

BLUE LINE LEGAL DEFENSE PRESENTS:

Navigating the Rock and the Whirlpool:
Managing Critical Incident Investigations
and *Garrity*

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Self Garrity

I understand that I am going to be asked questions related to my job performance and that any voluntary answers to those questions can be used as a basis to discipline me, up to and including termination, and can also be used against me in a criminal proceeding.

If I believe that a truthful answer to any question may be incriminating, I have the right not to answer the question.

My refusal to provide an incriminating statement cannot be used as a basis to fire me unless I am granted immunity from the use of my statements in a criminal proceeding.

Such immunity will only be granted if you order me to answer a question. When so ordered, I am legally obligated to answer the question and I can be disciplined, up to and including termination, if I then fail to do so.

If I refuse an order to answer specific questions that an innocent person would be expected to answer, my refusal to answer can be used as evidence of misconduct, and, in combination with other evidence of misconduct, can be used as a basis for discipline, up to and including termination. However, no such refusal to answer may be used in any subsequent criminal proceeding.

Navigating the Rock and the Whirlpool: Managing Critical Incident Investigations and Garrity

By Joseph R. Sullivan *

Introduction

This article presents a best practice model for managing officer-involved shooting or other critical incident investigations on behalf of the officer; one that protects the officer's legal interests and still preserves the most accurate factual information for investigators. Section I details the causes and effects of critical incident amnesia as it relates to officer-involved shootings. Section II analyzes the relationship between a public employee's Fifth Amendment privilege against self-incrimination and a public employer's ability to compel work related statements. Section III discusses the practical implications and aftermath of an officer-involved shooting or other critical incident and section IV synthesizes the presented information into a comprehensive post-incident strategy for the officer and his legal counsel.

I. Critical Incident Amnesia and Officer-Involved Shootings

Police officers are being subjected to an ever-increasing level of public and governmental scrutiny by agency bureaucracies, command staff, special interest groups, state and federal prosecutors, defendant's counsel, and the media.¹ Almost every situation that involves law enforcement has the potential to give rise to complaints, internal investigations, and criminal investigations, which could result in disciplinary actions, civil suits, and even criminal charges for the officers involved. Although technology can help an accused officer by providing audio and video evidence of his conduct, often times, when an investigation occurs, the best evidence in clearing an officer of wrongdoing is direct testimony from either the officer himself or other witnesses. Unfortunately, traumatic situations often result in "critical incident amnesia," where

the potential for memory problems increase when the officer or witness is exposed to greater levels of stress.² Key factors that can affect stress, and therefore memory, include: “the perception of threat or danger, the suddenness of the threat and the available time to respond or prepare, the amount of sensory input needing to be processed, and the degree of physical effort that was engaged in during the incident.”³ The effects of critical incident amnesia can be increased if the officer is injured, especially if the injury results in unconsciousness.⁴

The common understanding is that “memory is a process of active construction in which old knowledge, beliefs, prejudices, and expectations are constantly shaping our memories.”⁵ Memory is created by information gathered through each of the five senses, which provide the brain with a “constant source of information about the environment through a complex network of neural receptors.”⁶ The fixation that many people experience during high stress situations is due to the powerful process of “perceptual narrowing,” where the five senses focus on a central point as stress increases, and will generally result in a situation where vision takes over as the primary sense while the others may be diminished.⁷ This occurs because the sympathetic nervous system, which is activated when the brain perceives a threat to survival, discharges stress hormones into the body to prepare what is widely recognized as the “fight or flight response.”⁸ This “sympathetic nervous system excitement” causes the blood vessels around the periphery of the retina to constrict and results in a reduction of the visual field by as much as 70% as well as a loss of near vision and depth perception.⁹ Because memory is a product of a person’s perception, “it is clear that memory can be disrupted when perception becomes disrupted.”¹⁰

Although traumatic situations can arise from almost anything, most law enforcement-related research has focused on the memory impairing effects of officer-involved shootings

(OIS). Generally, people have two distinctly different methods of processing information: one, the “rational-thinking mode,” which occurs during states of low emotional arousal; and two, the “experiential-thinking mode,” which happens during periods of high stress and emotional arousal, such as during an OIS.¹¹ Ordinarily, when people are operating under normal conditions they are calmly able to engage in the “conscious, deliberative, and analytical cognitive processing that characterizes rational thinking.”¹² However, in an emergency situation involving the need for immediate action, a person cannot engage in the deliberative process and instead “their cognitive processing system automatically switches over to experiential thinking.”¹³ Conceptually, experiential-thinking “represents a system that automatically, rapidly, effortlessly, and efficiently processes information, an obvious advantage in a life-threatening situation demanding an immediate response.”¹⁴

Unfortunately for an officer trying to recall essential information about a critical incident, experiential thinking is more likely than rational thinking to be fragmented and based on past experiences instead of a conscious appraisal of events.¹⁵ Experiential thinking is also intuitive instead of analytical and logical; generally oriented toward immediate action instead of reflection and delayed action; highly efficient; and “seized by emotion.”¹⁶ In one study, conducted in 1998 and involving the reactions of more than three hundred officers who had been involved in an OIS, 41% of the officers thought that time slowed down while 20% perceived that it had sped up.¹⁷ Fifty-one percent reported that sounds seemed quieter however 23% of the officers thought sounds were louder.¹⁸ Forty-five percent of the officers experienced “tunnel vision” and 41% had an increased attention to detail.¹⁹ Another study showed that 52% of officers involved in an OIS reported memory loss for some aspect of the incident, 46% noted memory loss for some of their own behavior, and, notably, 74% of the officers stated “they responded on ‘automatic pilot,’

with little or no conscious thought.”²⁰ Other studies looking at how stress affects memory have shown similar results indicating a variety of physiological responses to critical incidents.²¹

One study, organized in 2010, looked more closely at how officers recall “high-stress” events by examining Sherriff’s Department deputies’ reactions to training simulations involving either a school shooting or terrorist attack.²² There, researchers organized simulated live-fire active-shooter situations and divided the officer into two groups.²³ The officers in group one each wrote a report immediately after the incident and were then interviewed three days later.²⁴ Alternately, the officers in group two were only required to detail their recollections three days after the event.²⁵ The purpose of the study was to “determine whether officer’s memories were sharper and more accurate in the time immediately following the shooting or some time later.”²⁶ Overall, the results indicated that the most accurate memories were achieved by the officers in group one, whose “recollections immediately after the incident improved slightly in their second report.”²⁷ Whereas, the officers in group two, who only provided a single statement three days after the simulation, showed lower overall recollection scores than the officers in group one.²⁸

Combat leaders throughout history have long understood that information gathered immediately after combat is “notoriously poor,” since much of the information is initially gathered from “shell-shocked soldiers” (experiencing what is now understood to be the effects of critical incident amnesia).²⁹ Such understanding has led the United States Army to conclude that, “[t]he first report is never right,” because, “after a critical incident, much of the information may still be in the brain, but it has not been processed in such a manner that it can be retrieved.”³⁰ Sleep and dream studies have shown that one important factor in being able to retrieve this information is sleep; particularly the dreaming that takes place during REM sleep cycles, which has increasingly been understood as “a time when the brain is focused on problem

solving and resolution of powerful emotional concerns” and where information is processed into long-term memory.³¹

Studies have also shown that during sleep “the brain divides new information into ‘wanted’ and ‘unwanted’ categories, and makes new associations in light of the days’ experiences.”³² Notably, the research also tells us that REM sleep cycles happen more frequently and are longer for individuals who are “highly stressed” or must process a large volume of new information,³³ two sub-factors common to an officer recently experiencing a critical incident. Because a person cannot immediately “mentally process and refine what they have experienced” after a critical incident, there should be significant memory recovery following the first sleep cycle.³⁴ Accordingly, if the person has been isolated from outside information, memories approximately twenty-four hours after the incident should be the most “pure.”³⁵ “The ability for an officer to convict the guilty and defend the innocent in a court of law, or even to defend himself against spurious charges, is greatly influenced by understanding the memory recovery process and by safeguarding this first night’s sleep.”³⁶

When appropriate, and after individual interviews or debriefings, a group debriefing can facilitate the exchange of information and “will serve as legitimate memory cues [that] will greatly aid in memory retrieval,” helping to completely reconstruct the entire critical incident.³⁷ This type of group debriefing was pioneered by Brigadier General S.L.A. Marshall in World War II and was found to be extremely effective at determining the “complete picture of what occurred in combat situations.”³⁸ Group interviews have been shown to be effective in that “individuals are very careful to tell exactly the truth, even when it reflects poorly upon themselves, since they know that others are there who can catch them at any misrepresentation of the event.”³⁹ Although the danger is slight, a group interview can cause memory contamination when there is

“potential for individuals to accept the memories of others,” which may or may not be correct, and is a potential consequence of any memory reconstruction technique.⁴⁰ Despite its limited practical application for criminal investigations, a group interview “provides the most accurate and truthful information” and “allows the maximum possible training and learning value” when combined with appropriately timed individual interviews, and if conducted approximately forty-eight to seventy-two hours after the incident.⁴¹ Another important aspect of the group interview is that it is considered to be “the single most powerful therapeutic tool in preventing post-traumatic stress disorder.”⁴²

Investigations of public employees, especially those involving critical incidents, can have a tremendous impact on the employee, the agency, and the public.⁴³ These investigations, whether internal or criminal, “can, and often do ruin jobs, careers, families, and lives.”⁴⁴ “Typical internal investigations of public employees often present due process, equal protection, privacy, search and seizure, self-incrimination, and other Fifth Amendment issues.”⁴⁵ Because of the tremendously high stakes involved and the impact of critical incidents on memory recall, it is essential for officers and their legal counsel to understand the legal ramifications of providing voluntary or compelled statements to their employer.

II. Garrity and the Privilege Against Self-Incrimination.

In June 1961, the New Jersey Supreme Court directed the State’s Attorney General to investigate the possibility that police officers were “fixing” traffic tickets in the boroughs of Bellmawr and Barrington, New Jersey.⁴⁶ Those investigations subsequently concluded that numerous officers and at least one court clerk, including Edward Garrity who was Bellmawr’s chief of police, had been involved in a number of conspiracies to falsify municipal records, alter traffic tickets, and divert money collected from bail and fines to unauthorized purposes.⁴⁷

During the course of the investigations, the State collected sworn statements from each of the suspects, which were later admitted at trial.⁴⁸ The defendants were each convicted of conspiracy to obstruct the proper administration of the state motor traffic laws and the convictions were affirmed by the Supreme Court of New Jersey.⁴⁹ The Supreme Court of the United States granted certiorari and reversed the officer's convictions.⁵⁰

The Court noted that before the officers were questioned, they were each advised of the following: “(1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office.”⁵¹ The Court described this choice, between the fear of being discharged for refusing to answer on one hand and the fear of self-incrimination on the other, as “a choice between the rock and the whirlpool,” which therefore made the resulting statements “a product of coercion in violation of the Fourteenth Amendment.”⁵² Because the choice imposed on the officers was one between self-incrimination or job forfeiture, the Court held that “the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office.”⁵³ The Court concluded that “policeman, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights” and that “the privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.”⁵⁴ Essentially, employer-compelled statements cannot be used against a public employee in a subsequent criminal trial.

Just one year later, the Supreme Court extended the doctrine established in *Garrity* when it handed down two more decisions relating to a public employee's right against self-

incrimination. In *Gardner v. Broderick*, the Court reversed the firing of a police officer who had refused to waive his privilege against self-incrimination.⁵⁵ There, the officer had been subpoenaed to appear before a New York County grand jury, which was investigating allegations that police officers were involved in bribery and corruption in connection with unlawful gambling.⁵⁶ Pursuant to his grand jury testimony, the officer was advised of his privilege against self-incrimination but, after being told that he would be fired if he did not comply, was then asked to sign a “waiver of immunity.”⁵⁷ After his refusal to sign, the officer was discharged pursuant to an administrative hearing and the New York Supreme Court dismissed his petition for reinstatement.⁵⁸ The Court noted that the officer was not fired for failing to answer questions about his official duties but that he was “dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege.”⁵⁹ Notably, the Court pointed out that, had the officer refused to answer questions “specifically, directly, and narrowly relating to the performance of his official duties,” without being required to waive his immunity regarding the use of such statements in a criminal prosecution, then “the privilege against self-incrimination would not have been a bar to his dismissal.”⁶⁰

The result of *Gardner* is that public employers may compel answers from employees to questions that are “specifically, directly, and narrowly related” to the performance of his official duties, despite the privilege against self-incrimination. However, the public employer may not require the employee to waive his immunity with respect to those answers, and when the answers are compelled, such “testimony or its fruits” may not be used against the employee in a criminal proceeding.⁶¹

In the same term that the Court handed down its decision in *Gardner*, the Court also decided the companion case of *Uniformed Sanitation Men Association, Inc. v. Commissioner of*

Sanitation of the City of New York.⁶² There, like the officer in *Gardner*, three sanitation workers were fired pursuant to administrative hearings on the sole grounds of refusing to sign “waivers of immunity” regarding their testimony to a grand jury that was investigating corruption within the Department of Sanitation.⁶³ Twelve others were told that the answers they gave to questions put to them by the Commissioner of Investigation could be used against them in subsequent proceedings and were discharged for refusing to answer on that basis.⁶⁴ The Court reasoned that the employees “were entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally.”⁶⁵ The Court, citing to *Gardner*, reiterated that if New York had demanded the employees to answer questions “specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefit of the constitutional privilege,” then the “employee’s right to immunity as a result of the compelled testimony would not be at stake.”⁶⁶ Further, public employees “subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.”⁶⁷

In *Lefkowitz v. Turley*, the Supreme Court once again revisited this issue when it decided that public contractors, like public employees, could not be required to “waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any proceedings brought against them.”⁶⁸ Revisiting *Garrity*, *Gardner*, and *Sanitation Men*, the Court explained that “these cases, and their predecessors, ultimately rest on a reconciliation of the well-recognized policies behind the privilege of self-incrimination and the

need of the State, as well as the Federal Government, to obtain information to assure the effective functioning of government.”⁶⁹ Further, “immunity is required if there is to be rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.”⁷⁰ Hence, “if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.”⁷¹

Such immunity, as required by the Fifth Amendment, is considered “use immunity” and still allows for the prosecution of an employee so long as “his own compelled testimony is not used to convict him.”⁷² Although some immunity statutes do provide for “transactional immunity,” which grants the witness “full immunity from prosecution for the offense to which compelled testimony relates,” such protection is considerably broader than that provided by the Fifth Amendment.⁷³ As such, the Constitutional rule is a witness (or employee) may not be compelled to provide incriminating testimony unless “the compelled testimony and its fruits cannot be used in any manner . . . in connection with a criminal prosecution against him.”⁷⁴ This leaves the witness “in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.”⁷⁵ Additionally, the “total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an ‘investigative lead,’ and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.”⁷⁶ Thus, once a witness has testified under a grant of use immunity, the burden of proof falls upon the government and “imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”⁷⁷ In the Ninth Circuit, the government is

required to show that any “witness exposed to [the] compelled statements has not shaped or altered her testimony . . . directly or indirectly, as a result of that exposure.”⁷⁸

Generally, the Fifth Amendment privilege against self-incrimination is not “self-executing,” and when a witness is “confronted with questions that the government should reasonably expect to elicit incriminating evidence” the witness “must assert the privilege rather than answer if he desires not to incriminate himself.”⁷⁹ If the witness chooses to answer, rather than assert the privilege, “his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as a result of his decision to do so.”⁸⁰

The Supreme Court has not addressed whether *Garrity* protection is automatic or “self-executing” or whether the public employee must “objectively believe he or she will be disciplined if they decline a request for a statement” and there is a split among the circuit courts to these questions.⁸¹ In some jurisdictions, the employee must have an objectively reasonable belief that his statements are being compelled under a substantial threat of discipline before *Garrity* immunity applies.⁸² In other jurisdictions, the public employer must take the following steps before it can punish the employee for refusing to answer: order the employee to answer questions that are specifically, directly, and narrowly related to the employee’s fitness for duty; advise the employee that the penalty for refusing to answer is dismissal or punishment; and advise the employee that their answers cannot be used against them in a criminal proceeding.⁸³ In *Kalkines v. United States*, the court held that the administrative and criminal investigation of an employee, who was accused of bribery, was “constitutionally defective” when the employee was not “advised of his options and the consequences of his choice” prior to giving an interview.⁸⁴ Many courts require strict compliance with the “*Kalkines* right of advice,” which has become a “term of art in public employee investigative procedures.”⁸⁵ However, some

courts have ruled that *Garrity* protection is self-executing and automatic, and therefore an employer is not required to provide any specific notice of the employee's rights before questioning them.⁸⁶

So far, the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have ruled that “the state does not have to inform employees that they possess *Garrity* immunity before it fires or threatens to fire them merely for refusing on Fifth Amendment grounds to answer specific job-related questions” so long as the state does not explicitly require the public employee to waive their *Garrity* immunity.⁸⁷ Alternately, the Federal, Second, and Seventh Circuits require that, “in order to fire or threaten to fire employees merely for refusing on Fifth Amendment grounds to answer specific job-related questions, the state must affirmatively inform them that they possess immunity under *Garrity* in the event they choose to speak.”⁸⁸ Notably, “even off-duty conduct can be job related if the off-duty conduct could reasonably adversely affect the agency or the employee.”⁸⁹

The Ninth Circuit most recently addressed the issue of employer-compelled statements in *Aguilera v. Baca* and determined that *Garrity* protection is self-executing.⁹⁰ There, several deputies filed suit against the Los Angeles County Sheriff, the Sheriff's Department, other supervisory officers, and internal affairs investigators, alleging that they were improperly detained and later punished through involuntary shift transfers because they refused to give non-privileged statements in connection with an internal criminal investigation where the officers were suspected of assault.⁹¹ The victim, who was a bystander at the scene of a narcotics investigation where a search warrant was being executed, was hospitalized after being severely beaten with a baton or flashlight by an unidentified uniformed deputy.⁹² After taking the complaint, Sheriff's Department supervisors immediately initiated an internal affairs

investigation regarding the assault and ordered all of the deputies who had been present to report to the station and remain there until they had spoken with an Internal Criminal Investigation Bureau (ICIB) investigator.⁹³

Each of the deputies had served as a sworn law enforcement officer for five to twenty years and was familiar with the Sheriff's Department policies and procedures regarding internal criminal investigations, which included: that officers have an affirmative duty to cooperate with internal investigations; that the department may require employees to remain at work past their normal shifts; that when employees are so required, they are paid overtime rates; and that failure to cooperate with internal investigations can subject a deputy to administrative discipline.⁹⁴ While the deputies were required to wait in various unlocked offices at the station they were offered food and drink; not required to relinquish their weapons or badges; and allowed to talk to each other, sleep, use a telephone, and travel to the bathroom unescorted.⁹⁵ "The deputies were never placed under arrest, searched, physically restrained, or otherwise touched or subjected to the use of force."⁹⁶ No deputy asked to leave the station before the interviews were concluded and they were each paid for all the time spent at the station.⁹⁷

However, the commanding officer of the station, Captain Thomas Angel, had called all of the deputies into his office and announced, "in a harsh, accusatory manor, that he knew that one of them had used excessive force," that "the others were covering it up, and that one or more of them could be criminally prosecuted or fired for doing so."⁹⁸ The Captain told the deputies that the only way to "avoid criminal charges was to come forward now," which the deputies "understood to mean to give an immediate and voluntary statement to the ICIB investigators without any protection against later use of such statements against them."⁹⁹ None of the deputies were asked to waive his right against having the statement used against him in a later criminal

proceeding and each deputy, based upon the advice of counsel, declined to give a statement to the investigator.¹⁰⁰ The deputies were each told they were free to leave the station and subsequently, because none of them could initially be cleared of wrongdoing, were reassigned from patrol to station duties until the investigation could be completed.¹⁰¹

After almost a year long investigation, the ICIB lead investigator submitted the investigation report to the Los Angeles County District Attorney's Office, which requested compelled statements from several of the deputies.¹⁰² "During the process of extracting these compelled statements, none of the deputies were asked to waive his or her constitutional right against having the statement used against him or her in a criminal proceeding."¹⁰³ After providing the compelled statements, the deputies were eventually reassigned back to their pre-investigation duties and no state or federal criminal charges were ever brought.¹⁰⁴

Affirming the summary judgment dismissal of the officer's suit, the circuit court concluded "a law enforcement agency has the authority as an employer to direct its officers to remain on duty to answer questions from supervisory officers as part of a criminal investigation into the subordinates' alleged misconduct."¹⁰⁵ Further, the court explained:

A law enforcement officer is not seized for purposes of the Fourth Amendment simply because a supervisor orders him to remain at work after the termination of his shift or to come into the station to submit to questioning about the discharge of his duties as a peace officer. In the case at bar, if the deputies had refused to wait at the station to be questioned regarding the events [surrounding the assault], or otherwise failed to cooperate in the criminal investigation, they could have been subject to administrative discipline including termination. However, while a law enforcement agency can order its employees to cooperate in a criminal investigation as a condition of their continued employment subject to the Constitution, it may not seize its employees and detain them against their will without probable cause. Nor may compelled statements be obtained in violation of their constitutional rights against self-incrimination without the protection afforded by Supreme Court decisions.¹⁰⁶

In its decision, the circuit court held that the supervisors did not violate the deputies' Fifth Amendment rights "when they were questioned about possible misconduct, given that the

deputies were not compelled to answer investigator's questions or to waive their immunity from self-incrimination."¹⁰⁷ Acknowledging that the refusal to answer the investigator's questions did in fact lead to reassignment, the court did "not consider re-assignment from field to desk duty as equivalent to losing one's job under *Gardner*."¹⁰⁸ Additionally, the deputies' Fifth Amendment claim also failed "because the deputies were never charged with a crime, and no incriminating use of their statements was ever made."¹⁰⁹

In a scathing dissent, Chief Judge Kozinski argued that when a law enforcement officer is placed in the precarious situation of forcing him to choose between disobeying an order from his employer and giving up the constitutional privilege against self-incrimination, "the employer must not play on this ambiguity to the disadvantage of the employee; rather, it must clarify whether it is questioning the employee in its capacity as an employer or as a law enforcer."¹¹⁰ In his view, the preferred approach should be that "the government must tell public employees that they have immunity before it can constitutionally punish them for refusing to make self-incriminating statements."¹¹¹ Otherwise, it may be unclear to a public employee "whether or not he has been *ordered* to give the statement" and, "even when it is clear that the employee has been given an order, the employee may not know that this gives him automatic immunity."¹¹²

Overall, *Garrity* and its progeny "settle that government cannot penalize assertion of the constitutional privilege against self-incrimination by imposing sanctions to compel testimony which has not been immunized."¹¹³ However, even though a compelled statement may not be used against a public employee in a criminal case,¹¹⁴ it can still be disclosed to a grand jury¹¹⁵ and admitted as evidence in civil trials.¹¹⁶ Notably, when *Garrity*-protected statements are admitted as evidence, such as in a section 1983 action (whereby state actors may be sued

individually for violations of constitutional rights),¹¹⁷ any direct testimony by an officer at the civil trial is considered voluntary and therefore unprotected.¹¹⁸

For example, if a plaintiff's attorney were able to get an officer to testify in a civil trial about statements made pursuant to a *Garrity* protected interview, the new testimony would not have the same legal protection as the original statements and could be used in a subsequent criminal trial. To maintain the *Garrity* protection of any employer-compelled statement, an officer should reassert his Fifth Amendment privilege for any testimony that may be self-incriminating, in any proceeding either "civil or criminal, administrative or judicial, investigatory or adjudicatory"¹¹⁹ regardless of whether or not the content of the statement has been previously protected by *Garrity* or some other form of immunity.

III. Practical Implications in the Field

An officer-involved shooting has the potential to be a career and life-altering experience for even the most veteran officer. The officer may be the subject of scathing media and public scrutiny and yet have no ability to defend himself in the court of public opinion.¹²⁰ There will likely be multiple and concurrent criminal, civil, personnel, regulatory, and administrative investigations.¹²¹ Each investigation will have its own unique purpose, and the result of each will have its own unique impact on those involved. Being able to navigate through each of the overlapping inquiries and understanding all of the possible ramifications for each is essential for both the officer and his legal counsel. Because the interview process is likely to be determinative to the outcome of any investigation, and also because the officer may not be capable of identifying the relevant legal issues due to the physical and mental duress of a critical incident, it is essential for the officer to have knowledgeable and competent legal counsel to help him navigate this process.

Because public employees share the same constitutional protections as the general public, and due to the serious potential consequences of a criminal investigation, officers have no affirmative duty to submit to an interview or otherwise cooperate with a criminal investigation, and they cannot be punished for refusing to do so or for refusing to waive their constitutional right against self-incrimination.¹²² Because of the possibility of criminal charges, the decision to provide a written or verbal statement to a criminal investigator is perhaps one of the most important decisions following an officer-involved shooting.¹²³ Generally, an officer should be extremely careful not to waive any rights and should only do so on the advice of counsel who, on behalf of the officer, has already initiated an investigation that considers all of the facts and circumstances.¹²⁴

Knowing when, and to whom, to give a statement, is an essential part of navigating the post-critical incident investigative process. Because internal and criminal investigations have fundamentally different purposes, it is extremely important for both the officer and his legal counsel to know the difference between the two. For most public employees, this question can usually be answered by determining who is conducting the interview.¹²⁵ Usually, police officers have no jurisdiction or authority to investigate internal personnel matters and human resources personnel have no jurisdiction or authority to investigate allegations of criminal conduct.¹²⁶ Generally, if the person requesting the statement works for the same department as the officer, it is probably for the purpose of an internal investigation. Alternately, if the request for a statement or interview comes from an outside law enforcement agency, the statement sought is likely to coincide with a criminal investigation. However, when an officer is employed by a law enforcement agency, this distinction becomes blurred and either the officer's supervisors or the agency's internal affairs officers will conduct most internal investigations. Accordingly, when

an officer is confronted with a request to provide a statement, the officer and his legal counsel must determine the reason for the interview and should obtain a written statement from the interrogating official stating the nature and purpose for the request.¹²⁷

If an officer's employer agency is requesting a statement through an administrative, personnel, or internal investigation, *Garrity*'s protections against self-incrimination will be available if asserted.¹²⁸ To ensure *Garrity* protection then, it is essential to make a statement on the record that the officer is complying with a direct order by his employer to provide the statement, that the statement is not voluntary, and that the officer understands that the statement cannot be used against him in any criminal proceeding.¹²⁹ If the questions are "specifically, directly, and narrowly" related to the officer's job or the incident in question, then the officer must ordinarily cooperate in the investigation and can be disciplined for insubordination if he fails to do so or is untruthful.¹³⁰ If an employer were to offer one, a public employee might expect a proper *Garrity* Warning to look something like the following:

You are going to be asked questions related to your job performance.

Any voluntary answers to those questions can be used as a basis to discipline you, up to and including termination, and can also be used against you in a criminal proceeding.

If you believe that a truthful answer to any question may be incriminating, you have the right not to answer the question.

Your refusal to provide an incriminating statement cannot be used as a basis to fire you unless you are granted immunity from the use of your statements in a criminal proceeding.

Such immunity will only be granted if we order you to answer a question. When so ordered, you are legally obligated to answer the question and you can be disciplined, up to and including termination, if you then fail to do so.

If you refuse an order to answer specific questions that an innocent person would be expected to answer, your refusal to answer can be used as evidence of misconduct, and, in combination with other evidence of misconduct, can be used as a basis for discipline, up to and including termination. However, no such refusal to answer may be used in any subsequent criminal proceeding.¹³¹

If an officer provides a voluntary statement to either a criminal or internal investigator, the protections afforded by *Garrity* will not apply. As a result, the officer and his legal counsel must carefully consider all of the potential employment, civil, and criminal liabilities involved before agreeing to do so.

For a criminal investigation, the officer may unequivocally invoke his Fifth Amendment right to remain silent and, with the advice of legal counsel, should only provide a statement to the criminal investigator when it is strategically beneficial for the officer.¹³² The decision to provide a statement should never be made lightly and should only be contemplated when the officer is in a proper state of mind, and not under the stress of a critical incident.¹³³ Before providing any statement to a criminal investigator, the officer and his legal counsel should make a careful and complete analysis of the risks and benefits to the officer.¹³⁴ Although a statement to a criminal investigator may help resolve the investigation without prosecution, any such statement should be given in a controlled environment.¹³⁵ Further, any statements given, whether criminal or administrative, should only be done so with the officer's legal counsel present, and if it is a verbal interview the officer and his attorney should make their own recording.¹³⁶

The forty-eight hour period immediately following a critical incident is often the most crucial for determining the potential consequences to the officer, and strategic decisions during this period can help manage the ultimate outcome.¹³⁷ In order for the officer to be protected from multiple threats, such as disciplinary actions, civil suits, and criminal charges, the officer's legal advocacy network must be fully functioning, and an immediate evaluation must take place to assess any potential risks.¹³⁸ Once a critical incident scene has been secured, an officer may be asked by his department to remain and answer basic public safety questions.¹³⁹ Such

questions may cover: the type of force used; the direction and approximate number of shots fired by the involved officer(s) and suspect(s); the location of injured or deceased persons; descriptions and locations of any known suspects, victims, or witnesses; description and location of any physical evidence; or any other information necessary to ensure officer and public safety.¹⁴⁰ Importantly, none of these questions involve asking the officer *why* he used deadly force and such a question should never be answered coincidental to the critical incident.¹⁴¹ Contemporaneous statements are subject to the maximum effect of critical incident amnesia and offer the least legal protection to the officer. If an officer's supervisor or employer agency demands a more detailed statement before the officer has been afforded the opportunity to contact his legal counsel, the officer should seek the protections afforded by *Garrity* themselves by clarifying the basis for the requested statement and confirming that it is to be given involuntarily.¹⁴² Additionally, unless the officer is seized and placed in official custody, he has no affirmative obligation to wait for, or cooperate with, a criminal investigator.¹⁴³ As soon as possible following a critical incident, the officer's legal counsel must get as much of the basic information as possible and develop an investigative plan to determine the full extent of any possible physical evidence and potential witnesses.¹⁴⁴

IV. Applications for the Officer and his Legal Counsel

Although there is no single agreed-upon best practice for post-critical incident interviews, the development in understanding critical incident amnesia and memory reconstruction, combined with legal developments regarding public employee Fifth Amendment constitutional rights, does lead to several conclusions. With the understanding that every critical incident will have its own unique factual and legal considerations, a possible interview timeline may consist of the following steps.

Step One, immediately after an officer involved shooting or other critical incident and when the physical scene is secured, the officer should give a basic and limited public safety debriefing to the scene commander so that the officer himself can be safely escorted from the scene.

Step Two, as soon as possible, the officer should contact his legal counsel and advise the attorney about the incident. As time allows, the officer and attorney should conduct a thorough initial debriefing. The purpose of this initial statement has two purposes. First, it will provide the attorney with initial information that will help him begin to prepare a legal strategy to defend the officer against potential employment, civil, and criminal liabilities. Second, this initial interview will help minimize the likelihood of critical incident amnesia by establishing a record from which to help in the memory reconstruction process.¹⁴⁵ Because this initial statement is given to the officer's attorney, it will be protected under the attorney-client privilege and, while still helping to aid in memory reconstruction, will protect the officer by minimizing inconsistencies that may develop as the memory reconstruction process continues.¹⁴⁶ This initial statement should be recorded and kept confidential by the attorney so that the officer can review it after he has had sufficient time to normalize after the incident.

Step Three, the officer and his attorney should begin preparing for the possibility of an employer-compelled statement or interview. The officer should review his initial statement, recorded by the attorney immediately after the incident, and when allowed should review any other audio or video evidence made available by the department.¹⁴⁷ If possible, the officer should conduct a walk-through of the scene.¹⁴⁸ A walk-through should not be recorded because it may highlight perceptual distortions experienced by the officer.¹⁴⁹ However, when combined with reviewing any other available audio or video recordings, a walk-through will help improve

the officer's recollection and lead to a more reliable interview.¹⁵⁰ The attorney should continue to conduct his own investigation during this period and continue to develop a legal defense strategy.

Step Four, if requested, and with the advice of legal counsel, the officer may provide a statement or interview to the employer agency. This statement should be given no sooner than at least twenty-four hours after the incident and after the officer has had at least one full, uninterrupted, sleep cycle.¹⁵¹ The officer and attorney must establish on the record that the statement is being compelled under threat of dismissal if the officer refuses to provide one, and that it will be afforded full protection under the *Garrity* doctrine. Unless it is strategically beneficial to the officer and is advised by his legal counsel, the officer should not give a voluntary non-immunized statement or interview. Being the second interview and following an appropriate amount of time to synthesize and reconstruct the officer's initial memory, this statement has a higher likelihood of being more complete and accurate.¹⁵² This statement must also be recorded and transcribed by the officer's attorney for later use in a possible criminal investigation interview.

Step Five, if it is in the officer's best interest and likely to help resolve a criminal investigation without prosecution, the officer may consent to a criminal investigation interview. Because this will likely be the second formal interview, precautions must be taken to avoid the possibility of creating two inconsistent statements. Even though a criminal investigator will not have access to a *Garrity*-protected statement, civil litigants and grand juries may eventually have both the administrative and criminal statements to compare. Common and inevitable perceptual discrepancies are likely to open up the officer to accusations of outright lying or withholding the truth.¹⁵³ Each subsequent interview will act as an additional memory prompt. This is especially

important should the subsequent interview result in additional observations or clarifications.¹⁵⁴

In order to minimize this possibility, the criminal interview should consist primarily of releasing the administrative statement to the criminal investigator once it has been properly redacted by the officer's attorney to minimize any potential criminal liability. Then, if the criminal investigation interviewer has any clarifying questions, the officer may answer additional questions with his attorney's advice and consent. Like the administrative interview, this criminal investigative interview should only be conducted with the officer's legal counsel present and the attorney should record the interview.

IV. Conclusion

Although *Garrity* and other public employee cases provide officers with a Fifth Amendment privilege against self-incrimination for employer compelled statements, post-critical incident compelled statements can still be problematic if not handled properly. Further, there is no failsafe way to protect an officer from the variety of potential liabilities that necessarily result from an officer-involved shooting or other critical incident because each one will be contingent upon the unique circumstances and events that took place. However, the proposed steps, when followed by both the officer and his legal counsel, can facilitate in bringing out the most accurate and complete memories, limit any unintentional exposure due to critical incident amnesia and perceptual distortion, and maximize the officer's legal protections.

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¹ See J. Michael McGuinness, *Fifth Amendment Protection for Public Employees: Garrity and Limited Constitutional Protections from use of Employer Coerced Statement in Internal Investigations and Practical Considerations*, 24 Tuoro L. Rev. 697, 702 (2008).

² Lt. Col. Dave Grossman & Bruce K. Siddle, *Critical Incident Amnesia: The Physiological Basis and the Implications of Memory Loss During Extreme Survival Situations*, *The Firearms Instructor: The Official Journal of the International Association of Law Enforcement Firearms Instructors*, Issue 31, August 2001.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Lt. Col. Dave Grossman & Bruce K. Siddle, *supra* note 2 (citing Easterbrook, J.A. (1959). *The Effects of Emotion on Cue Utilization and the Organization of Behavior*. *Psychological Review*, 66, 183-201).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Alexis Arthohl, Ph.D., *Perceptual and Memory Distortion During Officer-Involved Shootings*, FBI Law Enforcement Bulletin, October 2002, 18-24 (citing Seymour Epstein, *The Integration of the Cognitive and Psychodynamic Unconscious*, *American Psychologist* 49 (1994): 709-723).

¹² *Id.* at 18

¹³ *Id.*

¹⁴ *Id.* at 18, 19 (internal quotations omitted).

¹⁵ *Id.* at 19

¹⁶ Alexis Arthohl, Ph.D., *supra* note 11, at 19.

¹⁷ *Id.* at 19 (citing A.L. Hoenig and J.E. Roland, *Shots Fired: Officer Involved*, *Police Chief*, October 1998).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Alexis Arthohl, Ph.D., *supra* note 11, at 19 (citing R.M Solomon and J.M. Horn, *Post-Shooting Traumatic Reactions: A Pilot Study*, *Psychological Services for Law Enforcement*, eds. J.T. Reese and H.A. Goldstein (Washington, DC: U.S. Government Printing Office, 1986); David Klinger, U.S. Department of Justice, National Institute of Justice, *Police Responses to Officer-Involved Shootings*, NCJ 192285 (Washington, DC, October 2001)). The study conducted in 1986 by R.M Solomon and J.M. Horn showed that 67% of the officers saw the incident in slow motion, 15% observed it as faster than normal, 51% experienced diminished hearing, 18% heard intensified sounds, 37% had tunnel vision and 18% experienced greater visual detail. David Klinger's study showed that 56% of the officers saw the incident in slow motion, 23% thought it happened quicker than normal, 82% experienced diminished sound, 20% experienced intensified sound, 56% experienced heightened visual detail, and 51% had tunnel vision.

²² Geoffrey P. Alpert, Ph.D., John Rivera, and Leon Lott, *Working Toward the Truth in Officer-Involved Shootings - Memory, Stress, and Time*, FBI Law Enforcement Bulletin, May 2012, 1-7.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.* at 3, 4.

²⁶ *Id.* at 4

²⁷ Geoffrey P. Alpert et al., *supra* note 22, at 4.

²⁸ *Id.* at 4.

²⁹ Lt. Col. Dave Grossman & Bruce K. Siddle, *supra* note 2.

³⁰ *Id.*

³¹ *Id.* (citing Benson, K. & Feinberg, I., *The Beneficial Effects of Sleep in an Extended Jenkins & Dallenbach Paradigm*. *Psychophysiology*, 14, 375-383 (1977); Cartwright, R.D., *Sleep and Dreams in Depressed Men and Women Undergoing Divorce*, Paper presented at the annual meeting of the American Psychological Association, New Orleans (1989); Cartwright, R., *Dreams that Work: The Relation of Dream Incorporation to Adaptation to Stressful Events*, *Dreaming*, 1, 3-9 (1991); Cartwright, R. et al., *Effects of REM Time on what is Recalled*. *Psychophysiology*, 12, 561-568 (1975); Jenkins, J.G., & Dallenbach, K.M., *Oblivescence During Sleep and Waking Period*. *American Journal of Psychology*, 35, 605-612 (1924); Schoen, L.S., & Badia, P., *Facilitated Recall Following REM and NREM Naps*, *Psychophysiology*, 21, 299-306 (1984); Scrimia, L., *Isolated REM Sleep Facilitates Recall of Complex Associative Information*, *Psychology*, 88, 248-259 (1982); Tilly, A.J., & Empson, J.A.C., *REM Sleep and Memory Consolidation*, *Biological Psychology*, 6, 293-300 (1978); Webb, W.B. & Cartwright, R.D., *Sleep and Dreams*, In M. Rosenzweig & L. Porter (eds.), *Annual Review of Psychology*, 29, 223-252 (1978)).

³² *Id.*

³³ *Id.* (citing Luce, G.G., *Body Time*, New York: Random House (1971); Roffwarg, H.P., Muzio, J.N., & Dement, W.C., *Ontogenetic Development of the Human Sleep-Dream Cycle*, *Science*, 152, 603-619 (1966)).

³⁴ Lt. Col. Dave Grossman & Bruce K. Siddle, *supra* note 2.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* (citing Marshal, S.L.A., *Men Against Fire*, Gloucester, MA: Peter Smith (1978)).

³⁹ Lt. Col. Dave Grossman & Bruce K. Siddle, *supra* note 2. (citing Williams, F.D., *SLAM: The Influence of S.L.A. Marshall on the United States Army*, U.S. Army, TRADOC, Ft. Monroe, WA (1990)).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* (citing Belenke, G., *Presentation at Human Factors Symposium*, Camp Lejune, NC (1996)).

⁴³ J. Michael McGuinness, *supra* note 1, at 702 (quoting *United States v. Koon*, 34 F.3d 1416, 1432 (9th Cir. 1994)).

⁴⁴ *Id.*

⁴⁵ *Id.* at 703.

⁴⁶ *Garrity v. State of New Jersey*, 385 U.S. 493, 502 (1967).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 496, 500 (dismissing the officers' appeal and treating the papers as a petition for certiorari, which it granted).

⁵¹ *Garrity*, 385 U.S. at 494 (citing N.J.Rev.Stat. § 2A:81-18.1 (Supp. 1965) (requiring the removal and loss of any pension of any public employees who refuses to answer questions relating to their office upon the grounds that the answers may tend to incriminate him or compel him to be a witness against himself)).

⁵² *Id.* at 496.

⁵³ *Id.* at 500.

⁵⁴ *Id.* at 499,500.

⁵⁵ *Gardner v. Broderick*, 392 U.S. 273, 279 (1968).

⁵⁶ *Id.* at 274.

⁵⁷ *Id.*

⁵⁸ *Id.* at 274-276.

⁵⁹ *Id.* at 278.

⁶⁰ *Gardner*, 392 U.S. at 279.

⁶¹ *Id.* at 276.

⁶² *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968).

⁶³ *Id.* at 281-283.

⁶⁴ *Id.* at 284.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Uniformed Sanitation Men*, 392 U.S. at 285.

⁶⁸ *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973).

⁶⁹ *Id.* at 81 (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)).

⁷⁰ *Id.* (citing *Kastigar v. United States*, 406 U.S. 441, 446 (1972)).

⁷¹ *Id.* at 85.

⁷² *Lefkowitz v. Cunningham*, 431 U.S. 801, 809 (1977).

⁷³ *Kastigar*, 406 U.S. at 453.

⁷⁴ *Id.* at 457.

⁷⁵ *Id.* (quoting *Murphy*, 378 U.S. at 79).

⁷⁶ *Id.* at 460.

⁷⁷ *Id.*

⁷⁸ J. Michael McGuinness, *supra* note 1, at 708 (quoting *United States v. Koon*, 34 F.3d 1416, 1432 (9th Cir. 1994) (upholding the conviction of several officers involved in the Rodney King beating)).

⁷⁹ *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984).

⁸⁰ *Id.* at 420.

⁸¹ J. Michael McGuinness, *supra* note 1, at 715 (comparing *United States v. Friedrich*, 842 F.2d 382 (D.C. Cir. 1988), and *United States v. Camacho*, 739 F. Supp. 1504 (S.D. Fla. 1990), with *Singer v. Maine*, 49 F.3d 837 (1st Cir. 1995), and *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980)).

⁸² *Id.* (citing *Freidrick*)

⁸³ *Id.* at 716 (citing *Lefkowitz v. Turley*, 414 U.S. 70, 85 (1973); *Confederation of Police v. Conslick*, 489 F.2d 891 (7th Cir. 1973)).

⁸⁴ *Id.* at 728 (citing *Kalkines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973)).

⁸⁵ *Id.* (citing *Pension Benefit Guar. Corp. v. F.L.R.A.*, 967 F.2d 658 (D.C. Cir. 1992); *Masino v. United States*, 589 F.2d 1048 (Ct. Cl. 1978); *Peden v. United States*, 512 F.2d 1099 (Ct. Cl. 1975)).

⁸⁶ J. Michael McGuinness, *supra* note 1, at 716 (citing *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773 (4th Cir. 1995)).

⁸⁷ Peter Westen, *Answer Self-Incriminating Questions Or Be Fired*, 37 Am. J. Crim. L. 97, 152 (2010) (citing *Aquilera v. Baca*, 510 F.3d 1161, 1172 n.6 (9th Cir. 2007); *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998); *Harrison v. Wille*, 132 F.3d 679, 683 (11th Cir. 1998); *Arrington v. County of Dallas*, 970 F.2d 1441, 1446 (5th Cir. 1992); *Hester v. City of Milledgeville*, 777 F.2d 1492 (11th Cir. 1985)).

⁸⁸ *Id.* at 153 (citing *Atwell v. Lisle Park District*, 286 F.3d 987, 990 (7th Cir. 2002); *Weston v. United States Dep't of Hous.*, 724 F.2d 943, 948 (Fed. Cir. 1983); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of the City of New York*, 426 F.2d 619, 626 (2d Cir. 1970)).

⁸⁹ J. Michael McGuinness, *supra* note 1, at 717.

⁹⁰ 510 F.3d 1161 (9th Cir. 2007).

⁹¹ *Id.* at 1164

⁹² *Id.* at 1165

⁹³ *Id.*

⁹⁴ *Id.*

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- ⁹⁵ *Aguilera*, 510 F.3d at 1165.
- ⁹⁶ *Id.*
- ⁹⁷ *Id.*
- ⁹⁸ *Id.* 1165, 1166
- ⁹⁹ *Id.* at 1166 (internal quotations omitted).
- ¹⁰⁰ *Aguilera*, 510 F.3d at 1166.
- ¹⁰¹ *Id.*
- ¹⁰² *Id.*
- ¹⁰³ *Id.*
- ¹⁰⁴ *Id.*
- ¹⁰⁵ *Aguilera*, 510 F.3d at 1168 (citing *Driebel v. City of Milwaukee*, 298 F.3d 622, 638 (7th Cir. 2002)).
- ¹⁰⁶ *Id.* 1168, 1169 (internal citations omitted).
- ¹⁰⁷ *Id.* at 1172
- ¹⁰⁸ *Id.* at 1173 (citing *Gardner*, 392 U.S. at 273).
- ¹⁰⁹ *Id.*
- ¹¹⁰ *Aguilera*, 510 F.3d at 1175.
- ¹¹¹ *Id.* at 1178.
- ¹¹² *Id.*
- ¹¹³ *Lefkowitz*, 431 U.S. at 806.
- ¹¹⁴ *E.g.*, *Garrity v. State of New Jersey*, 385 U.S. 493 (1967); *Aguilera v. Baca* 510 F.3d 1161 (9th Cir. 2007).
- ¹¹⁵ *In re Grand Jury Subpoenas Dated December 7 And 8, Issued To Bob Stover, Chief Of Albuquerque Police Department V. United States*, 40 F.3d 1096, 1100 (10th Cir. 1994)
- ¹¹⁶ *See Chavez v. Martinez*, 538 U.S. 760, 770 (2003), *see also* F.R.E. 801.
- ¹¹⁷ *See* 42 U.S.C. § 1983.
- ¹¹⁸ *See United States v. Vangates*, 287 F.3d 1315, 1325 (11th Cir. 2002)
- ¹¹⁹ *Chavez*, 538 U.S. at 770.
- ¹²⁰ J. Michael McGuinness, *supra* note 1, at 702.
- ¹²¹ *Id.*
- ¹²² *Id.* at 730.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ J. Michael McGuinness, *supra* note 1, at 731.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 732.

¹³⁰ J. Michael McGuinness, *supra* note 1, at 732.

¹³¹ Adapted in part from Peter Westen, *supra* note 87, at 161-162.

¹³² J. Michael McGuinness, *supra* note 1, at 732.

¹³³ *Id.* at 735.

¹³⁴ *Id.* at 732.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ J. Michael McGuinness, *supra* note 1, at 734.

¹³⁸ *Id.*

¹³⁹ *Administrative Investigations of Police Shootings and Other Critical Incidents: Officer Statements and Use of Force Reports Part Two: The Basics*, 2008 (8) AELE Mo. L. J. 201, 202 (Wayne W. Schmidt ed., 2008).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² J. Michael McGuinness, *supra* note 1, at 736.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 734.

¹⁴⁵ See Geoffrey P. Alpert et al., *supra* note 22.

¹⁴⁶ See Guideline 3.2, *Officer-Involved Shooting Guidelines*, IACP Police Psychological Services Section (2009).

¹⁴⁷ See *Administrative Investigations of Police Shootings and Other Critical Incidents: Officer Statements and Use of Force Reports Part One: The Prologue*, 2008 (6) AELE Mo. L. J. 201, 202 (Wayne W. Schmidt ed., 2008); *Administrative Investigations of Police Shootings and Other Critical Incidents: Officer Statements and Use of Force Reports Part Two: The Basics*, *supra* note 139.

¹⁴⁸ *Administrative Investigations of Police Shootings and Other Critical Incidents: Officer Statements and Use of Force Reports Part Two: The Basics*, *supra* note 139.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See e.g., *id.* at 203; Guideline 4.2, *Officer-Involved Shooting Guidelines*, IACP Police Psychological Services Section (2009); Alexis Arthohl, Ph.D., *supra* note 11.

¹⁵² See *Administrative Investigations of Police Shootings and Other Critical Incidents: Officer Statements and Use of Force Reports Part One: The Prologue*, *supra* note 147; Geoffrey P. Alpert, Ph.D *supra* note 22.

¹⁵³ Alexis Arthohl, Ph.D., *supra* note 11, at 21.

¹⁵⁴ *Id.*

Self Garrity

I understand that I am going to be asked questions related to my job performance and that any voluntary answers to those questions can be used as a basis to discipline me, up to and including termination, and can also be used against me in a criminal proceeding.

If I believe that a truthful answer to any question may be incriminating, I have the right not to answer the question.

My refusal to provide an incriminating statement cannot be used as a basis to fire me unless I am granted immunity from the use of my statements in a criminal proceeding.

Such immunity will only be granted if you order me to answer a question. When so ordered, I am legally obligated to answer the question and I can be disciplined, up to and including termination, if I then fail to do so.

If I refuse an order to answer specific questions that an innocent person would be expected to answer, my refusal to answer can be used as evidence of misconduct, and, in combination with other evidence of misconduct, can be used as a basis for discipline, up to and including termination. However, no such refusal to answer may be used in any subsequent criminal proceeding.