

**COVER STORY**  
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## **THE MYTH OF COMPELLED PUBLIC SAFETY STATEMENTS**

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Our office was recently informed that a management consultant from the state of Washington has been conducting seminars and informing attendees that law enforcement officers can be compelled to provide a public safety statement to a supervisor at the scene of a critical incident. Our goal in this article is to debunk the myth of the "compelled public safety statement." To assist in the analysis, a couple of fact patterns might be helpful..

In the first scenario, its 1971 and a sadistic criminal has the city terrorized for weeks on end. First he starts with random sniper attacks, shooting at unsuspecting victims from rooftops with a high-powered rifle. Then he kidnaps a young girl and entombs her alive in a small hole with very little air.

You're lucky enough to catch the miscreant several hours after he's delivered his ransom note. As soon as you have him in your grip, you're in his face demanding that he tell you where the girl is hidden. The suspect gives you the location, but by the time the girl is removed from the hole, she has suffocated.

Although you have the suspect's statements accurately identifying the location of the victim, and all of the evidence flowing from those statements, the prosecution effort collapses because in your frantic concern for the victim's imminent peril, you did not provide the Miranda admonishment before you questioned the suspect. In 1971, five years after the Miranda decision, the formula was simple - custody plus interrogation required a Miranda admonishment.

Any deviation from the formula resulted in suppression of the suspect's statements along with any fruit of the poisonous tree. Cops, real and fictional, debated whether the "liberal" courts had gone too far.

Fast forward nine years to the second scenario. You and your partner are flagged down by a woman who reports that she has just been raped at gunpoint. The woman provides a description of the suspect and his clothing. She also informs you that the suspect was carrying a gun and that he had entered a nearby market.

You are the first officer who enters the market. You see a person matching the description provided by the victim. When the suspect sees you he runs from the front of the market toward the rear. You run after the suspect, but momentarily lose sight of him. When you relocate the suspect at the end of an aisle, you draw down on him and order him to stop and place his hands on his head.

The suspect complies and you do a pat down search. The pat down reveals that the suspect is wearing an empty shoulder holster. After handcuffing the suspect, you ask him where the gun is. The suspect nods in the direction of some empty cartons and responds, "The gun is over there." You then retrieve a loaded revolver from the location identified by the suspect. You tell the suspect he's under arrest, and then read him his Miranda rights.

The suspect waives his rights and then answers several more of your questions about the gun. In his answers, the suspect admits that he owns the gun and he also informs you where he had bought it. The suspect is eventually charged with rape and criminal possession of a firearm.

In 1980, the formula is still the same - custodial interrogation by a law enforcement officer mandates a Miranda admonishment prior to questioning. During the prosecution effort, the trial court excludes the statements about the gun which the suspect made prior to being Mirandized.

The judge also excludes the statements about ownership and purchase of the gun, which the suspect made after Miranda because those statements were "tainted" by the first Miranda violation. And, the judge also excludes the gun. The appellate court affirms the suppression of the evidence, and four years later the case lands on the docket of the U.S. Supreme Court.

Now you may ask yourself what either of these two scenarios has to do with whether or not my sergeant (or lieutenant) can order me to make a "public safety statement" at the scene of an officer-involved shooting incident, or a death-in-custody. The answer is simple - "Nothing!" If you've asked that question, you're curiosity is well founded, and you've already demonstrated a better grasp of the law than the management consultant.

The first scenario, though fictional, was legally accurate, much to the chagrin of Inspector Harry Callahan. Whether or not Justice Rehnquist was influenced by Dirty Harry will remain a mystery.

However, in response to the facts in the second scenario, Justice Rehnquist led a sharply divided Supreme Court to create a new "public safety statement" exception to the Miranda rule. When it was formally introduced in *New York v. Quarles*, 467 U.S. 649 (1984), the concept was actually a derivative of the exigent circumstances exception to the warrant requirements in the Fourth Amendment.

The remedies provided by the Fourth Amendment have historically shared close analytical relationships with the protections provided by the Fifth Amendment. *Quarles* dealt with the Fifth Amendment protection against self-incrimination.

The "public safety statement" is an exception to the Miranda requirement, and nothing more. By its very nature, the "public safety statement" is a voluntary response to a question which is asked without the benefit of a Miranda admonishment. Had *Dirty Harry* been written after the *Quarles* decision came down, the suspect's statements and all

evidence flowing from them would have been admissible and the movie would have been 20 minutes shorter.

All kidding aside, you want to carefully consider providing a “public safety statement” at the scene of a critical incident when you are the subject of the investigation.

The reason is simple: Every statement that you voluntarily provide in response to your supervisor’s public safety question(s) can be used against you in determining whether you will be prosecuted. And if you are prosecuted, your statements can be used against you in court.

It is both the epitome of ignorance and an oxymoron to refer to a compelled “public safety statement.” Worse than mixing metaphors, referring to a compelled “public safety statement” blends two mutually exclusive concepts into a mutation that may produce wholly unintended legal consequences.

The whole purpose in creating the public safety statement exception was to enable the use of the suspect’s statements even though they may have been obtained without providing the Miranda admonishment. Under the Lybarger/Garrity standards, when a supervisor “compels” a statement from a sworn employee, that statement becomes immunized. Once immunized, a statement cannot be used against the employee in a subsequent criminal proceeding.

*Kastigar v. United States*, 406 U.S. 441 (1972), is the leading case addressing the prohibition on prosecutors from using a witness’ immunized testimony in any respect against him or her in a subsequent criminal prosecution. The reach of *Kastigar* is far. Once it is shown that the employee provided a statement under a grant of immunity, the prosecuting attorneys then have the burden of showing that none of their evidence is tainted by exposure to prior immunized testimony, by establishing that they have an independent, legitimate source for the disputed evidence. In other words, compelling a

public safety statement would completely undermine the purpose of the Supreme Court's ruling in *Quarles*.

In the event that a critical incident involved criminal misconduct by the involved employee, compelling the employee to make a statement virtually assures that the statement cannot be used for any purpose other than impeachment if the employee takes the stand and provides inconsistent testimony. And, making matters worse, if for some reason the employee's compelled statement leaks into the criminal investigation, serious *Kastigar* issues would be created.

So what does all this mean? In an academic context, our advice is, and always will be, that it is never in your best interest to provide any statements to any persons about your actions in a critical incident, until you have had a chance to speak to your attorney. The investigation won't come to a grinding halt just because you take time to consult with your attorney before providing a statement. There are plenty of things for your supervisors and the investigators to do while you wait for the arrival of your attorney.

Now, as a practical matter we also understand that when your adrenaline is pumping and you're standing in a swirling storm of controversy you're likely going to spontaneously blurt out a statement to the first supervisor who arrives on scene. If it happens, it happens; just remember that those excited utterances can be used against you, whether or not you testify. Similarly, if, because of the circumstances, you feel morally obligated to provide a public safety statement, either spontaneously or in response to a supervisor's questions, that statement can be used against you in a subsequent criminal proceeding because it too, is a voluntary statement.

But, if you have your wits about you, and your supervisors insist that you answer their "public safety" questions, tell them you want to speak to your attorney before making any statements. If they still order you to answer their questions, clarify

that your refusal will result in disciplinary action for insubordination up to and including termination. Upon their affirmative response, your statement will then be immunized. Back to the management consultant for a moment: The legal authority which he cites in support of his misinformation is *Ward v. city of Portland*, 857 F.2d 1373 (1988). In that case, two officers and the Portland Police Association challenged the Portland Police Department's policy, which required officers to write reports on incidents using deadly force before consulting counsel. The two officers were involved in an on-duty shooting incident and attempted to confer with their attorney before writing their reports.

The officers objected to their attorney being removed from their presence, but they ultimately complied with the department's policy. The shooting investigation concluded that the officers' actions were neither criminal nor in violation of department policy. No administrative or criminal actions were taken against the officers.

When the officers and the association brought their lawsuit in the federal district court, it was dismissed as being moot. The trial court determined that there was no justiciable legal controversy because no harm came to the officers and none was pending. The officers appealed the trial court's decision to the Ninth Circuit.

In the published opinion, all the court of appeal did was reverse the trial court's dismissal, ruling that while the underlying controversy may have been moot, it was capable of repetition, yet evading review (providing an exception to the mootness doctrine). The case was remanded to the trial court, and quietly settled shortly thereafter. *Ward* does not stand for the principle that a supervisor can compel a public safety statement. Prior to *Ward*, the Ninth Circuit rendered a decision in *Portland Police Association v. city of Portland*, 658 F.2d 1272 (1981), which also challenged the constitutionality of the same department policy. This earlier case was vacated on procedural grounds, nullifying any determination on the underlying merits.

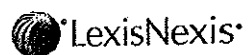
There currently is no case law supporting the management consultant's myth. In contrast, there is a memorandum opinion from the Central District of California

supporting the theory that if a law enforcement officer is forced to write a report about a critical incident while at the same time being denied the right to consult with counsel, that report can be barred from use in any subsequent criminal or administrative action against the officer (See, *Watson v. County of Riverside*, (1997) 976 F.Supp. 951).

As highly trained law enforcement professionals, your attempts to inflict, or your infliction of, death or serious bodily injury is almost always done in compliance with the law and your agency's policies. You know that and we know that.

Unfortunately, we're not the ones who decide if you'll be prosecuted. And remember, at the scene of a fatal shooting, you're the one standing there with the smoking gun in your hand.

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1. Watson v. County of Riverside, 976 F. Supp. 951

Client/matter: Krause