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TRAINING BULLETIN

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"CONSULT WITH A LAWYER BEFORE WRITING A POLICE REPORT?"

IN SOME CASES, YOU SHOULD!

In 1998, a federal judge in Riverside, California issued an injunction, prohibiting the Riverside Sheriff's Department from making any use of an "arrest report" written by Deputy Tracy Watson, in Watson's administrative hearing, in the appeal of his discharge based on his use of force in the incident chronicled in the report. The federal court enjoined use of the report, and any fruits thereof, because Watson's superiors ejected his union lawyer from a room where they had isolated Watson, and ordered him to complete his account of the incident, before talking to anyone. To better accomplish their purpose, a lieutenant also removed the only phone from the room, and told Watson, "you don't need to be talking to anyone". Earlier, this same lieutenant had ordered Watson's union representative, a detective, to stay away from Watson and to write a memo concerning his discussion with Watson, which occurred before the lieutenant was able to intervene. Recently, the federal judge had occasion to further discuss the reasons for the injunction, when Watson's supervisors, now defendants in Watson's civil rights lawsuit, moved for summary judgment. United States District Judge Robert J. Timlin's analysis is important for any law enforcement officer to consider, because this situation can occur in a variety of contexts, and recognition of the dangers is critical to asserting the all-important officer's right against self-incrimination. The initial issuance of the injunction was accompanied by a published opinion, entitled *Watson v. Riverside County, et al, USDC No. CV 96-0148 RT (VAPx), 976 F. Supp. 951 (C.D. Cal. 1997).*

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THE TELEVISED PURSUIT AND ARREST

On April 1, 1996, Watson and another deputy were involved in an extended, high-speed pursuit of a truck driven by a smuggler ("coyote"), loaded with undocumented aliens, which had run a Border Patrol checkpoint in Temecula. At the end of the pursuit, in Los Angeles County, the occupants all fled on foot, and news helicopters filmed Watson using his police baton to strike two of the occupants prior to arresting them. The footage was aired immediately throughout Southern California, and like most unexplained video footage of a police use of force, this one created a groundswell of community outrage.

THE INVESTIGATION GETS UNDERWAY

The news footage was also seen by Watson's superiors at the Sheriff's Department, and Watson was ordered to hand off his prisoners to another deputy, and come at once to Sheriff's Administration. Within a few hours, administrative and criminal investigations targeting Watson were underway. A "joint" criminal investigation was launched by the Los Angeles County Sheriff's Department and the District Attorney, coupled with the FBI, U.S. Attorney, and Justice Department's Civil Rights Division.

Internal investigators and Sheriff's command officers decided early that Watson would be relieved of duty as soon as he wrote a report of the incident. When Watson arrived at headquarters, he was met by the union representative-detective, who asked Watson if he wanted

the Association lawyer summoned. Watson replied, "yes". At about the time, a sergeant passed by and said to Watson, "I hope you've got a lawyer--you're sure gonna need one!" Watson was the taken by his lieutenant to a small, isolated office, and directed to "write (his) arrest report, including a description of the force (he) used". Watson was not permitted his request to do the report in the report writing room or the smoke-break room. The lieutenant put Watson in an office that was locked on the outside, and a key was required for entry. The Association's lawyer and President arrived. A detective took the lawyer to see Watson, and she entered the room and began talking to Watson.

THE LAWYER IS EJECTED FROM THE ROOM

Before long, the lieutenant arrived back at the office, heard voices within, and angrily knocked on the door. Inside, he found the lawyer, and ordered her out of the room, and told her "on no uncertain terms, will you go back in that room". He told Watson that although he "might need a lawyer later, he did not need one now". Thereafter, the lieutenant came to the room several times to hurry Watson along on the report. Watson, meanwhile, crumbled emotionally under the strain of the circumstances. Once the report was completed, Watson was permitted to show it to, and discuss it with, the lawyer and president. Watson was relieved from duty.

THE CIVIL RIGHTS LAWSUIT

On April 17, 1996 Michael P. Stone, P.C., hired by the Association to defend Watson, filed a civil rights lawsuit in federal court regarding the treatment of Watson by his superiors and the deprivation of his right to counsel.

THE REASON FOR JUDICIAL RELIEF

In issuing the injunction in 1997, and in its recent order denying summary judgment to defendants, the Court applied the 3-part "balancing test" employed by the courts in due process cases where governmental interests clash with individual rights. The so-called "Matthews test" comes from a U.S. Supreme Court decision, *Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976)*. It features a 3-pronged analysis of the interests at stake: (1) the individual interest; (2) the risk of an erroneous deprivation arising from the procedures employed, and (3) the governmental interest affected by permitting the individual interest to be served.

Judge Timlin found Watson's individual interest to be "substantial". With respect to the risk of wrongful deprivation of Watson's interest in protecting himself, and the probable value of additional safeguards, the Judge set forth the following:

> *Watson has submitted uncontested evidence that in officer-involved shooting incidents, deputy sheriffs such as Watson are permitted to consult with their counsel before writing any report. This policy, in the Court's view, significantly reflects the County's own determination that consultation with counsel serves a valuable function in the investigation of a major personnel incident such as an officer involved shooting.*

Important to the "risks to Watson" analysis, the Court asks:

> *1) was the use of force incident in which Watson was involved on April 1, 1996 of such unique concern to his superiors, as well as to other law enforcement agencies, that it was a major personnel incident; 2) to what degree was Watson distraught, upset or incoherent while drafting the report; 3) was he then aware that possible criminal prosecution and employment disciplinary action against him were either being contemplated, or underway, regarding the incident; 4) did the conduct of (the lieutenant) including isolating Watson, expelling (the lawyer), removing the phone and repeatedly interrupting Watson's work, heighten Watson's anxiety; 5) was Watson, under the circumstances, capable of evaluating and managing the potential impact his writing the arrest report*

could have on his County employment; 6) if counsel were allowed to remain with Watson, could and would she have advised Watson of the option of refusing to write the report, as well as the likely consequences of such refusal, and could she or would she have discussed with Watson the possible use of the report against him at any employment related disciplinary proceedings; 7) could or would Watson and his attorney have discussed the option of documenting the use of force in a separate memorandum, perhaps at a later time, as seems to have been Watson's right under county policy; 8) could and would counsel have advised Watson concerning the required or advisable scope of any report Watson did choose to write; 9) could and would counsel have explained to Watson the possible impact on his Fifth Amendment right not to testify at trial of choosing to write the report; 10) did the expulsion of Watson's attorney from his presence effect Watson's emotional state or his ability to exercise his best judgment; 11) was any such effect exacerbated by defendants hurrying Watson along and repeatedly interrupting his preparation of the report; and 12) did defendants act of allowing Watson's counsel and union representative to review the completed report with him before its submission to his superiors provide any significant procedural protection against these various risks, or were the circumstances such that this review meeting provided no meaningful opportunity for him to alter, revise or choose not to submit the report?

THE RULE FOR YOU

The rule for you that emerges from all of this is: when you are involved in a use of force, or a shooting, or any other unusual incident, that creates a risk of criminal prosecution for you, you need to assert your right against self-incrimination before writing a report or speaking to officials about the facts of what you did. In most cases, your invocation of rights will probably be overridden by a direct order to write or talk. But, if your invocation of the right against self-incrimination and to counsel are clearly recorded (perhaps by a side memo), and if it is reasonable and legitimately invoked, you may well have immunity against the use of your statement in a subsequent prosecution against you. Without invoking your rights, you may waive them, and the statement could be admitted against you later. The same is true of your right to counsel. But you must clearly and unequivocally assert that right (again, by side memo). *Don't be insubordinate* if your request for counsel is denied. Make the request, document it in a memo (right to silence and counsel), and obey the orders to you.

CAVEAT: This procedure should not be invoked frivolously, or just anytime you are expected to write a report. Occasionally, however, circumstances occur, as in *Watson*, that create a clear risk of self-incrimination. It is in those cases that this procedure should be employed. And, it is not necessary to, and you should never invite a charge of insubordination by refusing an order to write or speak about an official incident.

Stay safe!

- Michael P. Stone