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FBI Law Enforcement Bulletin

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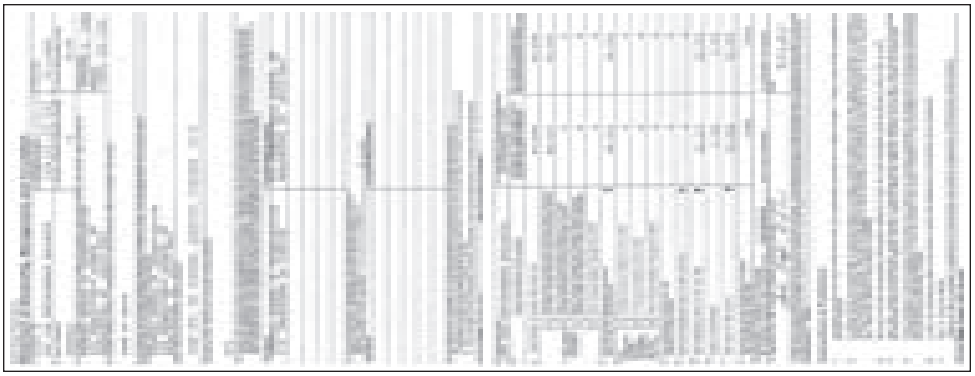

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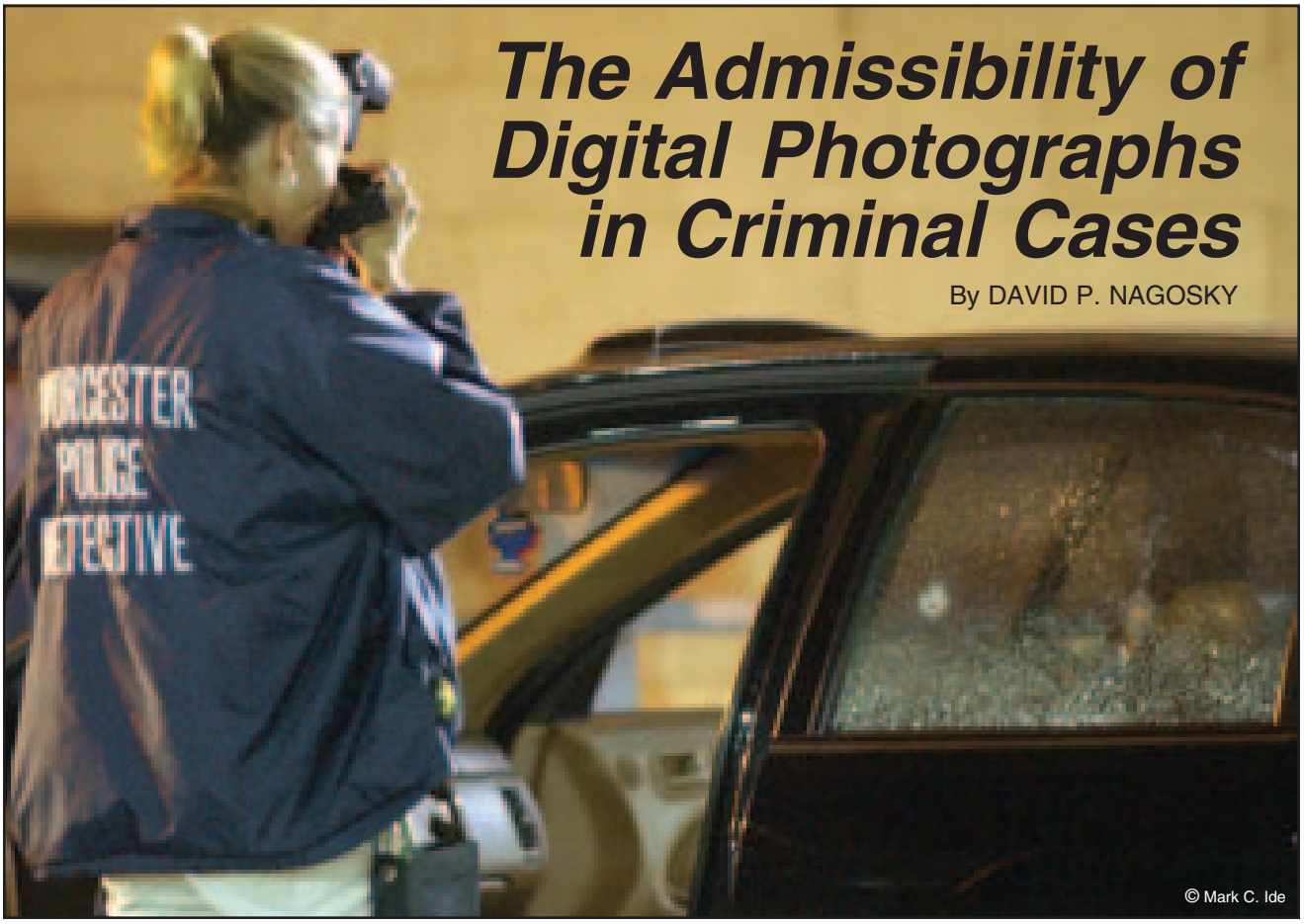

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The Admissibility of Digital Photographs in Criminal Cases

By DAVID P. NAGOSKY

Representing today's trend in photography, digital cameras continue to rapidly replace traditional film-based models. As prices keep dropping, consumer ownership will become even more prevalent. Similarly, law enforcement agencies have begun to favor digital cameras—just the latest in a long line of technological innovations used by departments to collect and document evidence. Digital photography offers law enforcement numerous benefits, including instant access to images, rapid transportability of pictures within a department or to outside agencies, and decreased cost and time as these cameras require no film development.

Of course, photographs—which generally hold substantial weight—serve as one of the most effective forms of evidence in court. However, many individuals in the legal community fear the potential abuse and manipulation of digital images. Therefore, they consider these pictures inadmissible under current evidentiary rules.

To this end, an examination of the admissibility of film-based photographs and an analysis of cases, legislation, and legal commentary pertaining to digital pictures can provide valuable insight. Further, agencies can follow recommendations as to how they can help ensure the admissibility of their digital photographs under the law as it develops in the United States.

FILM-BASED PHOTOGRAPHS

People can manipulate film-based pictures. Throughout the photographic process, an individual skilled in photography can alter the image.[1] For

instance, while taking a picture, a person can use a narrow f-stop and a fast shutter speed to make a photograph taken during the day appear as if someone took it at night.

Individuals also can alter a photograph during the development stage. "Through the judicious selection of exposure times for the paper emulsions and filters to screen selective color wavelengths, a skilled photographer can produce a different image from the one... viewed through the camera's eyepiece. This image could appear to the untrained eye to be...perfectly legitimate...yet in subtle ways could be misleading in the jurisprudential context."[2] Also, during development, a technique known as crop and splice can change the picture. Using this method, a person combines two negatives by cropping out a portion of one and splicing in its place part of another.[3]

Modifications of film-based photographs have presented problems for years.[4] "The forensic ramifications...are obvious. A skilled photographer could artfully assemble through either pre- or postphotographic processing a photograph that could either be highly incriminating or exculpatory. Litigants could then offer that photograph as evidence in support of their cause. Under the Rules of Evidence, to authenticate a photograph, a witness need only to say that the photograph accurately depicts the scene, object, or person. In this scenario, if a witness were willing to deceive the court with a manipulated photograph, discovery of such perjurious intent would be problematic."[5] However, someone suspecting manipulation of a picture always can ask for the negative to trace its origin.

> ***"...many individuals in the legal community fear the potential abuse and manipulation of digital images."***

Any party seeking to introduce a film-based photograph into evidence must demonstrate its relevancy (i.e., add to the likelihood that an event did or did not occur) and authenticity (i.e., a knowledgeable person must verify the image's accuracy).[6] For example, a detective photographs a drug deal. The picture depicts two individuals exchanging a package. The prosecutor wants to enter the photo into evidence at the criminal trial of the individual who received the drugs. The picture is relevant because it shows the person present at the scene where the deal occurred and in receipt of the package. To authenticate the photograph, the prosecutor can place on the stand the detective who took the picture or any officer who witnessed the transaction and elicit that the image actually represents the person, package, place, and time. After establishing the photograph's relevancy and authenticity, the prosecutor can move to admit it into evidence.

One additional rule exists that pertains to the admissibility of all photographs. Under the Best Evidence Rule, to prove the content of a picture, courts generally require the original—defined as the negative or any print therefrom.[7] Therein lies a major *perceived* problem with digital images: the absence of a traceable origin to rely upon (i.e., no negative).[8]

DIGITAL PHOTOGRAPHS

Digital photographs include pictures processed by computer. They consist of picture elements, or pixels—computer codes consisting of bits of information representing specific colors, intensities, and locations. More pixels result in a sharper and clearer image.

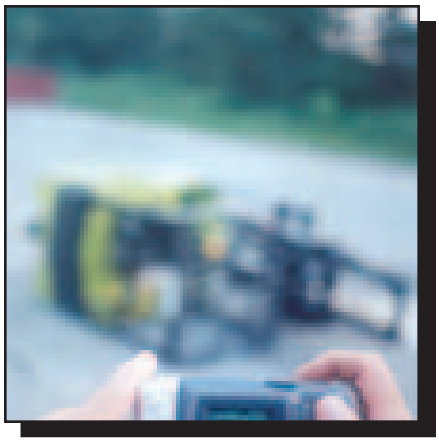
A digital camera works similarly to a film-based model. However, instead of using light-sensitive film, it employs a light-sensitive chip—a charged

coupled device (CCD). The CCD records the picture electronically as its light sensors capture, convert, and store the image as blue, green, and red pixels, which then become saved in the camera as a computer-readable data file. Using specialized software, a computer can reconstruct the image and display it on a monitor and route it to a printer.

Concerning admissibility, people mainly fear that digital photographs can become altered more easily than film-based images "to fabricate evidence for improper purposes."[9] Some in the legal community feel that such dangers in digital photography overall necessitate different treatment under the Rules of Evidence.

Certainly, software used to create digital photographs allows alteration of the picture. "At worst, objects...not in the original image can be added and those that were there can be removed."[10] However, detection of a manipulated digital picture does not prove difficult. "Factors such as the density of the image (based on light exposure), the shadows in the picture, existence or nonexistence of splice lines, and continuity of the image" can be scrutinized.[11]

Compression represents a secondary concern pertaining to digital photographs. While the amount of film limits the quantity of pictures taken with a traditional model, "digital cameras allow users to choose the number of images they want to capture and store."[12] The compression of data files allows digital camera users to save more pictures, resulting in lower-quality photos because when "the user wants to view the image, the decompression process 'guesses' what information was discarded to produce a complete image."[13]



ADMISSIBILITY OF DIGITAL IMAGES

Cases

Few cases directly address the admissibility of digital photographs in courts of law. In fact, the author found only one court in the U.S. federal and state systems that tackled the issue head-on. The many courts that have yet to address the subject largely must extrapolate from opinions pertaining to other issues concerning digital imaging.

The Georgia Supreme Court case of *Almond v. State* dealt directly with the admissibility of digital photographs.[14] In that case, a jury found Mastro Almond guilty of malice murder and the sale of cocaine. On appeal, Almond raised the issue of digital images as evidence at his trial. The court stated that because the record showed "that the pictures were introduced only after the prosecution properly authenticated them as fair and truthful representations of what they purported to depict," they were properly admissible.[15] The Georgia Supreme Court did not provide any other guidelines for determining the admissibility of digital photographs. In fact, the court went on to say that "[w]e are aware of no authority, and appellant cites none, for the proposition that the procedure for admitting pictures should be any different when they were taken by a digital camera."[16]

Although no other court has dealt directly with the admissibility of digital photographs, opinions exist that can offer insight as to where many will stand on the issue. For example, in *People v. Rodriquez,* the New York Supreme Court, Appellate Division, stated that the trial "court properly exercised its discretion in admitting bank surveillance videotapes, and photographs made from those tapes, without expert testimony

about the digitizing process used at the FBI laboratory to slow the tapes down and make still photos from them, since a bank employee responsible for making the original tapes at the bank testified that he compared the original and slowed-down tapes and that what was represented therein was identical except for speed."[17] The *People v. Rodriquez* holding indicates that the court seeks to ensure that an individual with first-hand knowledge of the photographed scene attests to the picture's accuracy. Again, this demonstrates that for admissibility, photographs must be relevant and authenticated.

The Washington Court of Appeals case of *State v. Hayden* represents an additional example that provides insight into how another state may rule on the admissibility of digital photographs.[18] The case mainly focused on the admissibility of digital imaging used to enhance latent fingerprints and palm prints. The court held that "[b]ecause there does not appear to be a significant dispute among qualified experts as to the validity of enhanced digital imaging *performed by qualified experts using appropriate software,* we conclude that the process is generally accepted in the relevant scientific community."[19]

Although *State v. Hayden* dealt with the admissibility of digital enhancement technology under the *Frye Test*—used to determine the admissibility of novel scientific evidence—the court made four important points that support the admissibility of digital photographs in general: 1) digital photography is not a novel process;[20] 2) the high cost may have contributed to the delay of digital image enhancement in forensic science;[21] 3) the court opined that digital photographs have an advantage over analog film photographs because they "can capture approximately 16 million different colors and can differentiate between 256 shades of gray";[22] and 4) like film photographs, digital images work with light sensitivity, except that the "computer uses a chip and a hard drive in place of the camera's film."[23] Based upon the dicta provided, Washington courts seemingly would rule on the side of admissibility concerning digital photographs.

> ***"Modifications of film-based photographs have presented problems for years."***

Recently, the Court of Appeals in California addressed the use of digital imaging to enhance a shoe print in a criminal case.[24] In *People v. Perez,* the court of appeals accepted the trial court's statement that a particular brand of software "is not a scientific technique" but represents "just an easier way of developing film, developing a picture. And it does it by means of digital imaging of pixels. Digital imaging...is accepted scientifically and has been for decades."[25] After reading *People v. Perez* and in light of the previous cases mentioned, courts in California seemingly would consider digital photographs admissible.

Legislation

Alternatively, a legislator sponsored Wisconsin Assembly Bill 584, which "prohibits the introduction of a photograph... of a person, place, document... or event to prove the content... if that photograph...is created or stored by data in the form of numerical digits."[26] The legislator apparently "became upset when high school students manipulated a digital photograph by putting heads on bodies of the opposite sex."[27] If this bill becomes law, digital photographs will not be admissible in Wisconsin courts.

Legislators in Hawaii also have concern about the admissibility of digital photographs. However, rather than taking the extreme position of seeking a

ban in courts, the legislature directed the Hawaii Supreme Court to establish written procedures governing police use of digital photography in traffic accident reconstructions. The directions to the Hawaii Supreme Court are contained in Hawaii House Bill 1309, which states, "[a]lthough current rules do not preclude the admission of digital photographs as evidentiary material, such admissibility is contingent upon the basic data and collection technique meeting a threshold requirement of reliability that has not yet been established by the Hawaii Supreme Court's Standing Committee on the Rules of Evidence."[28]

Legal Commentary

Many individuals in the legal community remain largely unreceptive to allowing the admission of digital photographs under the current rules of evidence. One author stated that "[a]lthough photographs may be manipulated, the potential for making subtle but significant alterations to digital images gives cause for concern that digital images may be unfit for use as evidence in a court of law"[29] and proposed amending the current evidentiary system specifically to deal with digital imaging.

In another article voicing concern over the admissibility of digital photographs under current evidentiary systems, the authors stated, "As noted, current principles of authentication have developed partly in response to certain assumptions about the inherent limitations of traditional media technologies. The degree to which these assumptions are appropriate in the context of today's highly sophisticated multimedia tools is an open question posing challenges for advocates, judges, experts, and legislative bodies alike."[30] And, another

author noted that "[w]hile advances in technology are generally viewed as positive within society as a whole, the potential for incredible abuse associated with electronic photography is, or should be, troubling to the legal profession in particular."[31]

A final author nicely summed up such concerns among those in the legal community by saying, "As the conventional photograph goes the way of the horse-drawn carriage and the vinyl phonograph record, courts and legislatures will have to establish procedures to assure the accuracy and integrity of visual evidence admitted into legal proceedings. If existing doctrines cannot rise to the task, new doctrines will have to develop."[32]

As evidenced by these statements, not everyone in the legal community agrees with any court decision admitting digital photographs under the current Rules of Evidence. At its October 18, 2002, meeting in Seattle, Washington, the Advisory Committee on the Federal Rules of Evidence considered the concerns of commentators who argue that digital photographs should not be admitted under current evidentiary rules. The committee held a preliminary discussion on whether to amend Rule 901, the authentication requirement, or if a new rule proved necessary to deal with digital photographs. Ultimately, the committee members were skeptical of the necessity of a new rule and felt that Rule 901 "was flexible enough to allow the judge to exercise discretion to assure that digital photographs are authentic and have not been altered."[33] However, the committee did direct its reporter to "prepare a background memorandum on the use of digital photographs as evidence" so that it could

consider changes to the rules in the fu-ture due to its "interest in assur-ing that the rules are updated when necessary to accommodate technological changes."[34]

As for the requirements of the Best Evidence Rule, a logical reading indicates that digital photographs are admissible under that rule. Generally, it requires the original to prove the content of a writing, recording, or photograph.[35] Under the Best Evidence Rule, "[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'"[36] Therefore, a digital image downloaded to a computer and subsequently printed would seem to qualify.[37]

RECOMMENDATIONS

At a minimum, agencies should establish standard operating procedures that focus on two goals that will ensure the admissibility of their digital photographs in court: 1) preserve the original and 2) follow a reliable process demonstrating the integrity of the image. Ideally, departments will concentrate on "chain of custody, image security, image enhancement, and release and availability of digital images."[38]

When attempting to preserve the original, unmanipulated image, agencies should store it on a compact disc that can be written to only once and then is only readable (i.e., a CD-R, rather than a CD-RW). This ensures that no one can remove or alter the data without copying the original. After capturing an image, agencies should immediately transfer it to a CD-R and label the disc with the date, time, and place the picture was taken; the individual who captured the image; and other important information associated with the photo.

> ***"...an examination of the admissibility of film-based photographs and an analysis of cases, legislation, and legal commentary...can provide valuable insight."***

Additionally, agencies should preserve the digital image in its original file format,[39] rather than compressing it for storage. This allows the camera to capture and store the most information possible. When departments must enhance a picture, they should create a new image file, saving it separately and not writing over the original.

When establishing reliable procedures that demonstrate the integrity of images from creation to admission into evidence, agencies must limit access to the files. As one commentator stated, "[i]mage handling procedures should be standardized and access to digital images should be strictly controlled."[40] The process used "should be able to demonstrate: who took the picture and when, where and how the image was stored, who had access to the image from the time it was taken through the time it is introduced in court, and any details on whether or not the image has been altered and how."[41]

In this regard, reliable procedures will help prevent challenges to admissibility by defense counsel. Also, they will allow agencies to track who had access to the photographs and what, if anything, was done with them. Of course, any reliable procedures must begin with preserving the original.

Also worthy of note, some law enforcement agencies use commercial photo labs for developing and processing film. Following such a procedure opens up possible challenges when departments seek to admit these pictures in court.[42] In this regard, digital images prove superior to film-based photographs because no one outside the department handles them.

CONCLUSION

Digital photographs serve as powerful, efficient tools for law enforcement. The ability to take a picture and instantly view and distribute it helps officials in their efforts to serve and protect their communities. Agencies should not become hindered by those in the legal system reluctant to stay in step with advances in technology. As one commentator stated, "Fear about manipulation of digital images is exaggerated, perhaps because of the perceived novelty of the technology. We often fear what is or seems new. Certainly, this fear has made many forget a secret of analogue photography [traditional film-based photographs], namely that conventional photographs may be manipulated to alter reality and at worst to fabricate false evidence."[43]

The trend in case law points to the admissibility of digital photographs as evidence, although many in the legal community rightfully suggest that digital photographs are subject to abuses. To alleviate those fears, law enforcement agencies should attempt to establish standard operating procedures that, at least, include the preservation of and accountability for the original image from creation to admission into evidence. Like so much in law enforcement, the admissibility of digital photographs will depend on the veracity and integrity of the authenticating official.

Ultimately, to help prevent the abuse of digital photographs, judges and attorneys on both sides of the courtroom must become aware of the potential abuses and familiar with the associated technology. As a result, the underlying fears will dissipate, and, in those rare cases where a dishonest person may falsely alter an image, the judicial system will recognize and effectively address the problem.

Endnotes

[1] Judge Victor E. Bianchini and Harvey Bass, Perspective, *A Paradigm for the Authentication of Photographic Evidence in the Digital Age*, 20 T. Jefferson L. Rev. 303, 306 (1998).

[2] *Id.* at 303, 308.

[3] *Id*.

[4] "Suggested Procedures for Preservation of Digital Crime Scene Photographs"; retrieved from *http://www.policecentral.com/wp-crimescene.htm*.

[5] *Supra* note 1 at 303, 309.

[6] *See, e.g*., Federal Rules of Evidence Rule 401, Rule 402, and Rule 901; *see also* M. L. Cross, Annotation, *Authentication or Verification of Photograph as Basis for Introduction in Evidence*, 9 A.L.R. 2d 899.

[7] *See, e.g*., Federal Rules of Evidence Rule 1001 and Rule 1002.

[8] *Supra* note 1 at 303, 311-312 ("However, modern technology has tossed another monkey wrench into the evidentiary gearbox. Traditional emulsive photography always had a traceable origin to rely upon. The courts or opposing counsel could always demand, 'Show me the negative.' However, it is now possible to create a photograph digitally without a negative and no traceable parentage.").

[9] Wesley M. Baden, "Digital Photographs as Evidence in Utah Courts"; retrieved from *http://www.utahbarjournal.com/html/march_2004_2.html*.

[10] *Id.*

[11] Christina Shaw, "Admissibility of Digital Photographic Evidence: Should It Be Any Different Than Traditional Photography," *American Prosecutors Research Institute* 15, no. 10 (2002); retrieved from *http://www.ndaa-apri.org/publications/newsletters/update_volume_15_number_10_2002.html*.

[12] Jill Witkowski, *Can Juries Really Believe What They See? New Foundational Requirements for the Authentication of Digital Images*, 10 Wash. U. J.L. & Pol'y 267, 270 (2002); *see also* William W. Camp, *Practical Uses of Digital Photography in Litigation*, 2 Ann. 2000 ATLA-CLE 1463 (2000). ("Image quality in digital photography commonly refers to the amount of compression, if any, that is used to store the electronic digital image.")

[13] *Supra* note 12 (Witkowski).

[14] 274 Ga. 348, 553 S.E. 2d 803 (2001).

[15] 274 Ga. 348, 349, 553 S.E. 2d 803, 805 (2001).

[16] *Id.* (citing *Ray v. State,* 266 Ga. 896, 897(1), 471 S.E. 2d 887 (1996) (videotapes admissible with the same limitations and on same grounds as photographs)).

[17] 264 A.D. 2d 690, 691, 698 N.Y.S. 2d 1 (1st Dept., 1999).

[18] 90 Wash. App. 100, 950 P.2d 1024 (Wash. Ct. App. 1998).

[19] 90 Wash. App. 100, 109, 950 P.2d 1024, 1028 (Wash. Ct. App. 1998).

[20] 90 Wash. App. 100, 106, 950 P.2d 1024, 1027 (Wash. Ct. App. 1998).

[21] *Id.*

[22] 90 Wash. App. 100, 108, 950 P.2d 1024, 1028 (Wash. Ct. App. 1998)*, but see* Michael Cherry, *Informal Opinion*, 27-JUL Champion 42 (July 2003) ("The Iowa International Association for Identification (IAI) Web site highlights *State v. Hayden*, 950 P.2d 1024 (Wash. App. 1998), where the Washington Court of Appeals noted experts' claims that digital photographs

are superior to regular film photographs because digital photographs can pick up and differentiate between many more colors and shades of gray than film photographs. Unfortunately this is not true, forensic quality film offers at least as many colors and more shades of gray than digital images.").

[23] 90 Wash. App. 100, 108, 950 P.2d 1024, 1028 (Wash. Ct. App. 1998).

[24] 2003 WL 22683442 (Cal. Ct. App. 2003) (not an officially published opinion).

[25] *Id.* at 4.

[26] 2003 WI A.B. 584; and *supra* note 9.

[27] *Supra* note 9.

[28] Hawaii House Bill 1309; and *supra* note 9.

[29] *Supra* note 12 (Witkowski) at 267, 273.

[30] William Sloan Coats and Gabriel Ramsey, *Fair, Accurate, and True? Authenticating Evidence in the Age of Digital Manipulation*, 11 No. 1 Prac. Litigator 31, 32 (2000).

[31] Christine A. Guilshan, *A Picture Is Worth a Thousand Lies: Electronic Imaging and the Future of the Admissibility of Photographs into Evidence*, 18 Rutgers Computer & Tech L.J. 365, 373-374 (1992).

[32] Roderick T. McCarvel, "You Won't Believe Your Eyes: Digital Photography as Legal Evidence"; retrieved from *http://www.seanet.com/~rod/digiphot.html*.

[33] Advisory Committee on Evidence Rules, *Minutes of the Meeting of October 18, 2002*, 11; retrieved from *http://www.uscourts.gov/rules/Minutes/1002EVMin.pdf*.

[34] *Id.*

[35] *See, e.g.,* Federal Rules of Evidence Rule 1002.

[36] *See, e.g.,* Federal Rules of Evidence Rule 1001(3).

[37] *Supra* note 12 (Camp) ("Arguably, a photograph taken by a digital camera of a particular event...is an 'original' photograph as defined by Federal Rules of Evidence 1001(3)...."); *but see* Roderick T. McCarvel, "You Won't Believe Your Eyes: Digital Photography as Legal Evidence," retrieved from *http://www.seanet.com/~rod/digiphot.html* ("Worse yet is any incarnation of the best evidence rule, which follows the Federal Rules of Evidence in defining a printout as an 'original' for purposes of the rule.").

[38] Steven B. Staggs, "The Admissibility of Digital Photographs in Court"; retrieved from *http://www.crime-scene-investigator.net/admissibilityofdigital.html*.

[39] *Id.*

[40] *Supra* note 11.

[41] *Supra* note 11.

[42] "Digital Camera Considerations for Crime Scene Investigations"; retrieved from *http://www.policecentral.com/wp-digicam.htm*.

[43] *Supra* note 9.

Special Agent Nagosky serves with the FBI's New York office.

Unusual Weapon

Pepper Spray Pen

This item is made of plastic and metal and appears to be a fountain or ballpoint pen. It actually can eject pepper spray. Such unusual weapons pose a serious threat to law enforcement officers.

A Prescription for Systemic Learning Management

By Vertel T. Martin

Policing in the 21st century requires law enforcement executives, managers, and supervisors to learn more about the ideas, concepts, theories, and research surrounding organizational learning, learning organizations, and systemic policing. Although many different definitions exist for these terms, Peter Senge's notions introduced a creative framework of how institutions can change their perspectives about how to operate.[1] He emphasized the importance of learning in organizations and outlined five key internal interventions for it to continuously occur in them: mental models, personal mastery, team learning, shared vision, and systems thinking.[2] Senge's premise was that "if these five areas of practice were introduced and cultivated within an organization, it could help to enhance the learning capacities of that organization" and its members.[3]

Challenging Mental Models

According to Senge, mental models exist in the minds of members of organizations.[4] These include the thoughts, beliefs, and assumptions that we hold based upon our knowledge, experiences, and opinions. These mental models are so deeply ingrained in our minds that we cannot readily access nor easily examine them and, therefore, cannot change them without considerable effort. The task of learning requires that we first exhume and scrutinize our mental models because "they influence everything we do, sometimes without us even knowing it."[5] Only then can we challenge the premises upon which we base them.

This means that police officials need to engage in premise reflection in the way that adult-learning theorist Dr. Jack Mezirow envisioned.[6] Are our thoughts, beliefs, and attitudes based upon sound reasoning and up-to-date evidence, or are they the result of tradition, malaise, or officially sanctioned knowledge? Are they frozen in time, or can they be defrosted periodically to respond to the elasticity required for the organization to survive?

Fostering Personal Mastery

Senge described personal mastery as the continuous, on-going improvement on the use of information and resources to achieve better results.[7] Essentially, this means that learning should take place on a day-to-day basis and that the discourse among members of an organization is desirable and necessary because it improves the knowledge, skills, attitudes, and abilities of the employees.

Initiating Team Learning

Senge emphasized team learning, which involves working well as a group.[8] The agency needs to place emphasis on teaching members how to execute tasks together as a whole organism.[9] They all must perform their functions for the team to be "fruitful" and to enhance the survival of the institution. If members work separately or do not perform in accordance with their potential, the team (and the system) will fail.

Leaders must promote team building and team work. Managers must communicate with members and reinforce the fact that they are an integral part

of a commendable mission and a worthy organization. Leaders must encourage their managers to engage in acts that inspire "knowing, thinking, remembering, and learning."[10]

Sharing the Vision

To effect change in an organization, leaders should "dismantle old cultures in order to adapt to new realities."[11] Executives must announce new goals and institute new ways of conducting police-related affairs. They must publish and distribute new vision and mission statements, as well as define new values and goals.

Senge stressed the necessity of an organization having a shared vision and mission.[12] When it has these, employees or members of that entity have a shared goal, direction, and purpose. They understand "why the organization exists and how their roles contribute to making the organization better."[13]

> **"Systems thinking deconstructs the notion of the organization as a machine made up of interchangeable parts."**

Introducing Systems Thinking

Executives must introduce and operationalize the idea of systems dynamics and not allow units to operate in isolation. They need to stress the imperative of interconnectedness of various intraorganizational units to sustain the institution as a whole. For example, detective squads should work with and through internal and external support and operational units and readily share information, intelligence, and newly acquired learning strategies with other specialized squads, units, divisions, bureaus, and agencies. Only then will the execution of tactics and strategies occur in a coordinated, systematic fashion.

Systems thinking is a paradigm that explains the interconnectedness and interdependence of the parts of an organization. This reliance is so profound that a failure of the functionality of a part can adversely affect the entire agency. Similarly, proficiency of the part can lead to positive effects on the system or institution (e.g., sustainability, success, and survival).

Systems thinking deconstructs the notion of the organization as a machine made up of interchangeable parts. Instead, Senge noted that "members of an organization and the causes of problems in the organization are part of a single system. It does no good, therefore, to blame others or outside circumstances for any difficulties being faced by the organization—the solutions to problems being faced by the organization lie within the organization."[14] This notion has been validated from the point of view of the entire criminal justice system, as well as from its component parts.

Conclusion

Under the former New York City police commissioner and deputy commissioner's tutelage and guidance, systems-thinking enlightened managers, like me, began asking some pertinent questions. What have we learned? How do we learn? No longer content with acquiring mere informational content, we began to concern ourselves with "the process of acquiring, processing, operationalizing, and storing information."[15] We were leaders who became learners ourselves. We, in turn, inspired new leaders and learners. We began to open up ourselves to different ways of knowing and learning. Hence, new crime-control strategies began to spring up; old ineffective ways of doing business began to be "unlearned."[16]

Eventually, the momentum of organizational learning and systems thinking will begin to accelerate throughout the agency. The "carriers" of change will become addicted to the idea of what can be. They, in turn, will spread their infections. This new philosophy will "enter into the stream of debates and deliberations" that will affect the

organization's "policies, programs, and practices."[17] In short, a systemically based institution is on its way to becoming a successful, results-oriented learning organization. ✦

Endnotes

[1] For additional background information, see *http://www.infed.org/thinkers/senge.htm*.

[2] C. Kochner and T.R. McMahon, "What TQM Does Not Address," in *Total Quality Management*, ed. W. Bryan (San Francisco, CA: Jossey-Bass, 1996), 89.

[3] B. Frydman, I. Wilson, and J. Wyer, *The Power of Collaborative Leadership: Lessons for the Learning Organization* (San Diego, CA: Elsevier Butterworth-Heinemann, 2000), 5.

[4] Supra note 2, 90.

[5] Supra note 2, 89-90.

[6] S. Merriam and R. Caffarella, *Learning in Adulthood: A Comprehensive Guide*, 2nd ed. (San Francisco, CA: Jossey-Bass, 1999), 328.

[7] Supra note 2, 90.

[8] Supra note 2, 91.

[9] F. Capra, *The Web of Life* (New York, NY: Anchor Doubleday, 1996).

[10] C. Argyris and D. Schon, *Organizational Learning II: Theory, Method, and Practice* (Boston, MA: Addison-Wesley, 1996).

[11] Supra note 3, xv.

[12] Supra note 2, 92.

[13] Supra note 2, 92.

[14] Supra note 2, 93.

[15] Supra note 10, 3.

[16] Supra note 10, 3-4.

[17] Supra note 10, 7.

Ms. Martin, a retired New York City Police Department lieutenant and commander of detectives, is an adjunct professor of criminal justice at East Stroudsburg University of Pennsylvania and Northampton Community College.

Book Review

Enhancing Police Response to Persons in Mental Health Crisis: Providing Strategies, Communication Techniques, and Crisis Intervention Preparation in Overcoming Institutional Challenges *by Don W. Castellano-Hoyt, Charles C. Thomas Publisher, Springfield, Illinois, 2003*.

This work is best suited for law enforcement administrators and field supervisors who want to understand persons with mental illness and their interactions with officers. For the last 15 to 20 years, articles have been written and lectures given about this topic but few books have appeared. *Enhancing Police Response to Persons in Mental Health Crisis* fills that void. The author presents a basic overview of major mental illnesses, a discussion of the interaction between persons with mental illness and police officers, and a frank account from a person personally familiar with both the mental health and criminal justice systems. Training over 7,000 police officers regarding persons with mental illness and serving as a negotiator in over 200 barricade situations, some involving SWAT, the author has become intimately familiar with crisis negotiation. The commander of the San Antonio Police Department's Crisis Negotiations Unit has told him many times during crisis negotiations that "you're the expert here. Tell me how much longer before this fellow will surrender." Don Castellano-Hoyt knows that in such situations, there is "no time for deferring the diagnosis or consulting a manual."

The book contains 16 chapters and 291 pages of practical information that may be read in its entirety or chapter by chapter. One chapter contains information that a police administrator could present in small amounts at daily roll calls. The author includes real-life scenarios in each chapter that come from his personal experience. These would make great discussion topics. The book has chapters regarding specific mental illnesses, such as schizophrenia (chapter 3) and depression (chapter 4). It also offers chapters about police officers executing mental health crisis interventions (chapter 5), suicide interventions (chapter 6), and emergency detention (chapter 8). Chapters concerning dealing with special populations (chapter 7) and communicating with persons with mental illness (chapter 9) provide practical techniques for field officers. Chapter 10 includes a discussion of psychiatric diagnoses and the manual used to make them.

The end of the book contains a list of each state and the District of Columbia covering statutes defining mental illness, nonpeace officer detention, and provisions for emergency detention. This book is concise, practical, easy to read, and written by someone knowledgeable about law enforcement officers and persons with mental illness. The author comes across as interested in solving real-life problems. He also is concerned for both officers and mental health consumers, which is refreshing and gives the book integrity. It is this integrity that will cause the reader to want to complete Don Castellano-Hoyt's book and refer to it in the future.

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Frequency of Publication: Monthly.

Purpose: To provide a forum for the exchange of information on law enforcement-related topics.

Audience: Criminal justice professionals, primarily law enforcement managers.

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Length: Feature articles should contain 2,000 to 3,500 words (8 to 14 pages, double-spaced). Submissions for specialized departments, such as Police Practice and Case Study, should contain 1,200 to 2,000 words (5 to 8 pages, double-spaced).

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Supreme Court Cases
2004-2005 Term

By the FBI ACADEMY
LEGAL INTSRUCTION UNIT

The 2004-2005 U.S. Supreme Court term included several cases addressing a variety of constitutional criminal procedural issues and employment-related matters of interest to the law enforcement community. One case addressed the extent to which the Constitution recognizes the ability of law enforcement to use canine detection, ruling on whether the Constitution requires articulable and specific facts indicating criminal activity to use a canine. Also before the Supreme Court was a case involving the extent to which law enforcement may exercise authority over occupants of a residence for which the officers have a search warrant to search. In two other cases, the Supreme Court ruled on whether the federal statute criminalizing conspiracy to launder money requires proof of an overt act and the extent to which a defendant can be visibly shackled during the penalty phase of a trial. Regarding employment matters, the Court provided further guidance on the extent to which speech engaged in by a government employee is protected under the First Amendment and also ruled on an issue arising under the Age Discrimination in Employment Act. A brief synopsis of each of these cases follows.

***Illinois v. Caballes*, 125 S. Ct. 843 (2005)**

The Supreme Court held that a dog sniff of the exterior of an automobile conducted during the course of a lawful vehicle stop is not a search and may be performed without any suspicion that the vehicle's occupants are engaged in criminal activity. In so holding, the Court distinguished *Kyllo v. United States*,[1] in which it held that the use of thermal imaging to detect a detail of the interior of a home not otherwise knowable was a search.

In *Caballes*, an Illinois state trooper stopped Roy I. Caballes for speeding and while radioing in to dispatch, a second trooper overheard the transmission and drove to the scene with his narcotics-detection dog. While the first trooper was writing Caballes a warning ticket, the second trooper walked the dog around the vehicle. When the dog alerted to the trunk, both officers searched it and found marijuana. Caballes was then arrested and later convicted on drug charges. The Illinois Supreme Court reversed the drug conviction, finding that because there was no specific and articulable facts to suggest drug activity, use of the dog sniff unjustifiably enlarged a routine traffic stop into a drug investigation.[2]

In reversing the Illinois Supreme Court, the U.S. Supreme Court found that the arrival of another officer at the scene while the traffic stop was in progress and the use of the narcotics-detection dog to sniff around the exterior did not itself constitute any additional infringement on Fourth Amendment rights that would have to be supported by a reasonable suspicion of criminal activity unrelated to the stop.[3] Recognizing that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution is unreasonable, the Supreme Court held that in this case, the traffic stop was not extended beyond the time necessary to issue a warning ticket. The outcome would be different if the dog sniff was conducted during an unlawful detention, not because of the constitutionality of the search, but rather due to the unreasonableness of the seizure.

The Court cited *United States v. Place*[4] to support its conclusion that the dog sniff itself was not a search within the meaning of the Fourth

Amendment because the use of a well-trained dog "does not expose noncontraband items that otherwise would remain hidden from public view."[5] Because it can reveal only the existence of an illegal substance, a dog sniff does not intrude into any legitimate expectation of privacy. Distinguishing this case from *Kyllo v. United States* the Court stated[6]

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search.... Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home.... The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectation concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.[7]

Muehler v. Mena, 125 S. Ct. 1465 (2005)

In this case, the Supreme Court provided additional guidance on the authority to detain, handcuff, and question occupants during the execution of a search warrant. In *Michigan v. Summers,* [8] the Court ruled that officers serving a search warrant for drugs could detain occupants of the premises while searching to "prevent flights in the event incriminating evidence is found, minimizing the risk of harm to the officers," and to facilitate the search, because occupants' "self-interest may induce them to open locked doors or locked containers to avoid the use of force."[9] Although the Court in *Summers* clearly held that a warrant to search for contraband carries with it the limited authority to detain occupants of the premises while a search is conducted, *Summers* did not resolve whether detained occupants could be handcuffed, or for how long, or questioned, nor whether its ruling also applied to searches for evidence as opposed to contraband. These issues were addressed in *Muehler v. Mena*.

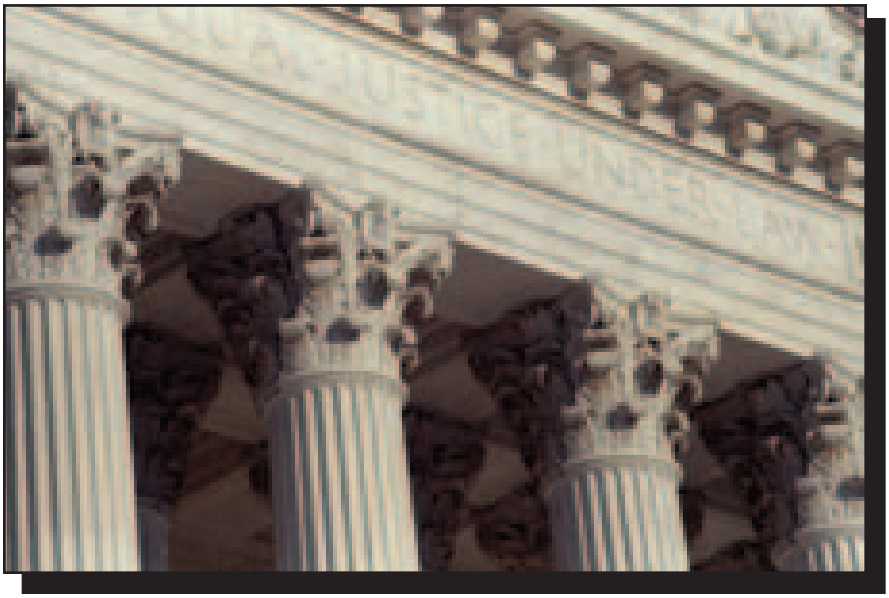
Police in Simi Valley, California, obtained a warrant in connection with a drive-by shooting to search a suspected gang member's house for weapons, ammunition, and gang paraphernalia. Because of the high-risk nature of the case, SWAT made the initial entry. Four occupants, including Iris Mena, were handcuffed at gunpoint and taken to a garage on the premises, where they were detained for the 2 to 3 hours it took to finish the search. Although Mena was not implicated in any crime, an INS agent who had accompanied the police briefly questioned her about her identity and immigration status. She was ultimately released. Mena brought a civil action against officers alleging a violation of her Fourth Amendment rights.

The U.S. District Court for the Central District of California upheld a jury verdict awarding Mena $60,000 in damages. The U.S. Court of Appeals for the Ninth Circuit affirmed.[10] In upholding the judgment against the police, the Ninth Circuit

took issue with the continued detention of Mena during the search despite determining that she was not a suspect, as well as the use of handcuffs during the search despite what the court believed to be insufficient information suggesting she posed a threat to officer safety.[11]

The Supreme Court reversed, finding that "Mena's detention was, under *Summers*, plainly permissible."[12] In so concluding, the Court made no distinction between searches for contraband and searches for evidence. An officer's authority to detain occupants incident to the execution of a search warrant was described as being categorical—meaning absolute and unqualified and not requiring any justification beyond the warrant itself. The authority does not depend on the amount of proof justifying detention nor the extent of intrusion imposed by the seizure.[13] The Court concluded that Mena's detention for the duration of the search was reasonable simply based on the existence of a warrant for a residence in which she was an occupant at the time of the search.[14]

The Court also found that the officer's continuing safety interests rendered the use of handcuffs for the full length of the search reasonable.[15] Inherent in the authority to detain occupants is the authority to use reasonable force to effect the detention.[16] What force is reasonable will depend on the facts of the case. Here, the underlying case was a crime of violence; the warrant was based on probable cause to believe that gang members and weapons would be located at the residence. Further, there were multiple occupants and only a limited number of officers to control them while the search was completed.[17]



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On the issue of questioning, the Ninth Circuit Court of Appeals ruled that an officer must have reasonable suspicion that an individual is not a citizen to interrogate that individual about citizenship status. The U.S. Supreme Court disagreed and held that officers do not need independent reasonable suspicion to question an occupant detained during a lawful search. As the Court explained, "We have 'held repeatedly that mere police questioning does not constitute a seizure'" and "[h]ence, the officers did not need reasonable suspicion to ask Mena her name, date and place of birth, or immigration status."[18]

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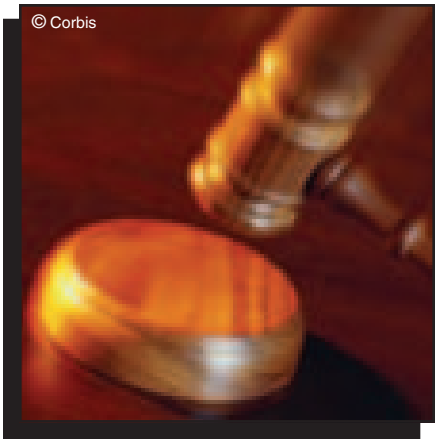
***Deck v. Missouri*,**
125 S. Ct. 2007 (2005)

In this case, the Supreme Court considered whether shackling a convicted offender during the penalty phase of a capital case violates the Constitution. The Court determined that the Constitution, in fact, does forbid the use of visible shackles during the penalty phase, just as it forbids their use during the guilt phase unless specific circumstances justify their use.[19]

Carman Deck was a convicted double murderer when he appeared before a second jury who was to recommend either life in prison or death as his sentence.[20] From the outset of the sentencing proceeding, Deck was shackled with leg irons, handcuffs, and a belly chain.[21] At the conclusion of the penalty phase, Deck received two death sentences.[22] Deck appealed the sentencing as a violation of Missouri law and the U.S. Constitution. The Missouri court rejected the claims and affirmed the sentence. He then appealed to the U.S. Supreme Court.

The Supreme Court initially recognized that "[t]he law has long forbidden routine use of visible shackles during the guilt phase"[23] of criminal cases. Justice Breyer, the author of the majority opinion, then applied the threefold legal rationale for this longstanding prohibition to the situation at issue in *Deck*—whether the use of visible shackles during the *penalty* phase violated Deck's right to due process.

The first reason for not routinely allowing shackles during the guilt phase of criminal trials is because "the criminal process presumes that the defendant is innocent until proven guilty."[24] While this presumption is no longer at play during the sentencing proceeding for a convicted defendant,



similar concerns are impacted. While the jury may no longer be deciding between guilt and innocence, it is deciding between life and death, and accuracy in making that decision is [no] less critical.[25]

The second traditional reason for prohibiting shackles in court is that they diminish a person's right to a meaningful defense. A person in shackles may decide against taking the witness stand on his own behalf, and shackles may interfere with the ability to communicate with counsel. The right to a meaningful defense is at least as equally important during the penalty phase as it is during the guilt phase of a capital case.

Finally, the Court considered the third traditional factor behind the ban on courtroom shackles. The Court noted that "judges must seek to maintain a judicial process that is a dignified process."[26] This factor mitigates against the use of shackles during the penalty phase as much (if not more) than at the guilt phase. If the use of shackles at trial affronts the dignity and decorum of trial proceedings, then to have a man plead for his life in shackles certainly undermines the dignity of those proceedings as well.[27]

While the Court banned the systematic use of shackles during penalty proceedings, it recognized that not all uses of restraints during these proceedings violate the Constitution. The decision to shackle, though, must be based on case-specific circumstances. Restraints, up to and including shackling, should reflect particular concerns, such as special security needs or escape risks, related to the defendant.[28] In making this allowance, Justice Breyer acknowledged that tragedy can result "if judges are not able to protect themselves and their

courtrooms. But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case."[29]

***Whitfield v. United States,* 125 S. Ct. 687 (2005)**

In this case, a number of co-defendants were charged by an indictment that described, in general terms, the manner and means used to accomplish the objects of a money-laundering conspiracy. The indictment, however, did not charge the defendants with any overt act in furtherance of the scheme. At trial, the government presented evidence that the defendants, as principals in Greater Ministries International Church, managed and promoted a fraudulent investment scheme. At the close of the evidence, the defendants asked the district court to instruct the jury that the government was required to prove beyond a reasonable doubt that at least one of the co-conspirators had committed an overt act in furtherance of the money-laundering conspiracy. The court denied the request, and the jury returned a verdict of guilty.

The Eleventh Circuit Court of Appeals affirmed the convictions, holding that the jury instructions were proper because the money-laundering conspiracy charge[30] does not require proof of an overt act.[31] The Eleventh Circuit noted that while neither it nor the Supreme Court had previously determined whether commission of an overt act is an essential element of a conviction under the money-laundering conspiracy statute, other circuit courts were split on the issue.[32] Those circuit courts that had found that the statute required proof of an overt act relied, erroneously in the view of the Eleventh Circuit, on case law interpreting the general conspiracy statute (Title 18, U.S. Code, section 371).[33]

The U.S. Supreme Court agreed to hear the case and held that conviction for conspiracy to commit money laundering does not require proof of an overt act in furtherance of the conspiracy. Writing for a unanimous Court, Justice O'Conner looked to the case of *United States v. Shabani* [34] in which the Court had held that the nearly identical language of the drug conspiracy statute (Title 21, U.S. Code, section 846) does not require proof of an overt act. Justice O'Conner pointed out that, in deciding *Shabani*, the Court found instructive a comparison between the money-laundering conspiracy statute and the general conspiracy statute that expressly includes an overt-act requirement. Indeed, the general conspiracy statute supercedes the common law rule by expressly including an overt-act requirement.[35] The Court concluded that the rule applied in *Shabani* dictated the outcome here as well.[36] Because the plain text of the money-laundering conspiracy statute does not expressly make commission of an overt act an element of the conspiracy offense, the government need not prove an overt act to obtain a conviction.

Smith v. City of Jackson, Mississippi, 125 S. Ct. 1536 (2005)

This case provided the Supreme Court an opportunity to decide whether the Age Discrimination in Employment Act (ADEA)[37] afforded complainants an opportunity to sue, not on the basis of direct discrimination (disparate treatment) but, rather, by arguing indirect discrimination, referred to as disparate impact. *Smith v. City of Jackson, Mississippi*,[38] involved a claim on the part of certain police and public safety officers alleging that the city's revision of a pay plan designed to bring salaries to a competitive level with other municipalities by providing more of a percentage increase for less senior officers as opposed to officers over the age of 40 had a discriminatory impact on older officers in violation of the ADEA. The Fifth Circuit Court of Appeals rejected this theory, ruling that a disparate impact theory of discrimination is not available under the ADEA.[39]

The Supreme Court reversed, holding that the ADEA should be read consistent with Title VII of the Civil Rights Act with respect to allowing for consideration of a disparate impact theory of liability under the ADEA. However, the Court ultimately held that the plaintiffs failed to establish such a claim. In so ruling, the Court concluded that while a disparate impact claim of discrimination is viable under the ADEA, language in the ADEA itself restricts its scope as compared with disparate impact discrimination under Title VII of the Civil Rights Act. The ADEA contains a provision that significantly limits its scope by allowing for an employer to take any action otherwise prohibited by the ADEA where the differentiation is based on reasonable factors other than age.[40] In other words, can the discrimination be explained by a nonage factor that was reasonable? Additionally, to establish a disparate impact claim, the plaintiffs must identify a specific test or requirement or point to a specific policy that has the disparate impact. The plaintiffs may not simply allege that a disparate impact exists.[41]

The Supreme Court concluded that the plaintiffs failed to identify a specific practice that had a disparate impact. The Court stated that "petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers."[42] The Court further concluded that the city's pay plan was based on a reasonable factor other than age, in this case, seniority. While recognizing the theory of liability—disparate impact—as viable under the ADEA, the Court concluded that the plaintiffs failed to establish a case.

City of San Diego v. Roe, 125 S. Ct. 521 (2004)

In *City of San Diego v. Roe*, the Supreme Court provided guidance on the extent to which speech and expressive conduct on the part of public employees is considered as relating to a matter of public concern. This finding is crucial to the viability of a claim brought by a government employee challenging an adverse employment action on the grounds that it violates the First Amendment. The long-established framework for determining the constitutionality of taking adverse action against a government employee includes balancing the interests of the employee in engaging in the speech or expressive conduct and the interests of the employer.[43] In the seminal case of *Connick v. Myers,*[44] the

Supreme Court announced a threshold inquiry that must be met requiring a finding that the speech or expressive conduct is a matter of public concern prior to balancing the interests of the employer versus the employee. The contours of the concept of public concern were addressed during the 2004-2005 Supreme Court term.

In *City of San Diego v. Roe*, a police officer was terminated after the department determined that he had been selling homemade, sexually explicit videos on an adult-only area of the Internet. The videos depicted him in vintage law enforcement uniforms but not the specific uniform of his department, nor did he identify himself as an officer of that department. The department ordered him to cease his activities. He complied to some degree but continued to sell some items. The department then fired him. The Ninth Circuit Court of Appeals ruled that Roe's activities fell within the category of speech touching on a matter of public concern, particularly as it occurred off duty and away from the employer's premises.[45] The case was remanded to the lower court to weigh the interests of the department versus those of the officer. The city appealed the Ninth Circuit's ruling to the Supreme Court.

The Supreme Court recognized that "the contours of the public concern test are not well-defined."[46] However, the Court noted that *Connick* did offer some guidance by directing that the "content, form, and context of a given statement, as revealed by the whole record"[47] should be considered. The Court also indicated that in *Connick*, it referred to the standard used in prior rulings interpreting governmental intrusions into privacy as the one that should apply in interpreting public concern. Applying these principles in *Roe*, the Supreme Court stated

> These cases make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.[48]

Applying these principles to the expressive conduct in the case at hand, the Supreme Court stated that "there is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test."[49] Accordingly, there is no need to apply the balancing of interests test, and the termination did not violate the First Amendment.

Cases Set for 2005-2006

While the Court will continue to accept cases for consideration once the 2005-2006 term begins, it has agreed to hear several cases during this term of interest to the law enforcement community. Notably, the Supreme Court agreed to hear *Georgia v. Randolph*[50] to resolve the conflict existing in

state and federal courts on whether an occupant may give valid consent to law enforcement over the objections of another occupant when both the consentor and non-consentor have authority to give consent to search the common areas of premises shared among the two. In *Booker T. Hudson v. Michigan*,[51] the Court will consider whether evidence seized following a violation of the knock and announce rule should be subject to a per se admissibility rule under the inevitable discovery doctrine. In an employment-related matter, the Court agreed to hear *Garcetti, et al. v. Ceballos*,[52] which may further clarify the concept of public concern within the meaning of the First Amendment.✦

Endnotes

[1] 533 U.S. 27 (2001).

[2] *People v. Caballes*, 207 Ill. 2d 504, 510; 280 Ill. Dec. 277, 280; 802 N.E. 2d 202, 205 (2003).

[3] 125 S. Ct. 834, 837.

[4] 420 U.S. 696 (1983).

[5] *Id.* at 838.

[6] 533 U.S. 27 (2001).

[7] *Id.* (The U.S. Supreme Court vacated the judgment and remanded to a District Court of Appeal of Florida for further consideration in light of *Caballes,* a case involving the dog sniff of the exterior of a residence. *See*, *Florida v. Rabb*, 125 S. Ct. 2246 (5/16/2005). In *Rabb*, a Broward County Sheriff's Office detective and drug dog walked from a public roadway in front of the residence up to the front door where the dog alerted. This information was used to obtain a search warrant for the residence. The Florida court had ruled that the use of a dog sniff to reveal the presence of drugs within a home was a search in light of *Kyllo*. *See*, *State v. Rabb*, 881 So.2d 587 (Fla. App. 4 Dist. 2004)).

[8] 452 U.S. 692 (1981).

[9] *Id*. at 703.

[10] *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003).

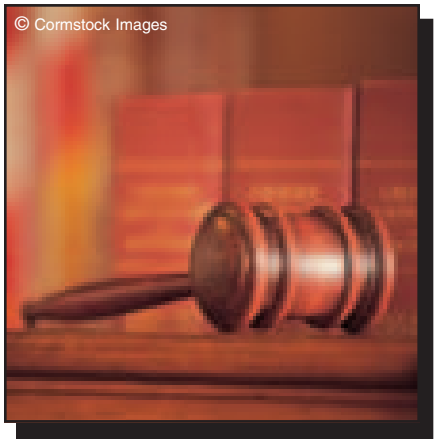
[11] *Id*. at 1263.

[12] 125 S. Ct. 1465, 1470.

[13] *Id.*

[14] *Id*.

[15] *Id.* at 1471. *Mena* underscores a distinction between the categorical rule that permits the detention of occupants while serving a search warrant and the more limited rule that permits the use of handcuffs only when it is reasonable to do so. Detention of occupants always is permitted without further justification while the search is completed, but the use of handcuffs will be evaluated as a use of force that must be justified on the basis of the circumstances confronted.



[16] 125 S. Ct. 1465, 1470

[17] *Id*. at 1471.

[18] *Id*. (It should be noted that the Court remanded the case on the question of whether Mena could show that she had been detained after the search was completed. This suggests that routine detention should end once the search is completed.)

[19] *Deck v. Missouri*, 125 S. Ct. 2007, 2009 (2005). Lower court opinion can be found at 136 S.W.3d 481 (Mo. 2004) (en banc).

[20] Deck was originally convicted and sentenced to death by the same jury. However, on appeal, the Missouri Supreme Court upheld his conviction but set aside the sentence [68 S.W.3d 418, 432 (Mo. 2002)], requiring the state to proceed with a new sentencing proceeding.

[21] 125 S. Ct. at 2010.

[22] *Id*. at 2016 (Thomas, J., dissenting).

[23] 125 S. Ct. at 2010.

[24] *Id*. at 2013 (citation omitted).

[25] 125 S. Ct. at 2014.

[26] *Id*. at 2013.

[27] *Id.*

[28] *Id*. at 2015.

[29] *Id*. at 2014. (A recent example of the type of tragedy alluded to was the March 11, 2005, courthouse shooting in Fulton County, Georgia. In that particular case, Brian Nichols was to appear before Judge Rowland Barnes. Prior to the day's proceedings, Barnes overpowered two sheriff's deputies and used one of their service weapons to kill Barnes and his court reporter. He then killed a sheriff's deputy he encountered while escaping from the courthouse. Nichols was apprehended the following day.)

[30] 18 U.S.C. § 1956(h).

[31] *U.S. v. Hall*, 349 F.3d. 1320,1324 (11th Cir. 2003).

[32] Fourth and Ninth Circuits did not require the indictment to allege an overt act; Fifth and Eighth Circuits required proof of an overt act for conviction.

[33] *Id.* at 1323.

[34] 513 U.S. 10 (1994).

[35] 25 S. Ct. 687, 691 ("As we explained in *Shabani*, these decisions 'follow the settled principle of statutory construction that, absent contrary indications, congress intends to adopt the common law definition of statutory terms.'").

settled principle of statutory construction that, absent contrary indications, congress intends to adopt the common law definition of statutory terms.'").

[36] *Id.*

[37] Age Discrimination in Employment Act of 1967, Pub. L. 90-202, codified at 29 U.S.C. §§621, *et. seq*.

[38] 125 S. Ct. 1536 (2005). Lower court case can be found at 351 F.3d 183 (5th Cir.).

[39] 351 F.3d 183.

[40] 29 U.S.C. §623, commonly referred to as the RFOA provision.

[41] *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). As a result of this decision Congress amended Title VII of the Civil Rights Act to address this burden of proof issue to expand the protections afforded employees under Title VII. However, Congress did not amend the ADEA. Accordingly, the Supreme Court held that the *Wards Cove* standard applies to the ADEA. *See* 125 S. Ct. at 1545.

[42] *Smith* at 1545.

[43] *Pickering v. Board of Education of Township High School Dist. 205 Will Cty.*, 391 U.S. 563 (1968).

[44] 461 U.S. 138 (1983).

[45] 356 F.3d 1108 (2004).

[46] *Roe* at .

[47] *Id*, *citing Connick* at 146-147.

[48] *Id.*

[49] *Id.*

[50] 604 S.E.2d 835 (Ga. 2004), *cert. granted,* 04-1067 (2005).

[51] Unpublished, *cert. granted*, 04-1360 (2005).

[52] 849 A.2d 410 (Md.App. 2004), *cert. granted*, 04-373 (2005).

[53] 361 F.3d 1168 (9th Cir. 2004), *cert. granted*, 04-473 (2005).

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.

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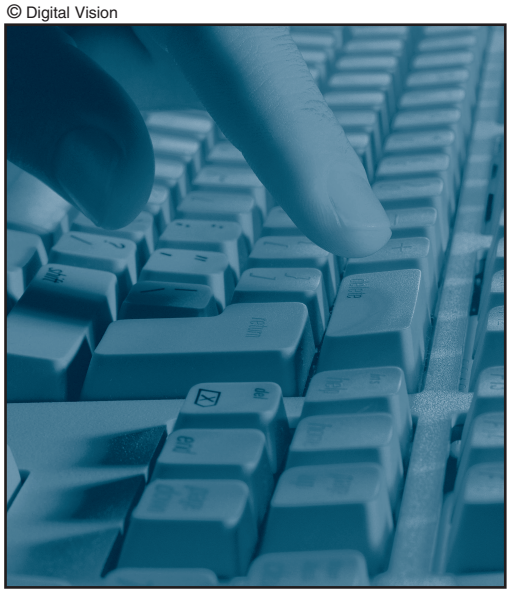

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Bulletin Reports

Public Relations

The Bureau of Justice Statistics presents *Contacts Between Police and the Public: Findings from the 2002 National Survey*, which offers data on the nature and characteristics of contacts between officers and citizens of the United States over a 12-month period. Findings reflect results from a nationally representative survey of nearly 80,000 residents age 16 or older. Detailed information pertaining to face-to-face encounters with the police includes the reason for and outcome of the contact, resident opinion on officer behavior during the incident, and whether police used or threatened force. The report provides demographic characteristics of residents involved in traffic stops and use-of-force encounters and discusses the survey findings' relevance to the issue of racial profiling. Highlights include the following: about 25 percent of the 45.3 million persons with a face-to-face contact indicated that the reason was to report a crime or other problem; in 2002, about 1.3 million residents age 16 or older—2.9 percent of the 45.3 million persons analyzed—were arrested by police; and the likelihood of being stopped by officers in 2002 did not differ significantly among drivers of different races, although police were more likely to carry out some type of search on an African-American or Hispanic driver than a Caucasian. This report is available online at *http://www.ojp.usdoj.gov/bjs/abstract/cpp02.htm*.

Corrections

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) offers *Implementation and Outcome Evaluation of the Intensive Aftercare Program: Final Report*, which presents the findings from a 5-year multisite analysis of the OJJDP program, the goal of which is to reduce recidivism among high-risk parolees. This model postulates that effective intervention requires not only intensive supervision and services after institutional release but also a focus on reintegration during incarceration and a highly structured and gradual transition between institutionalization and aftercare. This report is available online at *http://www.ncjrs.org/pdffiles1/ojjdp/206177.pdf*.

Bulletin Reports is an edited collection of criminal justice studies, reports, and project findings. Send your material for consideration to *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 201, Quantico, VA 22135. (NOTE: The material in this section is intended to be strictly an information source and should not be considered an endorsement by the FBI for any product or service.)

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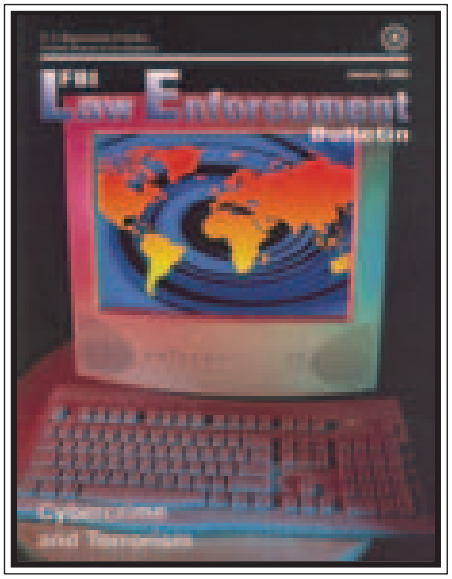

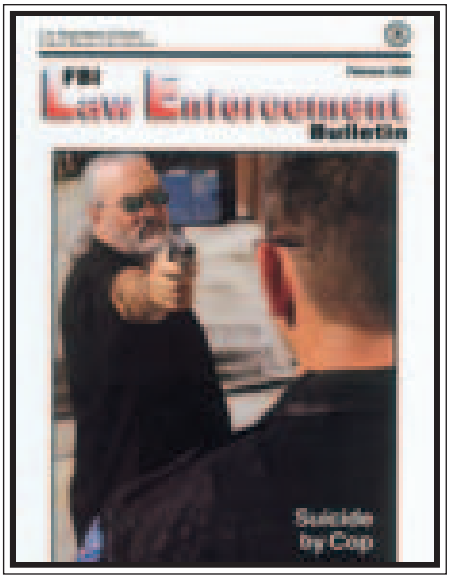

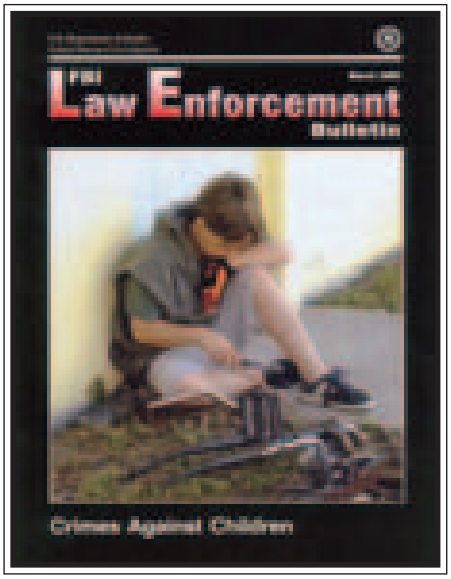

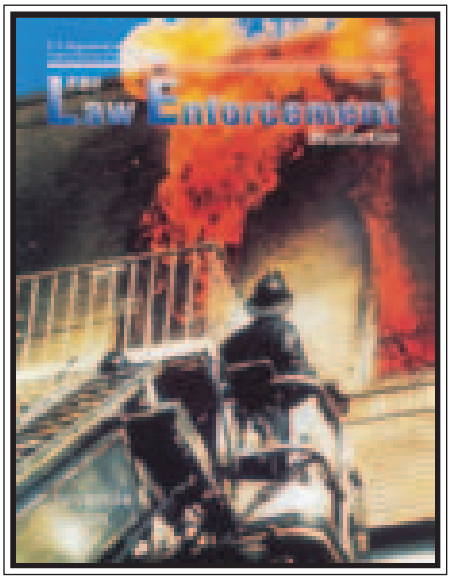

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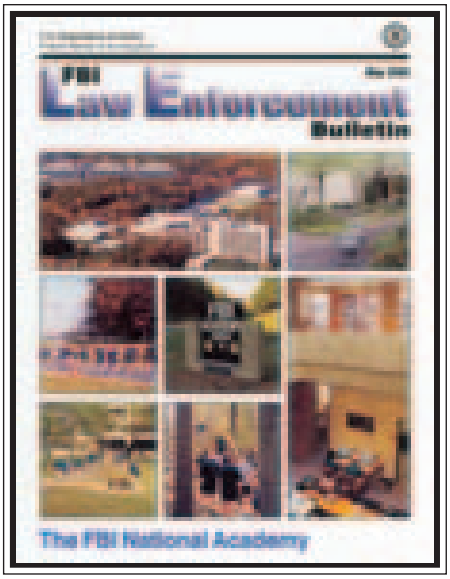

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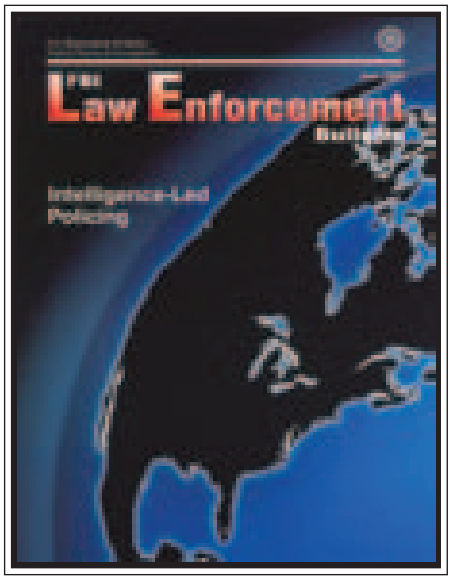

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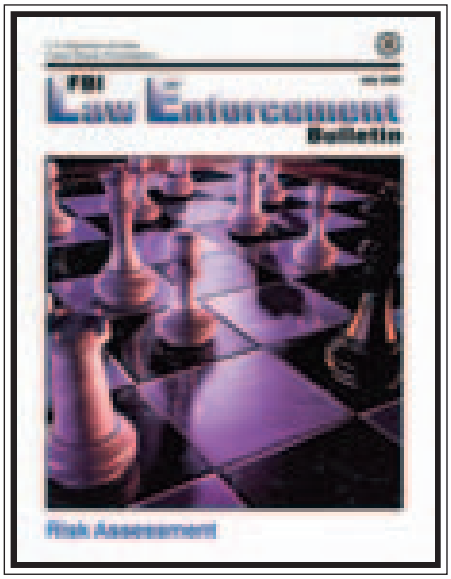

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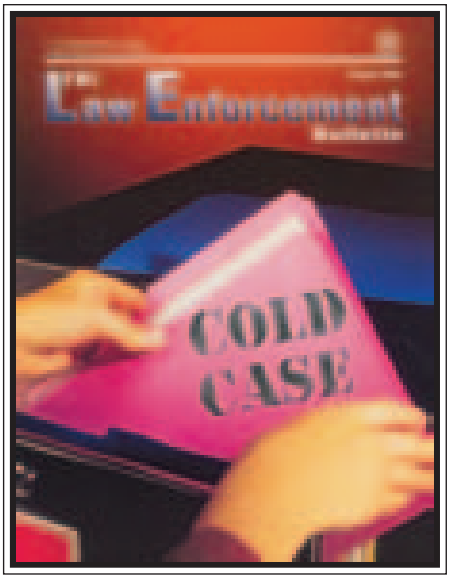

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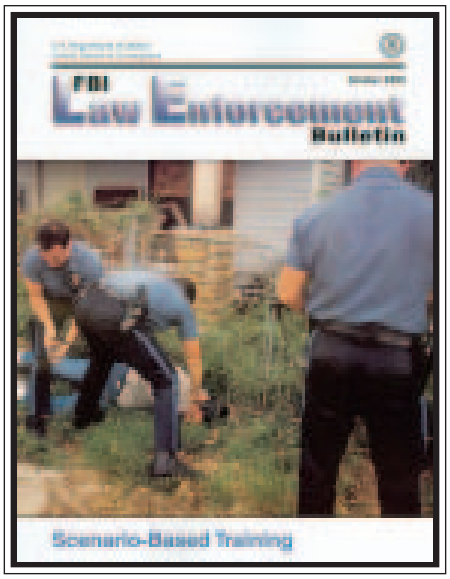
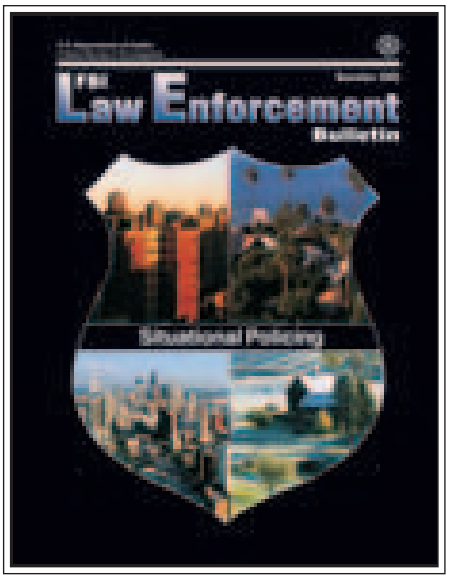
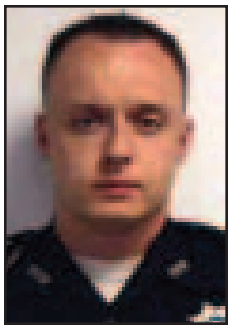




The Bulletin Notes

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.

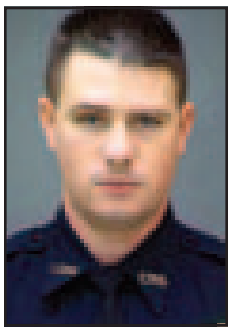
Officer Watson



Officer DiMaria

One evening, Officers Ellis Watson and Joseph DiMaria of the Swissvale, Pennsylvania, Police Department responded to a building fully engulfed in flames. Two handicapped, elderly women were trapped in apartments on the second floor. Without air masks or protective clothing, Officers Watson and DiMaria entered and made their way through heavy smoke and flames to the upstairs apartments. After a search, the officers located the two victims and carried them both outside to safety. One of the women required her oxygen tank to remain in use, presenting a risk of explosion; the officers also removed two additional tanks to protect the firefighters that later would arrive. Both victims received treatment at a local hospital and were released. The selfless actions of Officers Watson and DiMaria saved the lives of these two women.

Officer Espinola



Officer MacLaughlan

Officers Joseph Espinola and John MacLaughlan from the Lowell, Massachusetts, Police Department responded to a call of a man threatening to commit suicide by leaping from a bridge. Upon arrival, the individual already had jumped into the canal and was flailing in the water, appearing tired. Officer Espinola immediately jumped into the canal, swam to the victim, grabbed him, and helped him to catch his breath. Officer MacLaughlan also joined in the rescue, and the two officers worked their way back to the water's edge with the individual. With the help of fellow officers, the man was brought to safety. The victim and both officers then received medical attention. The brave actions of Officers Espinola and MacLaughlan saved this individual's life.

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 sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 201, Quantico, VA 22135.

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Patch Call

A local 8th grade student won the Blount County, Tennessee, Sheriff's Office's patch design contest and saw his entry adapted for official use. The patch features a police canine and handcuffs, as well as representations of other elements of the county, such as industry, agriculture, air transportation, and the Great Smokey Mountains.

The patch of the Sequim, Washington, Police Department features the New Dungeness Lighthouse, the first in the Straight of Juan de Fuca-Puget Sound area. Serving a similar purpose, the department provides a beacon of safety to the community. The Olympic Mountains sit in the background.