

Executive Summary

The Commission To Combat Police Corruption (“the Commission”) was concerned that the New York City Police Department (“NYPD” or “the Department”) was not able adequately to investigate cases involving deaths of civilians in police custody or as a result of police action. The concern arose because, as explained in further detail below, the officers responsible for a civilian’s death typically do not prepare reports or provide immediate statements to the Department. Further, the Department does not insist that all officers prepare reports or provide statements in connection with a death in custody; often, this is because a prosecutor’s office requests that the Department take no steps that might jeopardize a future criminal prosecution.

The Commission questioned whether the failure to obtain immediate reports and statements from all officers involved in a civilian death might facilitate efforts by officers to withhold or to alter their recollections, in the effort to cover up culpable conduct. Accordingly, the Commission explored whether changes could be made to the system, either through a change in the Patrol Guide or through a change in prevailing law or practice, better to enable the Department to obtain immediate statements or reports. To examine the available alternatives, the Commission first interviewed representatives of police departments around the country to determine their procedures in these types of cases. The Commission learned that most of these jurisdictions do not require a subject officer to make a statement or to prepare a report. The Commission also researched relevant case law, and found that existing law greatly complicates any effort by the Department to compel statements from subject officers. We also spoke with local prosecutors about these issues, and inquired whether they would support a change to the Patrol Guide. Further, we spoke to Executives in the Department and examined investigative files involving the deaths of civilians in policy custody. The local prosecutors and the Department do not support amending the Patrol Guide, nor do they support maintaining separate but parallel criminal and disciplinary investigations. These meetings indicated that both the Department and the local District Attorneys’ offices believe that “death in custody” cases are adequately investigated under existing law and procedures.

Background

Currently, there is no provision in the Patrol Guide that requires officers whose actions cause the death of a civilian either to complete a report or otherwise to provide a statement to Department investigators describing the circumstances surrounding the incident. A requirement to provide a report or a statement on pain of dismissal would create legal issues because of the decisions in two United States Supreme Court cases. In 1967, the Supreme Court decided Garrity v. New Jersey, 385 U.S. 493. That case held that statements obtained from public officials under threat of the loss of their positions were equivalent to coerced confessions. Use of these statements in subsequent criminal proceedings was, therefore, a violation of the Fifth and Fourteenth Amendments of the United States Constitution. Under Garrity, requiring that an officer answer questions relating to his or her job performance or face termination would confer use and derivative use immunity on the officer’s resulting statements, and any fruits of those statements, in a subsequent criminal proceeding. Although there has not been a specific court ruling regarding the preparation of

police reports, it appears that use and derivative use immunity might be equally applicable to any written reports prepared by the involved police officers if the retention of their jobs depended upon the completion of these reports.

In Kastigar v. United States, 406 U.S. 441 (1972), the Supreme Court held that the grant of use and derivative use immunity provided sufficient protection to override a person's refusal to provide a statement based on the possibility of his self-incrimination. The Court's analysis of the scope of the protection afforded by a grant of use and derivative use immunity erects further barriers against police investigators questioning officers who may be possible defendants in a later criminal proceeding. Use and derivative use immunity would not only prohibit the introduction of the officer's statement in a subsequent criminal trial. It would also impose an additional burden on the prosecution to prove that all the evidence gathered and presented in the course of the criminal investigation and prosecution was obtained independently of the officer's compelled statement. The prosecutor might, therefore, be required to demonstrate that the compelled statement did not affect the witnesses the prosecutor planned to call, the questions and strategies utilized by the prosecutor when presenting his case, the prosecutor's cross-examination of defense witnesses, and any other witness' testimony.¹ In short, the prosecution would be required to demonstrate that the evidence was obtained independent of the compelled statement to demonstrate that the evidence was not tainted by the compelled statement.

Approaches of Jurisdictions Outside of New York

The Commission sought to determine how other U.S. law enforcement agencies address the investigation of cases where a civilian's death or serious physical injury is the result of police action. To accomplish this, the Commission contacted representatives from law enforcement agencies in other large cities. These included the Philadelphia Police Department, the Washington, D.C. Police Department, the Boston Police Department, Dade County's Professional Compliance Office, Houston Internal Affairs, the Federal Bureau of Investigations, and the United States Attorney's Office for the Southern District of New York. The Commission also discussed this issue with a representative from Kroll Associates, which is responsible for monitoring the compliance of the Los Angeles Police Department and the Detroit Police Department with certain consent decrees. With the exception of the Los Angeles and Houston Police Departments, the other law enforcement agencies operate similarly to the NYPD when conducting investigations involving a death or serious physical injury caused by members.² While some of the other Departments ask the subject officer to make a voluntary statement, if he refuses to do so they follow the local prosecutor's instructions on whether to compel the subject officer to relate his version of the

¹ See Clymer, Steven D., Compelled Statements From Police Officers and Garrity Immunity, 76 N.Y.U. L. Rev. 1309, 1321-1327 (2001); Bloch, Kate. E., Police Officers Accused of Crime: Prosecutorial and Fifth Amendment Risks Posed by Police-Elicited "Use Immunized" Statements, 1992 U. Ill. L. Rev. 625 (1992).

² At the time we spoke with the representative from Kroll Associates, the consent judgments governing Detroit's responses to serious use of force cases were recently endorsed and a policy on the best way to implement the provisions of these judgments had yet to be established.

events. This practice is intended to avoid implicating Garrity and Kastigar and thereby to preserve the criminal prosecution.

The Houston Police Department requires officers involved in “death in custody” situations to complete police reports or to face insubordination charges. These charges could result in the termination of the officer’s employment. However, the officer’s union attorney is usually present when the report is prepared. In general, therefore, the reports lack specificity.

The Los Angeles Police Department is currently subject to a consent decree. Any time there is an allegation of force, regardless of the level of force alleged, all of the involved officers must be interviewed within twenty-four hours. If an officer does not voluntarily describe what transpired, he is compelled to make a statement with the admonishment that he can be penalized, and possibly terminated, if he refuses to answer questions. These compelled statements, however, cannot be used in any criminal proceeding, and the involved officer is so notified prior to making the statement. In addition to providing statements, the involved officers must complete reports about the incident. The Los Angeles County District Attorney’s office is notified only in the most serious force cases, such as those involving a likelihood of death. The purpose for the notification is to permit the District Attorney to participate in the investigation and questioning should he choose to do so. In Los Angeles, two separate teams within the police department are generally created to conduct the investigations. One team handles the criminal investigation, and the other handles the administrative investigation. These investigations run parallel to each other and are separate so each will not taint the other. The administrative case proceeds while the criminal investigation is pending, and it is possible that an officer can be fired before the criminal proceedings conclude. This jurisdiction has never tried to introduce the officer’s compelled statements or reports in a criminal proceeding. Furthermore, we were informed that very few officers are criminally charged in Los Angeles, perhaps due to the fear that administrative investigations may taint the criminal prosecutions. We were told anecdotally that Assistant District Attorneys might review the criminal investigative file only to find that the first item in the file would be the subject officer’s compelled statement, which creates immediate “taint” issues under Garrity and Kastigar. The prospect of contamination of the criminal investigation with information that should only be part of the administrative investigation is a concern for the Los Angeles Assistant District Attorneys.

The New York City Police Department

The Commission spoke with senior representatives of the Department about whether the Department believed that its “death in custody” investigations were incomplete or hampered without either an immediate statement from or a written report prepared by the subject officer. The Department stated that in most investigations, the investigators were able to uncover sufficient evidence to determine what transpired. Investigators did not object to conferring with the local District Attorney’s office and obtaining the prosecutor’s approval before seeking a recorded account from the subject officer. Moreover, investigators were usually able unofficially to learn the subject officer’s version of what occurred through other sources such as his union attorney. The Department did not support an amendment to the Patrol Guide to require the preparation of reports describing the incident. Department

Executives believe that if officers were required to prepare these reports, only the most general information would be provided. With regard to the Los Angeles approach of using two separate investigative teams, Department Executives stated that this would require too many resources and they did not believe that the results that would be achieved would sufficiently enhance the information that they collected.

Local Prosecutors

The Commission met with representatives from the Bronx County, New York County, and Queens County District Attorneys' offices to determine whether they would support a change in the Patrol Guide to require subject officers to prepare reports describing the incident. We also discussed the alternative of having two investigations running separately but concurrently, as in Los Angeles. Uniformly, the prosecutors believe that the Department could not legally require subject officers to complete reports based upon the relevant United States Supreme Court and New York Court of Appeals cases. While overturning the rulings in those cases would make prosecuting police misconduct cases easier, as long as those rulings are the prevailing law, none of the District Attorneys' offices want the Department to take statements or require reports from officers without their express consent. They stated that it was critical that they be involved in the decision-making process about whether to take a statement or report from an officer. They believe that in the case of criminal conduct, the public wants a criminal prosecution in addition to the termination of the officer. Therefore, careful determinations must be made about who the Department can and cannot interview. Their concern is that a compelled statement or report may produce valuable information that the prosecution will be prevented from using under Kastigar. While they would prefer that officers speak to them, given their current choice of options under the law, they are opposed to compelling statements and/or reports from officers. Without exception, they stated that they would not support an amendment to the Patrol Guide that would require the preparation of these reports. When discussing using two separate investigative teams to keep the administrative investigation from tainting the criminal investigation, they stated that they did not believe this solution was feasible. They further conveyed their belief that the investigations at issue are adequately conducted despite the Department's inability to compel a subject officer to make a statement or prepare a report describing the circumstances surrounding an incident. They also believed that were officers required to prepare reports, due to advice from their union delegates and attorneys, only the most general information would be provided. The various District Attorneys' offices confirmed the Department's view that they are able informally to obtain a sufficient amount of information at the scene to get an accurate sense of what occurred. In fact, in the majority of these types of cases, the District Attorneys send a representative from their office to the scene. This person often conducts the initial witness interviews.

Case Review

In order to verify the Department's assertion that it is able to obtain sufficient information successfully to investigate serious or deadly incidents without obtaining a verbal or written description of the incident from the subject officer, Commission staff reviewed twenty-one cases where a civilian died while in New York City police custody. These cases all occurred in 2003 and 2004. Of these twenty-one cases, thirteen involved a death that occurred as a result of police action. In the remaining eight cases, the deaths were a result of suicides, natural causes, or drug use. The investigations were conducted by members of the Internal Affairs Bureau, the relevant Borough Investigative Units, or by the local precinct. In some cases, more than one of these groups worked separately or together to gather information.

In all of the cases where the death was a result of police action, the investigators were able to interview civilian witnesses to determine what transpired. The investigators were also able to interview police witnesses who were present at the scene but whose actions were not the direct cause of the decedent's demise.

In all thirteen cases, Department investigators did not speak with the subject officer within twenty-four hours of the incident. In most of these investigations, the subject officer was not interviewed based upon the express direction of the local District Attorney's office. In nine of the thirteen cases, the subject officer completed a report. These reports were usually either Firearm Discharge and Assault reports or Line of Duty Injury reports. However, the reports were undated and contained only general statements about the incident such as, "I discharged my firearm in self-defense."

In all of the cases reviewed, the Commission was satisfied that Department investigators obtained sufficient information to reach the appropriate disposition even though the subject officer had not provided the Department with his version of events.

Conclusion

While the Supreme Court decisions do not prohibit compelling officers to complete reports or to give testimony about a job-related event, a criminal prosecution could be jeopardized under present law if an officer were threatened with the loss of his employment based on his failure to complete a report or to testify about a possible criminal incident. Because of these considerations, the Department reports that it defers to the wishes of the District Attorney before attempting to obtain a statement from a subject officer. The District Attorneys' offices are clear that they want input on whether a subject officer is confronted prior to the conclusion of any criminal proceeding.

Although the Commission speculated about the Department's ability to investigate cases without obtaining the subject officer's description of the events that led to the death of a civilian, our review indicates that, notwithstanding the lack of information from the subject officer, investigators generally are able to obtain a full and accurate account of what transpired. This account is obtained primarily from civilian and police witness interviews.

The Commission's review of the adequacy of the Department's current methods of obtaining information revealed that these cases are adequately investigated, and full and accurate information is usually obtained so the best decision may be made about the appropriate consequences for the subject officer.

While the Department conducts itself effectively within the constraints of existing law, the Commission believes that there is room to question whether the current United States Supreme Court would apply its holding in the Garrity case to a new Department rule requiring all police officers to write prompt and detailed reports regarding a death in custody. In our view, such a requirement might well survive Supreme Court scrutiny, notwithstanding the result in Garrity. Garrity involved compelled testimony from an officer suspected of wrongdoing; a generalized reporting requirement presents different considerations, and the current Supreme Court might well conclude that such a requirement is constitutional. We recognize, however, that an effort to test the limits of Garrity and its progeny would involve lengthy and protracted litigation.³ None of the District Attorneys with whom we spoke were willing to handle the "test" case necessary to initiate this litigation.

Unless and until the law changes in this area, existing Department procedure appears to be adequate. The Commission believes, however, that all police officers must be accountable to the public for all of their job-related conduct. The need for public accountability is greatest in cases involving a death in police custody. In such cases, therefore, we believe that all officers ordinarily should be requested to provide a prompt and detailed account of the incident.⁴ Under existing law, the request must be made on a "voluntary" basis; that is, no police officer may be terminated for a failure to provide such an account, and officers should be so advised. Nevertheless, the request should be made in all cases, so the public may understand that the involved officer was requested to provide an account of his or her conduct, subject to the officer's constitutional rights as they are presently construed.

³ Even were Garrity overturned by the current Supreme Court, the New York State Court of Appeals followed its holding in Matt v. Larocca, 71 N.Y.2d 154 (N.Y. 1987). Therefore, there would be further legal obstacles to requiring the officers to prepare reports or to give testimony.

⁴ We recognize that in particular cases a District Attorney may have a specific investigative reason to avoid making a request to obtain a report from a subject officer. The Department should continue to give appropriate deference to the views of the District Attorney's offices.