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August 4, 2003

The Honorable Paul W. Grimm
United States Magistrate Judge
District of Maryland
101 W. Lombard Street
Baltimore, Maryland 21211

Re: *Maryland State Conf. of NAACP Branches v. Maryland Dept. of State Police*, Civil Action No. PWG-98-1098

Dear Judge Grimm:

I write in follow up to Maureen Dove's correspondence to the Court of July 11 and to continue the discussion among the Court and counsel during the July 17 Status Hearing. Specifically, the purpose of this letter is to explain further plaintiffs' views concerning bifurcation, and to describe our proposal to structure this litigation so that it can move expeditiously toward resolution.

In short, plaintiffs do not believe that the "macro" claims, especially plaintiffs' claims against the Maryland State Police entity under Title VI of the 1964 Civil Rights Act, should be split from the "micro" claims against individual troopers, with discovery and trial postponed until the resolution of some or all "micro" claims. As explained below, we request that the "micro" and "macro" claims of individual plaintiffs be tried together, in a series of trials involving manageably-sized groups of plaintiffs.

Our sense is that the difference of opinion between plaintiffs and defendants about how best to proceed stems from our basic disagreement about the nature of the case. This case is not, as defendants assert, an amalgamation of unrelated police misconduct complaints against individual Maryland state troopers. To be sure, individual plaintiffs are pursuing state and federal constitutional claims against the individual troopers who stopped, detained and searched them for drugs. But the

common thread joining all of the plaintiffs is a claim challenging systemic racial discrimination in MSP's federally-funded highway drug interdiction program, pursuant to Title VI, 42 U.S.C. § 2000d.[1]

As this Court noted at the July 17 hearing, plaintiffs captioned their Title VI claim as Count I of their lawsuit. This was no accident; the Title VI claim is the plaintiffs' lead claim because it is the centerpiece of the case.[2] This claim is brought not against any individual troopers or supervisors, but only against the Maryland State Police entity. *See Farmer v. Ramsay*, 41 F.Supp. 2d 587, 592 (D.Md. 1999) (Legg, J.)("[T]he proper defendant in a Title VI case is an entity rather than an individual.")

And while there is authority that the Court, in its discretion, could bifurcate plaintiffs' § 1983 claims against MSP supervisors from those against individual troopers, the plaintiffs' Title VI damages claims stand on a different footing. This is because a supervisor's liability under § 1983 depends on the antecedent finding that an individual trooper has committed a constitutional violation. But a plaintiff can prove that he or she is entitled to damages from the MSP under Title VI even if no

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[1] Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[2] Defendants previously moved to dismiss the plaintiffs' Title VI claim against the MSP, and that motion was denied. *Maryland State Conf. of NAACP Branches v. Maryland Dept. of State Police*, 72 F.Supp.2d 560, 567 (D.Md. 1999). MSP has never disputed that it is a recipient of federal funds, and Judge Blake already has held that the plaintiffs fall within the zone of interests protected by Title VI. 72 F.Supp.2d at 567, *citing National Credit Union Admin. v. First Nat'l Bank and Trust Co.*, 522 U.S. 479 (1998). Furthermore, the Supreme Court has made clear that there exists a damage remedy under the Title VI statute. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

trooper is found liable on her § 1983 claims.[3] In other words, each claim presents an independent path to establish the plaintiff's entitlement to damages.

As such, it seems to us inefficient to split a given plaintiff's § 1983 and Title VI damages claims for separate trial, when each will eventually need to be tried, and there inevitably will be substantial overlap of evidence. That is, in presenting a Title VI damages claim, a plaintiff will need to present evidence regarding his or her individual encounter. The plaintiff also will need to present evidence of the "big picture" to show that, over the course of years, MSP operated its highway drug interdiction program in a racially discriminatory manner, in the face of notice after notice about racial profiling along Interstate 95, and heedless of the serious damage caused to the plaintiffs by this discrimination. Fair presentation of this claim will necessarily include: statistical evidence; expert testimony analyzing the significance of this evidence; documentary and testimonial evidence concerning notice, MSP's actual knowledge of and deliberate indifference toward its racial profiling problem, and lay witness testimony concerning specific incidents of profiling and the extent of the damage this profiling caused.

This "big picture" evidence, in turn, may substantially overlap the evidence of supervisory liability. The principal difference is that the supervisory liability evidence will necessarily focus on the knowledge and actions (or omissions) of particular individuals within the State Police chain of command, whereas the Title VI evidence will concern the Department of State Police more generally, as an institution. We acknowledge that, nonetheless, the Court may want to separate out supervisory liability claims for separate trial, in order to reduce the issues (and the number of parties) but we submit that the reasons for doing so are not compelling.

In sum, we believe that individual § 1983 claims should not be bifurcated from Title VI claims. And as long as § 1983 and Title VI claims are to be tried in a unitary trial, there is less reason to separate out supervisory liability claims for separate trial later.

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[3] It is even possible that, in a few cases, an individual plaintiff's inability to identify the troopers who stopped and searched her will mean the only claim she ultimately will be able to pursue will be her Title VI claim.

Plaintiffs' Proposed Litigation Plan

A far superior alternative to the bifurcation that the defendants seek would be for the Court to move forward with the jury trial of a "test case" consisting of several individual named plaintiffs, individual defendants (at least troopers, if not also supervisors), and the MSP entity. This trial would cover the plaintiffs' Title VI claims, and resolve all claims of the individual plaintiffs who participate (with the possible exception of supervisory liability claims under §1983). The option that we suggest is to proceed with all claims in which a particular trooper was the lead trooper. An obvious choice here would be David Hughes, who was the lead trooper in the detention and search of named plaintiffs Gary Rodwell, John Means and Kenneth Jeffries, Yancey and Aleshia Taylor (and son), and Verna Bailey (and daughter), as well as class member Antonio Sharp (and friends). Backup troopers who assisted Hughes in these searches also would be defendants at this trial.

The test case approach offers an enormous benefit in terms of economy, because if the plaintiffs in this initial trial establish a Title VI violation, subsequent plaintiffs can avoid relitigation of this claim through reliance upon offensive, non-mutual collateral estoppel. *See Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 162 F.R.D. 482, 488-89 (E.D. Pa. 1995), *citing Bogus v. American Speech & Hearing Ass'n*, 582 F.2d 277, 290 (3d Cir. 1977), Manual for Complex Litigation, Second § 21.63 (1985).[4] Defendants' vague and unsupported suggestion that their Seventh Amendment rights would somehow be compromised by trial in this format has no merit. The MSP entity and the individual troopers involved would enjoy a "full and

[4] Many courts have touted the test case approach as a superior alternative to class certification. *E.g. Katz v. Carte Blanche Corp.*, 496 F.2d 747, 758-63 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); *Commander Properties Corp. v. Beech Aircraft Corp.*, 164 F.R.D. 529 (D.Kan. 1996); *Fogie v. Rent-A-Center*, 867 F.Supp. 1398 (D.Minn. 1993); *Smith v. Lower Merion Township*, 1991 WL 205023 (E.D. Pa. 1991); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1133-34 (D.N.J. 1990);*Perez v. Gov't of Virgin Islands*, 109 F.R.D. 384 (D.V.I. 1986); *Gelman v. Westinghous Elec. Corp.*, 73 F.R.D. 60 (D. Pa. 1976); *Mendez v. Heller*, 380 F. Supp. 985 (D.N.Y. 1974), *vacated on other grounds*, 420 U.S. 916 (1975); *Yanai v. Frito Lay, Inc.*, 61 F.R.D. 349, 353 (N.D. Ohio 1973). Notably, in an early racial profiling case, *Wilson v. Tinicum Township*, 1993 WL 280205 (E.D.Pa. 1993), it was the defendants who advocated the test case approach (albeit unsuccessfully) in opposing class certification.

fair opportunity" to defend on these claims before a single jury, which preserves the jury trial and due process rights of all parties. *Parklane Hosiery Co., Inc. v. Shore*, 99 S.Ct. 645, 652 (1979). *See also, In re Microsoft Corp. Antitrust Litigation*, 232 F.Supp.2d 534 (D.Md.2002).

To allow the parties to prepare for such a test case trial, plaintiffs believe that free and open discovery should proceed forthwith on all of the remaining issues in this lawsuit. Even if the Court were ultimately to bifurcate trial of the supervisory liability claims, any further delay of the discovery process poses an intolerable threat of prejudice to the plaintiffs, given the passage of time since the filing of this case. The MSP administration has changed, many crucial witnesses, and even a number of the defendants, have moved on to other jobs.[5] Memories fade, and the passage of time since the incidents underlying the plaintiffs' claims — most of which occurred in 1995 and 1996 — makes it is imperative that the plaintiffs be permitted to conduct all discovery necessary to proof of their claims without further delay.

Moreover, because there likely exists substantial overlap between the discovery plaintiffs must conduct to present their Title VI claims against the MSP, and discovery pertaining to their § 1983 claims against MSP supervisors, little would be gained by a stay of discovery on the supervisory claims. Just in pragmatic terms, it would be difficult to identify the line where Title VI discovery ends and supervisory discovery begins. Trying to maintain that line would invite numerous unproductive discovery disputes. Certainly, the risk of prejudice to the plaintiffs outweighs any gain in efficiency that discovery restrictions would offer.

The Test Case Approach is Superior to Defendants' Bifurcation Proposal

Defendants urge the Court to bifurcate discovery and trial of this case into stages, with the first stage being a series of individual cases against individual troopers only. Second stage proceedings against supervisory officials, and all discovery

[5] A tragic example of the need for discovery to proceed swiftly and freely is found in the untimely death last February of former MSP commander Ernest J. Leatherbury, one of the few MSP officials plaintiffs have been permitted to depose thus far. No one could have anticipated Col. Leatherbury's sudden death at the age of 55, but had this deposition not been permitted, his testimony would have been lost.

pertaining to MSP's institutional liability, would be deferred and conducted at some later time. Moreover, that discovery would go forward only if plaintiffs are successful in their first stage proceedings. This approach, defendants erroneously contend, is mandated by *City of Los Angeles v. Heller*, 475 U.S. 796 (1986)(false arrest/excessive force case in which the Court found that a *Monell* claim against a municipality only lies where the underlying claim against individual police officers is sustained); *Marryshow v. Town of Bladensburg*, 139 F.R.D. 318 (D. Md. 1991)(false arrest/excessive force case in which § 1983 claims against town and supervisory officials were bifurcated from claims against officers on ground that these claims were entirely dependent upon plaintiffs' proof of their claims against the individual defendants); *Gray v. Maryland*, 228 F.Supp.2d 628 (D.Md. 2002)(false arrest/malicious prosecution case in which § 1983 claims against county were bifurcated from claims against individual officers, because "proof of any liability for the County based on a custom or policy requires a showing that there was a civil rights violation by one of the other defendants").

The obvious flaw in defendants' bifurcation proposal is its disregard for plaintiffs' Title VI claims. Defendants rely exclusively upon cases concerning § 1983 claims in which the liability of police supervisors is dependent upon a plaintiff's proof of a constitutional violation by the individual officers.[6] Such is not the case with plaintiffs' Title VI claims, which involve only the MSP entity, are broader in scope, and are analyzed differently than are plaintiffs' § 1983 claims against individual troopers.

The showing that plaintiffs must make to recover damages under Title VI is plainly articulated by two recent Supreme Court cases: *Gebser v. Lago Vista Independent*

[6] Defendants have cited no authorities utilizing bifurcation where, as here, one claim is made against a governmental entity under Title VI or Title IX, while another is made against individual officers under §1983. And plaintiffs have been unable to find any cases employing bifurcation in such circumstances. The norm seems to be unified trial of Title VI or IX/§1983 cases. *See, e.g., Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001)(Title IX claim against School Board tried simultaneously with §1983 claims against school principal and superintendent).

Sch. Dist., 524 U.S. 274, 290-92 (1998), and *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 641-46 (1999).[7] Under the standard stated in *Gebser* and *Davis*, a plaintiff proves a damages claim under Title VI if she demonstrates that "the [funding] recipient [was] deliberately indifferent to known acts of . . . discrimination." *Davis*, 526 U.S. at 643; *accord Gebser*, 524 U.S. at 290. This standard requires (1) that an official who has authority to address the alleged discrimination has actual knowledge of discrimination in the recipient's programs, and (2) that the official responds to the discrimination in a way that amounts to deliberate indifference to that discrimination. *See Gebser*, 524 U.S. at 290. As defined by the Supreme Court, "deliberate indifference describes a state of mind more blameworthy than negligence" but "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). And, significantly for purposes of the bifurcation issue, the notice received by MSP need not pertain to the particular plaintiff whose claim is at issue, *Baynard v. Malone*, 268 F.3d 228, 238 n.9 (4th Cir. 2001),[8] thus making clear that a plaintiff's Title VI claim is not derivative of his individual equal protection claim.

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[7] While both *Davis* and *Gebser* are Title IX cases, the damages liability standard they set forth for Title IX applies with equal force to Title VI. As the Supreme Court has often acknowledged, Title IX was patterned after Title VI. *See, e.g.*, *Gebser*, 524 U.S. at 286 (noting that Title IX and Title VI are "parallel" statutes that "operate in the same manner," and relying on Title VI case law in analyzing the scope of damages relief available under Title IX); *Grove City College v. Bell*, 465 U.S. 555, 566 (1984). For these reasons, the Supreme Court has consistently interpreted the two statutes in the same fashion. *See, e.g., id.* at 703 ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI."). And because Congress intended the two statutes to be interpreted consistently, the Title IX standard for damages liability set forth in *Gebser* and *Davis* applies to Title VI.

[8] Chief Judge Wilkins wrote in *Baynard*:

> We note that a Title IX plaintiff is not required to demonstrate actual knowledge that a particular student was being abused. We believe the actual notice requirement could have been satisfied, for example, if Malone had had actual knowledge that Lawson was currently abusing one of his students, even without any indication of which student was being abused.

The defendants may wish to avoid exposure of the extent of the MSP's past racial profiling, but they should not be allowed to achieve this goal through restrictive and, ultimately, inefficient discovery and trial plans that unfairly prejudice plaintiffs' ability to present their claims. *See generally*, Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499 (1993)(raising concerns about prejudice, increased expense, and inconvenience faced by plaintiffs whose claims are bifurcated, and arguing that bifurcation should be the exception, not the rule). Because case resolution through a single trial is favored under the federal rules, *see* Advisory Committee Note to the 1966 amendment of Rule 42(b), 39 F.R.D. 113, it is the proponent of bifurcation who bears the burden of persuading the trial court that bifurcation is appropriate. *E.g.*, *McCrae v. Pittsburgh Corning Corp.*, 97 F.R.D. 490, 492 (E.D. Pa. 1983)("A defendant seeking bifurcation has the burden of presenting evidence that a separate trial is proper in light of the general principle that a single trial tends to lessen the delay, expense and inconvenience to all parties.")

We respectfully submit that the defendants have failed to meet their burden here. As Judge Garbis noted in *Marryshow*, bifurcation is a useful tool only in those cases where it actually serves the interests of justice and efficiency. 139 F.R.D. at 319.[9] Here, it would disserve judicial efficiency for the Title VI claims to be

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[9] Defendants overstate their contention that the *Marryshow* and *Gray* cases *require* bifurcation here. It is well settled, however, that district courts enjoy broad discretion to structure discovery and trials as they see fit. And determinations concerning bifurcation should be made on a case by case basis. As Professors Wright and Miller counsel,

> [u]ltimately the question of separate trials under Rule 42(b) should be, and is, a matter left to the discretion of the trial court on the basis of the circumstances of the litigation before it. The district judge must weigh whether one trial or separate trials best will serve the convenience of the parties and the court, avoid prejudice, and minimize expense and delay. The major consideration, of course, must be which procedure is more likely to result in a just and expeditious final disposition of the litigation.

9 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure 2d, §2388 (citations omitted).

bifurcated from the individual claims and deferred, because that approach would require each individual plaintiff to participate in two complete trials. Whatever the outcome of the trial on a given plaintiff's trial on the constitutional claims against the individual troopers who searched him or her, that plaintiff would still retain the right to proceed with his Title VI claim against the Maryland State Police entity. This inefficiency, combined with the prejudice to plaintiffs' claims, make bifurcation a poor approach to litigation of this case.

For these reasons, we respectfully ask the Court to adopt a plan like the one that is outlined here, and to reject the defendants' bifurcation plan.

Respectfully,

/s/

Deborah A. Jeon

cc: All Counsel