



TESTIMONY OF:

Nick Malinowski

BROOKLYN DEFENDER SERVICES

**Presented before
The New York City Council
Committee on Public Safety
Oversight Hearing on
Examining the New York City Civilian Complaint Review Board**

October 21, 2016

My name is Nick Malinowski, I am here on behalf of Brooklyn Defender Services, which provides high-quality multi-disciplinary criminal, family and immigration defense, civil legal services such as housing, benefits, education and social work support to more than 40,000 indigent Brooklyn residents every year. Each of our clients, by definition, has had an interaction with the New York City Police Department and its officers, giving us a front row seat from which we can consider mechanisms of police accountability in New York City. We thank the City Council Committee on Public Safety, and Chair Vanessa Gibson, for holding this important oversight hearing on the Civilian Complaint Review Board, and for inviting us to attend.

Background: The Importance of Police Accountability and Legitimacy

Never before in the history of our organization has police accountability been so prominently an issue of popular national importance. Just four years ago drag-net Stop & Frisk was being defended as an essential policing tactic, responsible for saving tens of thousands of lives despite research that questioned this causality and obvious constitutional concerns. While we welcome the national, progressive attention on these issues, to which our clients are often at the receiving end, we must acknowledge how we got here: long-standing police abuses coming into the light due to lawsuits, civilian documentation and protest. The deaths of Eric Garner and Ramarley Graham at the hands of the New York Police Department, and the public's perception of a lack of accountability for the officers involved, especially as compared to the extensive punishment regimes for civilians in criminal court, have driven a significant interest in this topic both locally, nationally, and even internationally.

There is a growing interest in the role of civilian oversight to address the crisis of police accountability. While the administration has stressed opportunities for the NYPD to, as they say,

“reform itself from within,” history has not proven this to be the most expedient path to progress. Rather, anti-corruption commissions from the 1970s (Knapp Commission) and the early 1990s (Mollen Commission), followed by law suits including *Floyd v. City of New York*, *Ligon v. City of New York*, *Raza v. City of New York* have generated the biggest wins for civil rights and policing reform. The CCRB is generally considered a national model for civilian bodies, yet the question as to whether it actually deters police misconduct remains an open one; in fact, the CCRB suggested in its 2015 annual report that it would be studying this very question. We anxiously await the results.

While much of the national focus is on deaths in police custody, or at the hands of law enforcement, it is through non-fatal daily punitive interactions, nearly 1 million each year, that most people experience the police in New York City. One of the major changes in the courtroom resulting from the massive influx of arrests accompanying the shift towards broken windows policing is the reality that most cases rely on the testimony of a single police officer alone, rather than a civilian-generated complaint. Deference to prosecutorial power and discretion and sentencing guidelines that mandate long prison sentences have made trials nearly extinct, and thus the integrity of the police officer has become paramount to our system of criminal justice in New York City.

The importance of, and challenges of, accountability become even more apparent as we learn more about the importance of perceptions of legitimacy and how trust in the police drives down violence of all kinds. A recent study in Milwaukee showed that some people, particularly in areas of high police involvement, stopped calling 911 to report crimes after high-profile examples of police misconduct¹. We need to cease considering police misconduct as a case of “bad apples” and look towards systemic reforms and accountability measures. The racial gap in perceptions of policing is widening, along with other forms of polarization in our country. Nationally, confidence in the police is at an all-time low².

Current Holes in Accountability

The city needs to do more to protect the public from problem officers. New York City is home to one of the most secretive regimes in the country when it comes to police transparency. It is all but impossible for the public, or defense attorneys, to see police disciplinary records or any administrative actions resulting from alleged or substantiated misconduct. Compare these privacy protections to those experienced by our clients in criminal court, who are accused sometimes of serious offenses but much more frequently of minor behaviors less damaging to a sense of public order than police misconduct. Is it more important for the public to know which of their neighbors has stolen hygiene products from a chain pharmacy, or which officers in their communities carry substantiated claims of false arrest, brutality or other abuses of authority? Unfounded and unsubstantiated claims of gang involvement are used against our clients

¹ <http://www.asanet.org/sites/default/files/attach/journals/oct16asfeature.pdf>

² <http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx>

routinely, yet we are unable to include substantiated claims of misconduct against their accusers. Recently the Office of Court Administration sought corrections for 36,000 records where criminal histories meant to be sealed were left open; the state sells these records to third-party vendors who sell the information, even when it's inaccurate, to landlords, bankers, anyone who asks. Sealed information from RAP sheets is also regularly leaked to news outlets by law enforcement personnel, in violation of state law. When the names and photographs of our young clients are distributed to the media, our City has already done them grievous lifetime harm that cannot be undone by findings of innocence, youthful offender adjudications, or subsequent rehabilitation. As a general rule privacy has been greatly degraded in all areas except for police misconduct and discipline. Why?

Because the City has no apparatus for publicly collecting and disseminating these data and records, community groups are left tracking police officers in their precincts in order to try to produce some semblance of accountability. While the public, especially with cell-phone video, have done tremendous public good as a result, the city should be concerned that what is really a government obligation has been filled by community members as a public safety necessity. What is left is a well-founded public perception that the City will only act on police reforms when it is forced to do so. **The CCRB should be tasked with providing the public with greater access to the performance and disciplinary backgrounds of officers in local precincts. We cannot hide behind state laws that seem to frustrate this task.**

To the agency's credit, the CCRB has attempted to gain access to some police records, but has been blocked by the City Law Department, which the City Charter provides with final say over areas of litigation pursued by the CCRB. This is an obvious conflict of interest and disrupts any claims of the CCRB being an independent agency. **The Council should look into ways to make the CCRB independent of the Law Department, which, of course, defends the City in Civil Law suits stemming from police misconduct.** As a civilian oversight body, the CCRB should be accountable to the people of New York, and specifically to those people who have been victimized by police misconduct.

In keeping with this premise, the Council could consider changing the City Charter to allow the CCRB to have final disciplinary say over police officers, rather than deferring this responsibility to the police commissioner. The CCRB has itself acknowledged that it does not know if the penalties resulting from substantiated misconduct claims have any deterrent effect. Troublingly, for the most problematic officers, complaints stacked up after five or more years of service time, perhaps indicating that as they were disciplined they grew more comfortable with misconduct than before.

Brooklyn-Specific Concerns

Brooklyn was the borough with the most CCRB complaints in 2015. Specifically, the 75th and 73rd precincts were among the top two precincts in the City for CCRB complaints, with Brooklyn North Headquarters continuing to be another problematic command. The 75th precinct is also the precinct that generates the highest number of civil lawsuits against the City related to police misconduct, and with the most civil forfeiture claims as well. With the benefit of the CCRB's recent move toward more precise record keeping, we have also learned, unfortunately, that based

on the number of complaints, Brooklyn is home to five of the six worst precincts for LGBTQ New Yorkers. While the Brooklyn District Attorney has won accolades for his conviction integrity unit, these successes expose a history of police and prosecutorial misconduct in the borough that extends back decades.

We ask City Council today, what is being done to reverse these trends, many of which have gone wholly unchecked for years? The CCRB should have the power to recommend officers be transferred to a different precinct following substantiated misconduct. Advocates for police accountability, which include our clients and constituents, rightly seek the dismissal of problematic officers; however, historically this has been all but impossible to achieve. In one of our precincts, civilian video-tape has led to the substantiation of misconduct by several officers who nevertheless remain in the community. It is truly a slap in the face to people victimized by City employees of the Police Department when they are forced into repeated interactions with the same officers. At the very least, the City could explore getting problematic officers off the street, especially in the precincts and communities where they have victimized people.

The Glaring Absence of CCRB in the Courtroom

In its 2015 annual report, the CCRB acknowledged doing no outreach in criminal courts around the City. Roughly 600,000 people a year are summonsed or arrested by the NYPD; all of these people by definition have had contact with a police officer and thus an interaction that has the potential to include police misconduct. Just as the City uses targeted outreach to promote the services of 311 to tenants whose landlords might be illegally denying them heat in winter, we ask the City Council to push CCRB to make outreach in the courts a priority.

Last year a BDS client won his criminal case after a judge found that officers from the 67th precinct in Flatbush were not trustworthy. This was a case where a gun was planted on one of our clients. But what has the city done to curb the authority of these officers who nevertheless may be making arrests even today? How would the public even know? The Brooklyn District Attorney's Office said he would launch an investigation into the precinct, but more than a year later we have heard nothing. Similarly, the CCRB has found 60 police officers guilty of making false statements during CCRB hearings, though the agency has not published any disciplinary reports relating to these officers. If these officers made false statements to the CCRB, it warrants an investigation into whether they made false statements to courts as well. Does the CCRB have authority to consider cases dismissed or otherwise adjudicated in court with evidence of officer misconduct? If not the CCRB, who should be looking at these types of issues?

More recently a client was falsely arrested; his case was finally dismissed once surveillance video of the arrest was recovered. We knew initially that the officer involved in the arrest had been involved in misconduct due to newspaper articles, alone, but did not have enough facts about the resolution of the initial case to make a persuasive argument to a judge about the instant matter. Eventually our client was vindicated in his claims to innocence by video, but the City should have an interest in preventing cases like this from ever occurring in the first place, and resolving them immediately rather than having to wait for surveillance video. At least this client wasn't waiting in jail, but of course that happens as well.

Historically our office has been hesitant to work with the CCRB because of the potential negative impact on open criminal matters. Currently we are working with the CCRB to implement a new process for encouraging clients to make complaints of misconduct first to us, and then to the CCRB, so that we can protect their rights as they pertain to the criminal case. The CCRB's interest in case processing times can conflict with appropriate concern for the rights of people facing criminal charges. Our clients have been told by CCRB that their cases will be closed as "non-compliant" after we advised them to delay testifying due to complicated criminal court matters. People should not be forced into such a choice. To the extent that attorneys serve as reporting non-witnesses to a CCRB complaint, **the CCRB should update its rules to provide counsel with all information that is provided to the police and other parties to traditional cases.** We hope that by working with CCRB we can develop a process for people with pending criminal cases that works for everyone, and will help the CCRB to collect complaints from our clients.

In speaking with our clients about these issues, the reactions have been decidedly mixed. While some have expressed interest in filing complaints, others have declined, telling us that the CCRB process is unsatisfactory because nothing ever happens to the police officer. It's hard to explain to someone that at most an officer who has been found to have engaged in serious misconduct could lose a couple vacation days. There is not much incentive for our clients to spend a lot of time following up on these complaints if the outcomes will not be satisfactory. Meanwhile, the CCRB has emphasized mediation as a desired result to reach understanding between police officers and civilians. We agree that a great deal of good can come from this type of conflict resolution, but wonder why the City has prioritized this only in cases of civilians making complaints about police misconduct. We would like to see the City Council look into expanded the use of mediation in the criminal court context as well.

General Concerns for Greater Policing Accountability

The CCRB's 2015 annual report raises significant issues related to stops and searches and civilian filming of police activity that should prompt action by the City Council. Documented Stop and Frisks have dropped in New York City from 685,724 in 2011 to 22,563 in 2015; however the ratio of complaints to recorded stops has skyrocketed, while the racial make-up of people in reported stops exposes serious questions about racial equity. In 2011, there were 1,655 CCRB complaints related to Stop and Frisk, making the complaint to stop ratio 1:414. In 2015 there were 888 CCRB complaints related to Stop and Frisk, a decline, but one that puts the new complaint to stop ratio at 1:25. This shockingly steep increase combined with the findings of Peter Zimroth, the federal Stop and Frisk monitor, that officers are not always reporting stops is concerning. Similarly we do not always see UF-250s or other paperwork describing stops in arrest information provided to the court, all of which leads us to question whether the decline in stop and frisks has perhaps been overstated.

Similarly, in 2011 there were 58,363 documented searches, which drew 981 CCRB complaints for a ratio of 1:59. In 2015, there were just 4,204 documented searches, leading to 485 complaints, for a ratio of 1:9. Again these numbers lead us to question whether or not searches are occurring without being properly recorded. These issues point for a need for greater City

Council oversight of the NYPD as a general matter. Intros 182 & 541, otherwise known as the Right to Know Act, would perhaps mitigate some of these concerns.

Conclusion

Thank you for your consideration of our comments. We look forward to continuing to work with the Council to create meaningful police accountability in our City. Please do not hesitate to reach out to me with any questions about these or other issues at (718) 254-0700 (ext. 269) or nmalinowski@bds.org.