LEGAL DEFENSE TRUST TRAINING BULLETIN

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MILTON GRIMES OWES OFFICER DAVID LOVE $60,000 FOR "HOUSE NEGRO" LABEL

"My brothers, the most offensive entity during the slave trade when it was going on was the "house negro". Officer Love is representative of that." In 1994, Rodney King's lawyer, Milton Grimes, said these words about L.A.P.D. Officer David Love at a press conference outside the federal courthouse during King's civil damages trial after Love testified. Grimes said Love lied under oath to protect other officers in the King incident and to protect his job with the L.A.P.D.

Love, the only black officer present at the King arrest on March 3, 1991, denied under examination by Grimes, that he heard any officer use any racial names or epithets at any time during the King incident. In fact, he testified, if he had heard such things, and because he is black, he would have been offended and he would have reported the person who made such statements.

The press conference was attended by numerous members of the electronic and print media, including Linda Deutsch, an Associated Press reporter. In her article, she described these statements made by Grimes which were then republished in newspapers throughout the country. Television stations played footage of the statements by Grimes during news programs which featured films of Officer David Love walking into court to testify, immediately followed by footage of the Grimes' press conference including the "house negro" reference.

Represented by Michael P. Stone, P.C. lawyers, David Love sued Grimes for defamation (for saying Love committed perjury) and for intentional infliction of emotional distress ("house negro"). The case was tried to a jury in September 1997. The jury awarded Officer Love $40,000 in emotional distress damages but found no damages for defamation (impliedly finding that Love's reputation in the relevant community had not been damaged). The jury also voted to assess punitive damages against Grimes, finding that his statements were malicious and intended to harm David Love. However, the jury was unable to agree on the amount of punitive damages that should be awarded, and once they deadlocked, trial judge Joseph Kalin declared a mistrial. In conversations with some of the jurors, it was learned that the range of suggestions for an amount fell between a few thousand and $100,000.

Grimes and Love's counsel, Michael P. Stone, stipulated that the punitive damage portion of the case could be retried as a bench trial, leaving the jury's $40,000 verdict intact. After hearing additional evidence, including Grimes' financial condition, Judge Kalin assessed an additional $20,000 in punitive damages against Grimes. Grimes appealed.

The Court of Appeal, Second Appellate District, Division Three, in an unpublished opinion, affirmed the judgment in all respects.

Many of the issues on appeal concern the claimed invalidity of using "deemed admitted" requests for admissions to establish that these statements were made, that they were knowingly false, and to establish so-called "constitutional malice", a necessary element where a public official (such as police officer Love) sues someone for defamation. Federal and state first amendment decisions require that the plaintiff in such cases establish with "clear and convincing proof" the "constitutional malice" elements (for example, that the speaker knew that the statements were false, or uttered the statements with reckless disregard of their truth or falsity).

In pretrial proceedings, including a motion for summary judgment, Ms. Muna Busailah, Esq. of the Stone law firm demonstrated to the court that Grimes had repeatedly failed to respond to interrogatories and requests for admissions. As a sanction for this conduct, the judge granted Ms. Busailah's motion to have the requests for admissions deemed admitted (meaning that they could not be controverted at trial) and that Grimes would not be permitted to put on any evidence at trial for which information was solicited in interrogatories to Grimes and for which Grimes did not provide adequate answers.

These orders permitted Love's counsel to move for summary judgment prior to trial on the issue of liability to Love which was granted, fairly foreclosing Grimes from offering a defense at trial.

Nevertheless, Grimes was permitted to testify that he acted in good faith and to offer the jury his explanation of his motivation and belief in making the statements that he did, which included his testimony that he believed Love lied.

Love's testimony regarding the emotional injury he suffered, including extreme embarrassment and humiliation, was supplemented by the testimony of a psychiatrist, Dr. Joel Dryer, who examined Love and found indicators of significant emotional trauma. David Love's brother, a prominent Los Angeles lawyer and also his identical twin, testified to the emotional trauma David suffered in the family setting.

Michael P. Stone, tried the case for Officer Love. Marc Berger and Gregory Emerson, both of the Stone law firm, wrote the appellate brief and argued in the Court of Appeal, respectively.

If you have any questions, please feel free to contact us at the Riverside Sheriff's Association 909-653-5152.

Stay safe!

- Michael P. Stone

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LOOKING OUT FOR YOURSELF IN THE INTERNAL INVESTIGATORY AND DISCIPLINARY SYSTEM

If you assume that you should approach an internal affairs interview with your guard down and appear at the appointed time without a competent representative, you are embarking upon a perilous journey full of unseen and unappreciated risks and hazards. Let's all be clear on one point: *any* internal affairs interrogation is an *adversary* procedure. Internal affairs interrogators are conducting an *investigation* which is designed to determine what acts or omissions occurred, and whether that conduct deserves discipline, or in some cases, criminal prosecution consideration. Surely if you are the accused, you will recognize that you are in *jeopardy* and that the preliminary I.A. interrogation is a "critical stage" of the proceedings, warranting appropriate preparation, vigorous representation, and the utmost caution. What if you are deemed to be only a "witness" and you are being interviewed from that perspective? Have you anything to worry about? Absolutely you do, and the same precautions should be applied as though you are the accused. Remember, although you might not be a "principal" in the act of misconduct, you will likely be subject to discipline if you might be said to have "acquiesced" in another's misconduct, or if you "failed to take appropriate action" (including reporting) upon learning of the probable misconduct of another.

Rule No. 1: ***Do not try to predict the course of the interrogation nor the scope of the investigation. Obtain the aid of a competent representative or lawyer in advance. If you cannot locate one, call your association.***

You should remember that an interview (interrogation) is always tape recorded. Any utterance you might make in the course of the interrogation will be difficult to change or retreat from later. Any statement of fact you might make could form the basis of a charge of "false and misleading" if sufficient contrary evidence is developed by the investigators. Moreover, you may be subjected to orders or other directives to do this or that, or refrain from doing this or that. Do not take this on alone, and do not assume that internal affairs procedures and orders are proper or appropriate just because the investigators are from Internal Affairs or are your divisional supervisors. Tape record all conversations between you and investigators, with a plainly visible recorder. Discuss your interview in *advance* with your legal representative and listen carefully to his or her instructions.

Rule No. 2: ***Tape record all investigative interrogations. Obtain and consult with a competent representative in advance of the scheduled interview.***

Government Code §3303 specifies the minimal protections which must be afforded you when you are subjected to an administrative interrogation. The Public Safety Officers' Procedural Bill of Rights Act (§§3300-3311) is laid

out verbatim in your MOU. Remember that the protections apply whenever you are subjected to interrogation which *could* lead to punitive action. The interrogation must be *reasonable* as to scheduling and length. If you are off-duty at the time, you are entitled to compensation. You are entitled to an *explanation* of the nature of the investigation before any questioning. If you don't understand what it is all about, do not proceed with the questioning until you do understand. The Department is not allowed to question you through more than two investigators at a given time. You have the right to reasonable breaks for consultation and physical needs. You may not be threatened, although you may be told, in appropriate cases, that failure to cooperate may result in punitive action.

Rule No. 3: ***Make sure you understand what the focus and scope of the investigation are and whether you are suspected of any misconduct, and finally, whether whatever you are going to say in response to questioning will disclose misconduct. Discuss all of this thoroughly with your representative beforehand.***

If you are interrogated at a second or subsequent time, you have the right to review your prior statements (tape recordings) made by investigators before further questioning. Review these with your representative. Section 3303(g) states that you may be entitled to disclosure (beforehand) of non-confidential investigative materials (notes, reports, statements and complaints) prior to interrogation and the opportunity to familiarize yourself with such things, but you have to ask for them. You should demand all of these materials up front, on the tape. Only those materials which are "truly confidential" should be withheld from you. When an item is declared confidential and therefore withheld, it should be because disclosure will endanger someone, lead to the destruction of evidence, frustrate successful completion of the investigation, or identify a truly confidential informant. We do not believe that a mere desire of investigators to be "one up" on you during the interrogation is an appropriate reason to withhold documents. Put simply, investigators must be able to articulate some reasonable, good-faith premise for withholding materials other than an abstract desire to keep you in the dark or limit your maneuvering room.

Rule No. 4: ***Demand all notes, reports, statements and complaints made by any person. If the investigators insist on withholding anything, have them describe what is being withheld with sufficient particularity that it may be identified at a later time. Have them state the specific reason or basis for the claim of confidentiality. Also, demand on the record that all investigators' notes be retained until final disposition of the case. In appropriate cases, inquire if you have been tape recorded, photographed or filmed without your knowledge, or whether you have been subjected to surveillance. Put this on the record.***

Section 3303(h) entitles you to an advisement of constitutional rights if it is deemed that you may be charged with a criminal offense. If you are so advised, invoke your rights. You may still be required to answer, but your answers deserve protection from introduction into any potential criminal action against you. Never proceed with an interrogation under such circumstances until you have had an adequate opportunity to discuss your case fully with your representative. It may be prudent for you to talk to a lawyer.

Rule No. 5: ***If there is a potential for a criminal accusation, invoke your constitutional rights at once and follow the advice of your representative. Remember that you cannot disclose CRIMINAL misconduct to a representative who is also an employee, and expect that it will remain confidential between you. He is arguably under a duty to report such things. In this situation, it may be advisable to at least discuss your matter with a lawyer, where you have absolute confidentiality.***

Do not complete any reports or statements or answer any questions without being ordered or compelled to do so.

In disciplinary investigations, the initial interrogation is positively a critical stage of the proceedings. You should never walk into such a setting without representation. Obviously, there are fact situations too numerous to cover here which may present themselves in a given investigation. Your representative or lawyer will likely have faced them before and you owe it to yourself to get some help. If you need representation, call RSA-LDT at once.

We all recognize that a smooth functioning sheriff's department depends in large measure on discipline and vigorous personnel investigation. On the other hand, state law, constitutional principles and your MOU contain many protections for you in the disciplinary process. Failure to take advantage of these and the assistance that is available is inviting trouble.

At times, you may be contacted by internal affairs investigators when you are off-duty, at home, without any prior warning. There are very few interviews which must go forward immediately. If you are taken by surprise, ***do not proceed without representation***. If you are contacted by investigators at your home, and they want to take you from your home, you should immediately call a representative or a lawyer. You should make it clear that if you do leave your home and accompany investigators to a police facility or elsewhere, you are cooperating only because you fear discipline for insubordination. In other words, make sure it is clear that you are being *compelled* to leave your home. You must take the initiative to get legal help. If you do not ask for a representative, they will not give you the opportunity to obtain one.

Rule No. 6: ***If investigators desire to remove you from your home, demand to talk to a representative before you are required to leave, and demand to know the basis for such an exigency. Do not proceed with an interview until you are adequately represented.***

The willful refusal to obey an order from a supervisor is insubordination. It is generally a firing offense. If you are given an order, even one which seems wrong, ill-advised or even patently illegal, you should still obey if you safely can do so, being careful to make a record as soon as possible of your circumstances. Insubordination is very difficult to cure. On the other hand, there are remedies for a supervisor's illegal order.

Rule No. 7: ***Obey all orders that are even only arguably legal -- do not invite a charge of insubordination, if it can be avoided in any reasonable way.***

Investigators have the right, in investigations which are specifically, narrowly and directly related to an official interest, to give you an order to answer questions. If the answers may, in any way incriminate you, you have the right to object to answering on Fifth Amendment grounds. When you do, they will normally tell you (1) you are ordered to answer -- failure to do so is insubordination; (2) anything you say in answer cannot be used against you in a criminal proceeding. Once this occurs, you have use immunity for your statements.

Rule No. 8: ***If your answers to questions may tend to incriminate you, assert your Fifth Amendment rights (silence and counsel) and get a lawyer immediately.***

Sometimes when you are involved in an on-duty incident, and you have bonafide self-incrimination concerns, because your account may constitute admissions or statements against your criminal interests, you may be directed to write a report or a memo regarding your actions. These pose the same dangers present when you are questioned about your involvement, because written reports and memos may be used against you in a criminal

prosecution unless they are the product of compulsion.

In any case where you are under threat or apprehension of criminal investigation or prosecution and you are told to write an account of your relevant activities, you need to invoke your right against self-incrimination, and secure an order under pain of insubordination to complete the required document. Do not be insubordinate, but, document the circumstances, your invocation of the right to silence, and the direct order, in a side memo to your supervisor, so it is clear that your completion of the required report or memo was preceded by your assertion of the right to silence, but that your invocation of your rights was overridden by a direct order. If these facts are made clear in a record, you will be in a position to claim immunity from the use of your written statement if there is a criminal prosecution taken against you. If you are permitted opportunity to do it, seek legal counsel before completing any reports in these circumstances. *However, do not invoke this procedure lightly, or frivolously.*

Rule No. 9: *In proper circumstances, invoke your right to silence if you are directed to complete any written accounts of your actions. Secure a direct order to complete the report or memo and then document the facts in a separate memo to your supervisor. Get legal advice if you can.*

- Michael P. Stone

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