SUPPLEMENTAL TESTIMONY

To the

United States Commission on Civil Rights

Samuel Walker

University of Nebraska at Omaha

May 7, 2015

I am Samuel Walker, Professor Emeritus of Criminal Justice at the University of Nebraska at Omaha. I testified before the U.S. Commission on Civil Rights on April 20, 2015 in New York City. This statement represents my Supplemental Testimony.

This statement involves the so-called "48-Hour" rule with respect to the right of police officers to delay being questioned by department investigators about possible misconduct.

Introduction

The term "48-Hour" rule is a misnomer. Across the country, there are or have been a variety of provisions granting police officers the right to delay being questioned by investigators about possible misconduct. Some of these delays are for 48 hours and some are or have been for 72 hours. The Maryland Law Enforcement Officers' Bill of Rights statute, which applies to all sworn officers in the state, grants officers a delay of up to ten days.

Apart from a national survey of state statutory police officers' bill of rights, there is no national survey of these provisions, particularly in police union contracts.[1] Consequently, we do not know how prevalent they are, or the various lengths of time, or the most common form, or whether they are found in police union contracts or state laws. This is a serious gap in our knowledge about police accountability.

Delaying the questioning of a police officer in an incident of possible misconduct is unreasonable and is contrary to the emerging "best practice" with regard to the investigation of use of force incidents.

Reasonableness

Delays in questioning an employee suspected of misconduct is unreasonable by any standard. What other group of employees enjoys the right to delay being questioned about alleged misconduct? It is unreasonable that police officers should enjoy such a right.

Emerging Best Practices

Delay in questioning officers about possible misconduct is also contrary to the emerging best practice with respect to misconduct investigations.

It is now a recognized best practice in policing that in the case of alleged misconduct –and particularly in officer-involved shootings and uses of force that involve injury to a member of the community-- that it is essential for the officer to be questioned as soon as possible, when memories are fresh. (In cases where an officer is clearly distraught, as in an officer-involved shooting, it is appropriate to delay any questioning.)

The best practice on this issue is defined in the 2001 Consent Decree between the U.S. Department of Justice and the Los Angeles Police Department. (Similar provisions are found in Justice Department settlements regarding the Seattle, New Orleans, Albuquerque, and Portland, Oregon police departments.)[2]

First, Section III of the Los Angeles Consent Decree requires that an officer from the Operations Homicide Bureau immediately "roll out" to all serious use of force incidents (defined in the decree as Categorical Use of Force incidents). The purpose is to have an independent department investigator on the scene as soon as possible.

Second, the Consent Decree requires that "all involved officers and witness officers shall be separated immediately" (Section III, Paragraph 61). The purpose of this requirement is to end the long-standing and unacceptable practice of two or more officers conspiring to create a story that exonerates any and all officers of misconduct.

Third, Section III, Paragraph 61 refers to involved and witness officers giving "statements" about the incident. In short, it is expected that officers will give immediate statements about the incident while on the scene. Paragraph 61 further states that nothing in the Consent Decree "prevents the Department from compelling a statement." (The *Garrity* requirements regarding compelled statements are not mentioned but are presumed to apply to such compelled statements.)

In short, the Los Angeles Consent Decree clearly gives a very high priority to a police department obtaining a statement from all officers (both involved and witness officers) as soon as possible and at the scene of an incident. In light of this, the 10 day delay before questioning an officer, as provided by the Maryland Law Enforcement Officers' Bill of Rights is contrary to recognized best practices in this area, and is unreasonable and unacceptable.

A prolonged delay between the incident and the first questioning only increases the opportunities to create a false version of the incident. For example, it allows an officer the opportunity to talk with other

officers who have been in similar incidents, and to obtain their advice on how to explain and justify his or her conduct.

Testimony in Support of the "48-Hour Rule"

The Commission has heard testimony from Mr. Sean Smoot, Director and Chief Counsel for the Police Benevolent & Protective. Association of Illinois (PB&PA), regarding the validity of delaying the questioning of police officers. He cites scientific studies purporting to show that memories are clouded immediately after a traumatic event.

This justification for delaying the questioning of police officers is hypocritical on its face. Do the police extend this privilege to criminal suspects? Do they delay the questioning of witnesses to a crime? These people have just been involved in "high stress, adrenaline infused" incidents, to cite the testimony of Mr. Smoot. It is hypocritical for Mr. Smoot to argue that police officers should enjoy the privilege of a delay in questioning when other people in similar situations do not enjoy it.

Mr. Smoot testified that there is a difference between a criminal suspect and a public employee. He argues that a criminal suspect has no obligation to be truthful, while a public employee can be compelled, under the *Garrity* rule, to give testimony. In fact, we have a long and unfortunate history of officers not giving truthful testimony regarding critical incidents where their conduct is in question. In fact, there is such a long history of officers giving untruthful testimony while testifying in court that it has acquired a widely used label: "testilying."[3]

Even more authoritative evidence of officers not being truthful is found in the Maryland Law Enforcement Officers' Bill of Rights. Paragraph 3.106.1 of the law requires all law enforcement agencies in the state to maintain a list of officers "who have been found or alleged to have committed acts which bear on credibility, integrity or honesty, or other characteristics that would constitute exculpatory or impeachment evidence." In short, the state of Maryland, by law, has recognized the existence of a pattern of untruthfulness among law enforcement officers in the state. Mr. Smoot failed to acknowledge this problem in his testimony.

Mr. Smoot further testified that police officers should "be able to talk to other officers who were directly working with them." Thus, he actually justifies maintaining the opportunity for officers to conspire to create a version of the incident that exonerates the conduct of any and all officers. The current best practice in policing is to immediately separate all involved and witness officers immediately at the scene of an incident.

The so-called "48-hour" rule, or similar delays in being questioned, only serve to increase the opportunity for two or more officers to create false versions of incidents that are under investigation.

The Science of Memory in High Stress Situations

In his testimony, Mr. Smoot referred to scientific evidence regarding people's memory in high stress situations, arguing that it supports the need for a delay in questioning until an individual's memory has fully recovered from the stress. Mr. Smoot cites the research of Dr. Bill Lewinski of the Force Science Institute.

Two responses are in order here.

First, if the science is valid then the delay in questioning should apply to crime suspects and victims, as I have already argued.

Second, the Force Science Institute is an organization with obvious close ties to law enforcement. If the Civil Rights Commission is to accept its findings, it should solicit testimony from him directly and from other psychologists whose research is in the area of stress and memory in order to determine the consensus of scientific evidence on this subject.

The Way Forward

As the President's Task Force on 21st Century Policing declared in March 2015, trust in the police is the foundation of effective policing, but many communities have lost trust and confidence in the police.[4]

One source of that distrust and loss of confidence in the police is the fact that community residents, particularly in communities of color, see officers not being punished for misconduct. Provisions of union contracts and state laws that shield police officers from quick and thorough investigations of possible misconduct contribute to public distrust of the police.

Many people will understandably ask how "48-Hour" rules and similar impediments to investigating alleged misconduct came to exist in the first place.

The answer is that since the 1960s, police unions have been very aggressive in pursuing and obtaining provisions in union contracts that protect officers from meaningful accountability. Mayors, meanwhile, have been very reluctant to oppose police unions out of fear of being labeled "anti-police."[5] Finally, mayors and their designated contract negotiators are not fully cognizant of the impact on accountability of various contract negotiation demands of police unions. Too often, they are willing to trade away management issues in return for union concessions on the financial aspects of a contract.

The time has come to reorient police union contract negotiations for the purpose of eliminating any and all provisions that impede accountability, including but not limited to "48-Hour" rules.

The first step in this direction is to educate the public and public officials about the impact of such things as "48-hour" rules on police conduct and the resulting police-community relations. The U.S. Commission on Civil Rights has the opportunity to highlight this issue in its report based on these hearings.

I conclude by urging the U.S. Commission on Civil Rights to make a strong statement that will contribute to reframing the national debate over "48-Hour" rules and related impediments to the investigation of possible officer misconduct.

[1] For an analysis of the Baltimore police union contract and the Maryland Law Enforcement Officers' Bill of Rights, see Samuel Walker, The Baltimore Police Union Contract and the Law Enforcement Officers' Bill of Rights: Impediments to Accountability (May 2015). See also Samuel Walker and Kevin M. Keenan, "An Impediment of Police Accountability?: An Analysis of Statutory Law Enforcement Officers' Bills of Rights," *Boston University Public Interest Law Journa*l, 14 (2005): 185-243.

[2] Current consent decrees and settlement agreements over police departments are available on the web site of the Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice.

[3] In preparation for my Supplemental Testimony on this point, I conducted a simple Google search for the term "testilying." The search returned 16,200 results. (Search conducted on May 5, 2015.)

[4] President's Task Force on 21st Century Policing, *Interim Report* (Washington, DC: Department of Justice, 2015), pp. 1, 7.

[5] The highly publicized attacks on New York City Mayor Bill DiBlasio by the New York City Policemen's Benevolent Association (PBA) in December 2014-January 2015, which included a work "slowdown" by police officers, are simply the most egregious example of police union attacks on mayors.