In the

Senate of the Commonwealth of Pennsylvania

Ensuring Accountability and Equality in Law Enforcement and the Criminal Justice System

Joint Hearings of the

Committee on the Judiciary

Committee on Law and Justice

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Members of the Pennsylvania Senate Committees on the Judiciary and Law and Justice:

I thank you for the invitation to give testimony today. One can imagine few more critical issues in our country today; this is the defining civil rights moment of this generation, and members of these Committees and the General Assembly must respond. Pennsylvanians in every region of the state, from every walk of life, and from every demographic group have taken to the streets in cities and towns of all sizes to demand policing that meets their needs as they see it, and that does not endanger any member of the community. Too often, the people of Pennsylvania have not received this kind of enforcement; too often, efforts to improve the workings of police departments have not gone far enough, or have succumbed to determined grinding opposition from within the policing profession.

What the continuing demonstrations from Pennsylvanians of all descriptions tell us could not be clearer: the status quo will not do. As one of the Senators said in an opening statement to these hearings, the way things are now is neither moral nor endurable. The people of this state will not accept less than public safety efforts that do what they want, the way they want it, and that do not harm them, disrespect them, or make their lives harder. The reforms and proposals of the past that did not go far enough, or that were blocked or defeated, will not do.

Use of Force Law

The first and most important issue these Committees and the full legislature must deal with is the use of force by police. Anyone paying attention to the reaction to George Floyd's death, or the deaths of so many others at the hands of police officers, can see this; the most direct of the signs on the street say, "Stop Killing Us!" Put simply, there are far too many situations in which police officers kill civilians. Many are armed, but not all. And the statistics on who is killed by police show an undeniable racial skew. White Americans are shot and killed by police

at the rate of 13 per million people; for Black Americans, the number is 31 per million. Blacks are more than twice as likely to suffer death by police shootings as are Whites.

Other statistics indicate that, when we consider all uses of force (not just firearms, and not just all deadly force), the disparity is even greater. Minneapolis, where George Floyd died, provides a good example. When all uses of force are considered, Blacks are seven times more likely than Whites to experience force in a police encounter. There is no reason to believe that Minneapolis is any worse, or any better, than most American cities.

It is true that a change in the law on the use of force will not, by itself, solve this problem. But changing the law will result in a change in the way that police forces write use of force policy, train officers to operate according to that policy, and hold officers accountable for following that policy. It sets the baseline, and has a great impact after the fact, in cases in which an officer may be charged with a crime or becomes a defendant in a lawsuit.

The law on the use of force now in Pennsylvania has its basis in the Fourth Amendment to the U.S. Constitution, which protects people from unreasonable searches and seizures; think of the use of force as part of how a police officer seizes a person in an arrest. Killing another person is, of course, the ultimate seizure – a seizure of the person's life. This constitutional provision was interpreted by the U.S. Supreme Court in Graham V. Connor (1989), in which the Court instructed judges and juries – and, indirectly, police departments – that officers' actions were to be judged by the "objectively reasonable officer" standard. Whether one believes that this standard is right or wrong, it is inarguable that it favors the police in a significant way by instructions all of the actors in the justice system that they are not to look at what an officer did through their own judgement, or with the benefit of hindsight. This makes any case against a police officer for improperly using force extremely difficult to prove. That is a fact.

There are already several bills before the General Assembly that would change the law on use of force. The one to examine first is H.B. 1664, introduced in June of 2019 by Reps. Summer Lee and Ed Gainey, both of Allegheny County. This bill would fundamentally change use of force law in Pennsylvania, to offer more protection to citizens. Under current Pennsylvania law, a police officer can use deadly force on a person running from police when that person has a deadly weapon, even if that person poses no threat to take life or inflict serious bodily injury. We have seen this result in acquittal for officers for just the mere fear of a weapon in the killing of an unarmed civilian, most particularly in the death of Antwon Rose in East Pittsburgh, PA. H.B. 1664 would eliminate the effectuation of an arrest as justification for the use of deadly force. It would require that de-escalation and non-lethal force option be exhausted before the use of deadly force, and would mandate that lethal force may only come into play to prevent an imminent threat to life.

Another option to consider would be legislation like the new law in the District of Columbia, based on the work of Professor Cynthia Lee of George Washington University Law School. This new law goes a step further than the Lee/Gainey bill:

- The officer must actually believe that deadly force "is immediately necessary" to protect the officer or another person from the threat of serious bodily injury or death;

- The officer's belief and actions are reasonable "given the totality of the circumstances;" and
- "All other options have been exhausted" or are not reasonable.

The District of Columbia law goes on to add that, to determine the reasonableness of an officer's beliefs or actions, the judge or jury should consider the perspective of a reasonable officer but shall also consider:

- Whether the person killed or injured by the use of force had or appeared to have a deadly weapon, and whether the person refused to follow the officer's lawful order to give up the weapon before deadly force was used;
- Whether the officer engaged in de-escalation measures prior to using force, with a list of such possibilities; and
- Whether the conduct of the officer prior to the use of force "increased the risk of a confrontation, resulting" in force being used.

The advantages of the D.C. law will be considerable; they will give concrete direction to police agencies and officers concerning what will be considered reasonable in any criminal or civil litigation that follows a use of deadly force.

Racial Disparity

It is not news to say that the criminal justice system, at almost every level (police, prosecution, corrections and jails), exhibits disproportionate impacts on African Americans. They are incarcerated at higher rates, punished with longer sentences, held in custody prior to trial more often, and arrested more often for the same offenses than their non-Black counterparts. The evidence on these points is considerable, and has been replicated across various areas of academic and social research. Yet too many people remain willfully blind to this reality, and to the devastating disproportionate impact of policing, prosecution, and corrections on Black citizens. It is easy to ignore academic research and study findings that come out every once in a while, or are discussed in a news report.

We must make the measurement of racial disparity a regular and inescapable reality for policy makers, elected leaders, and everyone in our community, so that they become impossible to ignore. To paraphrase an old saw from the business world, we cannot fix problems that we don't measure. Measurement must become standard practice.

To that end, the General Assembly must require collection of data that includes race and ethnicity in appropriate ways that will allow judgments to be made and show us where further action is, or is not, necessary. These data must be transparent and available to the public; collected and analyzed in a standardized form and format across all agencies in the state, in order to facilitate comparisons, year over year changes; and must cover all routine interactions between the public and the Commonwealth's criminal justice systems and actors.

For example, police and law enforcement should be required to collect standardized data on every traffic stop, stop and frisk, arrest, suspect questioning, and street-level investigation. Data would include the reasons for the interaction, the person's racial or ethnic appearance, age,

and gender; the crime suspected, if any; whether any search was performed, and if so, its legal justification (e.g., probable cause, consent, etc.); whether any contraband or evidence was recovered; if the material was a controlled substance, type and approximate amount; and whether an arrest or other enforcement action resulted. One can imagine similar data templates for stop and frisk and other routine actions.

Similar kinds of data collection must also take place at each crucial step of prosecution decision making.

Last, any legislative proposal that will make changes to the criminal justice system, procedures, or agencies in the Commonwealth should be subject to a racial equity impact statement. For any bill introduced that will impact anything from length of sentences to police services to prosecution decisions, a member of the General Assembly would have the right to receive a racial equity impact statement for the asking, prior to any vote. S.B. 208 (2017-2018), which will be reintroduced soon by Senators Hughes and Collett, would address this point.

Transparency

For far too long, the public has been unable to understand the background of officers that may have led to a tragedy like the death of Antwan Rose, or the death of George Floyd. When it emerges, only later, that the officer involved had a number of complaints over the years, or had been terminated by another department for misconduct, we hear surprise, outrage, and anger. Why did this information not cause some change, such as re-training, discipline, or even termination before tragedy struck? How could another department hire an officer with this kind of background?

The answer, of course, is lack of transparency. Misconduct is hidden from the public, and even from other police departments in the Commonwealth. One proposal before the legislature now, H.B. 1841, approved by the House Judiciary Committee this month, will require that information on misconduct in one agency be given to a subsequent agency contemplating hiring the officer who committed the misconduct in the past. The idea is to inform police agencies when employment candidates have records of misconduct in prior law enforcement jobs; this will mean that officers who have been terminated or resigned ahead of termination in one agency do not simply hire on elsewhere. This is a good step.

In addition, we must think of ways to include transparency of this information that allows it to be public. Records of police misconduct concern actions by state actors, wielding state power, over members of the public. These records contain details of what is alleged, what investigations have uncovered, and what actions were recommended (or not) by police disciplinary authorities. All of this information is of real concern to members of the public, and the workings of the system that it illustrates is perhaps more important than what might be learned by records of any individual investigation. Yet, most of this information has remained unavailable to the public.

There is no other way to say it: this lack of transparency to the public must change. It has already begun to change in other jurisdictions, and that must continue, here in the

Commonwealth of Pennsylvania. In 2018, California enacted a new law, S.B. 1421, the Right to Know Act, making police disciplinary and misconduct records public. Several years before, after more than a decade of litigation, a court in Illinois made these records public; they now can be found in a publicly accessible database, the Citizen Police Data Project, found at https://invisible.institute/police-data. (Fact of note: disciplinary records in the historically-troubled Chicago Police Department are most often accessed by supervisory officers in the Department and other members of the Department, concerned about officers transferred to their commands and matched up with them as partners. They have had no other way to get this information before the database existed.)

The great public interest in police disciplinary and misconduct records, and especially the patterns that we can see in them, are reasons enough to make these records public and accessible to all. Often times, however, members of law enforcement groups argue that, despite whatever public purpose that may serve, the records must stay closed in order to protect officers from exposure and harassment by criminals and activists who could find personal details (names, addresses, contact information, etc.). This would put officers, and perhaps their families in danger. With all due respect, there seems to be little to this idea. Both Florida and Georgia, states whose laws generally favor police across many dimensions, have long allowed open access to police disciplinary and misconduct records under their state laws. There is no evidence of a parade of harassment incidents or dangers as a result.

Accountability

Accountability for misconduct by police officers could not be more basic and necessary in order for the public to have confidence in their law enforcement agencies. No one expects police officers to be perfect, or to get everything right; policing is a human endeavor. But when something goes wrong, and misconduct by an officer is part or all of the reason, the public has every right to expect that the agency will address that misconduct and take appropriate action. That action need not always be termination; it may be counseling, re-training, or various forms of discipline. But when misconduct occurs, when rules or laws are broken, there must be consequences. Without this, the agency's ethic and service are defined downward; the five percent of officers who create 90 percent of the agency's problems set the bar for all, and the public is endangered.

Accountability is the natural and reinforcing twin of transparency. If people served by police do not know what the disciplinary process in their police department looks like, how it operates, and what the results of complaints and problems are, they can have no sense of whether officers are or are not held accountable when misconduct occurs. Thus transparency is necessary for true accountability to the public.

Among the most effective accountability devices are early warning systems, also referred to as early intervention systems. By tracking multiple indicators that may signal trouble – everything from traffic stops that disproportionately target minority or female motorists, to citizen complaints, to civil lawsuits to vehicle accidents – agencies can get a strong sense of

whether an officer may be headed for trouble before that trouble occurs. As a result, the officer may be counseled, re-trained, disciplined or even terminated, as needed.

The legislature should create a fund that would support implementation of early intervention systems, and technical assistance for any department that wishes to create one. Creation and implementation of an early intervention system should become a requirement for any state-level accreditation of a law enforcement agency of any size.

Several other changes in state law regarding law enforcement must also be enacted now. I will mention these with somewhat less detail.

- **Neck restraints** – Chokeholds (which block the airway) and strangleholds (which block blood flow to the brain) are extremely dangerous. They should be banned; if not banned, then they should be limited by law to situations in which an officer or another person faces a threat of death or serious injury. The bill soon to be introduced by Senator Street, banning law enforcement use of chokeholds and positional asphyxia, will address this problem.
- **Civilian oversight** -- Create a state agency that will support, encourage and provide funding for any government unit at any level to create an independent citizen oversight agency for its police departments. Senator Anthony Williams' "Strengthening and Funding Civilian Police Oversight Boards" bill, introduce on June 9, 2020, is a good example of what can be done. Senator Fontana's reintroduction of S.B. 1262 (2017-2018), which in its updated form will create a civilian review board in each county, also deserves every consideration.
- **Independent investigation and prosecution** -- When a police officer uses deadly force against a civilian, or a critical incident occurs that may involve misconduct by a police officer, investigation must not be conducted by the officer's home agency or any other closely related one. Similarly, prosecution should not be handled by the office that typically prosecutes crime for the officer's home agency. Both investigation and prosecution must be handled by an independent agency, in order that the public can have confidence in the integrity of the investigation. S.B. 611, introduced by Senator Haywood, gives us one way of achieving this type of independence.
- **Collective bargaining agreements and police discipline** – The right of all working men and women to bargain collectively for fair wages, benefits and working conditions should not be in question. But too many collective bargaining agreements between police unions and the municipalities and other government units they serve give far too much power to unions over the disciplinary process. While discipline should of course be fair and appropriate, uninfluenced by politics or other irrelevant considerations, the protections in many agreements protects the officers with the worst disciplinary records who should not be in a position to serve the public. This must change.
- **Demilitarization of police** – For years, local police departments have received military equipment from the federal surplus stockpile, at little or no cost. No local jurisdiction needs armored vehicles, military-grade weapons, and the like to keep the peace and serve the people. And we have seen too many events at which display and use of these weapons

increases the tension, and results in worse outcomes. No state has to allow its police departments to amass military equipment or supplies. This practice should end, or at the least, be dramatically curtailed. The proposal by Senators Street and Muth is a good place to begin that discussion.

- **Required insurance** -- Require both police departments and individual police officers to carry liability insurance policies. Officers should be required to carry insurance in order to work as officers in the Commonwealth. Officers found to engage in misconduct and poor practices, resulting in damages and lawsuits, would experience increased premiums that would incentivize better work. Insurance carriers would undoubtedly require better policies in departments, and training and conduct that reflects best practices in the industry, in order to obtain a policy for a department.

I thank you once again for the opportunity to offer testimony to these Committees. I am glad to provide further information or answer questions, either orally or in writing.

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