power of Court of Appeals or Court of Special Appeals to certify question of law**

The Court of Appeals or the Court of Special Appeals of this State, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another state or of a tribe if:

- (1) The pending litigation involves a question to be decided under the law of the other jurisdiction;
- (2) The answer to the question may be determinative of an issue in the pending litigation; and
- (3) The question is one for which an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.

### **Maryland Code, Courts & Judicial Proceedings § 5-303**

#### **§ 5-303. Local government liability and defenses**

##### **Limits on liability**

(a) (1) Subject to paragraph (2) of this subsection, the liability of a local government may not exceed \$400,000 per an individual claim, and \$800,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions, or liability arising under subsection (b) of this section and indemnification under subsection (c) of this section.

(2) The limits on liability provided under paragraph (1) of this subsection do not include interest accrued on a judgment.



### **Governmental or sovereign immunity claims**

(b) (1) Except as provided in subsection (c) of this section, a local government shall be liable for any judgment against its employee for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government.

(2) A local government may not assert governmental or sovereign immunity to avoid the duty to defend or indemnify an employee established in this subsection.

### **Punitive damages**

(c) (1) A local government may not be liable for punitive damages.

(2) (i) Subject to subsection (a) of this section and except as provided in subparagraph (ii) of this paragraph, a local government may indemnify an employee for a judgment for punitive damages entered against the employee.

(ii) A local government may not indemnify a law enforcement officer for a judgment for punitive damages if the law enforcement officer has been found guilty under § 3-108 of the Public Safety Article as a result of the act or omission giving rise to the judgment, if the act or omission would constitute a felony under the laws of this State.

(3) A local government may not enter into an agreement that requires indemnification for an act or omission of an employee that may result in liability for punitive damages.

### **Subtitle not a waiver of common law or statutory defense or immunity**

(d) Notwithstanding the provisions of subsection (b) of this section, this subtitle does not waive any common law or statutory defense or immunity in existence as of June 30, 1987, and possessed by an employee of a local government.

### **Common law or statutory defense or immunity in existence on June 30, 1987**

(e) A local government may assert on its own behalf any common law or statutory defense or immunity in existence as of June 30, 1987, and possessed by its employee for whose tortious act or omission the claim against the local government is premised and a local government may only be held liable to the extent that a judgment could have been rendered against such an employee under this subtitle.

### **Lexington Market, Inc., and Baltimore Public Markets Corporation**

(f) (1) Lexington Market, Inc., in Baltimore City, and its employees, may not raise as a defense a limitation on liability described under § 5-406 of this title.

(2) Baltimore Public Markets Corporation, in Baltimore City, and its employees, may not raise as a defense a limitation on liability described under § 5-406 of this title.