LEGAL DEFENSE TRUST TRAINING BULLETIN

MICHAEL P. STONE, GENERAL COUNSEL

6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

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JUSTICE DELAYED IS JUSTICE DENIED

A Call For Rethinking The Way Departments Present Criminal Prosecutions of Their Own Members

By
Michael P. Stone
Stone Busailah, LLP

March 2, 2005. Another day of work for Riverside County Senior Correctional Deputy Mike Vernal and his fellow deputies assigned to Robert Presley Detention Center (RPDC).

An inmate named Daniel Leonard was apparently angry because he did not have any toilet paper. He yelled threats to the deputies that he was going to "gas" them (you all know that means throwing feces and urine at deputies). It was decided because of the threat, to move Leonard to a different cell, so that if he tried to throw feces and urine, his "window of opportunity" would be minimized because of the location of the cell. Several deputies accompanied Mike Vernal to move Leonard to the other cell. The idea was simple: go in, restrain and cuff Leonard, and move him without incident to the other cell.

Well, Leonard was having none of that. He was aggressive and non-compliant, even after handcuffing, requiring Vernal to "pin" him against the wall and a glass window. This forcible maneuver caused Leonard's face and body to violently contact the wall and glass. This wasn't intended, but neither was it unexpected. Such injury mechanisms frequently are involved when a resistant inmate is forcibly "pinned" against a wall.

The question always comes down to this: **unintended injury as a result of a reasonable use of force; or, gratuitous infliction of injury for the purpose of punishment or retaliation for some perceived insult?**

And you know, after 30 years of defending these kinds of cases, it always come down to the same question: reasonable use of force or summary punishment? For the decision maker, be it the Chief or Sheriff, an arbitrator, a prosecutor, a judge or a jury - - it's always the same question. The answer

means either, "no misconduct," or, "a crime."

What does all of this mean for you? Let's assume you are a typical deputy or officer, out there every day, trying to do the job the best way you can. Sure, you rail against laws and court decisions that overly emphasize criminals' "rights" and that de-value the community interests in safety and peace. You are sick to death of having to put up with assaults, insults, threats and even greater crimes committed against you by criminals, just because you are doing your job and your duty. *But you don't move the line*. You are not about to forsake the public trust and the badge of your office. You aren't going to "fudge" on probable cause. You're not going to write any false reports; you aren't going to use *excessive* force, even when you can, because some force is required, but more is not "better," nor is it legal; you will restrain yourself in the temptation to "teach lessons" even when they seem to be the most pragmatic way to get your point across to a knucklehead; you recognize that when a cop begins to perceive a blurring of the lines between right and wrong, the process of corruption is underway; it isn't always about money and financial profit - - morals can be corrupted by much more than money; sometimes it is as simple as "the ends justify the means," or more to the point. "it's the only justice this jackass will ever be dealt." But you are one of the ones we call "untouchable." You will not move the line. Regardless of profound provocation, you are going to do it the right way. That's what you are paid to do. And, that's why we all *need* you, more than you will ever know. You recognize wrongdoing immediately. You have conditioned your response to wrongdoing according to your own moral compass. When you see wrongdoing, you know it, and you know what to do. You do it because you demand it of yourself. You don't need direction from a supervisor.

So there you are, a typical deputy or officer, like Mike Vernal. You deal with "Daniel Leonards" hundreds of times throughout your career. Otherwise, you go about your duties, always trying your best to do the right thin. But then *somebody*, who has the authority or power to say "No, this was excessive; this was misconduct; this was *a crime,"* decides that is so. Suddenly, you are thrust into the systems, both administrative and criminal. Your job is threatened as well as your livelihood, and your *liberty.*

Simple misjudgments by decision makers along the way; lousy, result-oriented or biased investigations; personal agendas; reckless charging decisions; failures to apply objective analysis - - all or any of these can send you down a long road like the one traveled by Mike Vernal, who was, after all, just the "typical deputy" described at length above.

After Leonard was secured in a better location, Vernal made the customary reports and went to clean up and sanitize the blood drops which emanated from Leonard's collision with the wall and glass. Nothing much to it, but why leave blood-borne pathogens unattended? No big deal. That simple act became Count Two in the criminal case - - "Destruction of Evidence." The first Count was *Penal Code* § 149, a felony, "Assault Under Color of Authority."

The criminal investigation which triggered the criminal prosecution is what it is. Its defects are apparent to all. But when the Sheriff's special team of Administrative

Investigations Unit (AIU) investigators went after the case, the result was, shall we say, "180 degrees the other direction." What looked like a sure termination case based on the felony criminal submission, turned out to be a "no misconduct case" on the force issues. Mike was reprimanded for a policy violation (not notifying a supervisor before he pulled Leonard out of his cell). What was a termination case was stopped in its tracks by the Sheriff. Mike was reinstated to duty in the same jail facility, and since was promoted to Senior Deputy, winning a coveted assignment in gang intelligence and monitoring, where he commonly supplies the District Attorney's office (the same one that was prosecuting him) with audio tapes and intelligence on gang inmates!

Now, one would think that when the persons in charge of Mike Vernal's prosecution were made aware of the "new investigation" and results, some thought would be given to reconsideration of the merits. Sadly, it was not the case. Then, Mr. Leonard, while in state prison, called a watch commander at RPDC, and in a *taped* conversation, offered to "forget" everything about the incident, if the Sheriff's Department would help him get out of an unrelated criminal and/or civil TRO matter. We gave that tape to the District Attorney. "Ok, *now* will you consider a disposition?" *No response.*

So, on June 5, 2009, we answered "ready for trial." The People answered, "We will not take this case to trial." Judge Edward D. Webster dismissed the case "in the interests of justice." What? *Justice delayed is justice denied*. "Interests of justice??" How can this happen? Four years. Mike was charged on June 23, 2005. The case was dismissed on June 5, 2009.

But for the objectivity of the Sheriff's AIU investigation, and the courage of the Sheriff to call it right and reverse the Department action against Mike, this good deputy would have been out of a job, and tormented for four years with a serious felony prosecution. It turns out that he was *still* tormented by the prospect of a criminal trial for four years, but at least his career was saved.

WHAT SHOULD BE DONE ABOUT CASES LIKE THIS?

You know, we are all familiar with *Skelly v. State Personnel Board* (1975) 15 Cal 3d 533, *Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532 and *Arnett v. Kennedy* (1974) 416 U.S. 134. We know that before you take a cop's job away, you have to comply with certain pre-removal safeguards. The idea is to prevent mistaken or ill-advised *administrative* decisions that cost the employee his *livelihood.* Great stuff.[1]

But *do we, can we, should, we* employ the same safeguards before launching a *criminal prosecution* against a cop or deputy that could cost the officer his or her liberty? Doesn't it make sense that before we present a case to the prosecutor recommending a *criminal* prosecution against our employee, we activate the *same* or substantially similar safeguards that we are required to invoke before we take his or her *job* away?

[1] *Skelly, Arnett and Loudermill*, as an expression of 5th and 14th Amendment Due Process, call for pre-discipline or pre-removal safeguards "to act as a meaningful hedge against an erroneous deprivation. These safeguards consist of (1) notice of the proposed action; (2) copies of any materials (evidence) reviewed by the initial decisionmaker recommending the proposed action; (3) explanation of the reasons therefor; and (4) an opportunity to respond to a reasonably-uninvolved impartial reviewer.

Shouldn't we undertake a *thorough* administrative investigation *before* we refer the case to a prosecutor? Sure, we have to be careful about contaminating the criminal case with compelled statements from the accused. But if our administrative investigation discloses evidence that is *exculpatory*, don't we need to give that to the prosecutor? Isn't that *Brady* material??

Can we assign a process, similar to *Skelly* (or *Loudermill* for you non-Californians) that insures high-level staff review of a criminal case, supplemented by internal investigatory fruits *before* the case is referred to prosecutors? Why do we adhere to this meat-axe approach, walling off the "criminal" and the "administrative," even at the risk of ignoring "the truth of the matter?" And, worst of all, *delay* the administrative investigation until the criminal is "resolved?"[2]

In my view, no case should be presented to a prosecutor until the Department has thoroughly investigated *every* aspect of the case, whether by criminal or administrative means, and is therefore confident that the prosecutor has all the information, before deciding to file, subject to Constitutional requirements imposed by the Fifth Amendment. You know, that process, had it been invoked, would likely have saved Mike Vernal four years of torment for which he will never be compensated. Think about it.

STAY SAFE!
Michael P. Stone
June, 2009
Pasadena, CA

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 30 years, following 13 years as a police officer, supervisor and police attorney.

Postscript From Michael P. Stone:
As I always do when I write about a client's case before sending it out for publication, I sent this article to Mike and his wife, Alyssa, to be sure the content is accurate and acceptable. My article evoked a heartfelt response from Alyssa. It is repeated here below *without any modification*. It is very worthy for your consideration; it is in her words, and I could never replicate them.

Author's Note: Alyssa's letter has a familiar, but somber ring. Many years ago, in an elevator car going up to a Board of Rights hearing room, my officer-client and his wife accompanied me. She said, "Mr. Stone, there is something wrong with the system when I daily worry more about what the Chief of Police will do to my husband, rather than what will happen to him every night he patrols 77th Street Division (Watts) in South Central Los Angeles." That was the officer's *third* (x3) Board of Rights (during which we defended him) within a couple of years. He was found "not guilty" in all three cases.

[2] A number of agencies as a matter of internal policy, *delay* conducting an administrative investigation until the companion criminal case is resolved, or at least rejected by the prosecutor. Often, if the particular state has "Bill of Rights Act" statutes that contain a "statute of limitations," agencies will need to utilize "tolling" provisions in those statutes to keep the limitations period from running, thereby barring the administrative case. Sometimes it is the police unions that push for this delay. Well, I suppose reasonable minds can differ over this policy. *Strict application and observance of the officers' Fifth Amendment rights do not compel such delay, so long as the proper barriers are erected to keep compelled statements and their fruits away from the criminal case.* In my view, delaying the administrative investigation for *any* period can work substantial *injustice* to the deputy officer, because *justice* means getting to the truth of the matter by *complete, timely and objective investigation.* When this process is *delayed*, justice is denied.

“Mr. Stone

We really appreciate all that you have done, and all that you are still doing for law enforcement. After reading this article we feel it is well written, but somewhat blase. If it wasn't about our incident I probably would not have finished reading this article. Maybe it is because our emotions are so involved in this incident, but no one will ever know how traumatic this was for us. I am shaking even as I write this, it is not from anger, just emotion that I have bottled inside of me for the last four years... trying so hard not to stress my poor husband out even more than he already was. I think if you really want to gather people's attention to this article, you need to drive it home to them. Let them know that here you are a hardworking honest individual going to work and doing a good job. What started out as a normal day turns into a nightmare. An inmate threatens your safety and the safety of those you work with. You attempt to do the right thing, but the inmate turns this into a violent confrontation. You react based on your training, pinning the inmate against a wall to immobilize him and lessen his attack. But instead of criminal charges being pressed against the inmate, someone decides that you are the one at fault. The harsh light of investigation is upon you and everyone is looking at you like you are the scum of the earth. You are placed on Administrative Leave, arrested, booked into the very jail you work at, fingerprinted by your coworkers. The shock is still there while you arrange your bail and then attend court hearings for four long and stressful years. The thought of 3 years’ state prison time looms over every decision you make. The knot in the pit of your stomach that never goes away, the countless tears your wife cries on your shoulders, never knowing what is going to happen. And even though the department turned around and AIU did a thorough and remarkable investigation that exonerates you, the DA's Office doesn't drop the charges. You feel like you have brought great shame upon your family, even though you did nothing wrong.

Every decision you make: should we get married? What if I go to state prison? Should we have children or wait until this is over? What if I go to state prison? Should we buy a house? What if I go to state prison? What if I lose my job? What if I go to state prison? I'm innocent; how can this be happening? It is a dark shadow that hangs over every happy occasion...birthdays, Christmas, our wedding, the birth of our first child....

Trying not to think about it, but always a black worry....nibbling at your heart and mind no matter how hard you try not to think about it.

I am sorry if I am too harsh... too emotional... but my hands are shaking so badly right now as I live back through what these last four years have done to us and all the bottled emotions course through me.... our families...our lives. An administrator recently told me that it is just "collateral damage". The profound effect and the stress... there are no words for what this has put us through... but I know it has taken years off of our lives. That is a lot more than "collateral damage". It is only "collateral damage" to those who are not emotionally involved, or who just don't care because it was not them, so they will never understand. If it was not for our faith in God, the support of so many loving friends, and the fight, fight, fight mentality of the RSA Lawyers and representatives... this would have been utterly unbearable.

I apologize if I have insulted you.... but I want people to know the truth. It will be the only justice we ever get.

Alyssa Vernal

Correctional Corporal Alyssa Vernal”