LEGAL DEFENSE TRUST TRAINING BULLETIN

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"USE A GUN, GO TO PRISON" SHOULD NOT BE APPLIED TO POLICE

SENTENCING ENHANCEMENT UNFAIRLY PENALIZES THOSE WHO ARE SWORN TO PROTECT AND SERVE.

By Michael P. Stone, Esq.

Law enforcement legislative advocacy is a little removed from our usual practice. However, I know enough about it so that when I see a rule or law which screams for amendment for justice's sake, I recognize it for what it is: a fertile ground upon which to spread the seeds of change.

This is not an issue we can afford to debate for years; neither can we be slow to recognize the need for quick legislative action. Peace officers are at risk - - everyday, everywhere, in every clime and place.

We have perhaps the first, genuine course - and - scope peace officer in the State, to endure the full weight of the enhancement under former *Penal Code* §12022.5(b)(1), for the *authorized*, but according to the jury, *negligent*, discharge of a firearm, resulting in unintended injury and death, during a tense, violent, highly volatile and risky encounter with occupants of a motor vehicle.

Of course, we are speaking of Senior District Attorney's Investigator Daniel Riter, who was recently sentenced by Riverside County Superior Court Judge Charles W. Morgan, to seven (7) years in state prison, upon conviction of *Penal Code* § 192 (b) - - involuntary manslaughter.[1]

At sentencing, Judge Morgan dismissed our plea to invoke the "unusual circumstances" exception that would have permitted him to sentence this *33 year law enforcement veteran* of the Los Angeles Sheriff's Department and the Riverside County District Attorney's office, to probation or a combination of local custody and other probation terms. But Judge Morgan found this case "does not qualify as an unusual circumstances case". Pray tell us, if not unusual, what is it? A routine criminal act committed by a person bent on doing evil and who used a handgun to kill someone? Hardly. Judge Morgan also rejected *both* sentencing recommendations: one by the County Probation Department, recommending probation because of Riter's extraordinary life-long career of dedication to the community and public service, and the plain fact that Riter is not, never has been, and never will be, a criminal. Judge Morgan rejected the report outright. He ordered Riter into custody, to be sent to CIM Chino. The second sentencing report, this one by the California Department of Corrections following Riter's 90-day state prison commitment to Chino for diagnostic study, came to the same conclusion - - Riter does not belong in state prison, and presents little to no risk to the community if placed on probation. Riter was returned to Court on

[1] *Penal Code* §192 (b) states in pertinent part, "... *in the commission of a lawful act* which might produce death, in an unlawful manner, or *without due caution and circumspection.*"

November 7, 2003. His counsel again invoked the Court's discretion to place Riter on probation.

But Judge Morgan was unpersuaded; "No, he will be punished", as if every moment of Riter's life since February 1, 2002 has not been punishment, as he ended an otherwise stellar career as a law enforcement officer, *barred* from further service to the community because he is, after all, a felon. So, the silver-haired, handsome 56 year-old Senior Investigator with rock-solid Christian character and faith is going to ***state prison for seven (7) years***, as a result of a single involuntary (accidental) discharge which caused Mr. Jesse Herrera's death.

Many so-called "expert case watchers" and pundits thought that a good case could be made for justifiable homicide and self-defense; but that usually implies an intentional, or at least a voluntary discharge; that is not what happened - - it was *unintentional*. It is as simple as that. And Riter wasn't about to try to fool someone into believing different facts and intent, to get to a (perhaps) better result tactically. I accompanied Dan Riter on his D.A. - OIS walk-through at the scene shortly after the shooting. His re-enactment and our reconstruction never varied from this fact pattern. Most people are aware that Riter, with back-up "on the way", confronted three suspects in the pick-up truck driven by Herrera. One of the others, Bradley, had just committed a felony assault and battery on Riter's person, in an effort to keep Riter from taking two (2) minor children from the truck, *under the authority of child abduction warrants Riter had with him.* Any tactics expert would agree, and it was undisputed at trial, that Riter was reasonable and justified in drawing his weapon as he approached the truck driven by Herrera, who was proven to be loaded on methamphetamine, and was about to drive the truck away, despite Riter's orders to halt the truck - - clearly heard by the occupants - - as Bradley exhorted Herrera, "Run him over! Kill him!"

In an instant, as Herrera revved the engine, Riter chose to shoot the front tires to disable the truck, to avoid the children's removal from his presence, and to keep Herrera from running Riter over. The truck sped forward. Riter jumped and twisted out of the way, his pistol discharging unintentionally as the truck cab sped by within inches of Riter's body. We can debate the wisdom of Riter's millisecond choice to shoot the tires. But there is no debate that he was doing the best he could in a highly dangerous confrontation without any help. There is no debate that the death was the result of an unintended discharge.[2]

If this paper ended here, it would amount to, I suppose, nothing more than a defense lawyer's lament about a result that seems horribly wrong. But the real purpose of this paper is much more worthy of consideration than that. We must resolve to see to it that no other law enforcement officer will meet a similar fate, arising out of an officer's good faith commitment to do his or her duty.

Why did Judge Morgan settle on the unreasonably harsh penalty of seven (7) years' state prison for this case? Herein lies the point of this whole paper. First, Judge Morgan found "mitigating circumstances" to justify sentencing Riter to the low term of two (2) years. But then, because the Attorney General also charged the enhancement, and the jury found it true, Morgan enhanced the sentence, adding on the additional five (5) years. *Penal Code* §12022.5(b)(1) was one of several enhancing provisions passed by the Legislature under the more commonly - known "use a gun, go to prison" legislative agenda. The purpose of the legislation was to target street thugs, predators and gangsters - - *criminals who have no business possessing or using firearms to commit other crimes.* Did anyone foresee that this enhancement would one day be applied to an on-duty, in course-and-scope, accidental discharge of a peace officer's

[2]The indictment returned by the Grand Jury charged Dan with *Penal Code* § 187 – Murder, for the shooting of Jesse Herrera. The jury rejected that charge, and found Dan guilty of involuntary manslaughter.

firearm, under circumstances such as these? I cannot believe that.

Before sentencing, I researched the legislative history of these enhancement laws. It quickly became clear that they were prompted by the so-called "L.A. freeway shootings" and the more widespread phenomena in the gang world of the "drive-by" shooting. I drafted a brief for the Court on the issue of whether the enhancement, given its legislative and public policy underpinnings, should be applied to this case. I attached the entire legislative history.

Of course, the Attorney General responded that the enhancement was mandatory. Judge Morgan said he could see no exception for the case of a peace officer like Riter. So, Judge Morgan applied the enhancement to lift Dan's two-year sentence to seven years.

The evil in all of this is that the enhancement should never be applied to an on-duty, course-and-scope shooting. The only proper application to a peace officer would be for a situation where an officer acts completely outside the legitimate law enforcement function, and without any apparent authority, uses a firearm in the commission of some other crime. Let us remember and mark well, Riter was *required,* not just privileged, to carry and employ a firearm as an on-duty peace officer. The real targets of this legislation, criminal predators and gangsters, have no such requirement or privilege. The mere possession by these persons is a crime, standing alone. The laws are intended to discourage thugs from carrying and using firearms and engaging in indiscriminate firearm violence and to punish them severely when they do. I do not believe the bill's sponsors, the Legislature, or Governor thought that this amendment would result in something like this.[3]

I refuse to accept that it is too late to do something for Riter. The conviction and sentencing are on appeal.

But I also believe that an organized and motivated law enforcement community, backed by the large community it serves throughout the State, can achieve legislative change to forbid the application of such enhancements in this way.

On behalf of Dan, his wife Shari, and his children, and all of the many people who supported him throughout his ordeal, as well as the men and women of law enforcement in California, I, together with my co-counsel Ira Salzman, Esq. and Muna Busailah, Esq., and the Riverside Sheriffs' Association, which has pledged to take up and lead this campaign to see the passage of urgency legislation to eliminate this wholly unforseen application of the firearm enhancement, request your support. This is an "Officer Needs Help" call. Association and Department leaders, and interested individuals are urgently requested to write 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, a letter on your organization's letterhead, in support of amendments to the Penal Code for situations where a peace officer, as defined in *Penal Code* § 830, et. seq., and who is on duty and authorized to carry a firearm within the course and scope of employment, and while in the performance of

[3] Former *Penal Code* § 12022.5(b)(1) reads, "Notwithstanding subdivision (a), any person who is convicted of a felony or an attempt to commit a felony, including murder or attempted murder, in which that person discharged a firearm at an occupied motor vehicle which caused great bodily injury or death to the person of another, shall, upon conviction of that felony or attempted felony, in addition and consecutive to the sentence prescribed for the felony or attempted felony, be punished by an additional term of imprisonment in the state prison for 5, 6, or 10 years.

official duties, uses a firearm, and subsequently becomes the focus of a criminal prosecution.

Now, we must look for a moment at exactly what needs to be changed.

Incredibly, the Legislature acted to eliminate the enhancement specified in *Penal Code* §12022.5 (b) (1) (see footnote 2 above) which was charged and applied in Dan's case. The enhancement was in force and effect on February 1, 2002, when the shooting occurred, and when Dan was indicted on September 30, 2002. But it was repealed by AB 2173, signed by the Governor and filed with the Secretary of State on July 9, 2002, *almost three (3) months before the indictment.* The repeal of §12022.5 (b)(1), was effective January 1, 2003, six months *before* the trial started. Thus, by the time Dan was convicted of involuntary manslaughter and sentenced, the enhancement which added five (5) years to his two (2) year sentence was repealed.

Did the Legislature recognize in 2002 that the enhancement could be unfairly applied to peace officers in the line of duty? The legislative history of the amendment which repealed §12022.5 certainly does not so indicate.

In fact, the expressed legislative intent of the amendment was to "recognize that the conduct punished under that provision is now subject to greater punishment under subdivision (a) of Section 12022.53 of the Penal Code." However, § 12022.53 (2003) provides enhancements for use of a firearm in connection with felonies enumerated in that section. But look again, §192 (manslaughter, whether voluntary or involuntary) is not among the specified sections. Hence, it appears that in 2003, Dan was sentenced under an enhancement that had already been repealed, and not replaced to apply to involuntary manslaughter by § 12022.53.

Well, sorry for Dan, but if § 12022.5 (b) (1) has been repealed, is there any other enhancement provision to worry about? Yes; § 12022.5 (a) requires an enhancement of (3) three, (4) four, or (10) ten years for the personal use of a firearm in the commission of a felony or attempted felony. Another crime, which could be unfairly imposed upon an on-duty peace officer who discharges his weapon in the line of duty is *Penal Code* § 246, which prescribes a three, five or seven year sentence for a person who shall "maliciously and willfully discharge a firearm at an.....occupied motor vehicle...".

Both of these sections may unfairly be applied to a peace officer who is authorized by law to possess a firearm in the line of duty. Dan's case is an extreme example, to be sure, of a peace officer who *unintentionally* discharged his duty weapon in the line of duty, and was caught in the teeth of enhancement that was designed to apply to street thugs, not peace officers. But the Legislature needs to keep the State's peace officers in mind when it wields the big stick of legislation to get tough on violent crime, to make sure that anti-crime bills are not enacted in a way that permits them to be unreasonably applied to on-duty peace officers.

Your letter expressing outrage toward the results of Dan Riter's case will help. Please take the time to write. You owe it to yourself, and to all of the men and women of California law enforcement.

PLEASE STAY OUT OF HARM'S WAY!
-Michael P. Stone, Esq.-

Michael P. Stone was lead trial counsel for Investigator Dan Riter, assisted by Muna Busailah, Esq., Ira Salzman, Esq. and Terrie Coady, Esq.