



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Hawai‘i

BY EMAIL AND CERTIFIED MAIL

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**Re: HPD’s Pattern and Practice of False Arrests at Sobriety
Checkpoints, Including That of Ammon Fepuleai**

Dear Chief Logan and Corporation Counsel Viola:

The ACLU of Hawai‘i Foundation (“**ACLU of Hawai‘i**”) writes on behalf of our client, Ammon Fepuleai. Multiple Honolulu Police Department (“**HPD**”) officers unconstitutionally arrested Mr. Fepuleai for “Operating a vehicle under the influence of an intoxicant” (“OVUII” or “DUI”) at a sobriety checkpoint on November 7, 2023. Mr. Fepuleai does not drink or do drugs, was not inebriated at the time of the arrest, and *blew a 0.000 on a breathalyzer test*, yet HPD officers still arrested him for OVUII. Our investigation suggests these HPD officers fabricated their police reports to secure the arrest and justify it after the fact. These officers also improperly turned off their body-worn cameras to hide their scheme. Importantly, Mr. Fepuleai’s arrest does not stand in isolation; we understand that, in the past couple of years, at least 69 other individuals who blew 0.000 were also arrested for OVUII by HPD officers, which suggests that the City and County of Honolulu is itself responsible for having a de facto policy or widespread custom of making false arrests—despite clear indications of sobriety—as a means to justify receipt of federal grant money. We demand that HPD take immediate action to address these issues, and we are prepared to sue if HPD fails to do so.

I. HPD Unconstitutionally Arrests a Sober Driver for DUI

Ammon Fepuleai is a resident of American Samoa and a Mathematics instructor at American Samoa Community College. He lives in American Samoa but has family on Oahu whom he visits several times a year. On November 7, 2023, Mr. Fepuleai was serving as a wedding planner for his cousin’s wedding later that week. At around 11:30 p.m., Mr. Fepuleai, who identifies as m̄hū, was driving on Kamehameha Highway in Waipio when he was pulled over at an HPD¹ “sobriety checkpoint.” The checkpoint’s “protocol” was to stop *all* approaching vehicles.

As Mr. Fepuleai approached the checkpoint, Officer **Dallas Pauu** “flagged” him down and directed him to pull over. Neither Officer Pauu, nor the other officers involved in Mr. Fepuleai’s eventual arrest, stated during the incident or in police reports that Mr. Fepuleai was driving in a way that suggested he was intoxicated.

Officer **David Ferreira** approached Mr. Fepuleai and initiated a traffic stop. Upon Ferreira’s request, Mr. Fepuleai handed him his American Samoa license. After taking the license and learning that Mr. Fepuleai was coming from his cousin’s bridal shower, Officer Ferreira suddenly told Mr. Fepuleai that he “detect[ed] the odor of alcohol.” Mr. Fepuleai immediately responded: “I don’t drink.” He also showed Officer Ferreira a medication bottle that he had in the front seat—which has alcohol as one of its main ingredients—and explained that it may have been the source of the “odor” detected by Officer Ferreira. Mr. Fepuleai even offered to open the bottle so he could smell it, but Officer Ferreira showed no interest in investigating the true source of the scent and instead asked Mr. Fepuleai to take a field sobriety test (“FST”). Mr. Fepuleai, trying to be agreeable and confident he could perform well on the test—since he had not consumed any substances of any kind—agreed. Notably, Officer Ferreira stated in his police report for the incident that he did *not* detect *any* odor of alcohol.

After taking a field sobriety test and showing no signs of balance issues, Mr. Fepuleai voluntarily took a breathalyzer test. The test resulted in a “0.000.”

Undeterred by these clear signs that Mr. Fepuleai was sober, officers persisted in trying to find reasons to arrest him. After passing the breathalyzer test, Officer

¹ References to “HPD” throughout this letter are also references to the City and County of Honolulu (“City”), of which HPD is a department and agency.

Pauu conducted an additional FST, including a “Modified Romberg Test,” which asks participants to tilt their head back, close their eyes, count to thirty seconds, and then say “stop.” Possible indicators of impairment from the test include whether one stops at or close to thirty seconds and whether their head sways while tilted back.² Officer Pauu’s report stated Mr. Fepuleai was deficient for both: he stopped after only nineteen seconds and his head “swayed” in a circular motion by around 2-3 inches. However, Officer Pauu never instructed Mr. Fepuleai that he was supposed to keep his head still or that counting at an accurate pace was part of test; in fact, after concluding the test, Mr. Fepuleai immediately asked Officer Pauu to clarify whether he should have been counting “1-100, 2-100.” But instead of allowing Mr. Fepuleai to retake the test, Officer Pauu turned to Officer **Ridge Newcom** and told him to arrest Mr. Fepuleai.

Notably, Officer Pauu was not the only officer who made misrepresentations in his report. Officer Ferreira stated in his report that Mr. Fepuleai “almost fell down” when turning, but the video shows this did not happen. Officer Ferreira also stated that Mr. Fepuleai “started the test too early,” but the video shows that Mr. Fepuleai started as soon as Officer Ferreira instructed him to. And Officer Ferreira noted that Mr. Fepuleai “turned in the wrong direction,” but had never instructed him that turning in a particular direction was part of the test.

Contrary to the officers’ stated observations, the body camera video shows that, throughout his interactions with the officers, Mr. Fepuleai speaks clearly and coherently and responds to questions promptly, and often very quickly. Yet, Officer Ferreira’s report inexplicably stated that Mr. Fepuleai “had delayed responses to . . . questions,” “had a difficult time focusing,” and was acting “confused.”

As a sign that the three officers colluded to justify the arrest, each of the three reports use nearly identical language in observing that, from each individual officer’s perspective, Mr. Fepuleai’s eyes were “red,” “bloodshot,” “watery,” “glassy,” “droopy,” and/or that he exhibited a “blank stare.” Yet, body camera footage of Mr. Fepuleai when he is outside his car and illuminated by highway lights clearly shows that his eyes appear to have no redness and are neither “bloodshot” nor “watery.”

² See Romberg Balance Test, <http://www.fieldsobrietytests.org/rombergbalancetest.html>.

Notably, the HPD Sergeant who supervised the sobriety checkpoint that night—and who approved all three officers’ police reports—was **Darren Cachola**.³

Also, seemingly to further their attempted fabrication of the basis for Mr. Fepuleai’s arrest—and in blatant contravention of HPD policy—officers deliberately turned their body cameras off at key points in the investigation.⁴ For example, Officer Ferreira turned his camera off as soon as he began speaking with Officer Newcom immediately after administering the first FST, when the officers presumably were discussing whether there was probable cause to arrest Mr. Fepuleai for OVUII.⁵

Most shockingly, however, Officer Newcom turned his body camera off before driving Mr. Fepuleai to the Pearl City Police Station. He had a reason to do so: during the ride, Officer Newcom improperly convinced Mr. Fepuleai to decline to take a blood test upon arrival at the station—which would have required him to stay overnight in cell block—and to post bail instead. But he did not tell Mr. Fepuleai that doing so would mean making a legal admission that he was intoxicated, or that this would lead to the revocation of his driver’s license. Mr. Fepuleai, influenced by Officer Newcom’s manipulative statements, and being unaware of the consequences, had his sister bail him out.

While the City (understandably) declined to prosecute Mr. Fepuleai, the incident had a series of harmful consequences for Mr. Fepuleai: The night of the incident was, by itself, extremely emotionally distressing and traumatizing. The incident also negatively impacted his trip and work as a wedding planner. Since the incident, he has felt embarrassment, shame, and humiliation. Given that he has never been arrested before, his reputation has been harmed by the arrest. Mr. Fepuleai also lost his driver’s license for one month. He now also fears further

³ Mr. Cachola has his own separate history of serious misconduct. See Nick Grube, *Why Is It So Hard To Fire Honolulu Police Sgt. Darren Cachola?*, Honolulu Civil Beat (May 1, 2019), <https://www.civilbeat.org/2019/05/why-is-it-so-hard-to-fire-honolulu-police-sgt-darren-cachola>; Zuri Davis, *Police Union Protects Another Bad Cop, This Time Despite Domestic Violence Allegations*, Reason (May 2, 2019), <https://reason.com/2019/05/02/police-union-protects-another-bad-cop-this-time-despite-domestic-violence-allegations>.

⁴ See HPD, *Policy Number 2.57: Body-Worn Cameras*, Honolulu Police Department (Sept. 24, 2021), <https://www.honoluluupd.org/wp-content/uploads/2020/08/HPD-Policy-257-3-7-2023.pdf> (requiring officers to turn on their cameras during a “law enforcement or investigative encounter”).

⁵ Officer Newcom’s body camera video should have been turned on during this encounter, especially since, immediately before the conversation, he was observing Mr. Fepuleai’s FST. But the body camera footage from Officer Newcom that was provided to Mr. Fepuleai in response to his open records request does not capture any of this.

mistreatment by HPD every time he returns to Hawai'i. Every time he sees or hears police sirens, he feels like he is about to get arrested. Mr. Fepuleai seeks policy changes within HPD that will prevent similar abuses of power in the future.

II. Officers Ferreira, Pauu, and Newcom, and Sergeant Cachola are Liable for False Arrest Without Probable Cause And Other Claims

First, the officers did not even have “reasonable suspicion” to conduct a field sobriety test on Mr. Fepuleai. “Requiring a driver to submit to a field sobriety test constitutes a seizure within the meaning of the Fourth Amendment” and officers need reasonable suspicion to justify extending a stop to conduct the test. *U.S. v. Hernandez-Gomez*, 2008 WL 1837255, at *4 (D. Nev. Apr. 22, 2008). Under the reasonable suspicion standard, a police officer “must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Officer Ferreira’s only stated reason for having Mr. Fepuleai do the FST was that he detected the scent of alcohol while Mr. Fepuleai was sitting in his car.⁶ But Officer Ferreira cannot now maintain that he detected the scent of alcohol, since his police report specifically states he did not. Even if he did, a stop must “last no longer than is necessary to effectuate [its] purpose.” *United States v. Mondello*, 927 F.2d 1463, 1471 (9th Cir.1991). At this point, Mr. Fepuleai was showing *no* outward signs of impairment, had not been driving erratically or unusually, and had provided Officer Ferreira with a reasonable alternative explanation for a scent of alcohol, which Officer Ferreira declined to investigate. *See United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005) (“As a corollary of the rule that the police may rely on the totality of facts available to them . . . , they also may not disregard” relevant facts). And if Officer Ferreira’s report is correct that he never actually smelled alcohol (or any intoxicant), he should have never insisted that Mr. Fepuleai take the test in the first place. Instead, Officer Ferreira—who had just learned that Mr. Fepuleai was an American Samoa resident—effectuated an unconstitutional seizure by having Mr. Fepuleai do the FST without reasonable suspicion of impairment.

Second, the officers had no probable cause to believe that Mr. Fepuleai was inebriated, and fabricated much of the basis for Mr. Fepuleai’s arrest. If an “arrest was without probable cause or other justification,” it violates the

⁶ Officer Ferreira did not specify to Mr. Fepuleai whether he detected the scent coming from his person or from his vehicle.

Fourth Amendment. *Dubner v. City and Cnty. of San Francisco*, 266 F.3d 959, 964 (9th Cir. 2001). Importantly, “the police . . . may not disregard facts tending to dissipate probable cause.” *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005). Here, the officers disregarded ample evidence that Mr. Fepuleai was not inebriated. No officer observed him driving erratically or illegally, he consistently spoke clearly and articulately to officers, understood and abided by all their instructions (including for complex field sobriety tests) even though the stop occurred around midnight, did not have balance problems during the tests, and blew a 0.000 on the breathalyzer test. Importantly, the officers’ body camera videos call into doubt the truthfulness and completeness of their police reports. Moreover, Officers’ misrepresentations and false statements in their police reports, failure to properly administer field sobriety tests, and improperly shutting off their body camera videos at key points of their investigation strongly suggest a conspiracy to fabricate probable cause for Mr. Fepuleai’s arrest. As Commissioner Carrie Okinaga of the Honolulu Police Commission has stated, when officers “turn their cameras on, off and on again” it “raises suspicions about whether they’re hiding something.”⁷ Courts have found officers’ fabrication of the basis for a DUI arrest to support a false arrest claim. *See Kingsland v. City of Miami*, 382 F.3d 1220, 1226-27 (11th Cir. 2004) (allegations that officers inexplicably failed to investigate scent of marijuana coming from the plaintiff’s vehicle and that “officers decided to charge Kingsland with DUI-cannabis rather than DUI-alcohol . . . only after she passed Breathalyzer tests” supported plaintiff’s claim that officers “fabricated evidence to support probable cause”).

Third, the officers’ inclusion of false statements regarding Mr. Fepuleai’s behavior and state during the stop violated his Fourteenth Amendment rights. The Ninth Circuit has recognized that “there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government.” *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001). Here, the officers (1) included observations in their reports of Mr. Fepuleai’s behavior and appearance that are contradicted by video evidence, (2) tried to conceal their true motives by turning off their body camera videos during discussions in the middle of the investigation (in violation of HPD policy), and (3) “continued their investigation of plaintiff despite the fact that they knew or should have known that he was innocent.” *See Richards*

⁷ See Christina Jedra, *Honolulu Police Don’t Always Turn On Their Body Cams. That Needs To Change, Commissioners Say*, Honolulu Civil Beat (May 24, 2021), <https://www.civilbeat.org/2021/05/hpd-officers-wear-body-cameras-but-they-dont-always-turn-them-on>.

v. County of San Bernardino, 39 F.4th 562, 569 (9th Cir. 2022) (cleaned up); *Caldwell v. City and County of Honolulu*, 889 F.3d 1105, 1114-15 (9th Cir. 2018) (finding a plaintiff could sustain a deliberate fabrication claim with evidence that an officer included false information in notes regarding their encounter).

III. The City Is Liable for HPD’s Widespread Policy and Practice of Falsely Arresting Innocent Civilians During Sobriety Checkpoints

Separate from the four HPD officers’ potential personal liability, the *City itself* may be liable for having a de facto policy or widespread custom of falsely arresting innocent civilians during sobriety checkpoints. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978)). As discussed, Mr. Fepuleai’s false arrest was not an isolated event: “In 2022 and 2023, nearly 300 drivers who were arrested had breath or blood test results below the legal limit of 0.08, according to HPD data on arrests that did not result in charges.”⁸ Shockingly, 69 of those arrested blew a 0.000 just like Mr. Fepuleai. And these incidents bear other similarities to Mr. Fepuleai’s false arrest. For example, one arrestee, who eventually blew a 0.000, was told by the arresting officer that his eyes “look[ed] a little red and watery,” just like Mr. Fepuleai was told. What’s more, it appears that HPD officers have tried to persuade other arrestees to choose bail (and the concomitant admission of guilt) instead of a chemical test after arresting them for DUI.⁹

There is also reason to believe this pattern or practice of false DUI arrests is a result of the City encouraging officers to “pad” arrest statistics or failing to correct this ongoing issue with adequate training and supervision, despite being on notice of it. *See Lee v. City of Los Angeles*, 250 F.3d 668, 686-87 (9th Cir. 2001) (stating that a *Monell* claim can be sustained for failure to train in deliberate indifference to constitutional rights). Importantly, Hawai‘i funds sobriety checkpoints using federal grant money whose receipt may be contingent on reporting a sufficient number of arrests to show the effectiveness of impaired driving programs.¹⁰ In fact, HPD policy

⁸ Lynn Kawano, *Dozens of Oahu drivers arrested, jailed for DUI despite tests showing no alcohol in their systems*, Hawaii News Now (Apr. 23, 2024), <https://www.hawaiinewsnow.com/2024/04/23/dozens-drivers-arrested-jailed-dui-despite-test-results-showing-no-alcohol-their-system>.

⁹ *Id.*

¹⁰ *See Hawai‘i State Department of Transportation Highway Safety Annual Report: 2021*, at 32 <https://hidot.hawaii.gov/highways/files/2023/03/HDOT-2021-Highway-Safety-Annual-Report-FINAL-single-pages.pdf> (emphasizing that Hawai‘i’s federally-funded sobriety checkpoints produced “over 829 OVUII alcohol and drug arrests” in the 2021 fiscal year).

on federally-funded sobriety checkpoints seems to pressure officers to meet certain criteria to justify continuing to work sobriety checkpoints and get overtime or “grant hour” pay that comes with it. See HPD Policy 1.18 (“Officers who do not meet the activity goals for three consecutive operations may not be eligible to participate in future grant hours.”). Notably, the sobriety checkpoint where Mr. Fepuleai was arrested was federally funded.

* * *

HPD must do better. We now demand that HPD: (1) thoroughly and impartially investigate the misconduct of Officers Ferreira, Newcom, and Pauu, and Sergeant Cachola during the November 7, 2023, incident, and take meaningful disciplinary action; (2) end its policy and practice of falsely arresting drivers at sobriety checkpoints; (3) implement policies, practices, procedures, trainings, and other measures to ensure that HPD officers (a) conduct sobriety checkpoint stops fairly, impartially, and lawfully, and (b) comply with HPD’s body-worn camera policy¹¹; and (4) expunge all records related to Mr. Fepuleai’s arrest.¹²

Additionally, this letter serves as notice that the City/HPD, and Officers Ferreira, Newcom, and Pauu, and Sergeant Cachola must preserve all evidence relating to Mr. Fepuleai’s arrest from November 7, 2023 to the present, including: body-worn camera footage relating to the sobriety checkpoint; CAD, radio, and dispatch records; emails, text messages, notes, and other HPD communications (including those made on personal cell phones of Ferreira, Newcom, Pauu, and Cachola), and surveillance camera footage at Pearl City Police Station (including the area behind the station where Mr. Fepuleai was brought into the station and the booking areas). We expect that HPD will comply with its legal

¹¹ Similar concerns have been raised with HPD officers improperly failing to start body camera videos and turning cameras off for years. See Madeleine Valera, *Audit Calls Honolulu Police Commission’s Oversight ‘Inconsistent and Ineffective,’* Honolulu Civil Beat (Aug. 29, 2024), <https://www.civilbeat.org/2024/08/audit-calls-honolulu-police-commissions-oversight-inconsistent-and-ineffective> (“Between 2019 and 2022, 23% of officers in the complaints auditors reviewed had some kind of issue with their body camera use.”); Christina Jedra, *Honolulu Police Don’t Always Turn On Their Body Cams. That Needs To Change, Commissioners Say,* Honolulu Civil Beat (May 24, 2021), <https://www.civilbeat.org/2021/05/hpd-officers-wear-body-cameras-but-they-dont-always-turn-them-on> (“Commissioner Carrie Okinaga said in March that officers sometimes turn their cameras on, off and on again, which raises suspicions about whether they’re hiding something.”).

¹² To the extent they are applicable, this letter also serves as notice to the City of Mr. Fepuleai’s injuries and damages under HRS Section 46-72 and Section 13-111 of the Charter of the City and County of Honolulu. In the event that he files a lawsuit, Mr. Fepuleai will ask the court to award special and general damages as well as punitive damages to be determined at trial.

obligation to implement a litigation hold, even though it is our understanding that HPD has a policy of destroying certain records only 1 year after they are created.

We ask that you respond to this letter by 5 p.m. on November 21, 2024, and outline the commitments that HPD will be making to address our demands, both as to Mr. Fepuleai, but also as to other innocent Honolulu residents whose rights have been trampled and whose lives have been upended by HPD's unconstitutional sobriety checkpoint practices. We look forward to hearing from you. If you have any questions or comments, please contact me at 808-522-5905 or wkim@acluhawaii.org.

Sincerely,



Wookie Kim
Legal Director

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