

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

ACLU OF TENNESSEE, INC.,)	
)	
)	
Intervening Plaintiff,)	
)	No. 2:17-cv-02120-JPM-jay
v.)	
)	
CITY OF MEMPHIS, TENNESSEE)	
)	
Defendant.)	

PRETRIAL REPORT OF THE INDEPENDENT MONITOR

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Independent Monitor

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I.
INTRODUCTION

Consistent with this Court’s Amended Final Scheduling Order (ECF No. 293), this Pretrial Report performs three key functions. *First*, like the six prior reports submitted by Independent Monitor Edward L. Stanton III,¹ this Pretrial Report provides an overview of Monitoring Team activities. This overview is cumulative and references prior reports where appropriate. *Second*, this Pretrial Report summarizes the Monitoring Team’s analysis of four subjects: (1) Defendant City of Memphis, Tennessee’s compliance with the *Kendrick* Consent Decree;² (2) the City’s proposed changes to the Consent Decree; (3) the City’s Consent Decree-related obligations in national context; and (4) public sentiment regarding the Consent Decree. This portion of the Pretrial Report also anticipates the presentations that the Monitoring Team will make at the trial of this matter on June 17, 2020. *Third and finally*, this Pretrial Report refers two community recommendations to the Court for consideration.

II.
OVERVIEW OF THE MONITORING TEAM ACTIVITIES

Since the appointment of the Independent Monitor in December 2018 (ECF No. 176), the Monitoring Team has done the following:

- Requested, received, and reviewed nearly **2 GB** of data from the City and the ACLU-TN—the equivalent of more than **250,000** pages of text.
- Exchanged more than **5,800** internal and external emails.

¹ See Interim Report (ECF No. 197); 2019 First Quarter (Q1) Report (ECF No. 205); 2019 Second Quarter (Q2) Report (ECF No. 219); 2019 Q2 Supplemental Report (Q2 Supplement) (submitted on August 26, 2019, but not yet docketed); 2019 Third Quarter (Q3) Report (ECF No. 256, docketed without submitted exhibits); and 2020 First Quarter (Q1-20) Report (ECF No. 319, docketed without submitted exhibits). The Q2 Supplement is the first exhibit to the Q3 and Q1-20 Reports and is attached again here as **Exhibit 1**.

² The decree is ECF No. 3 in Case No. 2:76-cv-000449 before this Court and has been made publicly available on the Monitoring Team’s website, www.memphispdmonitor.com.

- Conducted **66** weekly Monitoring Team conference calls and additional ad hoc calls as necessary; participated in more than **65** weekly and ad hoc calls with the City; joined scheduled and ad hoc calls with Intervening Plaintiff ACLU of Tennessee, Inc. (ACLU-TN); and joined scheduled and ad hoc calls with both parties.
- Conducted **seven** in-person Monitoring Team meetings: February 11-12, 2019; April 22-23, 2019; July 11-12, 2019; August 27, 2019; November 7, 2019; November 21, 2019; and March 10, 2020.
- Met in-person, telephonically, or virtually with the following Memphis Police Department (MPD) personnel: Police Director Michael Rallings; Lt. Col. David L. Rudolph; Deputy Chief Don Crowe; Major Darren Goods, head of the Multi-Agency Gang Unit (MGU); Police Counsel Zayid Saleem, and more than a dozen members of MPD Command Staff, Real Time Crime Center, and Training Academy.
- Observed Consent Decree trainings at the Memphis Police Academy.
- Consulted with Facebook’s legal, public policy, and law enforcement teams and the Federal Bureau of Investigation (FBI).
- Launched and maintained the Monitoring Team Website, www.memphisdpdmonitor.com.³
- Posted Public Comment Procedure Protocols on a new “Trial & Public Comment” Page on www.memphisdpdmonitor.com and notified media and community contacts about the protocols.⁴
- Appeared before the Court, in person or telephonically, or otherwise brought matters to the Court’s attention, on more than **20** occasions:⁵
- Conferred via email, telephone, and www.memphisdpdmonitor.com and met in-person with dozens of community members.⁶

³ (See, e.g., June 2, 2020, Notice of Website Updates, sent to various media and community contacts, attached as **Exhibit 2**.)

⁴ (See Q1-20 Report, ECF No. 319, at PageID # 9377.)

⁵ (See Q2 Report, ECF No. 219, at PageID # 7580; Q3 Report, ECF No. 256, at PageID # 8496; Q1-20 Report, ECF No. 319, at PageID # 9376; see generally “Monitor Reports,” www.memphisdpdmonitor.com.)

- Participated in a Facebook Live interview and interviews with local media.⁷
- Hosted three community engagement forums on July 11, 2019; November 7, 2019; and March 10, 2020.
- Met in-person with members of the Memphis Shelby County Crime Commission and the Memphis Interfaith Coalition for Action and Hope (MICAH).⁸
- Submitted to the Court comments from community members on **four** separate occasions: September 26, 2019;⁹ October 4, 2019;¹⁰ May 7, 2020;¹¹ and May 28, 2020.¹²
- Retained and worked with Dr. Sheila Peters of Fisk University to schedule and conduct focus groups.
- Provided real-time responses to Requests for Authority (RFAs) for discrete MPD activity or clarifications regarding the same on **25** occasions: May 9, 2019;¹³ June 12, 2019;¹⁴ July 12, 2019;¹⁵ August 29, 2019 (2);¹⁶ September 6, 2019;¹⁷ October 4, 2019;¹⁸ October 11, 2019;¹⁹ October 16, 2019;²⁰ October

⁶ (See Q3 Report, ECF No. 256, at PageID # 8495.)

⁷ (See *id.* at PageID # 8496.)

⁸ (See *id.* at PageID # 8495.)

⁹ (See *id.* at PageID # 8496; Letter from E. Stanton to the Court of September 26, 2019, attached as **Exhibit 3**.)

¹⁰ (See *id.* at PageID # 8496; Letter from E. Stanton to the Court of October 4, 2019, attached as **Exhibit 4**.)

¹¹ (See Letter from E. Stanton to the Court of May 7, 2020, attached as **Exhibit 5**.)

¹² (See Letter from E. Stanton to the Court of May 28, 2020, attached as **Exhibit 6**.)

¹³ (See Q2 Report, ECF No. 219, at PageID # 7581, 7587.)

¹⁴ (*Ibid.*)

¹⁵ (*Ibid.*)

¹⁶ (See Q3 Report, ECF No. 256, at PageID # 8496, 8499-50.)

¹⁷ (*Ibid.*)

¹⁸ (*Ibid.*)

¹⁹ (*Ibid.*)

²⁰ (*Ibid.*)

21, 2019;²¹ October 23, 2019;²² November 9, 2019;²³ November 13, 2019;²⁴ December 19, 2019;²⁵ January 19, 2020;²⁶ March 21, 2020;²⁷ and March 27, 2020;²⁸ April 18, 2020;²⁹ April 22, 2020;³⁰ April 23, 2020;³¹ May 7, 2020;³² May 28, 2020 (2);³³ May 29, 2020;³⁴ and June 1, 2020.³⁵ (Because the eight RFAs from April 18, 2020, forward were addressed after the coverage period of the Q1-20 Report, correspondence related to each of those RFAs is included with this Pretrial Report.)

The following chart, updated since the submission of the Q1-20 Report, accounts for all tasks for which the Monitoring Team has been responsible:

Apr. 23, 2019, Hearing		Aug. 27, 2019, Hearing		Nov. 21, 2019, Hearing	
TASK	STATUS	TASK	STATUS	TASK	STATUS
Submission of 90-Day	Complete: ECF No. 208.	Submission of Audit &	Complete: Approved by the	Submission of final	Pending: Competing

²¹ *(Ibid.)*

²² *(Ibid.)*

²³ *(Ibid.)*

²⁴ *(Ibid.)*

²⁵ *(See Q1-20 Report, ECF No. 319, at PageID # 9377-78.)*

²⁶ *(Ibid.)*

²⁷ *(Ibid.)*

²⁸ *(Ibid.)*

²⁹ (Emails between J. Sink and E. Stanton of April 18, 2020, attached as **Exhibit 7.**)

³⁰ (Emails between J. Sink and E. Stanton of April 22, 2020, attached as **Exhibit 8.**)

³¹ (Emails between J. Sink and E. Stanton of April 23, 2020, clarifying April 22, 2020, attached as **Exhibit 9.**)

³² (Emails between J. Sink and E. Stanton of May 7, 2020, attached as **Exhibit 10.**)

³³ (Emails between J. Sink and E. Stanton of May 28, 2020, attached as **Exhibit 11.**)

³⁴ (Emails between J. Sink and E. Stanton of May 29, 2020, attached as **Exhibit 12.**)

³⁵ (Emails between B. McMullen and E. Stanton of June 1, 2020, attached as **Exhibit 13.**)

Goals.		Compliance Plan for the City.	Court on May 20, 2020. (ECF No. 320.)	draft of the City’s proposed social media policy.	submissions made by the Monitoring Team and the City on December 20, 2019, along with supplemental submissions on January 8 and February 5, 2020. ³⁶ Order held in abeyance by the Court pending trial. (ECF No. 322.)
Submission of Joint Public Engagement Plan.	Complete: ECF No. 211.	Implementation of Audit & Compliance Plan.	Pending: Held in abeyance by the Monitoring Team pending trial.	Submission of Public Comment Period Feedback to the Court.	Complete: Submitted on May 7 and 28, 2020. ³⁷
Submission of Second Quarterly Report, tracking progress towards 90-Day Goals.	Complete: ECF No. 219; <i>see also</i> Q2 Supplement (undocketed), Ex. 1.	Submission of final review of the City’s proposed policies, protocols, and training guidelines.	Complete: Final Monitoring Team recommendations submitted to the Court on October 23, 2019. ³⁸		
		Focus Groups.	Pending: Begun in February 2020 but interrupted by COVID-19 pandemic.		

³⁶ (See Q1-20 Report, ECF No. 319, at PageID # 9382-83 & n. 31.)

³⁷ See *supra* notes 11-12 and accompanying text.

³⁸ (See Q1-20 Report, ECF No. 319, at PageID # 9382 & n. 32.)

			Update to be provided by Dr. Peters.		
		Submission of survey of federal social-media policies.	Complete: Submitted November 20, 2019. ³⁹		
		Submission of comments from hearing attendees.	Complete: Submitted September 26, 2019, and October 4, 2019. ⁴⁰		

III. **EXPERT ANALYSIS**

The Monitoring Team's review of the various matters to be adjudicated at trial largely concerns four subjects: (1) the City's compliance with the *Kendrick* Consent Decree; (2) the City's proposed changes to the Consent Decree; (3) the City's Consent Decree-related obligations in national context; and (4) public sentiment regarding the Consent Decree.

A. The City's Compliance with the Consent Decree.

In two instances, both previously documented and reported to the Court, the Monitoring Team has concluded that the City may have departed from the Consent Decree or related Court Orders. Both instances have implications for the auditing functions of the Monitoring Team.

Potential Violation of § F(2). The first instance, reported to the Court on October 4, 2019, concerned the MPD's behavior during a Labor Day parade, which potentially violated § F(2) of the Consent Decree. (*See* Q3 Report, ECF No. 256, PageID # 8500 & Ex. 18.) Several community members alerted the Monitoring Team to the potential violation of § F(2), after which the Independent Monitor requested an explanation from the City. When the City's

³⁹ (*Id.* at PageID # 9382 & n. 33.)

⁴⁰ (*Id.* at PageID # 9382 & n. 34; *see also supra* notes 9-10 and accompanying text.)

response failed to resolve the Independent Monitor’s concerns, he reported the potential violation to the Court, consistent with the “appeal” procedure that the Court has outlined.⁴¹ The Court then directed the Independent Monitor to notify the ACLU-TN of the potential violation, which he did on October 4, 2019. (*See ibid.*)

Potential Violation of Sanction 5. The second instance involved a potential departure from Sanction 5 of the Court’s Orders of October 26 and 29, 2018 (ECF Nos. 151 and 152), which the Monitoring Team discovered when reviewing the quarterly social-media search-term reports that Sanction 5 requires the City to file. (*See* Q1-20 Report, ECF No. 319, at PageID # 9380, nn. 7, 28, and Ex. 5.) After conferring with the City and the ACLU-TN about the potential departure, the Independent Monitor reported it to the Court. On May 14, 2020,⁴² the Court held a Video Hearing on the matter, after which the Court set a schedule for additional briefing by the parties and the Independent Monitor. (*See* Order, ECF No. 316; Hr’g Tr., ECF No. 318, PageID # 9369.) The City filed pre-hearing and post-hearing briefs. (*See* ECF Nos. 297 and 321.)

Auditing Implications. On May 20, 2020, the Court approved the Monitoring Team’s Audit & Compliance Plan.⁴³ (ECF No. 320.) Subject-matter Expert David N. McGriff,

⁴¹ As the Court explained,

The first step is always to go to the monitor’s team and seek their input, but sometimes the monitor may say, on this issue we need to petition the Court on it, and that’s fine. And, then, sometimes, [the City] may disagree, either one of the parties in this case might disagree with either the resolution—or the resolution, and so, in essence, it’s like an appeal, but you just need to say we request the Court to review X, and we will.

(Hr’g Tr., ECF No. 207, PageID # 7189: 16-25.)

⁴² The hearing originally was scheduled for March 17, 2020, but was re-set. (*See* ECF Nos. 289, 310.) The Independent Monitor’s undocketed February 28, 2020, letter requesting the hearing is the subject of a pending motion by the City to seal or redact it (ECF No. 296).

⁴³ (Q2 Report, ECF No. 219, Ex. 4 (not yet docketed).)

Sr., will lead the Monitoring Team’s implementation of this plan and will elaborate on it at trial. But both instances above have implications for the plan because neither one was brought to the Monitoring Team’s attention by the City. The first instance was brought to the Monitoring Team by members of the public, and the second was discovered by the Monitoring Team on its own. Both instances thus illustrate the need for the Audit & Compliance Plan.

B. The City’s Proposed Changes to the Consent Decree.

The City has made four separate efforts to modify the Consent Decree, one of which currently is pending before the Court:

Motions. The City has filed two motions to modify the Consent Decree. The first motion was filed in August 2018 (ECF No. 124) but later suspended after the City and the ACLU-TN jointly moved to allow “a period of operation under the supervision and oversight associated with the soon-to-be Court-appointed monitor” (ECF No. 175). (*See* Order, ECF No. 178.) The second motion (ECF No. 227), which sought immediate modification of the Consent Decree, was opposed by the ACLU-TN (ECF No. 231) and ultimately denied by the Court (Order, ECF No. 250).

Alternative Proposed Social Media Policies. The competing social-media policies proposed by the City and the Monitoring Team (*see* Q1-20 Report, ECF No. 319, at PageID # 9379-9380), which relate to Sanction 4 of the Court’s Orders (*e.g.*, ECF No. 152, PageID # 6289), remain pending before the Court. On June 2, 2020, at the parties’ request, the Court held in abeyance an Order on the policies to allow mediation between the City and the ACLU-TN to proceed and “until after the issues to be presented to the Court at the Modification Hearing are resolved.” (ECF No. 322.)

Objections to the Scope of §§ G & H of the Consent Decree. On March 30, 2020, the City objected to the scope of §§ G & H of the Consent Decree as construed by the

Independent Monitor. (*See* Q1-20 Report, ECF No. 319, at PageID # 9377 & n. 13.) After a hearing on the objections (*see* ECF Nos. 301, 304), the Court overruled them (Order, ECF No. 305).

Notice of Joint Proposed Modifications to the Consent Decree. The City's latest effort to modify the Consent Decree is presently pending before the Court. In a notice of joint proposed modifications to the Consent Decree (ECF No. 309), the City has identified one minor change to which the City and the ACLU-TN have agreed and 17 additional changes to which the parties may agree. Those 17 additional changes are the subject of ongoing mediation between the parties, which the Court authorized the Independent Monitor to conduct and which began on May 12, 2020. (*See* ECF No. 311.) Deputy Monitor Jim Letten and First Amendment & Constitutional Law Subject-Matter Expert John C. Henegan will present the Monitoring Team's views regarding these 17 proposed changes at trial.

C. Memphis in (National) Context.

In imposing sanctions on the City and appointing the Independent Monitor, the Court noted that “Memphis is unique in having imposed a higher standard on itself by adopting the 1978 Consent Decree, but it is not alone in confronting the questions presented by modern surveillance.” (Order, ECF No. 151, at PageID # 6278.) The Court also observed that the MPD “has the opportunity to become one of the few, if only, metropolitan police departments in the country with a robust policy for the protection of privacy in the digital age” (*ibid.*), citing an article by Public Policy & Social Media Subject-Matter Expert Rachel Levinson-Waldman.

At earlier points in this litigation, Ms. Levinson-Waldman has provided testimony and evidence regarding the social-media policies in place in state and federal law enforcement agencies across the country. (*See, e.g.*, Q1-20 Report, ECF No. 319, Ex. 4 (Letter re: FISA Opinions); Q3 Report, ECF No. 256, Ex. 6 (federal chart); Q2 Report, Ex. 6, ECF No. 219-1

(state chart).) At trial, she will elaborate on that information and, along with Law Enforcement & Police Practices Subject-Matter Expert Theron T. Bowman, Ph.D, discuss the report of the City's Expert, Eric Daigle (*see* ECF No. 306.) Dr. Bowman will offer additional insights on the City's obligations under the Consent Decree as contrasted with those of other cities under state and federal consent decrees.

D. Public Sentiment.

In the Joint Public Engagement Plan that the Monitoring Team and the parties filed last May (ECF No. 211), they identified four principal ways by which to obtain the input of the general public regarding the Consent Decree and the City's compliance with it: (1) a public website; (2) interviews with the media; (3) community forums; and (4) focus groups. To those four, all of which were implemented to some extent, have been added in-person meetings with community members and groups⁴⁴ and direct correspondence with the Court.⁴⁵ They have met with varying degrees of success:

Public Website. Traffic on www.memphispdmonitor.com, which has been live for a year, was infrequent in 2019. In individual meetings with community members and community organizations, and at community forums, people largely professed ignorance of the website, lack of access to it, or frustration with its (limited) offerings. Traffic has begun to increase as the Monitoring Team has added more materials to the website, including the materials associated with the Public Comment Period (*see* ECF No. 295), and begun sending "e-blasts" to community members and media each time an update to the website is posted. The Monitoring Team now is receiving regular contacts from community members via the website when they believe that an infraction has occurred, which enables the Monitoring Team to respond quickly and directly and

⁴⁴ *See supra* nn. 6, 8 and accompanying text.

⁴⁵ (*See, e.g.,* Order, ECF No. 295; *see also supra* nn. 9-12 and accompanying text.)

to bring appropriate matters—such as the Labor Day parade issue discussed above in § III(A)—to the Court’s attention. One community member recently congratulated the Monitoring Team on the website’s content and “e-blast” updates.

Media Interviews. The Independent Monitor and various members of the Monitoring Team have participated in media interviews,⁴⁶ responded to written inquiries by the media, and now include *The Commercial Appeal*, *The Daily Memphian*, *The Memphis Flyer*, *MLK50*, and other print and television media on their “e-blast” contact list. The Monitoring Team also has sent out press releases in advance of its community forums, all of which have been attended by members of the media, and notified the media about upcoming Court hearings. Such notice enabled one reporter to attend the Video Hearing held by Court on May 14, 2020.⁴⁷

Community Forums. Of the three community forums that the Monitoring Team has hosted, the second forum, on November 7, 2019, was by far the best attended and received. More than 100 people were there—twice as many as at the first community forum in July 2019 and three times as many as at the third forum in March 2020. (*Cf.* Q2 Report, ECF No. 219, at PageID # 7588, *with* Q3 Report, ECF No. 256, at PageID # 8503.) The Monitoring Team took feedback that it received from the first community forum—for example, earlier notice; better coordination with community organizations in selecting the date; adding an educative component, with rotating sessions and presentations by each Monitoring Team member; having hard copies of the Consent Decree and other important papers on hand for people without internet access—and applied it in the second, which seemed to go over much better. (*Cf.* Q2 Report, ECF No. 219, at PageID # 7588, *with* Q3 Report, ECF No. 256, at PageID # 8503.)

⁴⁶ See *supra* n. 7 and accompanying text.

⁴⁷ See *supra* § III(A) & n. 42 and accompanying text.

But at least as effective as these changes, if not more, was Mayor Jim Strickland's inclusion of notice about the community forum in his weekly newsletter. For several weeks leading up to the November community forum, Mayor Strickland's newsletter not only advertised the forum but also posed hypothetical questions based on provisions of the Consent Decree on which he encouraged people to engage. The takeaway appears to be that although there are some things that the Monitoring Team can do to promote community engagement, the City and the ACLU-TN may have a greater ability to do so.

The third community forum, on March 10, 2020, was the least well attended and received of the three. Many of the same adaptations that the Monitoring Team applied to the second community forum were incorporated into the third, but the timing of the forum may have been impacted by COVID-19, the location was new, and several people complained that they received little or incorrect notice. (*See* Q1-20 Report, ECF No. 319, at PageID # 9383.) With the new success of the website, however, and without the stresses and strictures of COVID-19, the Monitoring Team expects future community forums to resemble the second one.

All three prior community forums have been recorded, live-streamed from www.memphisdmmonitor.com, or both. Footage from the first two forums remains on the website, and footage from the third will be uploaded shortly.

Focus Groups. The focus groups organized by Dr. Peters had just gotten started when COVID-19 began to take its toll. (*See id.* at PageID # 9382-83.) Early reception of the focus groups, some of which was expressed at the third community forum, was critical, but Dr. Peters has been working on alternative ways to continue gathering constructive community feedback to provide the Court. She will update the Court on her progress at trial.

In-Person Meetings / Direct Submissions to the Court. In in-person meetings with the Monitoring Team and direct submissions to the Court, a majority of community members expressed distrust of the MPD—with MPD officers assigned to the MGU in particular—and dissatisfaction with the MPD’s compliance with the Consent Decree. In-person meetings with individuals and community organizations alike have seemed to help build trust between the community and the Monitoring Team. And community members seem to appreciate having direct access to the Court. For example, several community members submitted comments during both the original and extended public comment periods, and community members requested the extension of the period.⁴⁸

But little change in community members’ perceptions of the MPD, or law enforcement more generally, has been apparent. Those community members who have expressed positive associations with law enforcement remain positive, and community members who have expressed negative associations with law enforcement remain negative.

IV. COMMUNITY RECOMMENDATIONS

Across all methods of community engagement, the recommendation from community members that is repeated most often is for the Monitoring Team to be broadened to include one or more “lay” community members.⁴⁹ Other recommendations from community members largely concern improvements that the Monitoring Team can make in educating the public and keeping them informed. (*See, e.g.*, Q2 Report, ECF No. 219, PageID # 7589.)

But one other recommendation would require intervention by the Court: Community members at the third community forum on March 10, 2020, asked whether a schedule of pre-set,

⁴⁸ (*See* Order, ECF No. 313; *supra* nn. 11-12 and accompanying text.)

⁴⁹ (*See* Q1-20 Report, ECF No. 319, at PageID # 9384; Q3 Report, ECF No. 256, PageID # 8504; Q2 Report, ECF No. 219, PageID # 7589.)

immediate remedies for violations of the Consent Decree could be established. Community members noted that the process of bringing a potential violation of the Consent Decree to the Monitoring Team's or the Court's attention, allowing the City and the ACLU-TN to address the potential violation, and obtaining an adjudication from the Independent Monitor or the Court can be protracted, even though it is more rapid than ordinary litigation processes. During the delay, community members note, violations can persist and perhaps worsen. Setting a schedule of immediate remedies when a violation is found would place the burden on the City, rather than community members, to appeal to the Monitoring Team or the Court for relief.

The logistics of creating and implementing such a schedule would pose some challenges. But the Monitoring Team is happy to work with interested community members on such a schedule if the Court deems it appropriate.

The Monitoring Team submits these recommendations to the Court for consideration:

V.
CONCLUSION

The Independent Monitor and the Monitoring Team look forward to discussing this Pretrial Report and offering the anticipated presentations and testimony at trial on June 17, 2020, or at any other time that the Court deems appropriate.

RESPECTFULLY SUBMITTED, this 3rd day of June 2020,

/s/ Edward L. Stanton III

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Independent Monitor

APPENDIX OF DOCUMENTS REFERENCED IN THIS REPORT

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