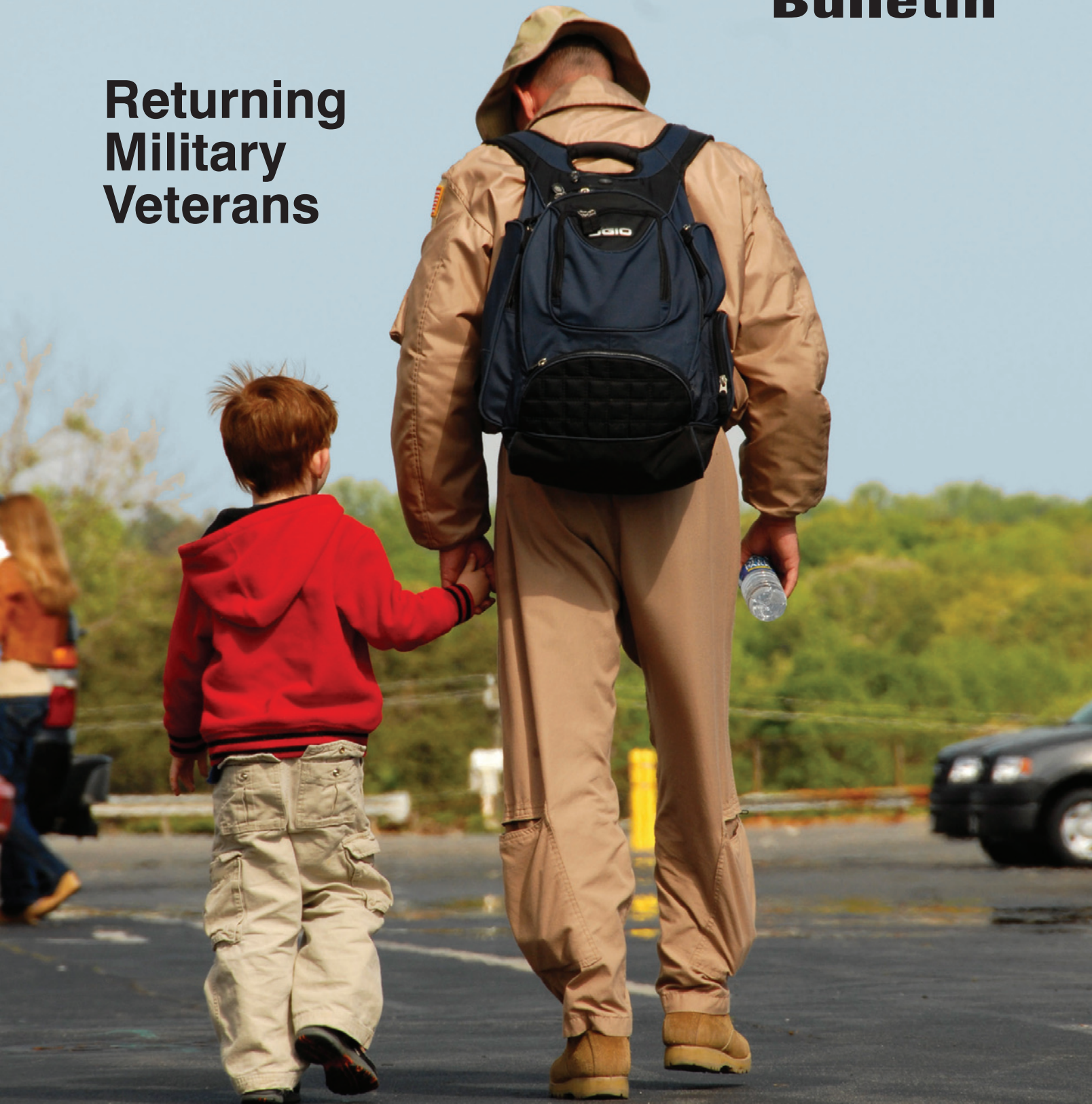




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Returning Military Veterans





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Robert S. Mueller III
Director

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FBI Law Enforcement Bulletin

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The Returning Military Veteran ***Is Your Organization*** ***Ready?***

By JEFF HINK

“Returning
law enforcement
veterans have served
the nation honorably
and heroically”



A young highly regarded officer and decorated veteran returns home from deployment overseas, excited to rejoin family members at home and serve again with fellow officers. He could hardly wait to rekindle relationships and get back to the community he loved. However, upon his return, other employees seemed uneasy around him, unsure if he had changed. The agency never had sent one if its own off to war. Unfortunately, the officer's transition back to life at home did not go as smoothly as he had hoped.

Many law enforcement officers nobly serve their country not only at home but also abroad. As they come back from combat, their agencies will have challenges to address. To this end, these departments must adequately prepare for

the eventual return of reservist personnel from deployment and have reacclimation measures in place that will benefit the employees, their families, fellow officers, and the community. An effective plan can help accomplish this goal.

IMPORTANT ISSUE

As of November 2008, more than 120,000 members of the National Guard and military reserves have been activated as part of recent war efforts.¹ Public safety professionals represent roughly 10 percent of these reservists.² Not only have deployments involved a higher proportion of the armed forces but they have lasted longer; further, soldiers commonly are redeployed and have infrequent breaks between deployments.³

At the same time, the wars in Iraq and Afghanistan have

seen historically lower casualty rates of the killed or wounded than in earlier prolonged wars, such as those in Vietnam and Korea.⁴ However, a different type of casualty has begun to emerge—invisible wounds, such as mental health issues and cognitive impairments resulting from deployment experiences.

Upward of 35 percent of returning troops may experience mental health issues, such as major depression and generalized anxiety, and seek help for such problems through military programs.⁵ Common factors leading to increased psychological stress in soldiers include encountering roadside bombs, improvised explosive devices (IEDs), and suicide bombers; handling human remains; killing an enemy; seeing fellow soldiers and friends dead or injured; and experiencing helplessness (e.g., an inability to stop violent situations).⁶ Further, more than 26 percent of troops who have served in combat may suffer from post-traumatic stress disorder (PTSD), an anxiety condition that can develop after direct or indirect exposure to a terrifying event or ordeal in which someone inflicted or threatened grave bodily harm.⁷ Unlike physical wounds of war, these conditions—although they affect mood, thoughts, and behavior—usually remain invisible to other service personnel, family



Captain Jeff Hink serves with the Redondo Beach, California, Police Department.

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Unlike physical wounds of war, these conditions...often go unrecognized and unacknowledged.

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members, and society in general; they often go unrecognized and unacknowledged.⁸

In 2006, 99 Army soldiers committed suicide, the highest rate in 26 years.⁹ Key factors, such as failed relationships, legal and financial trouble, and job stress, motivated the victims to end their lives. Research conducted by the U.S. Department of Veterans Affairs found that more than one-half of the veterans who committed suicide after returning home from the war consisted of National Guard or reserve members. One member of the U.S. Senate

Committee on Veterans' Affairs said, "I know members of our Guard and Reserves oftentimes don't think of themselves as veterans, they see themselves as going back to their same jobs; they sort of disassociate themselves with the VA system."¹⁰

Within the next 5 years, service members and reservists who have helped defend their country against terrorism abroad will complete their tours of duty and return home to their communities, families, and jobs. Because a segment of these individuals may experience mental health issues, such

as PTSD, they could find it difficult to assimilate back into society. In addition, a portion possibly may come to the attention of law enforcement because of domestic violence or other criminal activity, homelessness, or substance abuse.

EFFECTIVE MEASURES

Law enforcement executives must prepare for the eventual return of deployed personnel back to the communities they serve. Proper preparation will equip the agency with the tools and resources necessary to



ensure that these veterans are welcomed and reacclimated to their agency with open arms and that other personnel know what to expect during the transition period. Fortunately, programs and services exist at some agencies that can serve as models.

Each of the highlighted examples has proven successful for the organizations that have created them. The size of the agency and the number of personnel deployed should dictate the appropriate reservist reacclimation program. Law enforcement executives should realize the role such programs will have in maintaining healthy agencies.

Military Liaison Program

Created in 2003, the Los Angeles Police Department's (LAPD) Military Liaison Program (MLP) strives to offer a central point of contact to handle the many concerns and inquiries from deployed officers' families. The MLP has evolved to include assisting personnel before, during, and after their military leave with any of their needs, including benefits, promotions, and transfers. The department also has instituted a reintegration program to provide returning personnel retraining, physical and mental health assessments, and background checks.¹¹ About 500 of LAPD's 9,500 officers have been deployed to the war effort and

have engaged the MLP since its inception. "The goal of the program is to ensure the veteran remains part of the LAPD family during their deployment and to look out for their mental health."¹² Two full-time military liaison officers (MLO) staff the program at a cost, including salaries, benefits, and other overhead, of about \$300,000 per year.¹³

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Proper preparation will equip the agency with the tools and resources necessary to ensure that these veterans are welcomed and reacclimated....

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Military Activation Committee

In 2001, the Los Angeles County Sheriff's Department (LASD) implemented a Military Activation Committee (MAC) to address the needs of reservists called to active duty.¹⁴ Since 2002, the agency has seen about 500 of its 10,000 sworn personnel deployed.

The 4-day reintegration program developed by the MAC includes a welcome from the

unit commander, updates on department policy and procedure, a meeting with a department psychologist, firearms qualification, and a tactical refresher course.¹⁵ Each unit within the LASD staffs one of the department's 80 MLOs who assist their unit commander, troubleshoot issues, and provide advice and counseling to returning veterans. The LASD also has established a "Vets for Vets" peer support program to provide long-term mentorship, guidance, and assistance. "If you are paying attention to the veterans and communicating, you stand a better chance of achieving success."¹⁶ "Training and dialogue are key attributes of the program so that other department personnel don't think that the returning veterans have been off on a paid vacation."¹⁷

The Santa Monica Experience

For small and moderate-size agencies, other alternatives exist. For instance, the Santa Monica Police Department (SMPD) has had 6 of its 200 officers deployed since the beginning of the Gulf War in 2001. The agency created an informal program to address returning veterans. According to the SMPD deputy chief of police, these employees generally have a celebrity-like status with coworkers during the first few days of their return to work, which has helped

ease their transition process.¹⁸ SMPD's 7- to 10-day reacclimation period includes a welcome-home meeting between the returning officer and members of the command staff, a department orientation, a technology update, and the opportunity for the employee to temporarily work with a partner officer. Employees typically are back on their own within 1 month of their return to the agency. "We have been able to completely submerge our returning employees back into the police

culture without any negative repercussions."¹⁹ The deputy chief would like to see the program become formalized in the future: "It should become transparent and move beyond our current administration. Some veterans may need more or less time to reacclimate. Formalizing the program will allow that to occur."²⁰

One SMPD officer who also serves as a U.S. Marine Corps major is preparing for his third military deployment to Iraq since his hire. He noted that

returning veterans being well received by their agency has an immense value and helps underscore officers' belief that their military service is morally right. The support and friendly atmosphere the SMPD offered him upon his return from two previous deployments definitely aided his transition process.²¹

RECOMMENDED RESPONSE

Law enforcement organizations, especially those that



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may hire or currently employ military reservists, should consider a formalized plan to provide veterans and their families the assistance and support they need and to facilitate the smooth transition of the employee to and from the department. Such a program also can help personnel better understand the situation. Further, it could open lines of communication between the agency and representatives from the various branches of the military. Four important attributes of this plan are

- 1) the creation of an MLO position within the organization;
- 2) the provision of education to department personnel about the pre- and postdeployment process;
- 3) outreach to deployed employees and their families; and
- 4) the implementation of a standardized reacclimation process for returning personnel.

Liaison Officer

The LAPD and the LASD have achieved enormous success in developing and implementing the MLO position in their agencies. This greatly helps these departments to maintain awareness of and keep close contact with deployed personnel. The size of the

organization and the number of personnel experiencing military deployments can determine if the position is a full-time or ancillary role. Smaller agencies may consider employing a civilian in a full- or part-time capacity, depending on the needs of the organization and its budgetary constraints.

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Law enforcement organizations... should...provide veterans and their families the assistance and support they need....

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Departments should choose a rational, mature, highly respected individual to fill this position—ideally, a veteran familiar with military protocol and procedure. The MLO will facilitate communication between the deployed employee and the organization. The person will assist, counsel, and mentor the reservist before, during, and after deployment. The MLO also may function as the liaison between the agency and representatives from the various branches of the armed forces.

Department Education

Educating department personnel about what they should expect before, during, and after deployment and about PTSD will reduce misconceptions and give employees a broad understanding of agency protocols; the issue of PTSD in the military; and how the condition affects veterans, friends, and family members. The training should introduce department members to the warning signs of PTSD and the available treatment options and also reduce the possibility that employees will fear or avoid returning veterans.

Employee Outreach

Organizations can reach out in a number of ways. For example, agencies should consider providing time for their reservists to prepare for military activation.²² A department-sponsored celebration just prior to employees' departure can help reassure them that the agency looks forward to their return to work. During the deployment, designated members of the department, such as the MLO, should maintain close contact with the deployed veterans' family members to identify needs that the agency can assist with. Through traditional mail and more modern means, the department can maintain

communication with the deployed officers to, for instance, provide agency news and updates. Another department-sponsored celebration upon the employees' return to work will highlight their value and importance to the organization. According to one officer, the environment veterans return to plays an important part in how they will view their military service in the future, as well as their psychological ability to readjust to the workplace.²³

Reacclimation Process

Most important, agencies must develop and implement a reacclimation program. Because more than 1 in 4 returning veterans will experience PTSD or other mental health issues, a portion of returning law enforcement veterans may fall into this category. The overall purpose of the reacclimation process is to provide a transparent procedure and clear expectations to veterans as to what will occur when they return to work.

The LASD's 4-day reintegration plan represents an excellent example of what agencies can do to ensure that returning reservists receive the essential information and training necessary to equip them for their return to duty and to limit agency liability. The program provides the

opportunity for employees to consult with the personnel department regarding payroll and benefit needs; review department policies and procedures, including updates that may have occurred during their absence; participate in firearms qualification exercises; obtain tactical training; and become reacquainted with the unit commander and assigned MLO. Further, as a key component of the LASD's reintegration plan, veterans consult a department psychologist, not as a fitness-for-duty examination, but to provide an opportunity for employees to learn about mental health services available to them and their families and to inform them of some of the common

reactions they may experience in the coming months.

CONCLUSION

Returning law enforcement veterans have served the nation honorably and heroically. Their agencies should proactively take care of their needs on a consistent basis before and during their deployment and upon their return to their families and their departments. Agencies should ensure they have appropriate support in place to make military service all it can be for the veteran and the department. Doing so will improve the health and welfare of the law enforcement organization and will better prepare the agency for instances that call for U.S. military action. ♦



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Endnotes

¹ U.S. Department of Defense, "National Guard (in Federal Status) and Reserve Activated as of November 25, 2008," <http://www.defense.gov/Releases/Release.aspx?ReleaseID=12373> (accessed March 22, 2010).

² S. Curran and E. Ritchie, "Warrior Transition by Army Reserve and National Guard Personnel from Combat Operations in Iraq to Policing in the United States" (presentation, 113th Annual Convention of the International Association of Chiefs of Police, Police Psychological Services Section, Boston, MA, October 14, 2006).

³ L. Jaycox and T. Tanielian, ed., *Invisible Wounds of War* (Santa Monica, CA: RAND Corporation, 2008), xix.

⁴ Ibid.

⁵ U.S. Department of Justice, Office of Community Oriented Policing Services, *Combat Deployment and the Returning Police Officer* (Washington, DC, 2008).

⁶ Jaycox and Tanielian, 5.

⁷ Jaycox and Tanielian, 3.

⁸ Jaycox and Tanielian, xx.

⁹ "High Rate of Suicides Seen in Soldiers"; <http://articles.latimes.com/2007/aug/16/nation/na-suicides16> (accessed March 22, 2010).

¹⁰ K. Hefling, "VA Chief Addresses Veteran Suicides," *The Bakersfield Californian*, February 13, 2008.

¹¹ "Military Liaison Program"; http://lapdonline.org/search_results/content_basic_view/6491 (accessed March 22, 2010); and U.S. Department of Justice, Office of Community Oriented Policing Services. Any department considering measures that involve physical and psychological exams and background checks as part of the reemployment process must ensure that they comply with the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.

¹² LAPD Captain Duane Hayakawa, who oversaw the program from 2004 to 2008, interview by author.

¹³ Ibid.

¹⁴ U.S. Department of Justice, Office of Community Oriented Policing Services, 22.

¹⁵ "4 Critical Days: LASD's Transition from Foreign Battlefield to Domestic Streets"; <http://www.policeone.com/patrol-issues/articles/1690036-4-critical-days-LASDs-transition-from-foreign-battlefield-to-domestic-streets/> (accessed March 22, 2010).

¹⁶ LASD Commander Lynda Castro, who had led the MAC since 2003, interview by author.

¹⁷ Ibid.

¹⁸ Phil Sanchez, interview by author.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Officer Douglas Woodhams, interview by author.

²² Organizations must be aware of the protections provided to employees under the Family and Medical Leave Act (FMLA) and, perhaps, consider allowing additional time for personnel to prepare for military activation.

²³ Woodhams.

Wanted: Notable Speeches

The *FBI Law Enforcement Bulletin* seeks transcripts of presentations made by criminal justice professionals for its Notable Speech department. Anyone who has delivered a speech recently and would like to share the information with a wider audience may submit a transcript of the presentation to the *Bulletin* for consideration.

As with article submissions, the *Bulletin* staff will edit the speech for length and clarity, but, realizing that the information was presented orally, maintain as much of the original flavor as possible. Presenters can e-mail their transcripts. Or, they can mail them, typed and double-spaced on 8 1/2- by 11-inch white paper with all pages numbered, along with an electronic version of the transcript saved on computer disk. Send the material to: Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Outreach and Communications Unit, Quantico, VA 22135, or to leb@fbiacademy.edu.

Leaders Find the Positives

A task force team was driving back to the office to brief the squad supervisor following a recent operation. The squad supervisor had been on-site and had noted some operational challenges for the team leader. Luckily, the squad pitched in where needed and overcame these, resulting in a successful and safe operation.

When they got back to the office, the squad supervisor asked the team leader into his office for what the team leader thought would be a serious rebuke. Having been on other operations throughout his career, he knew that many supervisors seemingly took great pleasure at chastising people when they made mistakes. The squad supervisor was relatively new to the squad, and this was his first operation observing the team leader. As they walked into the office, the supervisor, who had arranged two chairs around a small unobtrusive coffee table, asked the team leader to make himself comfortable. By averting his eyes from the supervisor, the team leader displayed his nonverbal discomfort because he knew what he could have done better. The supervisor noted this and began speaking. To the team leader's surprise, the squad supervisor congratulated him on the successful operation and commended him for his excellent ideas. As the squad supervisor chatted with him, the team leader began to open up a bit more. The squad supervisor, a keen observer of nonverbal behavior, recognized that the team leader was aware of some of his recent shortcomings. The squad supervisor also realized that he had effectively de-escalated the team leader's discomfort, resulting in his being in a better state of mind to discuss his recent challenges.

Following the pleasant exchange, the squad supervisor tilted his head slightly, smiled, and asked the team leader what he would do differently in the next operation. Self-assured because of the supervisors obvious encouragement and recognition of his strengths, the team leader quickly leaned in toward the supervisor and outlined a number of things. The team leader then asked the supervisor what he thought. The supervisor also leaned in and nodded as he commended the team leader on a good, honest self-assessment and added a few comments of his own. The team leader nodded in agreement. The supervisor asked if there was anything more that they did not cover. The team leader smiled as he shook his head, thanked the supervisor for such a productive debriefing, and commented on how excited he was to put some of the new ideas into action on the next operation.

Reading and understanding how to bring out the best in people is the great leadership challenge. Effective leaders learn to recognize comfort from discomfort in their people's demeanor and know that it is easier to teach and mentor by beginning an instructive dialogue with what went well. When the leader can nonverbally de-escalate discomfort and begin an enlightening dialogue with all that went right, many team members will inevitably want to do better and will continue to strive for excellence because they know it is recognized by their leaders. ♦

Special Agent Robin K. Dreeke, an instructor at the Counterintelligence Training Center and an adjunct faculty member of the Leadership Development Institute, prepared this Leadership Spotlight.

Maintaining Ethical Behavior

By George Cartwright, M.A.



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As everyone does, those who take an oath to protect and serve the public also face ethical dilemmas. When such situations arise, officers carry the burden of deciding which road to take. They deal with temptations continually. Most law enforcement personnel make the right choices; however, as in any profession, some have made poor decisions. And, once a transgression becomes public, it often leaves those who know the perpetrator shocked and confused.

Ethical decision making simply involves thought processes. Of course, life is not always black and white with obvious answers. In the wake of a bad choice by a law enforcement officer, questions arise. Why did he take such a stupid risk? What was she thinking? Did they expect to get away with it? Why do people sometimes behave unethically?¹

Officer Cartwright serves as a training coordinator with the Clovis, California, Police Department.



Organizational Behavior

Agency executives set the tone for what constitutes acceptable behavior. Therefore, leaders must not only model appropriate actions but ensure that personnel who cross ethical lines face appropriate consequences. Otherwise, unethical behavior likely will increase.

Moreover, everyone likes receiving recognition or rewards for a job well done. Leaders must ensure that personnel receive appropriate recompense for ethical behavior. Agencies may feel that high ethical standards simply are expected. That is true. Those burdened with upholding the law must live above reproach. However, this does not mean that properly modeled ethical behavior does not deserve recognition. Public acknowledgment of exceptional principled conduct provides other personnel the opportunity to visualize exactly what the department expects from them. To identify issues and understand consequences, people have to be educated.

Through a simple assessment, leaders can determine if employees receive sufficient instruction. Each negative answer to several questions exponentially amplifies the likelihood of unethical behavior.²

- Has the agency actively promoted an environment of ethics and professionalism?
- Do leaders encourage employees to act according to the spirit, as well as the letter, of the law?
- Does the performance appraisal system feature an ethics component?
- Are personnel expected to play it safe, rather than bring attention to problems?
- Is communication open, truthful, and unrestricted?

- Do leaders seek out different perspectives and potentially disconfirming points of view?
- In the last 2 years, has the organization presented ethics training?
- Are employees expected to fit into the mainstream?

Identification of the issues makes the consequences easier to understand. Law enforcement organizations face the challenge of moving from a reactive mind-set to a proactive one. All too often, changes result from hindsight, not foresight. Agencies must proactively eliminate the barriers that cause unethical behavior. To this end, adopting counternorms and falling into groupthink represent the two most dangerous hazards that organizations may encounter.

If, through words or deeds, leaders have sent the message that the agency will tolerate unethical behavior, the organization may adopt *counternorms*, employee-ac-

cepted practices that act contrary to prevailing ethical standards.³ For example, the social order has clearly identified such concepts as being open and honest, following the rules, and acting as a team as valuable traits. Agencies with employees guided by counternorms value being secretive and devious and doing “whatever it takes” to get the job done. Shifting between proper standards and counternorms can create ambiguity, which may lead to unethical conduct.

In an environment rife with unethical behavior, employees may exhibit *groupthink*, a mode of thinking where members of a group show more interest in unanimity than in critical analysis of the issue at hand. Such personnel try to avoid focusing harsh judgment on the ideas of their leaders or colleagues.⁴ Inherent dangers and pitfalls arise in this

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**Why do people
sometimes behave
unethically?**

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situation. “Usually, the more complex an issue, the more likely groupthink can take over; people are less likely to disagree when they don’t have all the facts. It is a process of rationalization that sets in when members of a team begin to think alike. It occurs when a group places higher priority on organizational counternorms that lead to organizational benefits, thus encouraging and supporting unethical behavior.”⁵

Important Choices

When faced with an ethical dilemma, some people have difficulty putting aside their ego and asking for feedback. According to experts, emotionally intelligent individuals deny their ego, possess self-confidence, and seek counsel from others prior to making tough choices.⁶ Law enforcement officers are self-confident and intelligent, so why would they not do so? For them, it is easier said than done. They feel that asking someone else for feedback requires them to be vulnerable to that person.

And, in light of the expectations they feel they must fulfill, police often consider vulnerability as equal to weakness. More specifically, officers seeking feedback may perceive that asking someone else for advice relegates them to a subordinate role. This perception, that it is weak to confer with others, carries danger. Two heads truly work better than one. In this regard, the temptation to behave unethically resembles a flowing river that searches the landscape for the path of least resistance, seeking out the weaker pockets of earth to make traveling easier. Soliciting feedback and sharing the burden enables others to bring attention to those weaker areas so they will not be overwhelmed when the water approaches.

Society’s guardians value courage above most any characteristic, considering it an indispensable commodity. Law enforcement personnel represent the community’s last line of defense. It is the officers who run toward the gunfire. Across the nation every day, agencies conduct training on how to remain courageous under fire. Yet, does it not require bravery to make ethical decisions? While agencies likely will not dispute that fact, how often do officers receive ethics training? Of course, law enforcement personnel must hone the skills that could mean the difference between life and death. However, officers face ethical predicaments more often than shootouts in the street. Moreover, ethical breaches have a tremendous potential to ruin careers.

Why does the subject not receive more attention? Perhaps, the very word *ethics* can raise many questions. Is it just a fancy word for doing the right thing? Will it be interpreted as another way of controlling people under the guise of a moral code? Will the training really make a difference? It takes courage to lead in this area. It takes courage to

conduct a cultural analysis of the organization to determine how it stacks up and to create strategies for a desirable outcome. The key to success lies in discussing ethics and equipping the men and women of law enforcement with the tools needed to be victorious when faced with a dilemma.

Officers display courage when they must make a decision in the midst of several unknowns. Investigators make cases on tangible facts. Unknowns that hang in the air like so many gnats are death to an investigation. But, an investigation can be suspended; an ethical dilemma cannot be avoided. Just as running toward the gunfire requires bravery, it takes courage to make a decision when

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**...does it not
require bravery
to make ethical
decisions?**

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FBI Law Enforcement Bulletin Author Guidelines

not everything is known. And, it takes wisdom to use all available resources to close the gap between the known and the unknown.

Conclusion

Anyone easily can get caught up in circumstances. Some law enforcement personnel call it "tunnel vision." When it occurs, officers simply can turn their head to the right or to the left. That small movement disengages the brain long enough to bring perspective back to the situation. This also applies to ethical dilemmas.

The potential for unethical behavior always looms, and no one is above it. The difference between success and failure lies in the strategy employed. Agencies and their officers must face ethical dilemmas proactively, with measures already in place. Ethical decisions are not always easy, and the right answer does not always make itself readily known. It is vital to a department's success that those involved are not caught with their guard down. ♦

Endnotes

¹ The Interactionist Model of Ethical Decision Making in Organizations asserts that three qualities make up ethical thinking: possessing the aptitude to identify ethical issues and understand the consequences of other courses of action, having the self-confidence to solicit feedback when making a decision, and having the courage to make a decision when several unknowns linger. See Kenneth Andrews, "Ethics in Practice," *Harvard Business Review* (September/October 1989): 99-104.

² Joanne Speers, Jan Perkins, and Arne Croce, "Assessing the Ethical Culture of Your Agency," *Public Management* (January/February 2007): 10-12.

³ Ronald Sims, *Ethics and Corporate Social Responsibility: Why Giants Fall* (Santa Barbara, CA: Praeger Publishers, 2003).

⁴ Donald Brown and Donald Harvey, *An Experiential Approach to Organization Development* (Upper Saddle River, NJ: Prentice Hall, 1992).

⁵ Sims, *Ethics and Corporate Social Responsibility*.

⁶ Kenneth Andrews, "Ethics in Practice."

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The FBI Laboratory Division's New Forensic Anthropology Program

The FBI's Laboratory Division is pleased to announce a new service: forensic anthropology, the analysis of human skeletal remains in a medico-legal context. It is a branch of physical anthropology concerned with the interpretation of skeletal features that may be shared among groups, reflect an individual's life history, make a person unique, or indicate how and when someone may have died.

The Forensic Anthropology Program (FAP), a subgroup of the Trace Evidence Unit (TEU), began its pilot year in April 2010. The FAP was established to provide both laboratory analysis and field assistance for cases involving skeletal remains. Like other FBI Laboratory services, forensic anthropological examinations are provided free of charge

to duly constituted law enforcement agencies in support of investigative and intelligence priorities. The FAP is currently staffed by two full-time forensic anthropologists.

Laboratory analyses that FAP anthropologists can conduct include

- determination of whether or not suspect material is bone;
- examination of whether bones are human or nonhuman;
- resolution of commingling (if more than one body/skeleton is present);
- estimation of a deceased's age, sex, ancestry, and stature;
- analysis of skeletal trauma, including projectile, blunt force, sharp force, and burning;

- identification of skeletal features that may help lead to identification;
- confirmation of identity by comparison to medical records; and
- assistance with facial approximations prepared by forensic artists.

Bones submitted for analysis should be individually packaged in paper bags or other breathable material and marked with biohazard or refrigeration stickers as appropriate. Good judgment should be exercised when packaging bones to minimize damage from contact or movement during shipping. If in doubt, please contact the Laboratory with questions about submitting skeletal remains. Skeletal remains submitted to the Laboratory also can be forwarded for DNA analysis.

FAP anthropologists also may deploy to the field to assist with

- detection of clandestine graves;
- surface searches for scattered skeletal remains;
- identification/location of burned or submerged remains;
- recovery of surface or buried remains; and
- preliminary field analyses, which can potentially eliminate the collection and analysis of nonforensic material (such as animal bones).

Deployments are coordinated through the Evidence Response Team Unit (ERTU). Please call ERTU with requests for anthropological field assistance.



FAP anthropologists also can provide lectures and training upon request. For more information about the FBI's Forensic Anthropology Program or for questions regarding a specific case, please call TEU at 703-632-8449 or e-mail one of the anthropologists: Dr. Angi Christensen (angi.christensen@ic.fbi.gov) or Dr. Richard Thomas (richard.m.thomas@ic.fbi.gov).

The Strategic Communication Plan

By CRIS HOOVER



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"Your system is perfectly designed to give you the results that you get."

—W. Edwards Deming¹

The most important and often least understood factor that moves an organization from strategy development to implementation is strategic communication. Research has shown that "enterprises [often] fail at execution because they go straight to structural reorganization and neglect the most powerful drivers of effectiveness—decision rights and information flow."²

Unfortunately, many government and law enforcement agencies fall into this trap and adopt tactical, short-term communication approaches when responding to their myriad constituencies. Not only does this lack strategy but it can undermine an organization's long-term goals. When agencies fail to implement strategies as envisioned, executives often look for someone or something

to blame. However, as W. Edwards Deming pointed out, they need look no further than the organizational system itself.

Strategic communication entails packaging a core message that reflects an agency's overall strategy, values, purpose, and mission to persuade key stakeholders and enhance positioning. Active, not reactive, it establishes organizational clarity and dissuades freelance endeavors that may serve a few well, but detract from the organization's overall direction and purpose. To this end, one important tool, a solid strategic communication plan (SCP), should synchronize organizational units and align resources to deliver a common core message.³

THE IMPORTANCE OF AN SCP

Of course, an agency must have an underlying strategy in the first place and, ideally, incorporate strategic communications in the policy development process, not address it as an afterthought. In a complex world, leaders cannot simply create a policy, push it down the chain of command, and expect it to automatically come to fruition. Messages bombard people all day every day; a strategically delivered one will resonate better with employees. SCPs can serve this purpose and, from an organizational perspective, facilitate the implementation

of initiatives or major organizational change efforts. At its core, strategic communication must carry a particular unambiguous message that not only reflects an agency's strategy but interacts with a specific vision.

Leaders need to take time to ensure the core message reflects that vision and, if not, take steps to remedy any organizational dysfunctions. Many will find the concept of strategic communication new. However, not properly framing and communicating an organization's core message for targeted audiences will produce mediocre change efforts and dilute overall agency effectiveness.

THE COMPONENTS OF AN SCP

An SCP generally has at least four components, depending on how an agency groups them. Together, they provide a

road map to get from strategy development to implementation.

Rationale Statement

First, a rationale statement makes a concise case for the desired change. For example, an organization wants to begin a structured leadership development program. The agency must articulate why the current process is insufficient. Analyses (e.g., SWOT, gap) can expose organizational deficiencies—for instance, that the present method lacks consistency when, ideally, it would provide interconnected, progressive, and sequential development models built on predictive pillars, such as operational assignments and formal education.⁴ The rationale statement should underscore this sense of here-but-not-yet tension and also summarize the SCP goals and objectives

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that will move the organization toward strategy implementation. It serves as a kind of introduction to the broader SCP.

Situational Analysis

The second section should concentrate on determining where the organization is today and where it wants to go. The SCP must identify issues, challenges, and barriers to communication along the way. To do this, the agency needs to diagnose the existing culture, or how things are done now.

For instance, an agency formally advocates developing tomorrow's leaders today. However, rather than encouraging leadership practices, such as modeling the way, inspiring a shared vision, challenging processes, enabling others to act, and encouraging the heart, the organization consistently promotes into key leadership jobs people with a rigid management style.⁵ This kind of organizational doublespeak often leaves employees frustrated, stifled, and looking elsewhere for creative outlets. An agency that consistently delivers mixed messages, intentionally or not, may get 40 hours per week from employees, but not their passion or spirit.

Facing the reality of how things are done versus how they are said to be done can prove instructive for executives to judge whether an agency's vision serves as a guide or merely

as a set of platitudes. Several diagnostic tools (e.g., SWOT, gap, G2G) exist that can help executives flesh out why an organizational system produces the results it does and, in most instances, will lead them to the formal vision statement.⁶

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Vision

An agency's vision differs from its mission, key performance indicators, or goals. For example, eliminating gang activity from a particular neighborhood, disrupting the flow of drugs through a certain transportation corridor, or reducing violent crime by 10 percent may represent excellent strategic goals, but not vision statements. While various academics and consultants have advocated several vision-building models, most organizational development practitioners agree that the foundation must include an organization's core values, or guiding principles, and an

envisioned future that looks at least 10 years down the road.

Core Values

Plenty of examples exist in both the private and public sectors of organizations that get values right. For instance, any U.S. Marine will cite honor, courage, and commitment as prominent examples. These are drilled into recruits and emphasized throughout their careers and also comprise an integral part of the Marines' public relations efforts and organizational culture. Put another way, the Marines are clear about what they stand for. Even when facing the most difficult circumstances, they take responsibility and act honorably.

Also important, an agency's core values must be known before they become meaningful. Core values are essential and enduring tenets.⁷ If an organization buries them in a policy document, changes them occasionally, or never articulates them to begin with, they are not, by definition, core values. A quick way to gauge whether an agency's stated values truly are genuine core values is to ask employees at random to recite them and to assess whether the current organizational culture reflects those values. When leaders clearly define what principles truly serve as guides, they afford major decisions a sense of consistency and certitude because these can be filtered

through the matrix of well-established core values.

Envisioned Future

Leaders must begin envisioning the future by setting a direction. This differs from making plans—a management process—and almost certainly involves organizational change. Endeavoring to move an agency, especially a government bureaucracy, away from the status quo and toward an alternative future presents a monumental communications challenge, which underscores the need for a good SCP.

Merely announcing an envisioned future by edict or via a one-time medium never works. The change message has to be continuous, specific, memorable, concise, believed, and delivered by a credible guiding coalition. Perhaps most important, words and deeds must remain consistent.⁸ The paradoxical part of envisioning a future, however, is that while it must convey a degree of certainty, it also must be just beyond reach and imbue aspiration. While organizational core values answer questions about identity, an envisioned future addresses direction, both of which contextualize strategic communication goals.

Goals and Objectives

Setting goals encompasses, perhaps, the most crucial stage

of the strategic communication planning process. An effective SCP must identify the fundamental issues facing the organization and provide a framework to achieve articulable goals. Leaders must frame the goals by briefly describing the challenges to overcome and how each specified goal will help advance the overall change initiative. Strategic communication goals should be specific, measurable, attainable, relevant, and time bound (SMART), and each



should be summarized in two or three concise sentences. Generally, three to five SCP goals should prove sufficient without bogging down the process.

An SCP goal should focus attention on particular elements of the desired change. For instance, if an agency seeks to create an environment where innovation flourishes or to become a learning organization, it may strive to have personnel start questioning basic, underlying assumptions and implement double-loop learning, which involves first asking why the

agency follows current practices and then establishes goals and strategies that produce results.⁹ From the results stage, instead of merely focusing on solving problems and adjusting strategy within the existing organizational structure, employees again question underlying assumptions, which leads to necessary adjustments to the goals and strategies. This loop never stops, and it produces an organization that continuously learns.

In a broader context, as sometimes evident in the federal government, an agency may face direct challenges to effectively carrying out its mission, and calls may emerge from various quarters to either consolidate or diffuse statutory authority. This immediately puts an organization in a reactive mode, indicating that an SCP did not exist to begin with. In this example, strategic communication goals within a broader strategy to avoid such challenges in the first place might include establishing a brain trust or guiding coalition to frame the debate before it starts, increasing face-to-face interactions with members of Congress and staffers by 50 percent in 60 days, or telling the agency's story and its successes through a focused public relations campaign and the establishment of a speakers bureau.

Each of these goals must have intermediate objectives and specific timelines as benchmarks. These goals would serve a broader SCP designed to place the agency on firm footing with a unified, coherent message for key stakeholders.

Key Stakeholders, the Message, and Media

For each strategic communication goal, organizations must identify key stakeholders, specific messages for them, and media for appropriate delivery. Navigating this step is key to success. If an agency does not effectively and persuasively deliver its messages, the whole exercise was for naught.

Stakeholders include anyone affected by the strategic communication goal, including employees, citizens, lawmakers, or other groups who have a vested interest in the outcome. Organizations should distinguish key stakeholders between primary (target)—the person or entity with the authority, power, or influence to provide the organization with what it seeks—and secondary (audience), those who may have influence with the target or others affected by the change.

The messages must be tailored for the respective target or audience, and an agency must answer the “what’s in it for me” questions that inevitably

emerge. For law enforcement departments, the message for employees must address how the change will increase effectiveness, esprit de corps, or other relevant cultural issues. Concerning citizens, the message must tell them how their neighborhoods will be safer and their tax dollars better spent. For primary stakeholders, the message must answer why the investment, financial or otherwise, will pay dividends for them in the future.

“An SCP generally has at least four components.... Together, they provide a road map to get from strategy development to implementation.”

Selecting the right medium to either inform of or discuss the change depends on the stakeholders. Most people will more readily accept change when they have some involvement in the process. For employees, this may mean interactive meetings with the chief executive, intranet blogs or threaded discussions, and

dialogue up and down the organizational hierarchy. Effective media for citizen or neighborhood groups might include town hall meetings and timely, helpful information routinely updated on the agency’s Web site. Media options are as varied as a person’s imagination, and executives should look beyond what has traditionally worked to effectively communicate their change message.

CONCLUSION

George Bernard Shaw said, “The single biggest problem in communication is the illusion that it has taken place.” Poor or nonstrategic communication for law enforcement organizations means lost opportunities, reduced effectiveness, diminished morale, and getting stuck in the status quo. By developing a strategic communication plan for the organization’s change efforts, agency leaders not only mitigate distractions but lead with focus and clarity toward an inspired shared vision of the future. ♦

Endnotes

¹ W. Edwards Deming was a statistician, university professor, and business consultant famous for his 14 points for management, credited for Japan’s dramatic increase in manufacturing efficiencies. For additional information, see W. Edwards Deming, *Out of the Crisis* (Cambridge, MA: MIT Press, 1982).

² Karla Martin, Gary Neilson, and Elizabeth Powers, “The Secrets to Successful

Strategy Execution,” *Harvard Business Review*, June 1, 2008, 61-70.

³ Agencies differ as to the frequency and purpose of SCPs. The author has not found any resources that address strategic communication planning specifically for law enforcement.

⁴ SWOT stands for strengths, weaknesses, opportunities, and threats. For additional information, see M. Card and M.R. Fairholm, “Perspectives on Strategic Thinking: From Controlling Chaos to Embracing It,” *Journal of Management and Organization* 15 (2009): 17-30; and Randy Garner, “‘SWOT’ Tactics: Basics

for Strategic Planning,” *FBI Law Enforcement Bulletin*, November 2005, 17-19. A gap analysis focuses on current organizational structures, those desired, and the gap separating the two. For additional information, see G.R. Jones, *Organizational Theory: Text and Cases* (New York, NY: Addison-Wesley, 1998): 525-547.

⁵ James Kouzes and Barry Posner, *The Leadership Challenge* (San Francisco, CA: Jossey-Bass, 2002).

⁶ Additional information about G2G (Good to Great) can be found at <http://www.jimcollins.com>, (accessed January 4, 2010).

⁷ Jim Collins and Jerry Porras, “Building Your Company’s Vision,” *Harvard Business Review*, September/October 1996.

⁸ John Kotter, “What Leaders Really Do,” *Harvard Business Review*, May/June 1990.

⁹ Double-loop learning, as well as single-loop learning, was pioneered by Harvard Business School Professor Chris Argyris and Massachusetts Institute of Technology Professor Donald Schon. For additional information, see <http://www.infed.org/thinkers/argyris.htm>, (accessed January 5, 2010).

Bulletin Honors



Lewiston Police Memorial

The Lewiston, Idaho, Police Department recently unveiled a monument honoring its fallen officers. The memorial plaza, located in front of the agency, features the polished stone monument draped with an American flag; the department’s badge is on the front, and the names of its five officers who died in the line of duty are written on the back. Benches and an adjacent fountain sit nearby.



Preliminary Crime Statistics for 2009

The FBI's Preliminary Annual Uniform Crime Report showed that violent crime in the nation decreased 5.5 percent and property crime declined 4.9 percent when compared with data from 2008. Data in the report came from 13,237 law enforcement agencies that submitted 6 to 12 months of data in both 2008 and 2009. The complete Preliminary Annual Uniform Crime Report is available exclusively at <http://www.fbi.gov/ucr/prelimsem2009/index.html>.

Violent Crime

All four violent crime offenses (murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault) declined nationwide in 2009 when compared with 2008 data. Robbery dropped 8.1 percent, murder decreased 7.2 percent, aggravated assault declined 4.2 percent, and forcible rape fell 3.1 percent.

Violent crime declined in all city groups. The largest decrease, 7.5 percent, was in cities

with populations ranging from 500,000 to 999,999 inhabitants. Violent crime dropped 4.0 percent in the nation's metropolitan counties and 3.0 percent in nonmetropolitan counties.

Cities with 25,000 to 49,999 inhabitants were the only city population group to report an increase in the number of murders, 5.3 percent. The nation's nonmetropolitan counties also reported an increase in the number of murders, 1.8 percent.

Forcible rape trends dropped in all city population groups. The largest decrease was 7.3 percent in cities of less than 10,000 residents. Metropolitan counties reported a 3.7 percent decline in the number of rapes, but the number of rapes reported in nonmetropolitan counties rose slightly, 0.3 percent.

All population groups reported decreases in the volume of robbery offenses in 2009. Of the city groups, those with populations of 100,000 to 249,999 had the largest decrease at 10.3 percent. Metropolitan counties reported

The number of aggravated assaults dropped in all population groups, with cities of 500,000 to 999,999 inhabitants reporting a 6.3 percent decrease. Aggravated assaults fell 3.7 percent in nonmetropolitan counties and 3.0 percent in metropolitan counties.

Property Crime

All property crime offenses (burglary, larceny-theft, and motor vehicle theft) decreased in 2009 when compared with 2008 data. Motor vehicle theft showed the largest drop in volume at 17.2 percent, larceny-thefts declined 4.2 percent, and burglaries decreased 1.7 percent.

reported the biggest decrease in the offenses that comprise property crime: a 21.1 percent drop in motor vehicle theft, a 5.7 percent decline in burglary, and a 5.5 percent decrease in larceny-theft. In the nation's nonmetropolitan counties, larceny-thefts fell 9.5 percent; in metropolitan counties, larceny-thefts declined 5.9 percent.

The only population group to indicate a rise in any type of property crime was in nonmetropolitan counties, where burglary rose 0.5 percent.

In comparing 2008 and 2009 data by region, law enforcement agencies in the West reported the biggest decline in property crime, with a decrease of 6.8 percent. Property crime declined 5.6 percent in the Midwest, 5.3 percent in the Northeast, and 3.2 percent in the South.

Arson

Arson offenses, tracked separately from other property crimes, declined 10.4 percent nationwide. All population groups reported decreases in the volume of arson offenses. In addition, arson fell in all four of the nation's regions: 11.6 percent in the West, 10.6 percent in the South, 9.2 percent in the Midwest, and 8.6 percent in the Northeast. ♦



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Confronting Science

Melendez-Diaz and the Confrontation Clause of the Sixth Amendment

By CRAIG C. KING, J.D.

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"In this country if someone accuses you of something...the phrase still persists, 'Look me in the eye and say that'"

Justice Antonin Scalia

"The eyes are the windows to the soul"

Persian Proverb

In an interesting turn of its docket this year, the U.S. Supreme Court agreed to hear a case with an almost identical issue as a controversial decision from its last term.¹ That second bite at the apple, however, did not bear fruit, with this year's Court issuing a one-sentence opinion and sending it back down to the Virginia

Supreme Court, merely instructing its members to make their ruling consistent with last year's *Melendez-Diaz v. Massachusetts*.² The *Melendez-Diaz* decision addressed the practice of using evidence affidavits in lieu of in-person testimony by forensic examiners, holding that the practice violates the Sixth Amendment to the U.S. Constitution. This article

explores this decision and its implications for prosecutors relying on such examinations.³

Melendez-Diaz v. Massachusetts

In *Melendez-Diaz v. Massachusetts*, the Court expounded on its previous ruling in the landmark case *Crawford v. Washington*, where it interpreted and explored the application of the constitutional provision found in the Sixth Amendment to the Constitution known as the Confrontation Clause. The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."⁴ This bedrock procedural guarantee applies to both federal and state prosecutions.⁵ In the procedural history of *Melendez-Diaz v. Massachusetts*, the Massachusetts courts admitted into evidence affidavits reporting the results of forensic analysis, which showed that material seized by the police and connected to the defendant was cocaine. The case hinges on the issue of whether those affidavits are testimonial, rendering the affiants witnesses subject to the defendant's right of confrontation under the Sixth Amendment.⁶

In 2001, after receiving information on a drug transaction, Boston police officers arrested three men, among them Luis

Melendez-Diaz. The officers had witnessed what appeared to be plastic bags containing drugs passed between the men. Once arrested, the three men were put in a police cruiser and transported to the station. After depositing the men at the station, the officers searched the police cruiser and found a plastic bag containing 19 smaller plastic bags hidden in the partition behind the front seat. They submitted the seized evidence to a state laboratory required by law to conduct chemical analysis upon police request.⁷

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams.⁸ At trial, the prosecution placed into evidence the bags seized from the police cruiser. It also submitted three certificates of analysis showing the

results of the forensic examination performed on the seized substances.

The certificates reported the weight of the seized bags and stated that the bags "have been examined with the following results: The substance was found to contain: Cocaine."⁹ The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law.¹⁰

Melendez-Diaz objected to the admission of the certificates. He argued that the Confrontation Clause decision in *Crawford v. Washington*¹¹ required the analysts to testify in person. The trial court admitted the certificates, as was usual practice and pursuant to state

“ The decision in Melendez-Diaz provides additional clarity on the use of live testimony over the introduction of testimonial documents. ”



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law, as “prima facie evidence of the composition, quality, and the net weight of the narcotic... analyzed.”¹² Melendez-Diaz was found guilty. He appealed, contending, among other things, that admission of the certificates violated his Sixth Amendment right to be confronted with the witnesses against him.¹³

Justice Antonin Scalia, writing for a majority of the Court, found that this rather common practice in many courts was, in fact, a violation of the defendant’s Sixth Amendment right to confront witnesses against him. They decided that the affidavits in question were testimonial in nature; that is, they were paper substitutes for live witnesses—live witnesses who can and should be cross-examined.¹⁴ To justify this outcome, the Court relied on its previous ruling in *Crawford v. Washington*, where it explored the length and breadth of the confrontation clause.¹⁵

Crawford v. Washington

In 2004, the U.S. Supreme Court addressed the parameters of the Confrontation Clause in *Crawford v. Washington*.¹⁶ In this case, a recorded statement of a spouse was used against her husband in his prosecution. The marital privilege prevented the wife from testifying, so the prosecutor submitted her recorded statement. Crawford argued that this was a violation

of his right to confront witnesses against him under the Sixth Amendment, and the Supreme Court agreed.¹⁷ The Court concluded that the Confrontation Clause applies to witnesses against the accused, meaning “those who bear testimony.” Relying on this, the Court stated, “The Framers would not have allowed admission of testimonial statements of a witness

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Since the decision in Melendez-Diaz, there have been a number of cases where defendants have invoked the case to raise the question as to whether their Confrontation Clause rights had been violated.
”

who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”¹⁸ The Court determined that a prior opportunity for cross-examination was mandatory and dispositive of whether or not testimonial statements of an unavailable witness are admissible. “Dispensing with confrontation because testimony is obviously reliable is

akin to dispensing with jury trial because a defendant is obviously guilty.”¹⁹ Elaborating on the text of the Confrontation Clause,²⁰ the Court stated,

It applies to “witnesses” against the accused—in other words, those who “bear testimony.”²¹ “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”²² An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.²³

The Ruling in *Melendez-Diaz*

The opinion authored by Justice Scalia described the class of testimonial statements covered by the Confrontation Clause as follows:

Various formulations of this core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent—that is, material, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial

statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.²⁴

The affidavits presented at the *Melendez-Diaz* trial were found by the majority of the Court to fit into the above class and, were to them, very clearly affidavits and, thereby, subject to the Confrontation Clause.

There is little doubt that the documents at issue in this case fall within the “core class of testimonial statements” thus described. Our description of that category mentions affidavits twice.²⁵ The Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: “declaration [s] of facts written

down and sworn to by the declarant before an officer authorized to administer oaths.”²⁶ They are incontrovertibly a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”²⁷ The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants



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was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The “certificates” are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.”²⁸

According to the Court in *Melendez-Diaz*, “our decision in *Crawford* [was that] the analysts’ affidavits were

testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ‘be confronted with’ the analysts at trial.”²⁹

Application of *Melendez-Diaz* v. *Massachusetts*

Since the decision in *Melendez-Diaz*, there have been a number of cases where defendants have invoked the case to raise the question as to whether their Confrontation Clause rights had been violated.³⁰ Defendants have tried to stretch the opinion in *Melendez-Diaz* to fit other circumstances where they believed there has been a violation.

In *United States v. Forstell*, Officer Pente Gillespie of the U.S. Park Police stopped defendant Scott P. Forstell while he was driving on the George Washington Parkway. Forstell was pulled over for speeding 62 miles per hour in a 40 miles-per-hour zone. While conversing with the defendant, Officer Gillespie noticed that Forstell smelled of alcohol and that his eyes appeared red and glassy. After the defendant was unable to perform a series of roadside sobriety tests satisfactorily, Officer Gillespie transported

Forstell to a station house to administer a breathalyzer test to him.³¹

At Forstell's trial, the government called Officer Gillespie to testify about the events of May 8, 2009, and moved for the admission of five exhibits. Government Exhibit 1 is a certificate signed by a technician with the Radar Lab of Maryland certifying that a Speed Measuring Radar Device had been checked for accuracy and correctness of operation. Government Exhibit 2 is a certificate signed by a technician of the Radar Lab of Maryland certifying that tuning forks bearing serial numbers 093050 and 093084 had been tested and found to be operating properly.³² Government Exhibit 3 is the Intoxilyzer 5000EN Maintenance Record for the Intoxilyzer unit bearing serial number 68- *580 010813.³³ Government Exhibit 4 is a certification notice for Intoxilyzer model 5000EN, serial number 68-010813, and notes that the model has been tested and found to be suitable for use in analyzing breath alcohol.³⁴ Government Exhibit 5 is the results report for two breath tests administered to Scott P. Forstell on May 8, 2009, by Officer Gillespie.³⁵

Forstell claimed the admission of Government Exhibits 1 through 5 violated his rights under the Confrontation Clause

as articulated in *Melendez-Diaz v. Massachusetts*. Forstell believed the accuracy of Government Exhibits 3 and 4 had not been established because the government did not provide testimony of the person who certified Government Exhibits 3 and 4 and did not allow him to cross-examine that person.³⁶

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***Certain
circumstances...
require a person
take the stand
and be subject to
cross-examination....***

”

In *Forstell*, the Court first examined *Melendez-Diaz* and then applied that ruling to its own facts.

In the instant case, Officer Gillespie testified that Sergeant Donald N. Upright, the U.S. Park Police technician who signed the certificates presented as Government Exhibits 3 and 4, was not present in the courtroom. Similarly, the technician who signed the certifications of accuracy for the laser and tuning fork, presented as Government Exhibits 1 and 2, respectively, also was not present

in the courtroom. It is the defendant's position that exhibits 1 through 4 should not be admitted in the absence of the technicians' testimony. It is clear, however, that Government Exhibits 1 through 4 are nontestimonial and, thus, their admission does not run afoul of the Confrontation Clause. Indeed, the *Melendez-Diaz* decision explicitly notes that the Court “d[id] not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of sample, or accuracy of the testing device, must appear in person as part of the prosecution's case.”³⁷ Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.³⁸

The Court further reasoned that *Forstell* did not argue that the certificates did anything more than verify the accuracy of the testing devices and equipment used by the U.S. Park Police. It concluded the information contained in Government Exhibits 1 through 4 merely confirmed that routine accuracy and maintenance tests were performed on the laser device, tuning fork, and Intoxilyzer 5000EN unit. Certificates regarding such routine information fit squarely into the category of

nontestimonial records carved out by the Supreme Court. Thus, the government is not required to make available at trial the technicians who performed the tests for the certificates to be admissible.³⁹

When it came to the admission of Government Exhibit 5, it also was found not to be a violation of the Confrontation Clause. Government Exhibit 5 contained the results from the breath test administered to the defendant by Officer Gillespie. In addition to offering the exhibit at trial, the prosecution called Officer Gillespie to testify as to the steps he performed in administering the breath test to the defendant. Officer Gillespie stated that upon arriving at the District-2 substation, he offered the defendant a glass of water, read him his rights, and quoted him the chemical-testing notice contained in 36 C.F.R. § 4.23. The defendant then indicated he would take the breath test. Officer Gillespie further testified that he sat across from the defendant for the requisite 20-minute waiting and observation period before administering the test and that the defendant did not vomit, hiccup, or burp during that time. Before conducting the test, Officer Gillespie inspected the defendant's mouth, as required, and then administered the first breath test at 1:52 a.m. The second breath test was conducted

at 1:58 a.m. According to the officer's testimony, there was no radio interference with the test, and, before administering the test, he reviewed the unit's log book to verify that no problems had been logged with previous tests.⁴⁰

Finally, Officer Gillespie testified that he looked at the certification sticker on the Intoxilyzer unit to be sure that the expiration had not passed and also checked to be sure the solution in the unit had not expired. Accordingly, the defendant had the opportunity to cross-examine Officer Gillespie regarding any or all of these steps to determine whether he properly performed the test. Thus, with respect to Government Exhibit 5, the defendant's right to confrontation was satisfied by his

cross-examination of Officer Gillespie.⁴¹

In *State v. Murphy*, the defendant tried to apply *Melendez-Diaz* to the admission of a certificate issued by the secretary of state relating to the suspension of his driver's license.⁴² Officer Christopher Woodcock, a police officer with the Cumberland Police Department, observed a vehicle stopped at a road that intersects Route 100 in Gray. Believing that he had pulled over the same driver days earlier for operating after suspension, Officer Woodcock turned his vehicle around and increased his speed in an attempt to view the vehicle's license plate number. He soon regained visual contact with the vehicle and eventually came upon it,



with Murphy still inside, parked in a driveway. After running a check on the car's license plate, Officer Woodcock confirmed that Murphy's license was suspended. He made contact with Murphy and obtained his license, registration, and insurance information.⁴³

Murphy was charged with and pleaded not guilty to operating while license suspended or revoked⁴⁴ and unlawful use of a license.⁴⁵ Before trial, Murphy moved to exclude from evidence a certificate issued by the secretary of state, asserting that the admission of the certificate would violate his Sixth Amendment right to confront witnesses.⁴⁶

The Supreme Judicial Court of Maine ruled "*Melendez-Diaz* might be interpreted as extending the definition of testimony beyond sworn certificates addressing scientific analysis prepared for purposes of a criminal prosecution, to include sworn certificates that authenticate and summarize routine governmental records. The opinion contains conflicting signals on this point. The Court's majority recognized that, by their nature, business and public records are not testimonial."⁴⁷

Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having

been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.⁴⁸

The court concluded that neither the certificate nor the records to which it refers are primarily maintained and employed for purposes of criminal prosecution. Identical certificates are routinely prepared for nonprosecutorial purposes, such as administrative motor vehicle proceedings and insurance-related inquiries.

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Determining when a document is testimonial is a new issue that lower courts still are exploring on a case-by-case basis.

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The nature of the Confrontation Clause itself also guided the Murphy court.

Cross-examination guarantees that the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and

judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. Cross-examination has far less utility with respect to the information contained in the certificate at issue here. The Bureau's collection and maintenance of motor vehicle license-related information are largely automated, and the data collected are not subject to any serious interpretation, judgment, or analysis. Our constitutional analysis should not ignore the context in which these records are produced. Because neutral, bureaucratic information from routinely maintained public records is not obtained by use of specialized methodology, there is little, if any, practical benefit to applying the crucible of cross-examination against those who maintain the information.⁴⁹

Defendants have asserted *Melendez-Diaz* violations regarding the admission of varied types of records maintained by police departments. In *State v. Fitzwater*, an officer in Hawaii issued a speeding ticket to a motorcyclist after “pacing” the motorcycle doing 70 miles per hour in a 30 miles-per-hour zone.⁵⁰ The defendant claimed his right to confrontation had been violated pursuant to *Melendez-Diaz* because the

prosecution introduced into evidence a speed-check card. The speed-check card was a record kept routinely by the police verifying the accuracy of the speedometers on police vehicles. Fitzwater claimed he had a right to confront the mechanic who performed the test. Using similar reasoning related to business records, the Supreme Court of Hawaii rejected Fitzwater's claims. The speed-check cards were not prepared with prosecution in mind and were kept in the ordinary course of business; additionally, the officer driving the vehicle testified and was cross-examined by the defendant.⁵¹

Other attempts at applying *Melendez-Diaz* have included challenges to DNA results when a technician other than the one who conducted the test testified and the report was admitted. The Appellate Court of Illinois rejected this assertion—explaining confrontation was satisfied by the testifying technician who interpreted the results of the admitted report on the stand. Because the witness was a qualified technician able to testify about the report, there was no need to call the actual testing technician.⁵² Finally, the Confrontation Clause and *Melendez-Diaz* do not apply in probation revocation hearings, making probation reports admissible without the testimony of the preparer.⁵³

Conclusion

The decision in *Melendez-Diaz* provides additional clarity on the use of live testimony over the introduction of testimonial documents. Certain circumstances, such as the laboratory reports prepared for prosecution in the *Melendez-Diaz* case, require a person take the stand and be subject to cross-examination, instead of merely submitting the testimonial document. This is in keeping with



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the Sixth Amendment right to confront witnesses against you. Determining when a document is testimonial is a new issue that lower courts still are exploring on a case-by-case basis. ♦

Endnotes

¹ *Magruder v. Commonwealth of Virginia*, 275 Va. 283, 657 S.E.2d 113 Va., (2008).

² *Briscoe v. Virginia*, 130 S. Ct. 1316 (Mem) U.S., (2010).

³ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 U.S.Mass., (2009).

⁴ *Id.*

⁵ *Pointer v. Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965).

⁶ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 U.S.Mass., (2009).

⁷ *Id.*

⁸ Ch. 94C, §§ 32A, 32E(b)(1).

⁹ App. to Pet. for Cert. 24a, 26a, 28a.

¹⁰ Mass. Gen. Laws, ch. 111, § 13.

¹¹ *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

¹² Mass. Gen. Laws, ch. 111, § 13.

¹³ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 U.S.Mass., (2009).

¹⁴ *Id.*

¹⁵ *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The most famous out-of-court statements in legal history used against a defendant on trial is the treason case of Sir Walter Raleigh. Raleigh was being tried in England for treason, a plot to remove the King; the evidence against him came mostly from the forced confession of an alleged coconspirator, Lord Cobham. Cobham's confession was placed into evidence, but Raleigh was repeatedly denied the opportunity to confront his accuser. The trial of Raleigh is notorious in the annals of legal history; it is often cited as being the catalyst for the Sixth Amendment, Confrontation Clause.

²¹ 2 N. Webster, *An American Dictionary of the English Language* (1828).

²² *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

²³ *Id.*

²⁴ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 U.S.Mass., (2009).

²⁵ See also *White v. Illinois*, 502 U.S. 346, 365, 112 S. Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment).

²⁶ Black's Law Dictionary 62 (8th ed.2004).

²⁷ *Crawford, supra*, at 51, 124 S. Ct. 1354 (quoting 2 N. Webster, An

American Dictionary of the English Language (1828)).

²⁸ *Davis v. Washington*, 547 U.S. 813, 830, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006) (emphasis deleted).

²⁹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 U.S. Mass., (2009).

³⁰ *Melendez-Diaz* has even found its way into the employment context. In *Sutera v. Transportation Sec. Admin.*, Sutera was employed as a lead transportation security officer by defendant Transportation Security Administration (TSA). TSA policy requires employees to report to work free from any effects of alcohol or drugs; it mandates removal for offenses that involve the use of drugs or alcohol. The policy requires random drug and alcohol testing of designated classes of employees, including transportation security officers, such as Sutera, because they occupy safety- or security-sensitive positions. Sutera was asked to provide a urine sample for a random drug test. Following the test, the TSA held three predecisional meetings with plaintiff, informing and discussing with him the fact that his sample tested positive for marijuana. After his termination, Sutera invoked *Melendez-Diaz*, claiming that during his administrative hearings, he never was afforded the opportunity to confront the person or persons who tested his urine. The U.S. District Court for the Eastern District of New York was quick to point out that confrontation was a right reserved for “criminal” prosecutions and not informal administrative hearings.

³¹ *United States v. Forstell*, 656 F.Supp.2d 578, E.D.Va. (2009).

³² Specifically, the certificate states that the transmitter frequency of the Speed Measuring Radar Device bearing the serial number G2-2651 had been tested and found to be within the prescribed limits. According to the certificate, the Speed Measuring Radar Device is certified accurately within +/-1 mph (+/-2 kph) in stationary mode and/or +/-1 mph (+/-2 kph) in moving mode. Antenna 1, bearing serial number G2-05114 was found to have

a transmitter frequency of 35.600 Ghz and a maximum aperture power density of 0.15 mw om. Antenna 1, bearing serial number G2-02981, was found to have a transmitter frequency of 35.600 Ghz and a maximum aperture power density of 0.15 mw om. In addition to noting that the laser being certified was model type GEN II, the certificate lists two serial numbers for associated units. These serial numbers, 093050 and 093084 match the serial numbers of the tuning forks that are the subject of the certificate marked Government Exhibit 2. Finally, the certificate marked as Government Exhibit 1 bears an expiration date of April 16, 2010.

The Confrontation Clause and Melendez-Diaz do not apply in probation revocation hearings, making probation reports admissible without the testimony of the preparer.

³³ Specifically, the certificate states that the tuning fork bearing serial number 093050 had been tested and found to oscillate at 3.74=5 Hz at 70 degrees Fahrenheit and will cause a Doppler traffic radar transmitting at 35.600 GHz to display 35.2 MPH Km/h and that the tuning fork bearing serial number 093084 has been tested and found to oscillate at 5.37 =5 Hz at 70 degrees Fahrenheit and will cause a Doppler traffic radar transmitting at 35.600 GHz to display 50.6 MPH KM/h.

³⁴ The certificate, which is signed by Sergeant Donald N. Upright, a technician in the Traffic Safety Unit of the U.S. Park

Police, indicates that on April 14, 2009, maintenance and instrument checks were performed on the Intoxilyzer unit.

³⁵ *United States v. Forstell*, 656 F.Supp.2d 578, E.D.Va. (2009).

³⁶ *Id.*

³⁷ 129 S. Ct. at n. 1. See also *Larkin v. Yates*, 2009 WL 2049991, n. 2 (C.D.Cal.2009) (noting that *Melendez-Diaz* “explicitly rejected the suggestion that the Confrontation Clause required that every person whose testimony might be relevant to the authenticity of sample or accuracy of a testing device appear in person as part of the prosecution’s case”).

³⁸ *Melendez-Diaz*, 129 S. Ct. at n. 1.

³⁹ *United States v. Forstell*, 656 F.Supp.2d 578, E.D.Va. (2009).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *State v. Murphy*, 991 A.2d 35, 2010 ME 28.

⁴³ *Id.*

⁴⁴ (Class E), 29-A M.R.S. § 2412-A(1-A)(D).

⁴⁵ (Class E), 29-A M.R.S. § 2102(1) (2009).

⁴⁶ *State v. Murphy*, 991 A.2d 35, 2010 ME 28.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *State v. Fitzwater*, 122 Hawaii 354, 227 P.3d 520 Hawaii (2010).

⁵¹ *Id.*

⁵² *People v. Johnson*, 394 Ill.App.3d 1027, 333 Ill.Dec., 774 Ill.App. 1 Dist., (2009).

⁵³ *People v. Gomez*, 181 Cal.App.4th 1028, 104 Cal.Rptr.3d 683, Cal.App. 2 Dist., (2010).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize those situations that transcend the normal rigors of the law enforcement profession.



Lieutenant Doebel

Early one morning, Lieutenant Dave Doebel of the Storm Lake, Iowa, Police Department responded to a one-car accident at an intersection. Upon his arrival, he encountered a vehicle that had left the roadway and struck a power pole, causing the car to catch on fire. Lieutenant Doebel saw that the unconscious driver was trapped inside. Quickly, Lieutenant Doebel used a small fire extinguisher to fight the flames, freed the victim's trapped legs, and pulled him out of the vehicle to a safe spot. Moments later, the vehicle exploded. Lieutenant Doebel then extinguished the fire burning on the victim's pants. The critically injured driver survived.



Sergeant Knight

One night, the Bradenton, Florida, Police Department received an emergency call regarding a structure fire. Immediately, Sergeant William Knight responded. Arriving in minutes, he saw a mobile home fully engulfed in flames. As Sergeant Knight exited his vehicle, he saw an adult male, later identified as the lone resident, standing just outside. Upon seeing the officer, the man quickly turned and headed inside, into the flames. Without hesitation, Sergeant Knight entered the home. After locating the individual, Sergeant Knight began pulling him to safety; the resident resisted, broke free, and attempted to run further into the flames. Sergeant Knight followed and forcefully removed the man from the burning residence.

Nominations for the **Bulletin Notes** should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be mailed to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Quantico, VA 22135 or e-mailed to leb@fbiacademy.edu.

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Patch Call



The University of Delaware, in the city of Newark, was established in 1743. The patch of its police department depicts Memorial Hall, erected by citizens as the state's World War I memorial and listed on the National Register of Historic Sites. It served as the university library from 1924 to 1963 and now houses the Department of English.



The city of Bradenton, Florida, incorporated in 1903, is located on the south side of Tampa Bay and is bordered by the Gulf of Mexico and the Manatee River. The patch of its police department features the United States, Florida, and Bradenton flags, which symbolize the agency's service to its country, state, and city.