

Kami Chavis  
Professor of Law and Director of the Center for Criminal Justice Policy and Reform  
William & Mary School of Law<sup>1</sup>

Testimony in Support of Maryland House Bill 857: Office of the Attorney General-Independent  
Investigations Division-Authority to Prosecute

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<sup>1</sup> This testimony represents my own views based on my experience as a former prosecutor and a criminal law scholar, and it does not represent the view of the institution or the Commonwealth of Virginia.

I am writing in support of Maryland House Bill 857 and the authority it would give the Maryland State Attorney General's Office to independently prosecute police-involved deaths and serious injuries. As a former prosecutor and a scholar who has written about police accountability for nearly two decades, I am uniquely qualified to discuss the merits of this bill.

In March of 2021, the Maryland State Legislature passed The Police Accountability Act, which established an Independent Investigations Division ("IID") in the Maryland Office of The Attorney General.<sup>2</sup> The passage of this law can, in part, be attributed to the increasing demands for effective police increased police accountability, both nationally and locally in Maryland. The establishment of the IID was a victory for police-reform advocates<sup>3</sup> and a part of the most significant police reform legislation ever passed in Maryland.<sup>4</sup> Yet, despite the IID's inception in October of 2021, not a single police officer investigated has been prosecuted by the state's attorney as a result of an IID report.<sup>5</sup> This lack of prosecution in Maryland mirrors national trends – there are over 1000 police shootings per year,<sup>6</sup> and yet since 2005, it was found that in 2001 only 139 officers nationwide were charged with a crime.<sup>7</sup> House Bill 857 would give the Attorney General's Office the ability to prosecute these cases, therefore removing the potential barriers that exist to such

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<sup>2</sup> Police Accountability Act of 2021, S.B. 0600, MD Cong. 141 (2021).

<sup>3</sup> Jessica Anderson & Pamela Wood, *The Maryland General Assembly passed sweeping policing reforms. Here's what goes into effect first*, THE BALTIMORE SUN, (Sep. 27, 2021). <https://www.baltimoresun.com/politics/bs-prem-md-pol-new-policing-laws-20210927-3gfgxobypneo5kjdlo5to6hsv4-story.html>

<sup>4</sup> *Id.*

<sup>5</sup> Alex Mann, *Local prosecutors have not charged officers in any of the police-involved death investigations completed by Maryland attorney general's office*, THE BALTIMORE SUN, (Nov. 29<sup>th</sup>, 2022). <https://www.baltimoresun.com/news/crime/bs-md-cr-police-deaths-attorney-general-independent-investigations-20221129-xzyt2rbrcxzeb5hn7cdksfb4-story.html>

<sup>6</sup> Wash. Post. Database. <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>

<sup>7</sup> German Lopez, *Police officers are prosecuted for murder in less than 2 percent of fatal shootings*, VOX (Apr. 2, 2021). <https://www.vox.com/21497089/derek-chauvin-george-floyd-trial-police-prosecutions-black-lives-matter>

prosecutions in local prosecutors' offices. This is good for public confidence that investigations will be fair and impartial, and it also alleviates the tension that prosecutors' offices may experience when there is a police-involved death or serious injury,

There may be a variety of reasons the state's attorney decides to decline a prosecution for a police-involved death or serious injury, and even when police officers are charged, many of these reasons result in an acquittal.<sup>8</sup> Thus, prosecuting a police officer from a local police department represents a political and practical risk for the prosecutor. The public views the prosecutor as who should be "tough on crime," but it is difficult for many members of the public to understand that police officers are not immune from committing crimes. Thus, prosecutors face a dilemma between risking their working relationship with police officers and the local police department, in addition to the political risk of unsuccessfully overcoming the hurdle necessary to prosecute a police officer who has committed a crime.

Because of these inherent conflicts of interest, it is well-established that it is best practice to have an independent party conduct any investigation, and if necessary, to conduct the prosecution.<sup>9</sup>

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<sup>8</sup> John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803 (2000)., (discussing the reluctance of police officers to pursue investigations of fellow officers' misconduct).

<sup>9</sup> See, e.g., Kami Chavis Simmons. "Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors" 49 WASH. U. J.L. OF LAW & POL. 137-158 (2015).; Samantha Levitz, Article, *Appointing an Independent Prosecutor in Cases of Police Misconduct: Repairing Trust in the Criminal Justice System*, Hofstra Law Student Works (2020).; Reuben Fischer-Baum, *Allegations of Police Misconduct Rarely Result in Charges*, FIVETHIRTYEIGHT (Nov. 25, 2014). <https://fivethirtyeight.com/features/allegations-of-police-misconduct-rarely-result-in-charges/>; Trivedi, Somil and Gonzalez Van Cleve, Nicole, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U.L.REV. 895, (2020); Rod Smith, *Florida Needs Independent Prosecutor For Police Abuse Cases*, THE DAYTONA-BEACH NEWS JOURNAL, June 15<sup>th</sup>, 2020. <https://www.news-journalonline.com/story/opinion/columns/more-voices/2020/06/15/florida-needs-independent-prosecutor-for-police-abuse-cases-rod-smith/42114859/>; Alexandra Hodson, *The American Injustice System: The Inherent Conflict of Interest in Police-Prosecutor Relationships & How Immunity Lets Them 'Get Away with Murder'*, 54 IDAHO L. REV. 563 (2018).; Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. 235, 236-37 (2015).

The idea of an independent prosecutor making decisions to prosecute in cases of police violence is not a new one. President Barack Obama's 2015 21<sup>st</sup> Century Policing Task Force Report included a recommendation that independent prosecutors to conduct such investigations to demonstrate transparency and create a mutual trust between the community and law enforcement.<sup>10</sup> Proponents of independent prosecutions<sup>10</sup> argue that this is necessary because of the incredibly close relationships local police and their respective prosecutorial counterparts share.<sup>11</sup> It is the police who initiate almost all the cases the prosecutor's office charges, and it is the police who serve as witnesses, collect evidence, and perform investigations.<sup>12</sup> This phenomenon can also be seen grand jury context. Even though grand juries overwhelmingly choose to indict,<sup>13</sup> they rarely choose to do so in cases involving police misconduct, a fact that scholars have attributed to the vast power prosecutors have over the grand jury process.<sup>14</sup> The idea of an independent prosecutor also has wide bipartisan support from voters.<sup>15</sup>

Statistics from the state of Maryland demonstrate the difficulty in criminal prosecutions of police officers. For example, the IID investigated 23 police involved killings from October 2021 to September 2022.<sup>16</sup> Of these investigations, the IID sent 12 final case reports to the local States'

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<sup>10</sup> OFFICE OF COMMUNITY POLICING: FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING (2015).

<sup>11</sup> Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY, 501 (2008).

<sup>12</sup> Paul Butler, Op-Ed., *The System Must Counteract Prosecutors' Natural Sympathies for Cops*, N.Y. TIMES, Apr. 28, 2015, available at <https://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garners-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops>.

<sup>13</sup> Deborah Weiss, *D. C. Grand juries almost always indict, federal stats show; is there a shooting exception for cops?* ABA JOURNAL, (Nov. 26, 2014).

<sup>14</sup> German Lopez, *Grand juries usually don't indict police officers. Should they be changed?*, VOX (Dec. 31, 2014), <https://www.vox.com/2014/12/31/7468775/grand-jury>

<sup>15</sup> Aaron Burke, *Republicans and Democrats have vastly different views on race and police. But they agree on solutions.*, THE WASHINGTON POST, (Dec. 29, 2014). <https://www.washingtonpost.com/news/the-fix/wp/2014/12/29/republicans-and-democrats-have-vastly-different-views-on-race-and-police-but-they-agree-on-solutions/>

<sup>16</sup> MARYLAND ATTORNEY GENERAL, INDEPENDENT INVESTIGATIONS DIVISION, 9 (1<sup>st</sup> Ann. Rep. 2021).

Attorney for a charging decision, and in all matters, the State’s Attorney declined to file charges.<sup>17</sup> Notably, in Hartford County, Maryland, the state’s attorney did not allow the IID to complete its investigation, and still announced that it would not be filing charges in the police-involved shooting at issue.<sup>18</sup> The independent report issued by Attorney General Brian Frosh stated that “under current law, the IID has no remedy if a State’s Attorney decides to decline a case without investigation.<sup>19</sup>”

Perhaps almost as important as *actual* fairness in police prosecutions is the *perception* of fairness in these proceedings and public confidence in the legitimacy of the criminal justice system. To be sure, many prosecutors can remain impartial when choosing whether prosecute law enforcement officers, but it is very likely that a state prosecutor’s office will *appear* biased when handling such cases. Allowing an independent prosecutor or investigator in these cases will increase confidence in these prosecutions and ameliorate the perception of bias.<sup>20</sup> It will also allow prosecutor to avoid conflicts of interest that may arise with police unions, from whom they may seek endorsements,<sup>21</sup> police departments,<sup>22</sup> from whom they rely on to bring cases, and from themselves when they are unable or unwilling to set aside their own bias.<sup>23</sup>

For these reasons, I urge the legislature to pass Maryland House Bill 857.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Kami Chavis Simmons, *Bias Can Strain an Already Difficult Standard in Prosecuting Police*, N.Y. TIMES, April 8, 2015, available at <https://www.nytimes.com/roomfordebate/2014/11/25/does-ferguson-show-that-cops-who-kill-get-off-too-easily/bias-can-strain-an-already-difficult-standard-in-prosecuting-police>.

<sup>21</sup> See e.g., Kami Chavis, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. OF LAW & POL. 145 (2015).

<sup>22</sup> *Id.* at 151.

<sup>23</sup> *Id.*