LEGAL DEFENSE TRUST TRAINING BULLETIN

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"USE A GUN, GO TO JAIL" SHOULD NOT BE APPLIED TO PEACE OFFICERS - PART TWO - - *AN UPDATE*

by Michael P. Stone, Esq.

Last month, we circulated my article in PORAC's *Law Enforcement News*, March 2004, ("'Use a gun, go to jail' should not be applied to peace officers," page 40) which announced the campaign led by Riverside Sheriffs' Association President Pat McNamara, to find sponsors for legislative amendments to protect California's peace officers from the enhancements that will be applied to them if they are convicted of certain crimes occurring while they are armed, or where they use a firearm which by law they are authorized and required to carry, and when they are otherwise acting in the course and scope of their official duties. This month, we zero in on the laws which threaten to harm more peace officers.

It takes no imagination to conclude from these proposals that they are prompted by the recent sentencing of our client, Riverside District Attorney's Senior Investigator Daniel Riter, to seven (7) years in prison as a consequence of his conviction of *involuntary* manslaughter (*Penal Code* §192[b]). While in the course and scope of his official duties working child abduction cases, he attempted to take custody of two (2) minor children pursuant to valid warrants, when the parents and their associate (decedent, Jesus Herrera) attempted to flee in a truck with the children, despite Investigator Riter's repeated demands to stop and his attempts to shoot the tires flat. In fact the driver, Herrera, accelerated the truck at Riter, narrowly missing him, as Riter's firearm unintentionally discharged into the cab as the truck roared by Riter, killing Herrera.

The *Riter* conviction, absent the enhancement applied by the court at sentencing, would have resulted in at worst, a two (2) year sentence for conviction of involuntary manslaughter, because the trial judge found, for reasons amply articulated in the record, that Dan Riter's circumstances all favored mitigation and downward adjustment of the sentence. There were *no* aggravating factors. Add to this that both the Probation Department report and the Department of Corrections Diagnostic Study report recommended against a prison sentence, the determination to sentence Dan Riter to prison for even the low term of two years is arguably excessive and unwarranted. However, the enhancement of five years for a total sentence of seven years because of former §12022.5 (b)(1) requiring at least five years *additional* prison time for shooting (even as here, *unintentionally*) into an occupied motor vehicle causing death or injury, is utterly unconscionable. If as he said, the trial judge had no discretion to stay or strike the enhancement, that is all the more reason to seek changes in these laws which can be unfairly applied to on-duty peace officers. That is, if indeed the judge added the five years because he thought he had no choice, that fact is all the more compelling in demonstrating the need for legislative amendment.

In my research, I have identified at least three *Penal Code* sections in Part 4, Title 2, "Control of Deadly Weapons" that present the same threat to peace officers as the now-repealed enhancement which operated so brutally and disproportionately in Dan Riter's case to exact a prison sentence far beyond that necessary or reasonable. There may be others I have not discovered. But at least these three enhancement sections must be amended so that they will not be applied to on-duty, in course-and-scope peace officers, who act without actual malice, using a firearm which they are *authorized* by law to carry and use in the performance of their duties. We know from the legislative history of these enhancement sections that these laws were designed to apply to street thugs and gangsters, and others who while *unlawfully possessing* firearms, *use them* in committing felonies or indiscriminate firearm violence. Simply put, but for the unjust application of this enhancement to Dan Riter, he would have been sentenced to at most, two years, and perhaps not to prison at all. But, because these poorly-drafted enhancements can be applied to on-duty peace officers, *as well* as the criminal thugs, gangsters and predators which the laws were specifically enacted to deal with, every peace officer is at risk, all the time and everywhere. We must act now to bring this to the attention of our legislators and Governor Schwarzenneger, so that no other peace officer suffers the same shameful miscarriage of justice as Dan Riter is now enduring. We must stand together, the State's law enforcement officers and all of us who value their contribution to the safety of us all, and to the protected liberty we share as direct beneficiaries of their willingness to protect us, despite the risks they confront.

We need to initially look at adding "peace officer exemptions" to three (3) enhancement sections:

(1) **§12022 (a) and (b)** which collectively require a enhancement of one to three years for the use of, or being armed with a firearm, machine gun or assault weapon, in the commission of a felony or attempted felony.

(2) **§12022.5 (a) and (b)** which add between three and ten years for use of a specified firearm, in the commission of a felony or attempted felony.

(3) **§12022.55** which adds an enhancement of five, six or ten years where the defendant, with "intent to inflict great bodily injury or death", inflicts such injury or death as a result of *shooting from a motor vehicle.*

To me, the simplest and most direct way to remedy this situation is to add a final subpart to each of the listed sections, which will contain the same language for each section to be amended:

( ) This enhancement shall not apply to a peace officer appointed pursuant to Tittle 3, Chapter 4.5, who is authorized by law to possess and carry firearms in the course and scope of official duties, where the event, act, omission or transaction constituting the commission of the felony or attempted felony occurs within the course and scope of the peace officer's performance of official duties, unless it is found that the peace officer acted with actual malice as defined in section 7 of this Code.

In the event the prosecutor contends that in a particular case the exemption is inapplicable, the special enhancement could still be charged, and the issue would be presented to the trier of fact. The judge or jury would make the finding whether the exemption applies in considering whether the special enhancement allegation is true.

Without the amendments, a judge or jury is left simply to determine whether a specified firearm was used in committing the offense, without regard to whether the defendant was lawfully in possession of the firearm and acting in the course and scope of official duties. This means the enhancements will be applied, almost necessarily, if there is a conviction.

There is another enhancement section, §12022.53, which greatly increases sentences for use of firearms in the commission of listed felonies. An exemption for peace officers in regard to this enhancement is probably unnecessary, because the nature of the specified felonies, if committed by an on-duty peace officer, imply malice, and would therefore be outside of the exemption anyway. And yet, this section *does* contain an exception for "the *lawful* use of a firearm by a public officer"!

Finally, it has been suggested that an alternative, perhaps better method of amendment would be to propose changes to the statutes governing discretionary grants of probation upon a finding that "on-duty and in course and scope" is an unusual circumstance, permitting probation, or that probation is appropriate in the interests of justice. The problem with this approach, in my view, is that the peace officer is still at risk. The court ruled in the *Riter* case that the circumstances in Dan Riter's matter were "not unusual." A contrary finding would have permitted probation. So, even if the law *permitted* a finding of unusual circumstances for the on-duty peace officer, the court could always reject probation, and the enhancements would be imposed. A weakly-worded exception to the enhancements for "the *lawful* use of a firearm by a public officer" misses the point entirely. If the shooting is *lawful*, there wouldn't be a crime, and thus no enhancement. Am I missing something here? *See: Penal Code* § 12022.53(l).

In conclusion, we would prefer to see if the listed enhancement sections can be *directly* amended to achieve the protection our peace officers desperately need.

The citizens of California do not need sentencing enhancement laws in order to discourage on-duty peace officers from carrying firearms. These laws provide absolutely no deterrent effect in the case of peace officers, who fire their weapons almost always in self-defense and defense of others, and commonly in rapidly-evolving, tense and dangerous confrontations which they face as part of their duties. Sometimes they will make mistakes in resorting to or in applying lethal force. If in so doing, they violate the criminal law, for example the manslaughter statute, they should not suffer the additional penalties that were designed to deter the illegal possession and use of firearms in commission of other crimes, by severely punishing the offender for the choice to illegally possess and use a firearm.

In last month's article, we appealed to law enforcement agency members, top to bottom, as well as every law enforcement association, to join in this quest for legislative amendments "to protect those who protect others", by writing a letter of support for the amendments to Pat McNamara, President, Riverside Sheriffs' Association, 6215 River Crest Drive, Suite A, Riverside, CA 92507, Telephone No: (909)653-1943, Fax No: (909)274-5540, on official letterhead. If you have not done so yet, please do. Let's not turn our backs upon those who protect and serve.

STAY SAFE!
-Michael P. Stone, Esq.-