

Use of Force and Incident Reports Are Not Compelled Reports

The Question

One of the questions I am often asked when implementing a Use of Force Reporting system that requires completion of a Use of Force Report is whether the required completion of a Use of Force Report is a compelled statement for purposes of *Garrity*. I am also often asked if the officer can be disciplined in investigations where officers have refused to complete a required incident report or Use of Force Report; in fact, when discussing the need for complete and accurate Use of Force Reports, it is one of the most frequently asked questions. After fielding several questions on this topic in a single training session, it became clear that this topic is of great concern to many officers. The two most common questions officers ask are: 1) Why isn't an officer's Use of Force Report protected under *Garrity*, especially since many departments require that an officer submit a Use of Force Report prior to the end of the shift or at some other interval and 2) should officers avoid completing the Use of Force Report in critical incidents, especially since this document can come back to haunt the office in potential criminal proceedings.

The Answer

It is well known that *Garrity* rights protect officers from being compelled to give statements that may incriminate themselves during Department investigatory interviews. This protection stems from an individual's right against self-incrimination as provided by the *Fifth Amendment* of the United States Constitution. In *Garrity v. State of New Jersey*¹, before being asked questions regarding allegations of fixing traffic tickets, each officer was warned: (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 subject to removal from office. The United States Supreme Court found where officers were faced with the choice to either lose their jobs or to incriminate themselves, "the option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."² Although the Department claimed the officers waived their rights against self-incrimination by answering the questions, the Court found "where the choice is 'between a rock and the whirlpool,' duress is inherent." As a result of the Court's decision in *Garrity*, compelled statements in an administrative investigation cannot be used in a subsequent criminal proceeding.

Later court decisions, however, have refined the holding in *Garrity* to provide that the Use of Field and Use of Force Reports does not violate an officer's privilege against self-incrimination. *U.S. v. Cook*³: in *Cook*, a subject filed a citizen's complaint against the defendant alleging that he had assaulted him in the sally port in the courthouse. After receiving the complaint, the defendant's supervisor instructed him to complete a Field Report and a Use of Force Report, which he did. At trial, the defendant tried to suppress the statements he made in his Field and Use of Force Reports, arguing that their use against him in a criminal prosecution

violated his due process rights and his privilege against self-incrimination pursuant to *Garrity*.⁴ The defendant claimed that because the citizen's complaint alleged possible criminal conduct, his supervisor's instruction to prepare the reports should have been accompanied by a *Garrity* warning and in the absence of such a warning his statements were coerced and must be suppressed. The court held that, contrary to the defendant's argument:

Garrity does not stand for the proposition that a statement made in a standard report is coerced whenever an officer faces both the remote possibility of criminal prosecution if he files the report and the arguably even more speculative possibility of termination if he declines to do so. Rather, the touchstone of the *Garrity* inquiry is whether the defendant's statements were coerced and therefore involuntary. In Cook's case, both the possibility of prosecution and the possibility of termination were far too tenuous to support a finding that he was between "the rock and the whirlpool" at the time he filed his reports. . . . [the Defendant] cites no case, nor has the Court located any, to support the position that *Garrity* should be applied prior to the initiation of an administrative or criminal investigation. To interpret *Garrity* as defendant advocates would be both unprecedented and impracticable. It would mean that when a supervisor receives a complaint against an officer that has even the slightest potential of resulting in criminal charges, the supervisor could not follow up by requesting the standard paperwork without providing the officer with *Garrity* protections, because the request could be construed as an "order" to comply with an "investigation." This scenario would be unworkable for a number of reasons, not the least of which is that it would require line supervisors to make legal judgments about the potential criminality of the conduct alleged."

The *Cook* Court also found that given the frequency with which force is and must be used, extending *Garrity* in this manner would create a tremendous and unnecessary administrative burden, and therefore declined to adopt the extension of the *Garrity* doctrine.⁵

Similarly, in *U.S. v. Smith*⁶, a case involving the use of excessive force and death of an inmate, the defendant officer moved to suppress his duty and incident reports on the ground that they were compelled statements afforded *Garrity* protection. The Appellate Court held, however, that duty and incident reports were not compelled within the meaning of *Garrity*. The court held that even though administrative regulations required the completion of the reports during a shift or tour of duty and that failure to comply with the regulations could lead to progressive disciplinary sanctions where there is no direct threat, but rather the mere possibility of future discipline, *Garrity* protections are not triggered.⁷ Likewise, in *U.S. v. Indorato*⁸, the court found that a rule requiring officers to obey lawful orders did not suggest that "dismissal would . . . have automatically followed the defendant's invocation of the *Fifth Amendment*." Also, in *Watson v. County of Riverside*, the court found that an officer's report regarding an arrest of an incarcerated prisoner was a requirement of his job and did not constitute a compelled self-incrimination.⁹

Moving Forward

Federal case law makes it clear that even if the completion of incident or use of force reports are required during the course of an officer's duties or a supervisor orders the officer to complete the reports, courts do not consider these reports compelled self-incrimination statements subject to the *Garrity* protections. When focusing on the operational standards we first look to see if the report (i.e. use of force, incident, pursuit

report, etc.) is required by department operational procedure. If the policy provided direct procedures of when the completion of the report is required and it is done in the normal operation of the police department failure to complete the report will be grounds for discipline. The one area where the policy should clarify this concern is the use of deadly force. It is recommended that the policy should not require a written Use of Force Report to be prepared by the officer due to the automatic criminal investigation and the use of interviews are proven to be better methods of obtaining information from the subject officer, while providing the protection for the officer, ensure a complete investigation for the community and the department.

¹ 385 U.S. 493 (1967)

² *Id.* at 498.

³ 526 F.Supp.2d 1

⁴ *Id.* at 2.

⁵ *See also, United States v. Camacho*, 739 F. Supp. 1504, 1516 (S.D. Fla. 1990) (declining to find that “the mere existence of a departmental policy of disciplining those officers who refuse to give statements always operates as a matter of law to render officer statements involuntary”); *United States v. Tsou*, 1993 WL 14872, at *4-5 (5th Cir. Jan. 18, 1993) (unpublished) (holding that an FBI agent’s statement was not compelled, despite an FBI policy requiring agents to cooperate with any administrative investigation).

⁶ 821 F.3d 1293 (2016)

⁷ *Id.* at 1303. *See also, U.S. v. Ruiz*, 579 F.2d 670, 676 (1st Cir. 1978) (holding that an arrest report prepared by a police officer could be used at a criminal trial because it “clearly does not come within the ambit of the Fifth Amendment)

⁸ 628 F.2d 711, 715-16 (1st Cir. 1980)

⁹ 976 F.Supp. 951 (1997), relying on the following cases: *United States v. Rios Ruiz*, [579 F.2d 670, 675 \(1st Cir.1978\)](#) (use, in the officer's criminal trial, of an arrest report made by the officer did not violate the privilege because the “fifth amendment proscribes compelled self-incrimination, not incriminating statements”); *Commonwealth v. Harvey*, [397 Mass. 351, 491 N.E.2d 607, 611 \(1986\)](#) (in prosecution for larceny and civil rights violations, a police officer attempted to exclude his statements made in an administrative investigation; acknowledging that defendant, as a police officer, was required by department rules to answer questions regarding his duties as a police officer, the court nevertheless concluded that the “fact that there existed the possibility of adverse consequences from the defendant's failure to cooperate does not demonstrate that the defendant was ‘compelled’ to incriminate himself”); and *State v. Falco*, [60 N.J. 570, 292 A.2d 13 \(1972\)](#) (New Jersey Supreme Court limited *Garrity*, and *Gardner* to their facts, recognizing that they dealt with police officers subject to questioning for suspected prior misconduct and not with the failure to perform specific duties expected of all police officers, and refused to exclude from the officer's criminal trial a report which the officer was required to prepare).

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