POLICE UNION CONTRACT "WAITING PERIODS" FOR MISCONDUCT INVESTIGATIONS NOT SUPPORTED BY SCIENTIFIC EVIDENCE

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EXECUTIVE SUMMARY

Some police union contracts around the country have provisions prohibiting departmental investigations of suspected officer misconduct for 48-hours or even 10 days. Advocates of these waiting periods argue that the stress of a critical incident, such as an officer-involved shooting or serious use-of-force, adversely affects an officer's memory, and that it takes "two sleep cycles" for memory to fully recover. A review of the psychological literature finds no support for this argument. The evidence on the impact of stress on memory is very complex, with contradictory findings. Some studies, in fact, have found that stress actually enhances memory.

In addition, even if the science underlying waiting periods were valid, police unions and their advocates apply waiting periods in an inconsistent, hypocritical and self-serving manner. They do not, for example, extend the privilege of delayed investigations to crime victims, witnesses, or suspected criminals, two groups who presumably would have flawed memories because of their recent traumatic experiences.

THE WAITING PERIOD CONTROVERSY

The national crisis arising from the deaths of citizens at the hands of the police in Ferguson, Missouri, and Baltimore, Maryland, among other incidents since August 2014 has focused public attention on standards for holding officers accountable for their day-in-day-out interactions with citizens. Critics of the police argue that officers are routinely not thoroughly investigated and disciplined for misconduct, including unjustified shootings, use of excessive physical force, offensive language, and improper use of race in stops, frisks, and arrests.[2]

Increased attention has focused on police union contracts, which critics charge include provisions that impede effective investigation of suspected misconduct and meaningful discipline. Much attention has focused on "waiting periods," which prohibit departmental interviews with police officers

for periods of 48-hours, or 10 days in the case of the Baltimore police union contract and the Maryland Law Enforcement Officers' Bill of Rights.[3]

THE ARGUMENT FOR WAITING PERIODS

The advocates of waiting periods argue that traumatic incidents adversely affect memory, with the result that an officer involved in a stressful event such as a shooting or use-of-force will not be able to give a fully accurate account of the incident. They further argue that it requires two full "sleep cycles," or 48 hours, for memory to fully recover.

Mr. Sean Smoot, Chief Legal Counsel for the Police Benevolent and Protective Association of Illinois, for example, testified before the U.S. Civil Rights Commission on April 20, 2015, and argued that even in departments where there is no contractual requirement, investigators "often require that officers have at least two sleep cycles" before they interview officers.[4]

Mr. Smoot began his testimony by saying that "research shows and the science shows" the need for waiting periods. He cited the work of the Force Science Institute, and its Director, Dr. Bill Lewinski, Ph.D. in support of his argument. [5]

Jim Palmer, Executive Director of the Wisconsin Professional Police association, was recently quoted as saying that the 48-hour rule allows officers to "get some rest and participate in the investigation on a voluntary basis."[6]

A 2008 article in the Americans for Effective Law Enforcement *AELE Monthly Law Journal* states that "In no case should a formal interview be conducted in less than 48 hours, even if the officer is willing to participate." It then adds that "It is better to wait 48 to 72 hours before conducting the interview."[7]

This report argues, however, that current psychological research does not support these claims.

THE SCIENTIFIC EVIDENCE

The subject of the impact of stress on memory has been intensively studied by psychologists for over 100 years. This report relies on a systematic review of the literature: Sven-Ake Christianson, "Emotional Stress and Eyewitness Memory: A Critical Review," published in the four-volume encyclopedia, Jackie Andrade, ed., *Memory* (London and New York: Routledge, 2008). The review examines 244 published studies. The various studies include both empirical studies of actual events (e.g., interviews with participants in or eyewitnesses to crimes or other traumatic events) and laboratory experiments.[8]

The findings of the review of the literature are discussed below.

There is No Consistent Evidence That Stress Adversely Affects Memory

The Abstract of the Christianson review states that the argument that stress "leads to less efficient memory processing" is "overly simplistic" [p. 151, emphasis added].

Christianson points out that research in just the past 20 years (presumably 1988 to 2008) has found a "wide variety of results concerning memory for negative emotional events." The "diversity of research findings," he continues, does not support claims on either side of the controversy, and "raises serious concerns about claims that negative emotional events are either well retained or poorly retained in memory" (p. 152).

Some Studies Have Found that Some Eyewitness to Crime Have Very Accurate Memories of the Event

A study of 13 eyewitnesses to a murder found "a high degree of accuracy of memory and little decline over time," with respect to the event. In fact, those people "who reported the highest amount of stress showed a mean accuracy of 93% in the initial police interview" (p. 157). [Accuracy was measured in terms of consistency with other evidence about the event.]

In a study of 58 witnesses to 22 post office robberies, witnesses recollections of "detailed information" (e.g., "action, weapon, clothing") were consistent among the group (pp. 157-8). It should be noted that these are the kinds of details that crime investigators are most interested in.

Christianson concludes that on the basis of the two studies, "highly negative emotional events are relatively well retained, both with respect to the emotional event itself and with respect to the central, critical detail information of the emotion-eliciting event" (p. 190).

Findings Specifically Relevant to Immediate Post-Event Interviews of Police Officers

Three findings are directly related to the memories of police officers following a traumatic event.

First, research on "real-life" events consistently find that details are well-retained in memory, whereas laboratory studies find mixed results on this point (p. 155). Police officer-related events are by definition "real-life" events and not laboratory experiments.

Second, recent laboratory studies have found that "central details are retained better" in emotional events than in non-emotional events (p. 166). In the case of police officer memories about a traumatic event, the "central details" are the most important details that investigators seek to learn about.

Third, some studies have compared the memories of crime victims with bystanders. These studies have found "no significant differences in accuracy or confidence of victims compared with bystanders" (p. 173). In short, there is no reason to assume that the memory of the police officer who did a shooting will be any less accurate than the memories of witnesses to the event.

Problems with Measuring the Impact of the Level or Trauma or Arousal

A widely accepted assumption in the studies of the impact of stress on memory is that the accuracy of memory initially increases as the level of stress rises, but then begins to decline as the stress level exceeds "a hypothetical optimal point." The layperson readily understands this process in terms of psychological overload. The model for this argument, in the form of a U-Curve, was established in the field of psychology in 1908 as the Yerkes-Dodson Law, and has been widely used ever since (pp. 174-180).

Applying the Yerkes-Dodson Law to policing, it would hold that an officer responsible for a fatal shooting would have less efficient memory than an officer involved in a low-level use of physical force incident.

Christianson's review, however, finds that the Yerkes-Dodson Law is "not very often supported by contemporary research findings" (p. 176). This conclusion involves a number of complex methodological issues that are beyond the scope of this report, but interested readers can study the report for themselves.

Christianson concludes that the Yerkes-Dodson Law has served its purpose but should now be "retired" (pp. 179-180).

Thus, there is no scientific basis for arguing that officers who have experienced a very high level of stress will have high levels of memory failure.

On this subject, we should also note that the advocates of waiting periods for police officers facing investigations do not distinguish between the levels of stress officers may face. Thus, the officer accused of having filed a false report enjoys the same waiting period privilege as the officers who has shot and killed someone.

Christianson's Conclusions

Christianson concludes his systematic review of the literature by arguing that "there are no real grounds for a simple relationship between intense emotion and memory," and that "the way emotion and memory interact is a very complex matter," and finally that "there is little evidence to support the view that emotional stress is bad for memory" (190-192).

INCONSISTENT, HYPOCRITICAL, AND SELF-SERVING APPLICATION OF THE WAITING PERIOD

Even if the science behind waiting periods for police officers was valid, police unions and their advocates apply waiting periods in an inconsistent, hypocritical, and self-serving manner.

If it were true that people who have experienced trauma and suffer some memory dysfunction, then the waiting period privilege should be extended to all people who have contact with the criminal justice system. Police investigators, for example, should not immediately interview a recent crime victim because the trauma may cause that person to not recall important details about the crime and the alleged perpetrator. Such memory failure might prevent the police from correctly identifying and arresting the suspect, or cause them to arrest the wrong person.

For the same reasons, if the science of trauma and memory is valid, the waiting period should also be extended to the witnesses of crimes. (And as already noted, some of the psychological research involves witnesses to events.)

Despite these considerations, the police union advocates of waiting periods do not argue that the waiting period privilege should be extended to crime victims or witnesses to crimes.

Traffic accidents provide good example of the failure of police unions and their advocates to apply their "science" in an inconsistent fashion. In an accident, the at-fault driver, the not-at-fault driver, passengers, and witnesses all experience some degree of trauma. If the science is valid, immediately interviewing these individuals creates the risk of obtaining inaccurate information. Yet, the advocates of waiting periods do not argue that the police should grant these individuals two "sleep cycles" (48-hours) so that their memories can fully recover.

The failure of police unions and their advocates to apply the waiting period due to trauma-related memory loss to crime victims, criminal suspects, traffic accident participants, and witnesses to criminal events is <u>inconsistent, hypocritical and self-serving</u>. The purpose of waiting periods is not to ensure obtaining accurate information but to shield officers from timely investigations.

THE EMERGING STANDARD FOR IMMEDIATE STATEMENTS BY POLICE OFFICERS

Delay in questioning officers about critical incidents is contrary to the emerging best practice with respect to departmental investigations of officer conduct.[9]

The emerging best practice is that officers should be to be questioned by their immediate supervisors as soon as possible after an incident. This standard is clearly stated in the 2001 Consent Decree between the U.S. Department of Justice and the Los Angeles Police Department.[10] Similar provisions are found in Justice Department settlements regarding the Seattle, New Orleans, Albuquerque, and Portland, Oregon police departments.

First, Section III of the Consent Decree requires that an officer from the Operations Homicide Bureau immediately "roll out" to all serious use of force incidents, in order 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). This requirement is designed 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 –including 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.

The 2012 Settlement Agreement with the Seattle, Washington, is even more detailed in its requirements. Paragraph 96, under "Use of Force and Investigation," requires that "All involved officers will be required to submit statements in accordance with that level's [of force] requirements." Paragraph 102 requires that "The supervisor [on the scene] will address any concerns with the officer involved," which clearly implies that the supervisor will converse with the officer. Paragraph 104(e)(6) requires that the supervisor on the scene will "Require each officer at the scene to complete either a witness statement . . . or a Use of Force Statement." Further, "Each officer will describe what he/she did and saw as comprehensively and descriptively as possible . . . identifying all other officers involved in the incident when possible."[11]

The requirement that all officers involved in an incident give an immediate report of the incident could not be clearer.

CONCLUSION

Police union contract provisions that grant officers a waiting period before they can be interviewed about possible misconduct are not supported by the scientific evidence on the impact of trauma on memory.

Police unions and their advocates have made false and self-serving claims about the scientific evidence on the impact of trauma on memory.

Even if there were scientific evidence that trauma has a negative impact on memory, police unions and their advocates apply that evidence in an inconsistent, hypocritical and self-serving manner,

denying the waiting period privilege to crime victims, criminal suspects, witnesses to crimes, accident participants, and others whom the police routinely interview.

A Concluding Note About the Christianson Literature Review

This report is based on the 2008 Christianson review of the literature on "Emotional Stress and Eyewitness Memory." It is both recent (2008) and thorough (244 studies). There is no indication, moreover, that the review was undertaken with the subject of interviews with police officers in mind.

Anyone who suspects that this report has misrepresented the Christianson review many examine it for themselves.

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[2] The President's Task Force on 21st Century Policing heard much testimony on these issues. The testimony is available on the COPS web site: http://www.cops.usdoj.gov/policingtaskforce. The *Final Report* of the Task Force was released on May 18, 2015, and is also available on the COPS web site.

[3] See Samuel Walker, *The Baltimore Police Union Contract and The Law Enforcement Officers' Bill of Rights: Impediments to Accountability* (May 2015). Available at http://samuelwalker.net.

[4] The author of this report testified before the U.S. Civil Rights Commission on April 20, 2015, and in response to a request from one member of the Commission gave Supplemental Testimony commenting on Mr. Smoot's testimony about the 48-hour waiting period issue. See Samuel Walker, Supplemental Testimony, available at http://samuelwalker.net . The Civil Rights Commission has not as yet posted the testimony of the various witnesses on its web site. The relevant excerpts from Mr. Smoot's testimony were provided by the member of the Commission who requested comment on it. The Police Benevolent and Protective Association of Illinois web site is http://www.pbpa.org/.

[5] The web page of the Force Science Institute is http://www.forcescience.org/. Mr. Lewinski testified before the President's Task Force on 21st Century Policing on January 31, 2015. The COPS office web site has posted the written submissions of the various witnesses, but Mr. Lewinsky evidently did not submit written testimony.

[6] Steven Verberg, "Probes of Police Shootings Give Leeway to Involved Officers," *LaCrosse Tribune*, May 26, 2015. http://lacrossetribune.com/news/state-and-regional/probes-of-police-shootings-give-leeway-to-involved-officers/article_a9efe284-4824-5d18-b516-9413bf44eea0.html.

[7] "Administrative Investigations of Police Shootings and Other Critical Incidents: Officer Statements and Use of Force Reports, Part Two: Basics," AELE Monthly Law Journal 8 (August 2008): 201. http://www.aele.org/law/2008FPAUG/2008-8MLJ201.pdf

[8] Sven-Ake Christianson, "Emotional Stress and Eyewitness Memory: A Critical Review," Jackie Andrade, ed., *Memory*, V. IV (London and New York: Routledge, 2008): 151-207.

[9] This section is adapted from Walker, Supplemental Testimony to the U.S. Civil Rights Commission.

[10] United States v. City of Los Angeles, *Consent Decree* (2001), "Section III. Incidents, Procedures, Documentation, Investigation, and Review."

[11] United States v/ City of Seattle, *Settlement Agreement*, (2012), Section III(A)(3).