# Handling a Case Against The Police – An Overview

by Terrell N. Roberts, III

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The most inspiring statement I have read about the Fourth Amendment was written by Justice Robert Jackson. After reciting the language of the Fourth Amendment, he said:

> These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[1]

Justice Jackson had prosecuted Nazi war criminals at Nuremberg, and when he penned these words (in a dissenting opinion) he had good reason to know how a whole population of people can be made to bend to the will of a few men.

The work of protecting our cherished constitutional freedoms is an important one. A lawyer serves an indispensable role in that process. As the Supreme Court has noted: "If the citizen does not have the resources [a lawyer], his day in court is denied him; the congressional policy [enforcement of constitutional rights] which he seeks to assert and vindicate goes unvindicated; *and the entire Nation, not just the individual citizen, suffers.*"[2]

Many police officers are never prosecuted or disciplined for police abuse. There is a need for more lawyers to take these cases. If you can do so, you will fulfill the fundamental role of a lawyer in our country to protect our most cherished rights.

The case should be selected on the strength of the evidence that a constitutional violation was committed, not on the basis of the status of the plaintiff. You don't need to represent an eagle scout in order to win the case. Indeed, victims of police abuse are often not pillars of the community. As the late Judge K. K. Hall of the Fourth Circuit aptly stated:

> But Casella was a criminal. He deserved to be arrested and punished; his story stirs little sympathy, much less outrage, in the crowd. The courts cannot be so impassive. We must always remember that unreasonable searches and seizures helped drive our forefathers to revolution. One who would defend the Fourth Amendment must share his foxhole with scoundrels of every sort, but to abandon the post because of poor company is to sell freedom cheaply.[3]

At the outset, one must recognize that in the minds of many there is a natural belief that police officers act lawfully. And in most instances they do. In a country founded on law, a citizen should have the right to expect that a police officer will act within the bounds of law. But it is also true that citizens today are not programmed to believe that a police officer can do no wrong. I have found that jurors will not condone law breaking by police officers anymore than they would condone illegal conduct by anyone else. An arrest or prosecution which has no legal justification, the use of excessively brutal and unreasonable force, a flagrantly illegal and unreasonable search, or engaging in other forms of misconduct are not

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[1] *Brinegar v. Unites States*, 338 U.S. 160, 180, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

[2] *City of Riverside v. Rivera*, 477 U.S. 561, 575, 106 S.Ct. 2886 (1986).

[3] *Kopf v. Skyrm*, 993 F. 2d 374, 379-80 (4th Cir. 1993).

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going to pass muster with jurors.

In deciding whether to take a case against the police, it is sometimes readily apparent that the case is a good one. But more often than not you will need to conduct an investigation and engage in a careful sifting of the facts before making the call (not all of us can have a video tape of the client's encounter with the police). After you have conducted your investigation, you should have an abiding belief in the strength of your case, a feeling that justice compels a judgment in your client's favor. If you have doubts, you're better off rejecting the case.

Once you have decided to take the case, you must spend sufficient time with the client to get all the facts. Speak with the witnesses right away and have their statements reduced to writing or otherwise recorded. Visit and photograph the scene and canvass the area for potential witnesses. Gather police records through requests under Maryland's freedom of information statute,[4] which will usually give you access to most of the relevant police records, including police reports, witness statements, tapes of police and fire board communications, ambulance reports, and hospital records. These should be reviewed with the client before any suit is filed.

In a case of excessive force, photographs and, if there are broken bones, x-rays, are essential to proving the case. Photographs must be taken immediately. The old saying, "A picture is worth a thousand words," is never truer than in a case of excessive force. In one case, photographs literally made the case. A SWAT team entered an apartment to arrest a man named Jeffrey Gilbert, for whom the police had an arrest warrant for the murder of a police officer. Gilbert did not know he was wanted for the crime. (As it turned out, he was innocent of the charge. As we eventually learned, the police charged Gilbert on the basis of an incredibly shoddy investigation and a rush to judgment.) During a briefing before the raid, the SWAT team was shown photographs of the dead officer, whose body was riddled with bullet holes. After the SWAT team entered the apartment in the dead of night, they brutally beat Gilbert. It was so bad that Gilbert was knocked unconscious, had to be hospitalized, and homicide detectives could not question him. The next day Gilbert's mother retained my partner to defend Gilbert in the criminal case. He immediately sent another lawyer and an investigator to the hospital to take photographs and interview Gilbert. With some luck, the deputy sheriff who was stationed at Gilbert's bedside allowed photographs to be taken. (The guard was appalled by Gilbert's condition.) The photographs graphically displayed a very badly beaten man. The victim had welts, contusions and cuts all over his body and head, including visible boot prints on his back and stomach. There was marked soft tissue swelling of the scalp and face from multiple blows to the head. The client had a few broken bones in the face and an intra-cranial bleed. Within days, the actual killer was identified in dramatic fashion. After killing a FBI agent who was a part of a stake out to arrest the man, the actual killer was shot and killed by the police in a shoot out. Found on the killer was the gun which he had used to kill the officer. Photographs of Gilbert were supplied to the newspaper and media, who requested them. By the time that Gilbert was exonerated and the civil suit was brought, the outwards signs of Gilbert's injury had disappeared. But graphic photographs of Gilbert's injuries made the claim of excessive force virtually indisputable and demonstrated that Gilbert was entitled to significant compensatory damages. Ultimately, the case settled favorably.

When the lawsuit is ready to be filed, the lawyer will need to know the legal claims which will maximize the chances of recovery. Both state and federal law pro-

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[4] Md. Code, State Govt. Article, § 10-611, et seq.

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vide suitable remedies. However, there are crucial differences which must be studied. In some cases you may want to consider filing exclusively state law claims to keep the case in state court. For example, if your case arises in a county where juries have a history of making awards against police officers for misconduct, then you will want to try your case there. Another advantage is that under Maryland law police officers do not have public official immunity for either intentional torts or a violation of a citizen's rights under the State constitution.[5] Also, a claim under the Maryland Constitution can impose liability under respondeat superior against the county or municipality which employed the officer.[6] This is significant because the plaintiff has a right to insist that the jury know that the officer's employer is on the hook for damages. Most jurors think that the police officer will have to pay any judgment when, in fact, that is rarely so. Savvy defense counsel want jurors to believe the officer will pay the judgment in order to keep the award down. Another advantage to state court is that, should your case be appealed, the Maryland appellate courts are widely considered to be less conservative, and more plaintiff friendly, than the 4th Circuit Court of Appeals.

State law claims, however, have two disadvantages: first, the claims are subject to the damage caps imposed by the Local Government Tort Claims Act, which limit recovery to $200,000 per claim, $500,000 aggregate,[7] or, if the officer is a state official, by the State Tort Claims Act, which limits recovery to $200,000 to "a single claimant from injuries arising from a single incident or occurrence."[8] These caps are absurdly low, especially when you consider that a police officer's use of excessive force can result in serious injury or death. In all cases, counsel should vigorously challenge the constitutionality of such caps.[9] Second, state law does not provide for an award of attorney's fees to a prevailing plaintiff.

If the client's damages are likely to exceed the state caps, or if the client's damages are not likely to cover attorney's fees, then you will want to file federal claims along with the state law claims. Under 42 U.S.C. § 1983, the vehicle for bringing a federal civil rights claim, state law caps on damages do not apply because they are inconsistent with the statute's twin goals of deterrence and adequate compensation.

In federal court, the old hobgoblin is the defense of qualified immunity. A detailed discussion of this defense is beyond the scope of this short article, but suffice it to say that the defense, in simple terms, is this: if a reasonably well-trained officer would have believed that his actions were lawful, then the officer has immunity for his conduct. If the officer can demonstrate that the law clearly did not prohibit his actions, the officer wins. Whether the law was "clearly established" and whether the officer should have appreciated that his conduct was unlawful has at times led to some bizarre results and can make the defense of qualified immunity a bit of crap shoot.[10] Often as not, success or defeat will depend on the judge. In any event, in federal court you can expect a motion for summary judgment based on qualified immunity at the end of discovery. Therefore, it is imperative that every deposition must be conducted with the aim of adducing facts which tend to prove that a reasonably well-trained police officer would not have done what the defendant police officer did in your case. Start your legal research early and find those cases which show that the law is fairly well established. I've found that it usually is.

In addition, the lawyer will want to request in discovery the documents that will assist in overcoming the immunity defense. The police department's general orders or regulations are a good start. Often most police departments issue regulations which govern the use of force, particularly lethal force; the use of police dogs, batons and night sticks; high speed vehicle pursuits; and the like. Also, the officer's training records should be obtained. Lessons plans, instruction manuals, and similar documents may

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[5] *DiPino v. Davis*, 354 Md. 18, 51, 729 A.2d 354 (1999).

[6] 354 Md. at 52-53.

[7] Md. Code, Court's Article, § 5-303.

[8] Md. Code, State Govt. Article, § 12-104.

[9] See, Article 19 of the Maryland Declaration of Rights, which guarantees "[t]hat every man, for any injury done to him in his person or property, ought to have a remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without denial, and speedily without delay, according to the Law of the land."

[10] *Robles v. Prince George's County, Maryland*, 302 F.3d 262, *petition for rehearing denied*, 308 F.3d 437 (2002)(qualified immunity granted to police officers who, to spite another police agency, tied arrestee to a pole behind a shopping center early in the morning and abandoned him for no legitimate law enforcement purpose).

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also be relevant. I've seen several cases in which the police officer has struck a person's head with a nightstick or baton. Police training manuals universally prohibit blows to the head.[11] Often as not, the training records and departmental orders are admissible.[12]

If the case is one of excessive force and involves more than a simple use of the hands by the officer, the lawyer may want to consider using an expert in police practices relevant to the instrumentality or practice which resulted in the use of force. This is particularly true in cases involving shootings, dog bites, and high speed pursuits. Police officers will offer various technical explanations for their actions. Often, jurors will accept these explanations on faith because they don't know any better. An expert can clarify the technical aspects of the case and often undermine the officer's account of the incident.

If the judge grants summary judgment on qualified immunity, you are forced to appeal. By reputation, the United States Court of Appeals for the Fourth Circuit is a tough venue for plaintiffs in Sec. 1983 cases. I have had some luck, however, in cases where the Court has conscientiously searched the record and found genuine issues of fact which are shown clearly by the record. If you are successful on appeal, and then ultimately prevail at trial, the defense will ultimately have to pay the piper, including your attorney's fees on the appeal.

Finally, to achieve victory in these cases, you must have a theory of the case which *compels* the jury to decide the case in your favor. One case in which I was involved illustrates this point. A Prince George's County police officer, Officer Carlton Jones, shot and killed Prince Jones, Jr. (no relation), a 26-year-old African American Howard University student and fitness trainer. Officer Jones asserted that he shot in self-defense when Prince Jones rammed his car twice into the officer's unmarked SUV. The shooting took place in a quiet residential street during the early morning hours in Fairfax County, Virginia. Officer Jones was a narcotics officer working undercover. He looked the part of a criminal. We were fortunate to have a photograph of him taken shortly after the shooting. It depicted a menacing looking individual with long scraggly hair. That night, Officer Jones followed Prince Jones for several miles, from Maryland, into the District of Columbia and then into Virginia. It turned out that Officer Jones was mistaken and followed the wrong car, ignoring several facts about the car which would have told him that he had the wrong car. Our theory of the case was not so much that the officer followed the wrong car, but that the deadly encounter took place because the officer failed to do what any police officer should have done – he failed to identify himself to Prince Jones and thereby provoked Prince Jones to take defensive action. We knew that based on his background, Prince Jones had no reason to attack a police officer. He was driving to his girlfriend's house and was not involved in criminal activity of any kind. He had also enlisted in the US Navy's elite submarine program and was set to start his enlistment in a few months. Prince Jones was not looking for trouble that evening. When Prince Jones got to Virginia, it was clear that he knew he was being followed by this menacing individual and that he pulled into a driveway to elude his pursuer. The officer drove past the driveway. Prince Jones then drove out of the driveway and turned away from the officer. Although the officer acknowledged that his cover had been blown, he immediately turned his car around to go in the direction of Prince Jones' vehicle. At this point, Prince Jones stopped his vehicle and then put it into reverse, striking the officer's SUV. The officer testified, however, that there was a break in the action: he stated that Prince Jones got out of his jeep and approached him, at which point he identified himself as a police officer. According to the officer, it was after he identified himself that Prince Jones got back into his car and immediately rammed the officer's SUV twice, at which point he fired his gun 16 times at Prince Jones. We simply knew that Prince Jones would not have attacked a police officer. A woman happened to look outside her window to the street in front of her house and saw the incident unfold. She testified that she saw the two vehicles side by side in the street, as if the drivers were speaking to each other, and then she saw Prince Jones' vehicle pull away and the officer's SUV turn around to follow the other vehicle when she saw Prince Jones' vehicle begin to ram the SUV. What was critical to our theory of the case was that the woman did not see Prince Jones get out of his vehicle at any time. Her testimony directly contradicted the officer's and enabled us to cast doubt on the officer's testimony that he had identified himself as a police officer. In an interview with one of the jurors after trial, I learned that the jury did not believe that the police officer had identified himself as such. This was critical to the determination that the officer was not justified in using lethal force against a person who was acting solely to defend himself against a potential threat.

Find the theory which rings true and fulfills the jury's quest to render justice in the case. This is the way to win any case against the police.

As a final parting thought, a lawyer who prevails and vindicates his or her client's constitutional rights will feel a tremendous sense of accomplishment and pride, knowing that in no small measure he or she has upheld the rule of law.

[11] *Kopf v. Skyrm*, 993 F. 2d 374, 379-80 (4th Cir. 1993).

[12] For an excellent discussion of the issue whether such police general orders are admissible, see Judge Harrell's concurring and dissenting opinion in *Richardson v. McGriff*, 361 Md. 437, 505-11, 762 A.2d 48 (2000).