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FBI Law Enforcement Bulletin

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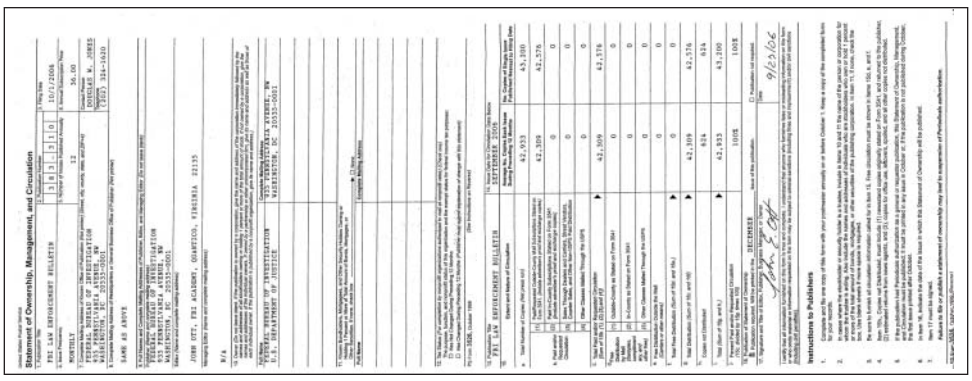

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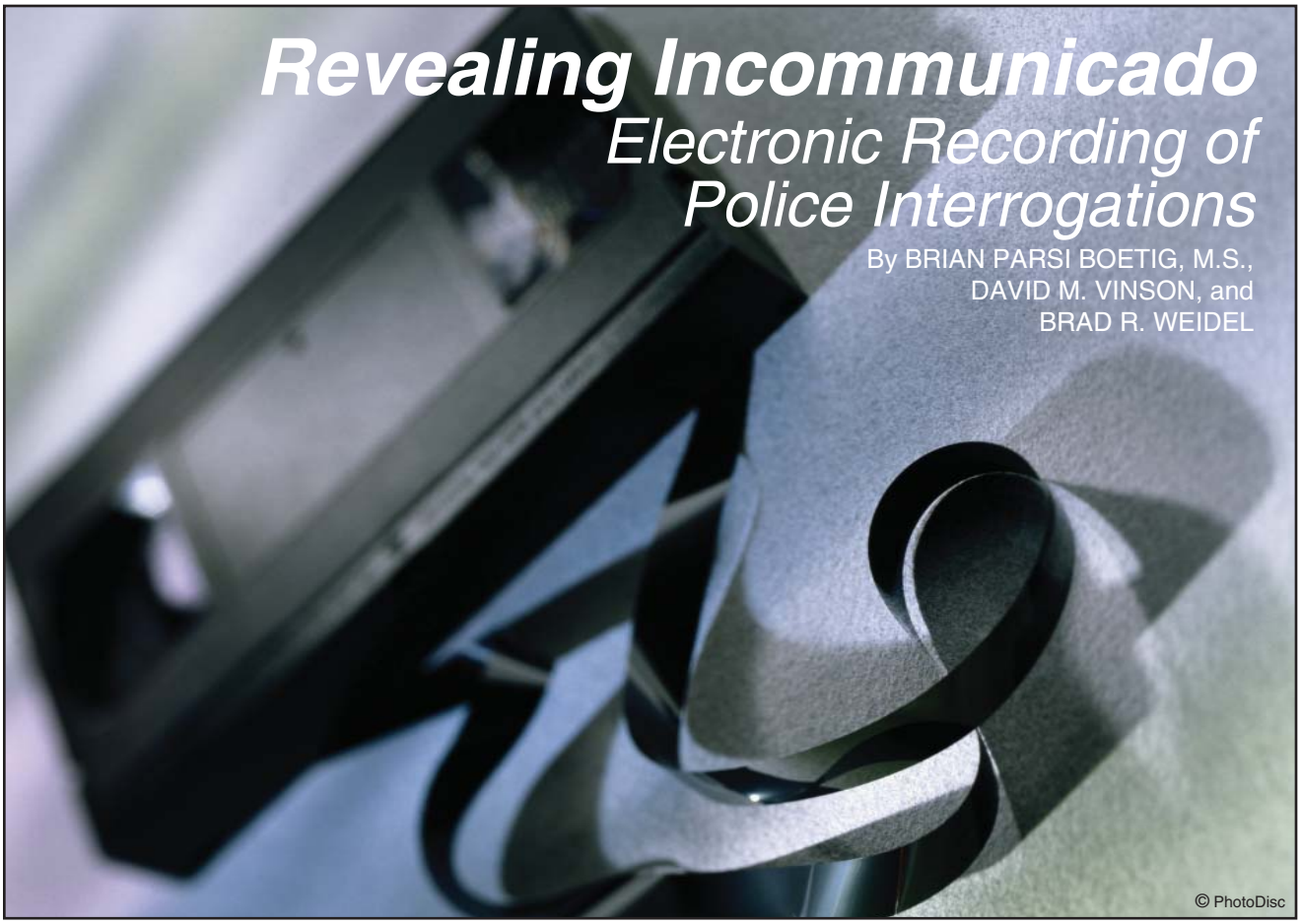
Revealing Incommunicado

Electronic Recording of Police Interrogations

By BRIAN PARSI BOETIG, M.S., DAVID M. VINSON, and BRAD R. WEIDEL



Many U.S. law enforcement agencies face the decision of whether or not to electronically record interrogations.[1] The underlying principle of recording interrogations is to accurately collect and preserve confession evidence in the most unbiased and efficient manner. Law enforcement officers and administrators should be aware of the judicial decisions and statues in several states that require the recording of interrogations, the benefits of electronically recording, and obstacles to overcome when deciding to begin this technique.

In the landmark *Miranda v. Arizona* decision, the U.S. Supreme Court noted that the difficulty in depicting what transpires during interrogations is based on the fact that "they have largely taken place incommunicado."[2] The privacy of the interrogation is not simply an inherent characteristic but a carefully calculated strategy aimed at creating an environment of isolation,[3] evident by the fact that most law enforcement officers do not conduct successful interrogations with a group of suspects at once or in public places. Similar to nonsuspect interviews, interrogations generally are conducted in private locations that limit distractions and outside interferences. On the other hand, privacy limits the number of available witnesses to the two or three people present who can attest to the activities that occurred during the interrogation, and these participants generally have a vested interest in the outcome of the interrogation.

Testimony regarding what transpired inside the interrogation room can become tainted if only the participants witnessed what occurred. Conflicting

statements by the police and defendant regarding the presentation and waiver of *Miranda* warnings, requests for an attorney, the use of coercive tactics, and the mere presence of a confession expose the spectrum of issues that can arise.[4]

Although dishonesty and other nefarious machinations can explain contradicting accounts of what occurred, other abstruse reasons may apply. First, problems associated with recollection can contribute to conflicting statements. Interrogations often last for hours and exact transcripts cannot precisely memorialize everything. Furthermore, a trial may not occur for years after the interrogation, reducing the ability to cognitively recall all of the specific details and circumstances not recorded in notes or reports.

Second, disparities in perceptions or preconceived biases by participants might facilitate certain, and possibly wrong, inferences. Perception is the mental process by which people gather, organize, interpret, and evaluate information; each participant could perceive the same incident or conversation differently. In the interrogation setting, this not only includes differences in perceptions between the investigator and the suspect but also between investigators.

Third, certain statements can have equivocal interpretations.[5] While officers, with a few exceptions, are not intentionally coercive or dishonest, they can view some statements differently. For example, an interrogator's references to counseling for the defendant may imply an offer of leniency to the defendant, although that never was the intention.

Investigators assigned to conduct criminal investigations and custodial interrogations have the common goal of uncovering the truth. Often, interrogations result in admissions and confessions by suspects. Currently, many departments do not electronically record custodial interrogations despite the exceptional value and benefit to the criminal justice system, including the police, prosecutors, and courts, as well as defendants and the community. Two reasons exist for this failure to record. First, most states do not legally require it. But, electronic recording has proven a valuable tool in administering justice by accurately preserving confession evidence.[6] Despite

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its value, some law enforcement agencies often do not view electronic recording as a priority because many courts still accept confession evidence based solely on an investigator's oral testimony and written reports. If a state supreme court issues a ruling similar to those in states that do require the recording of custodial interrogations, the impact on law enforcement agencies could be disastrous. Unless the court makes special provisions, such a ruling could impact pending cases with confession evidence as extraordinarily as causing those confessions to be inadmissible or, at a minimum, harder to introduce as evidence. Additionally, procuring and installing equipment and training investigators on how to use it may prevent the timely and logical progression of active and new cases involving custodial interrogations.

The second impediment preventing law enforcement agencies from routinely electronically recording interrogations, and perhaps the most important, is that agencies do not possess the proper equipment to adequately perform the task. While agency support, community pressure, or a legal mandate might force recording to occur, acceptable electronic recording requires the use of appropriate equipment. Although just having a standard video camera may seem to suffice, audio and visual recordings will suffer. For example, interrogations may run longer than a standard video camera's taping capacity; therefore, agencies must use a system that will not cause unrecorded breaks. Further, covert recording requires special equipment.

Law enforcement agencies should address the contemporary issue of electronic recording in a progressive manner. The commitment of departments to effectuate change in their investigative practices

> ***Law enforcement agencies should address the contemporary issue of electronic recording in a progressive manner.***

related to the electronic recording of custodial interrogations will allow them to reap the benefits of an established, effective, and reliable police practice while avoiding a potentially chaotic transition if mandated to do so in the future. Waiting until the law requires it, and without knowing when that time will occur, will prevent agencies from maximizing the many benefits electronic recording can provide in the interim to the criminal justice system and the citizens of the community.[7]

EXAMINATION OF EFFECTIVENESS

Many law enforcement agencies and courts have recognized and accepted electronic recording as a just and viable manner to collect and preserve confession evidence, the single most valuable tool in securing a conviction in a criminal case.[8] Departments routinely use electronic recording in other aspects of evidence collection and preservation, and it has proven an effective tool. For example, they regularly use video recording to document crime scenes, traffic stops, accidents, and undercover and surveillance operations, as well as to monitor prisoners.

In 1990, one-third of domestic law enforcement agencies video recorded at least some of their interrogations.[9] By 1993, it was anticipated that 60 percent of law enforcement agencies would electronically record confessions in at least some cases they investigated.[10] These estimates were based on some departments recording as a result of legal requirements and others doing so on a voluntary basis.

When deciding whether or not to electronically record, an agency must dispel a major myth associated with the

practice: that recording will adversely affect the ability to obtain cooperation and confessions. First, most states permit covert recording. Therefore, agencies can install such systems to record without a suspect's knowledge, thus eliminating this myth. Second, departments that electronically record obtained more incriminating information when they recorded than when they did not. Finally, no conclusive evidence exists to support the belief that suspects' reluctance to cooperate and confess increases when they know that officers are recording them.[11] In the rare case that a suspect refuses to talk while recorded, the investigator simply can turn off the camera and obtain the evidence without a recording (or covertly record anyway). The court and statutory provisions in those states that mandate recording concluded that a suspect's refusal to be recorded constitutes a permissible exception to the mandatory recording requirement.

STATUTORY PROVISIONS

Several states have passed legislation requiring law enforcement agencies to electronically record interrogations while Alaska and Minnesota have court-ordered requirements mandating that departments electronically record certain custodial interrogations. Beginning in August 2005, Illinois law enforcement agencies were required, by legislative statute, to electronically record custodial interviews for certain criminal violations, most of which involve homicides.[12] The statute was specifically intended to protect agencies from claims of abuse and coercion while preserving the rights of the interviewee. Although only a few other state legislatures have adopted such measures, the courts in two other states have set precedent that clearly imposes a requirement on law enforcement to record interrogations when conducted in police or detention facilities.

> ***Many courts recognize the value of recording interrogations for use in resolving matters.***

COURT PRECEDENT

In 1980, the Supreme Court of Alaska ruled that police must electronically record interrogations of suspects when feasible, especially when the interrogation occurs in a police facility.[13] The court cited its reason as the assistance a recording would provide the court in determining the circumstances surrounding a defendant's confession and *Miranda* rights waiver. Without a recording, the court was charged with resolving contrary statements. In 1985, the court realized that ambiguity existed with its earlier decision. Therefore, it established that recording interrogations was a requirement of the state's due process as provided in the Alaska Constitution when an interrogation occurred in a law enforcement or detention facility and when feasible.[14]

In 1994, the Supreme Court of Minnesota followed the Alaskan court's decision and established precedent that required police to record interrogations when conducted in a place of detention and when feasible.[15] It concluded that recording was now a reasonable and necessary safeguard, essential to the adequate protection of the accused's rights to counsel, against self-incrimination, and, ultimately, to a fair trial.

In 2004, a Massachusetts court issued a ruling related to recording interrogations to better preserve details.[16] Although not cited as a violation of the state's constitutionally guaranteed due process, the lack of recording was considered a relevant factor in determining the voluntariness of a *Miranda*

rights waiver and confession. The court concluded that the failure to preserve evidence in a thorough and reliable form, cited as electronic recording, could comprise the basis for establishing that voluntariness and valid waiver of *Miranda* rights had not been proven beyond a reasonable doubt. Jurors now can receive special instructions to cast doubt on the reliability of the confession evidence because it was not recorded. Other trial and reviewing judges also have stopped short of mandating electronic recording but urge its use when feasible.[17]

BENEFITS

Courts

No court ruling or legislative action aims to make police work more difficult but, instead, to provide a mechanism of fundamental fairness in the overall pursuit of justice. An accurate depiction of the interrogation, rather than dishonesty and police misconduct, prompted the statutes and court decisions requiring electronic recording. People, including officers and suspects, forget facts or reconstruct and interpret them differently. Furthermore, given the fine line between proper and improper interrogative techniques, the ability to reproduce the exact statements made benefits everyone. The courts have cited several other advantages of recording interrogations, including deterring police misconduct, reducing the number and length of motions to suppress confessions, providing accurate resolution of conflicting testimony by furnishing a complete version of what was said to the fact finders, and ensuring that the essence of the *Miranda* decision was not eschewed when presented to suspects.[18]

Many courts recognize the value of recording interrogations for use in resolving matters. Each U.S. law enforcement agency not already electronically recording interrogations is, quite possibly, only one judicial court decision away from the requirement, which could come in the next session or in 10 years. Even if courts do not make the practice mandatory, extensive lobbying occurs for statutory requirements similar to those recently passed in Illinois. Although the mandatory electronic recording requirements are generally court or statute related, law enforcement agencies can benefit from this effective tool because the value of recording is even greater for them than for the courts.

Law Enforcement Agencies

Law enforcement agencies concurrently reap all the benefits of electronically recording custodial interrogations as the courts have acknowledged. Departments that use electronic recording overwhelmingly report their experiences as positive.[19] The reduced time spent in pretrial motions to suppress directly impacts the ability of officers to commit their time to other valuable activities or lessens overtime costs associated with lengthy hearings. Decreasing claims of police misconduct in the interrogation room also translates to hours saved conducting lengthy investigations and litigation costs for frivolous lawsuits.[20]

A law enforcement officer's credibility is his most valuable asset when testifying in court.[21] Electronic recordings of suspect confessions help enhance an officer's credibility in several ways. First, it provides unequivocal, unbiased evidence that can support the officer's testimony. Second, it indicates that the officer used the most complete and accurate method available for collecting the confession

evidence. Because video-recording technology is readily available in the United States, jurors have difficulty believing that some type of electronic recording equipment was not available to the investigating officer, the same assumption the courts made that led to the requirement in several states. By recording, the officer can demonstrate commitment to impartiality by collecting and preserving evidence in its most unbiased and unadulterated form.

As an operational benefit, electronic monitoring allows investigators to concentrate on the interrogation while it occurs without having to engage in distracting note-taking practices counterproductive to effective active listening. Therefore, investigators can focus on the verbal and nonverbal properties associated with the suspect that might reveal evasive answers, deceptive cues, or inconsistent responses. Investigators have cited not having to take copious notes during the interrogation as an important aspect because it also puts the suspect at ease by making the interrogation more of a natural conversation than a formal government inquiry.

Once the interrogation concludes, a review of the recorded interrogation proves valuable to investigators because it permits them to have an exact transcription of what was said during the encounter. An examination of nonverbal mannerisms; linguistic properties, such as voice inflection and pitch; and the words chosen by the suspect may provide insight overlooked during the actual interrogation. Also, other investigators, nonlaw enforcement professionals, and those familiar with the suspect can assess both the credibility of the statement and the suspect's behavior and mannerisms.[22]

> ***Electronic recordings of suspect confessions help enhance an officer's credibility in several ways.***

Without an electronic recording, police reports only paraphrase and summarize the occurrences within the interrogation room. Information provided by the suspect but not captured in official notes may be lost forever. Details that may have appeared innocuous at the time of the interrogation may later become critical to the investigation or prosecution. Unless adequately recorded in the investigator's notes and interview report, the information may not be easily admitted in court or even recalled by the investigator. Electronic recording provides a permanent and complete record of the entire interrogation.

In addition, electronically recording interrogations also permits supervisors to evaluate an investigator's performance. Because a key element of most successful interrogations is privacy, supervisors rarely get the opportunity to observe an investigator in action, inhibiting the ability of supervisory personnel to take corrective measures on ineffective or inappropriate techniques. Knowing that an interrogation is recorded often deters officers from lapsing into improper tactics or misinterpreting what someone said. Finally, agencies can use recordings in the training environment to enhance interview and interrogation skills.

Prosecutors

Prosecutors in jurisdictions that routinely electronically record interrogations approve and encourage the technique because it helps reinforce cases. With a recording, prosecutors overwhelmingly believe that they can better assess a case and prepare for trial. They can use the recordings to evaluate a defendant's sophistication level, as well as to appraise how he answers questions, to assist in

preparing a cross-examination approach. Electronic recordings capture details, such as demeanor, physical condition of the investigator and suspect, body language, and treatment, not easily memorialized in police reports. Even if videotapes do not provide favorable results for the prosecution, they can prove useful when preparing for a trial or plea bargain.[23]

Defense Counsels and Defendants

Defense attorneys and their clients share the same value from electronic recording as prosecutors. If police conduct was too coercive or a statement was not voluntary, the recording provides an independent, disinterested witness on behalf of the suspect. The ability to use a recording to develop defenses or identify potential support for a false confession claim will improve with a recording to examine. Additionally, the tapes can be used for "client control," cutting through inconsistencies told to the representing attorneys about what actually occurred during the encounter between the officer and the suspect.[24]

Citizens

Public confidence in police practices increases with electronic recording. Many of the nefarious connotations associated with interrogations are media generated and rarely occur in real life. The recording helps dispel these myths and beliefs. Furthermore, the cost savings identified by the courts as one advantage of electronic recording directly benefits the public. Ultimately, the electronic recording of interrogations does not unjustly affect any member of the criminal justice system or community.

Miscarriages of justice are a detriment to society. Wrongful convictions place innocent people in jail and permit the guilty parties to escape punishment. One of the greatest sources of wrongful convictions is an unreliable confession.[25] Factors that make confessions unreliable include violence or threats of it, the effects of custody on demeanor, psychological factors associated with the interrogation style, and unethical behavior by the police.[26] Recording custodial interrogations enables each of these factors to be examined in its entirety, within context, to assess the credibility and veracity of confession evidence.

PROPER RECORDING

Studies show that electronic recordings of police interrogations can have certain biases if not conducted properly. The point-of-view bias, the most prominent one, suggests that the positioning of the camera can adversely affect the objectivity of the interrogation and not provide the police and courts all of the protections discussed. For example, a video camera that records only the suspect would not preclude the defense from making a claim that officers outside the lens of the camera pointed weapons at him, thus coercing a statement. When the camera focuses solely on the suspect, the amount of pressure placed on him can be underestimated.[27]

Equipment failures can present a serious problem for law enforcement agencies involved in the electronic recording of interrogations. While the courts and statutory laws have realized that technical problems occasionally occur, the malfunction of equipment can be devastating. First, the failure to produce a recording when expected may cause concerns about improprieties during the interrogation, easily resulting in a police cover-up claim. Second,

all of the other benefits will be lost, including the potential for reducing lengthy court proceedings, saving overtime costs, preparing for trial, and increasing public confidence. Finally, if detectives planned to rely on the recording for a detailed account of the suspect's statements, rather than taking copious notes, the exact account of the interrogation may be lost forever. Having the proper equipment, including backup power supplies, multiple digital or analog recording devices, and several cameras with the capability to capture various angles, is critical.

CONCLUSION

The electronic recording of custodial interrogations is a valuable law enforcement tool when executed properly. As the most accurate and efficient method of collecting and preserving confession evidence, the benefits of recording to the criminal justice system and community are unequivocal. Further, electronically recording during the interrogation process enables investigators to concentrate on a suspect's verbal and nonverbal components and can enhance an officer's credibility. The technique also offers supervisors an opportunity to evaluate the performance of investigators.

Law enforcement professionals should be cognizant of the judicial decisions and statutes in several states that require the recording of interrogations, as well as problems they may face when deciding to implement this technique. Agencies not currently recording custodial interrogations may have legislation or court rulings force the issue upon them. However, departments do not have to wait for these potential mandates to occur to begin reaping the benefits of this valuable practice. ✦

> ***"Public confidence in police practices increases with electronic recording."***

Endnotes

[1] For the purposes of this article, electronic recording refers to contemporaneous audio and visual recordings, including analog or digital.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966), referring to Inbau and Reid, *Criminal Interrogation and Confessions* (1962).

[4] T.P. Sullivan, Northwestern School of Law, Center on Wrongful Convictions, *Police Experiences with Recording Custodial Interrogations*, no. 1 (Summer 2004),1-28.

[5] For additional information, see Vincent A. Sandoval, "Strategies to Avoid Interview Contamination," *FBI Law Enforcement Bulletin*, October 2003, 1-12.

[6] Supra note 4; and W.A. Geller, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Videotaping Interrogations and Confessions* (Washington, DC, March 1993).

[7] An examination of existing literature, legal cases, and statutory laws related to electronic recording can realize and justify these benefits.

[8] S.M. Kassin, "The Psychology of Confession Evidence," *American Psychologist* 52, no. 3 (1997): 221-223.

[9] Supra note 6 (Geller).

[10] Supra note 6 (Geller).

[11] Supra note 4.

[12] 20 ILCS 3930/7.2(d) (Illinois custodial monitoring law).

[13] *Mallott v. State*, 608 P.2d 737 (Alaska 1980); and *S.B. v. State*, 614 P.2d 786 (Alaska 1980).

[14] *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

[15] *State v. Scales*, 518 N.W.2d. 587, 592 (Minn. 1994).

[16] *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004).

[17] *United States v. Azure*, 1999 WL 33218402.

[18] Ibid.; and supra notes 12, 14, and 15.

[19] Supra note 4.

[20] Supra notes 4 and 6.

[21] For illustrative purposes, the authors employ masculine pronouns throughout the article.

[22] Supra note 6 (Geller).

[23] Supra note 6 (Geller).

[24] Supra note 6 (Geller).

[25] R.P. Conti, "The Psychology of False Confessions," *The Journal of Credibility Assessment and Witness Psychology* 2, no. 1, (1999): 14-36.

[26] T.M. Williamson, "From Interrogation to Investigative Interviewing: Strategic Trends in Police Questioning," *Journal of Community and Applied Psychology* 3, (1993): 89-99.

[27] Supra note 8.

Accentuate the Positive

Keep your fears to yourself, but share your courage with others.

—Robert Lewis Stevenson

It took every bit of effort that Bob possessed to keep from slamming the phone on the cradle at the end of the conversation. Once again, his efforts to launch a new initiative to foster interagency cooperation had been subverted by politicians more concerned with their own futures than the good of the agency. This latest turn of events was a major setback. It was going to take a lot of effort and energy to get things back on track. Bob was fuming over the situation and developing his strategy to deal with it when his assistant reminded him of the awards ceremony he was scheduled to host in 5 minutes. He quickly put on his "game face" smile, thanked his assistant, and left his office for the ceremony. As he walked to the conference room, he warmly greeted those he met in the hallway and the elevator.

This scenario illustrates a process that successful law enforcement leaders undergo countless times each day. Bob has discovered a cornerstone of effective leadership best summarized by Mike Mason, an executive assistant director of the FBI, who said, "As a leader, you are not allowed to have bad days." Many leaders feel the harsh reality that, frequently, bad days are the only days they have. Therefore, a key to successful leadership is learning how to quickly refocus your emotions and not share with those you lead the fact that you are having a bad day. We all have had curmudgeonly bosses who openly showed their feelings. All too often, the message they tried to deliver was derailed by the grimace they wore, reflecting a negative experience from earlier in the day. Impactful leaders have mastered the art of projecting the positive in not only what they say but how they say it. Positive delivery of a message includes body language and facial expressions. Just as fear and pessimism are contagious, so are courage and optimism. Modeling is a significant component of leadership, and organizations tend to reflect the leadership style of their bosses. People often are acutely aware of the style and tenor projected by the leadership of an entity after only a few minutes with the frontline employees. What message are you routinely sending?

There are times when it is appropriate, even necessary, for a leader to display more intense emotions. Leaders are not automatons, and they need to be able to share an appropriate range of emotions with others. As with many other aspects in life, timing and place are crucial. An operative rule for effective leaders should be to routinely project the positive.

In *The 21 Irrefutable Laws of Leadership*, John Maxwell espouses the law of sacrifice. Maxwell maintains that "the law of sacrifice says you have to give up to go up." One of the things successful leaders must sacrifice is the right to have a bad day. Now, put a smile on your face and lead your agency to excellence. ✦

Jeffrey Lindsey, special agent instructor and program manager in the Leadership Development Institute at the FBI Academy, prepared Leadership Spotlight.

Book Review

Nuclear Terrorism: The Ultimate Preventable Catastrophe, *by Graham Allison, Times Books, New York, New York, 2004*.

Nuclear Terrorism, a book by Graham Allison, undoubtedly is one of the clearest, most enlightening introductions to the subject ever written. This book offers a lucid explanation of special and general theories of nuclear terrorism. Allison points out (among other things) what kind of devastation a nuclear explosion from a 10-kiloton weapon would have on specific cities, such as New York, Chicago, and Boston. He states that "from the epicenter of the blast to a distance of approximately a third of a mile, every structure and individual would vanish in a vaporous haze." Such a grim account by a scholar like Allison, who takes a straightforward, no-nonsense approach to the thorny question of nuclear terrorism, needs to be taken seriously. He further advises that "precisely what qualifies as even a more vulnerable target are the nuclear plants." He outlines the issue of a nuclear plant being the building that houses the spent fuel rods, which are stored in pools of water to prevent the heat from their residual radioactivity from melting them. Should these fuel rods somehow become ignited, the resulting fire would spew radioactivity into the environment equaling three or four times that from the Chernobyl incident.

According to Allison, the "clock is ticking" for the United States and its allies to make a change in the process for preventing catastrophe. He further surmises that there could be 40,000 nuclear weapons, or maybe 80,000, in the former Soviet Union, inadequately controlled and stored. This book is an excellent resource for readers interested in the author's review of some of the efforts made by al Qaeda to acquire nuclear weapons, clearly demonstrating their "appetite for weapons of mass destruction." The author devotes a whole chapter to discussing the potential of other terrorist groups using such devices and points out that the time for these incidents to happen is now.

The author's thoroughness and clarity is impressive. The chapters provide an excellent introduction to the field of nuclear terrorism, especially for people with limited backgrounds in the area. The 263 pages represent the best of what is known about nuclear terrorism, absent only the recent cutting-edge tools available for simulating a nuclear blast. Allison, however, does provide a small list of online references, including his Web site, at the end of his book for those interested in further research. *Nuclear Terrorism*, in conclusion, is highly recommended as useful reading for those attempting to decipher the whole array of terrorism and nuclear material that could reach an apex in the near future unless prevented.

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Reserve Officers
A Valuable Resource

By KAREY HEDLUND, M.A., and TOD W. BURKE, Ph.D.

A reserve officer, along with a full-time police officer, responded to a call regarding a baby who had stopped breathing. Trained in CPR, the reserve officer revived the infant, and both responders received medals of honor for heroism. The elated parents further recognized the hero who saved their son's life—they named their baby after him.

Hearing over his home police scanner a request for officer assistance regarding a traffic incident near his home, a reserve deputy sheriff quickly entered his vehicle and sped to the location despite icy road conditions. Upon arrival, he found a car upside down in water and determined that two occupants remained trapped inside. Immediately, without regard for his own safety, he entered the freezing water. Unfortunately, the conditions prevented him from rescuing the victims, but this brave individual received recognition from his state for this unselfish sacrifice of placing his life in jeopardy to help fellow citizens.

© Karey Hedlund

Every day, in situations like these, reserve officers show their courage and dedication. They offer police departments many benefits. Agencies across the country are discovering the advantages of having these officers within their ranks.

WHAT ARE THEY?

Background

Since the hue and cry of the parish constable,[1] law enforcement agencies have employed civilian volunteers to assist them. The tragedy of September 11, 2001, created a need for more officers to protect America's streets. In many instances,

with insufficient funding for additional positions, police departments have sought alternatives, one being the employment of reserve officers. An estimated 400,000 or more currently serve in the United States.[2]

A reserve officer is "a volunteer, nonregular, sworn member of a law enforcement agency who serves with or without compensation and has regular police powers...and who participates on a regular basis in agency activities, including... crime prevention or control, and the preservation of the peace and enforcement of the law."[3] Reserve officers differ from full-time officers because they are not in a career-development role.[4] Generally, they have full-time jobs in other fields of employment.

Assignments

Reserve officers serve in a variety of ways. As one example, they promote community safety and awareness. For instance, individuals in the Minneapolis, Minnesota, Police Reserve do this by educating about bicycle safety and producing fingerprint identification cards for children.[5]

Patrol duties on motorcycles and bicycles, in cars, and on foot represent other areas of service. Examples of these activities include serving official documents, pursuing fleeing suspects, executing searches, processing and transferring detainees, and identifying and gathering evidence. In rural areas, such as Carter County, Oklahoma, and Yankton, South Dakota, reserve officers have responsibility for many miles of roads that may not have 24-hour coverage by full-time officers.[6] They also patrol large parks to help alleviate shortages of law enforcement presence.[7]

Many reserve officers handle administrative functions. These include maintaining records of daily activities, interviewing parties to a crime, and preparing and preserving official documentation about the investigation of criminal activities. Reserve officers who can perform such functions as background checks relieve some of the stress on the full-time clerical and administrative staff.

In urban areas, departments use reserve officers to assist with traffic and crowd control during public events, such as concerts and parades. In the city of Minneapolis, reserve officers who have received specialized traffic training assist in special events and emergency circumstances.[8]

Reserve officers also serve in specialized capacities. For instance, the U.S. Coast Guard Auxiliary employs approximately 35,000 members who have many responsibilities, including helping the Coast Guard patrol U.S. waterways.[9] Reserve officers also perform search-and-rescue functions. For example, in Santa Fe, New Mexico, special officers participate in operations, such as mountain climbing missions,

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mine and cave evacuations, medical snowmobile responses, and horse and dog rescues.[10]

Pay and Benefits

Generally, reserve officers serve as volunteers committed to the safety of the community and receive no pay or benefits and little, if any, recognition for their time and efforts. Often, their compensation comes in the form of personal growth and satisfaction or, perhaps, experience to help in the pursuit of a full-time law enforcement position.

Some departments do pay reserve officers. These agencies also recognize such personnel as auxiliary officers and, generally, employ them part time. No set federal mandates exist for compensation or benefits for reserve officers, and, of course, policies vary among departments. Some pay an hourly wage, while the state of Iowa, for example, compensates reserve officers at a rate of $1 per year and provides medical insurance.[11]

WHY USE THEM?

Reserve officers benefit the department, its full-time officers, and the community. They allow agencies to add personnel without experiencing budgetary burdens. This increased law enforcement visibility helps deter crime without additional stress on full-time personnel. And, not only do residents feel safer but officers have more contact with citizens. As a result, the relationship between the police and the community improves.

Also, reserve officers help ensure the safety of the agency personnel they work with. For instance, a full-time officer could benefit from a reserve officer as a second responder while addressing a domestic violence incident. This additional officer would provide needed assistance in controlling the situation, and both responders would help protect each other.

> ***"Reserve officers benefit the department, its full-time officers, and the community."***

HOW ARE THEY HIRED?

Recruitment

Agencies recruit prospective reserve officers through various methods, including employment fairs, print and broadcast media, flyers, word of mouth, and school presentations. Many departments also turn to the Internet as an affordable way to advertise that creates a large pool of potential candidates. This may involve a simple announcement on an agency's Web site.

Departments vary on the criteria that interested candidates must meet. Most agencies require reserve officers to be at least 18 years of age, but some set the minimum age at 19 or 21. Candidates must have U.S. citizenship, and some departments require them to meet city or county citizenship requirements.

Further, some agencies require physical-agility testing of candidates; this also varies by department. The Newark, California, Police Department mandates a test typical of agencies that includes a 99-yard obstacle course, a body drag, a fence climb, and a 500-yard run.[12] Additionally, some departments require candidates to undergo a physical examination to include vision and hearing tests and weight measurements.

Reserve officer candidates also must submit to a background check, which may include an interview, possibly with the department chief or city council; fingerprinting; drug testing; criminal, credit, driving-record, and work-history checks; and a polygraph examination. Candidates cannot have a felony conviction, and some misdemeanors (e.g., domestic violence) may disqualify them.[13]

Training

Agencies that employ reserve officers follow department or state training guidelines. They strive to ensure thorough training; if not, these individuals could present liability issues for the department and its other officers. Generally, this process occurs on the job with a field training officer. Other programs exist for reserve officers to attend pertaining to such subjects as first aid/CPR, domestic violence response, firearms, public safety, driving techniques, interviewing practices, and criminal law.

Some departments mandate additional requirements. For instance, the North Port Police Department in Florida requires aspiring reserve officers to obtain certification through the Florida Department of Law Enforcement and the Criminal Justice Standards and Training Commission.[14] Individuals interested in the Millbrae, California, Police Department must meet the guidelines established by the California Commission on Peace Officers Standards and Training (POST) before applying to serve as a reserve officer.[15] The Wingate, North Carolina, Police Department recruits former officers who are Basic Law Enforcement Trained (BLET) and radar certified.[16]

The Tazewell, Virginia, Police Department further expands on its training requirements; the reserve officer must have obtained or be in pursuit of a degree in criminal justice. Therefore, the individual will possess important information on constitutional laws, diversity, law enforcement regulations, and community-police relations.[17]

> ***"Well-screened, thoroughly trained reserve officers can provide much needed assistance to agencies without hurting their budgets."***

Additionally, reserve officers requesting a position in a specialized unit may have to pass a test in that specialty. Such requirements may be necessary in specific areas, such as crime mapping and cold case investigation.

CONCLUSION

Reserve officer programs can offer many benefits to the department and the community. Well-screened, thoroughly trained reserve officers can provide much needed assistance to agencies without hurting their budgets. The assistance of these individuals can help ensure the safety and well-being of full-time officers and the community as a whole. ✦

Endnotes

[1] For additional information, see *http://www.mkheritage.co.uk/nppm/constable.html.*

[2] *http://www.nrlo.net/Page.html*

[3] *http://www.legis.state.la.us/lss_doc/lss_house/RS%5C14%5CDoc%2078739.html*

[4] The term full-time is used in the article to differentiate between regular and reserve officers.

[5] *http://www.mplspolicereserve.org/what_we_do.html*

[6] Richard Weinblatt, "Reserves Aid Rural Counties," *Law and Order*, January 2001, 30-31.

[7] Jim Mallory, "Volunteer Bike Patrol Boosts Park Coverage," *Law and Order*, April 2001, 80-84.

[8] Supra note 5.

[9] *http://members.cox.net/flotilla4-10/files/join%20the%20aux.htm*

[10] Richard Weinblatt, "Discovering a Valuable Asset: Reserve Search and Rescue Units," *Law and Order*, May 1999, 18-19.

[11] Staci Hupp, "Hiring Plan Divided Iowa Police," *Des Moines Register*, December 21, 2003.

[12] *http://www.newark.org/externals/d7/4a3d187 eae64e9d938e8792add5abcc5af8e19.pdf*

[13] Captain Brian Hieatt, Tazewell, Virginia, Police Department, interview by the authors, July 20, 2005.

[14] Lia Martin, "Men in Black Aided by Volunteers," *Sun Herald*, April 1, 2004.

[15] *http://www.ci.millbrae.ca.us/police/reserves.html*

[16] Richard Weinblatt, "Holding onto a Knowledgeable Resource," *Law and Order*, June 1999, 127-130.

[17] *http://www.townoftazewell.org/police/Auxiliary.htm*

Missing Person

On April 1, 2006, Brian R. Shaffer disappeared without an apparent reason. The last known contact was at 1:55 a.m. when Mr. Shaffer was having drinks with friends at a local bar near Ohio State University in Columbus, Ohio.

Alert to Law Enforcement

Law enforcement agencies should bring this information to the attention of all homicide, missing persons, special victims, and crime analysis units. Any agency with information on this case may contact Sergeant John Hurst, Jr., Columbus Police Special Victims Bureau at 614-645-4670, ext. 109, or *jhurst@columbuspolice.org*; or Crime Analyst Courtney Fitzwater of the FBI's Violent Criminal Apprehension Program (ViCAP) Unit at 703-632-4162 or *cfitzwat@leo.gov*. ✦

NCIC Missing Person Number: M965615308
Name: Brian R. Shaffer
Race: White
Sex: Male
Age: 27 at time of incident
Date of Birth: 02/11/1979
Height: 6' 2"
Weight: 160-165

Tattoo of Pearl Jam symbol on Shaffer's upper right arm

Detaining Individuals at the Scene of a Search

By CARL A. BENOIT, J.D.

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A cherished right enjoyed by Americans is the protection of the privacy of the home against government intrusion. This right is deeply rooted in U.S. history and finds its source in American jurisprudence within the words of the Fourth Amendment of the Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

According to the U.S. Supreme Court, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[1] A basic principle of Fourth Amendment law is the requirement that before searching a residence, police officers are required to obtain a valid search warrant prior to entry into the home.[2] Searches are considered unreasonable unless conducted under the authority of a search warrant or they fall under a valid exception to the warrant requirement.[3] Once a search warrant for a residence is issued, however, officers are permitted to enter the residence and conduct a search of the location described in the warrant for the items listed in that warrant. In addition to conducting the search, officers often encounter people. Generally, these people are neither named nor identified in the search warrant itself. At this point, an important question arises—what legal basis, if any, permits police

officers to exercise control over people they encounter during the execution of a warrant? This article addresses the authority of police officers to detain people present at the scene of a search warrant and what degree of force may be used during the detention.

> ***"…police officers serving a search warrant for contraband possess categorical authority to detain occupants present at the scene…."***

Special Agent Benoit serves as a legal instructor at the FBI Academy.

THE AUTHORITY TO DETAIN UNDER A SEARCH WARRANT

Michigan v. Summers[4]

As Detroit police officers were about to execute a search warrant for drugs, they observed an individual, later identified as George Summers, leave the front door of the residence specified in the warrant.[5] Police officers approached Summers and requested that he open the door to the dwelling. Summers told the officers that he had left his keys in the residence and then used an intercom to summon someone inside to come to the door. An individual came to the door but refused entry to officers after they identified themselves. The officers forced the door open and brought Summers inside the premises where he was detained for the duration of the search. The officers then located and detained all other individuals inside the residence and conducted their search. After finding narcotics in the basement and learning that Summers owned the house, the police officers arrested Summers. A search of Summers incident to his arrest located 8.5 grams of heroin inside his coat pocket.

Following the government's decision to charge him with drug possession, Summers moved to suppress the heroin found on his person.[6] Summers argued that the police officers had no authority to detain (or seize) him outside his residence before they executed the search warrant and that the heroin found on his person was the fruit of this unlawful seizure. The Michigan Supreme Court affirmed the lower court's ruling, agreeing the evidence should be suppressed as the initial seizure of Summers violated the Fourth Amendment.[7] The government then appealed the decision to the U.S. Supreme Court.

The Supreme Court disagreed with the previous rulings, holding that even though the officers did not have probable cause to arrest Summers initially, the detention of Summers was reasonable nevertheless. In so holding, the Court noted that some seizures covered by the Fourth Amendment "constitute such limited intrusions on the personal security of those detained" that they do not require probable cause but only an "articulable basis for suspecting criminal activity."[8] As for the basis for suspecting criminal activity, the Court turned to the significance of the existence of a search warrant. The issuance of the search warrant indicated that a "neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there."[9] The Court noted that the

detention of one of the residents was "less intrusive than the search itself" and then set forth three government interests that supported the need for a detention of the occupants at the scene of a search warrant: 1) "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found"; 2) "minimizing the risk of harm to the officers"; and 3) "the orderly completion of the search."[10] In balancing the interests of law enforcement executing a search warrant against the limited intrusion into personal freedom, the Court found the balance favored the government. The Court also noted that the "connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant."[11] The Court upheld the authority of the police officers to detain Summers prior to and during the search of his premises while announcing the following rule:

> A warrant to search for contraband found on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.[12]

Under the facts of the *Summers* case, the police officers were permitted to detain Summers because he was observed departing the premises for which the officers possessed a valid warrant to search for drugs. Because the detention was reasonable under the Fourth Amendment, the later arrest and search of Summers based upon probable cause was permissible, and the narcotics found on his person were not found in violation of the Fourth Amendment.[13]

> ***Because the detention was reasonable under the Fourth Amendment, the later arrest and search…based upon probable cause was permissible….***

Muehler v. Mena[14]

While investigating a gang-related drive-by shooting, police officers developed information giving them reason to believe that an involved gang member lived at 1363 Patricia Avenue. Officers also believed that the suspect was armed and dangerous because of his participation in the recent shooting. The officers obtained a search warrant for the residence, seeking such items as guns and evidence of gang membership. The search warrant was executed by police officers and special weapons and tactics (SWAT) team members. After making entry, officers located four people inside the residence, including Iris Mena, who was found asleep in her bed. Officers handcuffed Mena and three other individuals found on the property and removed them to a converted garage where they were allowed to move around but were forced to remain handcuffed.[15] Other officers then conducted a search of the premises that resulted in the discovery of a gun, ammunition, and other evidence of gang activity. Mena was released by the officers before they left the area. Mena brought a civil lawsuit against the officers under Title 42, U.S. Code, Section 1983[16] alleging that her detention by police officers at the scene of the search was unreasonable both in time and manner. The federal Court of Appeals for the Ninth Circuit affirmed a jury verdict in favor of Mena, noting that it was unreasonable to keep Mena handcuffed in the converted garage and that Mena should have been released as soon as officers determined that she posed no immediate threat.[17] The government appealed this case to the U.S. Supreme Court.

The Supreme Court initially noted that the detention of Mena was permissible under the authority granted to police

officers as set forth in the *Summers* case. In this regard, the Court noted that "an officer's authority to detain incident to a search is categorical" and is not dependent on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure."[18] The Court then held that the detention of Mena for the duration of the search was reasonable "because a warrant existed to search 1363 Patricia Avenue and [Mena] was an occupant of that address at the time of the search."[19]

The Court then addressed the manner in which Mena was detained during the search—the use of handcuffs on Mena and noted that "[i]nherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention."[20] While the use of properly applied handcuffs for the duration of the search was an additional intrusion beyond the detention permitted in *Summers*, their use was reasonable under the circumstances of this case due to the nature of "the safety risk inherent in executing a search warrant for weapons" and made all the more reasonable because of the need to detain multiple occupants.[21] The Supreme Court found in favor of the police officers and upheld the authority of the officers to detain Mena in handcuffs during the execution of the search warrant.[22]

REQUIREMENTS FOR DETENTION INCIDENT TO A SEARCH WARRANT

A clearly stated rule can be deduced from the two U.S. Supreme Court cases discussed so far. However, although police officers executing a valid search warrant[23] for contraband have the authority to use reasonable force to detain occupants of the premises,[24] some aspects of this rule remain open to interpretation.

Detaining Occupants

When the Supreme Court announced the rule in the *Summers* case, it noted "[t]he connection of an occupant to that home gives a police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant."[25] According to the Court, this authority to detain is "categorical" and does not require police officers to evaluate their authority on a case-by-case basis.[26] This is consistent with the Supreme Court's recognition of the interest of police officers to "routinely exercise unquestioned command" of the scene of a search warrant.[27] The presence of the search warrant itself justifies the detention of the occupants, and the occupants are easily identifiable by their connection to the location to be searched. There is no requirement that the officers possess any suspicion beyond the warrant itself to justify the detention.[28] Therefore, police officers, after valid entry under a search warrant, are permitted to locate and detain occupants present within the location of the search in situations where the officers are confronted with factors consistent with those in *Summers* and *Mena*. In this regard, it is important to determine the definition of the word *occupant*. For example, several circuit courts of appeals have expressly recognized the difference between the terms *occupant* and *resident*.[29] The authority to detain incident to the search warrant does not depend upon a determination by police officers of whether the subject of the detention actually resides at the location described in the search warrant. Police officers did not determine that Summers

owned the premises until after he had been detained by the police and before they executed the search warrant.[30] But, Summers, like Mena, was not alone inside the location of the search as the police officers detained several other occupants located inside the residence. The additional occupants themselves may be detained by police officers simply because they are occupants of the premises being searched.

Detaining Subjects Approaching and Leaving the Scene

Other situations may arise that are not as obvious as detaining a person present at the scene of the search or one who has just left the scene. Since *Summers*, lower courts have interpreted this detention authority to extend even beyond the most obvious cases when law enforcement interests outweigh an individual's personal freedom. For example, several courts have determined that police officers may detain subjects approaching the location where police officers are executing or about to execute a search warrant.[31] Police officers have been permitted to detain individuals who have left the location of a search and are a short distance away from the scene[32] and those neither entering nor leaving the location to be searched but are present in the backyard.[33] One federal circuit court of appeals upheld the detention of a subject leaving the scene of the search when police officers did not have physical possession of the warrant but were aware that the warrant had been issued and was being brought to the scene.[34]

> ***…police officers may detain subjects approaching the location where police officers are executing… a search warrant.***

A common thread running through these cases is the court's focus that those detained are "easily identifiable" to police officers by their connection to the location to be searched. In summary, courts have recognized the authority of police officers when executing a search warrant for contraband to detain 1) those present at the location of the search; 2) those leaving the scene of the search at or immediately before the execution of the warrant; and 3) those who arrive at the scene of a search. This ensures that the risk of flight is minimized, the safety of the officers is protected, and the search may be completed in an orderly fashion.

USE OF REASONABLE FORCE

A likely scenario emerging during the execution of a search warrant is the need to detain individuals and place them in handcuffs. The court cases dealing with issues arising out of the execution of search warrants frequently involve defendants alleging that a police officer violated their Fourth Amendment rights upon 1) the initial detention and 2) in the amount of force used by the officers to make this detention. While *Summers* clearly addressed the scope of the authority to detain individuals, the level of force that may be used to effect this seizure, including the use of handcuffs, presents a separate and sometimes more difficult question. The determination of what constitutes reasonable force under the varying circumstances presented during the execution of search warrants requires careful consideration.

The *Mena* case is particularly instructive with regard to the level of force that police officers may use in detaining a person incident to the execution of a search warrant. In *Mena*, the Supreme Court specifically recognized what was implied in *Summers*: police officers have the authority to use

reasonable force to detain the occupant present at the location of a search.[35] In *Summers*, the Supreme Court noted that the protections of the Fourth Amendment are "meaningful only when it is assured that at some point, the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge."[36] While it may appear minimally intrusive to law enforcement to detain and possibly handcuff an individual, to the individual detained, intrusions on personal freedom are quite meaningful and thus may be subjected to later judicial scrutiny.[37] Under the reasonableness standard, a court must look to determine whether the conduct of the police officer was objectively reasonable in light of the facts confronting the officer at the moment force is used.[38] If it is determined that the conduct of an officer was objectively reasonable, then the requirements of the Fourth Amendment are satisfied.

In the *Mena* case, the police officers executing the search warrant "entered [Mena's] bedroom and placed her in handcuffs at gunpoint."[39] In analyzing the level of force used to detain Mena, the Supreme Court noted that the use of properly applied handcuffs was reasonable under the situation.[40] The Court noted that the police officers in this case were not involved in an "ordinary search" but one that involved a warrant authorizing the search for weapons at the residence of a wanted gang member.[41] The use of handcuffs to detain Mena and the other occupants minimized the risk of harm to the officers and the occupants.[42] Additionally, the use of handcuffs for the duration of the 2- to 3-hour search also was found to be reasonable by the Supreme Court, although the Court noted that duration of detention could affect the reasonableness of the seizure.[43]

It is significant to note that the Supreme Court did not require the officers to articulate an individualized factual basis to justify the use of handcuffs on Mena. The police officers were permitted to handcuff Mena because she was present at the scene of a search for weapons, and they were not required to make a determination independent of the warrant as to whether Mena actually posed a safety risk to the officers. The Supreme Court indicated that sufficient justification arose from the nature of the search warrant itself, as authorized by a judicial determination on probable cause, that items listed in the warrant to be seized included weapons at the location of the home of a suspected gang member, a situation labeled "inherently dangerous."[44]

Of significance, the Supreme Court did not authorize the use of handcuffs on occupants during the execution of every search warrant. To reinforce this point, Justice Kennedy, in his concurring opinion, also addressed the issue of handcuffing occupants during the execution of search warrants "to help ensure that police handcuffing during searches becomes neither routine nor unduly prolonged."[45] Justice Kennedy believed that it is important to consider the expected or actual duration of the search when determining whether continued use was objectively reasonable. In addition, he provided three examples where he believed that handcuffs, even if initially applied properly, should be removed: 1) if the search extends to the point where the handcuffs can cause real pain or serious discomfort; 2) if it became readily apparent to any objectively reasonable

officer that removing the handcuffs would not compromise the officer's safety; or 3) if it risked interference or substantial delay in the execution of the search.[46] Justice Kennedy believed that the continued detention of Iris Mena in handcuffs for the duration of the search was reasonable because the "detainees outnumber[ed] those supervising them, and this situation could not be remedied without diverting officers" from the search.[47]

While the use of handcuffs to detain individuals in the execution of every warrant is not authorized, the Supreme Court has found that the execution of two types of searches raises special concerns for police officers by the very nature of the search warrant itself. The *Summers* case involved a search of a residence for narcotics. In this context, the Supreme Court noted "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence."[48] The *Mena* case involved a search for weapons at the home of a suspected gang member, which the Supreme Court characterized as "inherently dangerous."[49] In both of these cases, the Supreme Court noted that there was no indication of the existence of any special danger to police officers from their observations at the scene. Yet, the Court upheld the detention in *Summers* and the detention and handcuffing in *Mena*. The justification for this action arises from the nature of the particular search warrants alone and suggests that the government interests are at their maximum in at least these two situations.[50]

> ***"The presence of the search warrant itself justifies the detention of the occupants...."***

Lower federal courts have generally been deferential to the use of handcuffs by police officers executing warrants for narcotics or weapons without any individualized suspicion directed at the person so detained. For example, police officers executing a search warrant for drugs in a dormitory room knocked on the door and were admitted by one of the occupants. As the occupant opened the door, he observed the police officers' weapons pointed at him, and then "armed officers entered the room, loudly ordered [the occupants] to get on the floor, and handcuffed them."[51] One of the occupants claimed that this seizure violated his Fourth Amendment rights, but the court ruled that the use of the handcuffs was "an appropriate measure incident to the search, [and] there was no evidence that any excessive force was used during the detention" and, thus not unconstitutional.[52] Police officers approaching a residence to execute a drug search warrant observed five males in the yard. The officers "drew their weapons, ordered all of the men to lie face down on the ground, and handcuffed them." In addressing the lawfulness of the detention of one of the occupants, the circuit court noted that "the police were not unreasonable in restraining persons found on the property during the search in order to protect the officers' safety."[53]

While the use of handcuffs to detain individuals at the scene of a drug search warrant is generally found to be reasonable,[54] it is possible the conduct of police officers after applying the handcuffs can cause a violation of the Fourth Amendment. For example, police officers used handcuffs to detain an individual who approached the scene of a drug search warrant but was then placed inside an unventilated police car in 90-degree heat for 3 hours.[55] The court concluded that the use of handcuffs was permissible, but the "unnecessary detention in extreme temperatures," especially because there were

other "effective alternative ways" of detaining the individual, violated the Fourth Amendment.[56]

NATURE OF THE SEARCH WARRANT

Outside the context of executing a search warrant for drugs or weapons, the use of handcuffs to detain occupants results in more exacting judicial scrutiny. While IRS agents were executing a warrant to search a building for evidence of income tax violations, they were confronted by Gayle Bybee, an individual who lived in the building, who loudly and repeatedly requested to see the warrant. The agents handcuffed this individual for the duration of the search.[57] In ruling on the lawfulness of the use of handcuffs by the agents to detain Bybee, the federal Circuit Court of Appeals for the Ninth Circuit noted that "detaining a person in handcuffs during the execution of a warrant to search for evidence is permissible but only when justified under the totality of the circumstances."[58] In this regard, the court noted that the officers had no reason to believe that the occupants were dangerous,[59] and the warrant sought evidence for nonviolent crimes. Based upon the circumstances confronting the IRS agents, the use of handcuffs to detain Gayle Bybee was a violation of her Fourth Amendment rights.[60]

The *Summers* case specifically addressed the authority of police officers to detain occupants incident to a search warrant authorizing a search for contraband and "d[id] not decide whether the same result would be justified if the search warrant merely authorized a search for evidence."[61] The Court did not explain this limitation but referred to a case it had decided previously in which it upheld the use of a search warrant to obtain evidence that was in the possession of a third party not involved in the criminal activity.[62] Presumably, the likely reason for this apparent limitation is based upon the connection between the occupant of the residence and the crime itself. For example, when a court issues a search warrant for contraband within a residence, there has generally been a judicial determination that the police have probable cause to believe that an occupant of the home is committing a crime or, at least, there is a connection between the occupant and the crime. Thus, the interests of the government supporting the detention of occupants as set forth in the discussion of the *Summers* case would permit a detention. However, in cases where a search warrant is issued that seeks evidence only, especially evidence that may be located at the residence of a person who is not connected to the crime or may not even be aware of the crime, automatic detention under the *Summers* rule may not be justified.[63]

However, circumstances in a given case may justify more intrusive approaches depending on the circumstances even when serving a warrant that does not seek contraband. For instance, the federal Circuit Court of Appeals for the Tenth Circuit ruled in a case involving a warrant for the seizure of stolen property[64] that detention of persons encountered during the search was permissible as the definition of contraband was broad enough to cover stolen property. In another case, a warrant seeking evidence of tax evasion did not justify detention of the occupants. The court noted that the warrant sought evidence and not contraband, and it could "not assume that the Summers' general rule automatically applies."[65]

CONCLUSION

Police officers possessing a search warrant for contraband also may possess authority to conduct more than a search of the location described in the warrant. The U.S. Supreme Court has expressly recognized the compelling interests of law enforcement to maintain control of the scene of a search to allow for its safe and orderly completion. In recognition of these interests, the Supreme Court has determined that police officers serving a search warrant for contraband possess categorical authority to detain occupants present at the scene and use force reasonable and necessary to carry out the detention and maintain control over the location of the search. Presearch planning should take into account this authority, including allocating and tasking personnel, with the responsibility of maintaining control over those present at the search location. ✦

Endnotes

[1] *United States v. U.S. District Court*, 407 U.S. 297 (1972).

[2] This article does not address exceptions to the Fourth Amendment that may permit the entry into and search of a residence without a warrant.

[3] *Payton v. New York*, 445 U.S. 573 (1980).

[4] *Michigan v. Summers*, 452 U.S. 692 (1981).

[5] *Id.* at 692.

[6] Summers was not charged for the narcotics found in his home. *See* note 7.

[7] *People v. Summers*, 286 N.W.2d 226 (1979).

[8] *Id.* at 699-700.

[9] *Id.* at 701.

[10] *Id*. at 702.

[11] *Id.* at 703-704.

[12] *Id* at 705.

[13] *Id.*

[14] *Muehler v. Mena,* 544 U.S. 93, 95 (2005).

[15] *Id.* at 93.

[16] 18 U.S.C. § 1983 (This statute allows citizens to bring allegations of violations of their constitutional rights by police officers into federal court.).

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

[18] *Muehler v. Mena*, 544 U.S. 93, 98 (2005), quoting *Michigan v. Summers,* 452 U.S. 692, at 705 n.19.

[19] *Id*. at 98.

[20] *Id.* at 98-99.

[21] *Id.*

[22] But, *see Mena v. City of Simi Valley*, 156 Fed. Appx. 24 (9th Cir. 2005) (On remand from the Supreme Court, the Ninth Circuit determined that the police officers detained Mena in handcuffs after the search was completed in violation of the Fourth Amendment.).

[23] A valid warrant describes a warrant that is facially valid, issued on probable cause, supported by oath or affirmation, and contains a particular description of the location to be searched and the items to be seized.

[24] Wayne LaFave, *Search and Seizure*, § 4.9.

[25] *Michigan v. Summers*, 452 U.S. 692, 703-704.

[26] *Id.* at 705, n.19.

[27] *Id.* at 703.

[28] Compare with *Terry v. Ohio* 392 U.S. 1 (1968) which requires police officers to articulate a reasonable suspicion to justify a limited detention.

[29] *United States v. Cavazos*, 288 F.3d 706 (5th Cir. 2002*)*; *United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993) cert. denied 114 S. Ct. 608 (1993); *United States v. Pace*, 898 F.2d 1218 (7th Cir. 1990).

[30] *Id.* at 693.

[31] *See Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002) (detention of person approaching property being searched, pauses and then flees); *United States v. Bohannon*, 225 F.3d 615 (6th Cir. 2000) (detention of subjects driving up to the scene of a search); *Baker v. Monroe Township*, 50 F.3d 1186 (3rd Cir. 1995) (detention of invited dinner guests arriving as the search commenced).

[32] *United States v. Briley*, 319 F.3d 360 (8th Cir. 2003); *United States v. Smallwood*, 86 F.3d 27 (2nd Cir. 1996); *United States v. Cochran*, 939 F.2d 337 (6th Cir. 1991); But, *see United States v. Reinholz,* 245 F.3d 765 (8th Cir. 2001) (Detention not authorized when defendant was at work at least 25 miles away from residence at the time of the search.); *United States v. Edwards*, 103 F.3d 90 (10th Cir. 1996) (*Summers* does not apply where defendant was stopped 3 blocks from the search.).

[33] *United States v. Vite-Esponoza*, 342 F.3d 462 (6th Cir. 2002).

[34] *United States v. Ritchie*, 35 F.3d 1477 (10th Cir. 1994).

[35] *Muehler v. Mena*, 544 U.S. 93, 98-99 (2005).

[36] *Michigan v. Summers*, 452 U.S. 692, 700 (1981).

[37] *Graham v. Connor*, 490 U.S. 386 (1989).

[38] *Id.* at 394-395.

[39] *Muehler v. Mena*, 544 U.S. 93, 96 (2005).

[40] *Id.* at 99.

[41] *Id.* at 100.

[42] *Id.*

[43] *Id. See* n.14.

[44] *Id.*

[45] *Id.* at 102 (Kennedy concurring).

[46] *Id.* at 103 (Kennedy concurring).

[47] *Id.*

[48] *Michigan v. Summers*, 452 U.S. 652, 703 (1981).

[49] *Muehler v. Mena*, 544 U.S. 93, 100 (2005).

[50] 544 U.S. at 100, 452 U.S. at 702-703.

[51] *Mazuz v. Maryland*, 442 F.3d 217, 222 (4th Cir. 2006). It is interesting to note that the police officers entered the wrong room, but the court of appeals determined

that this mistake was reasonable, and, thus, the entry and detention of the occupants was constitutional.

[52] *Id.* at 231.

[53] *United States v. Thompson*, 91 F.3d 145 (6th Cir. 1996).

[54] *See Hinson v. West*, 2006 WL 1526895 (M.D. Ala, 2006) (Use of handcuffs on two infirm women for duration of search for drugs held unconstitutional.).

[55] *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir. 2002).

[56] *Id.* at 945.

[57] *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003).

[58] *Id.* at 1063-1064.

[59] Police officers also should be aware that the use of force and handcuffs on children who may be present at the search scene raises additional concerns. The Supreme Court has not addressed the particular issue, but lower federal courts have clearly drawn a distinction between the amount of force that may be used on an adult and that which may be used on a child. *See Tekle v. United States*, 457 F.3d 1088 (9th Cir. 2006); Holland v. Harrington, 268 F.3d 1179 (10th Cir. 2001).

[60] *Id.* at 1064 (However, the officers were granted qualified on this point because this right was not clearly established at the time the officers used handcuffs to detain Bybee.).

[61] *Michigan v. Summers*, 452 U.S. 652, 705 n.20 (1981). But, *see Dawson v. City of Seattle*, 435 F.3d 1054 (9th Cir. 2006) (The authority to detain occupants incident to a search for evidence of violations of the Seattle Health Code under both *Summers* and *Mena* "apply to all searches upon probable cause not just to searches for contraband.").

[62] *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

[63] *See Denver Justice and Peace Committee, Inc. v. City of Golden*, 405 F.3d 923 (10th Cir. 2005); *Daniel v. Taylor*, 808 F.2d 1401 (11th Cir. 1986) (*Summers* rule is not applicable "to a search for evidence, because the existence of mere evidence, as opposed to contraband, on the premises does not suggest that a crime is being committed on the premises.").

[64] *United States v. Ritchie*, 35 F.3d 1477 (10th Cir. 1994).

[65] *Leveto v. Lapina*, 258 F.3d 156, 170 n.6 (3rd Cir. 2001).

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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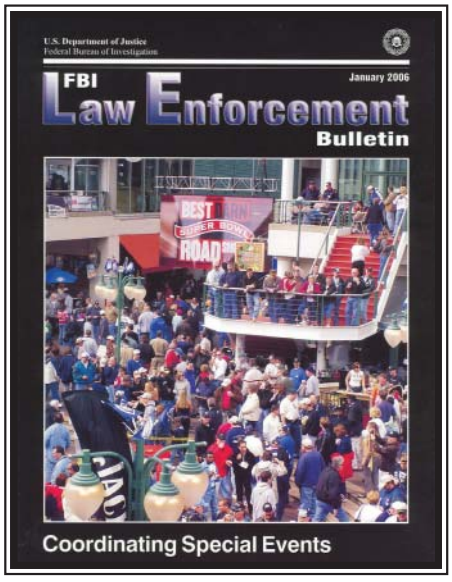

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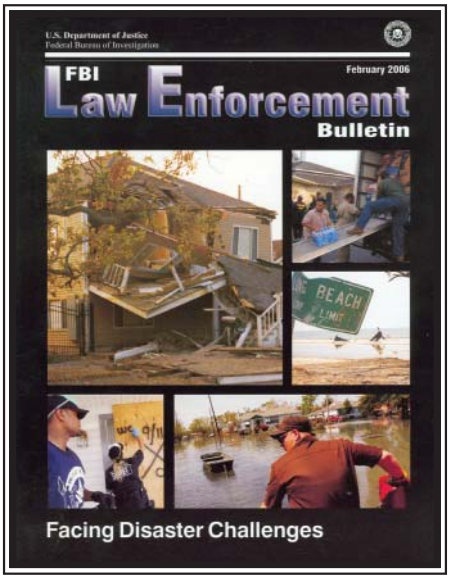

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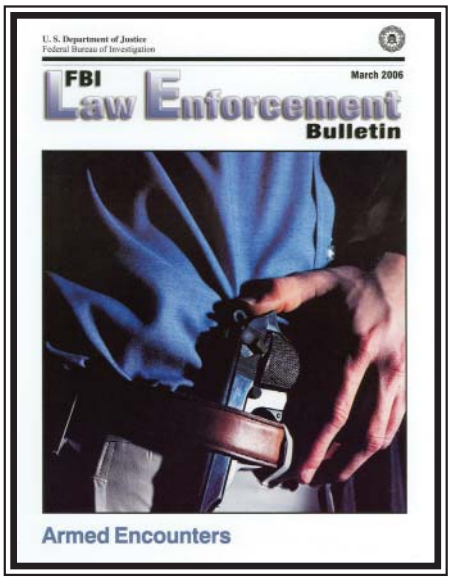

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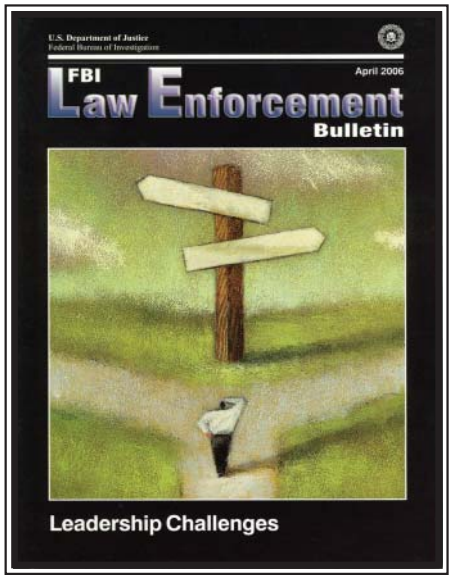

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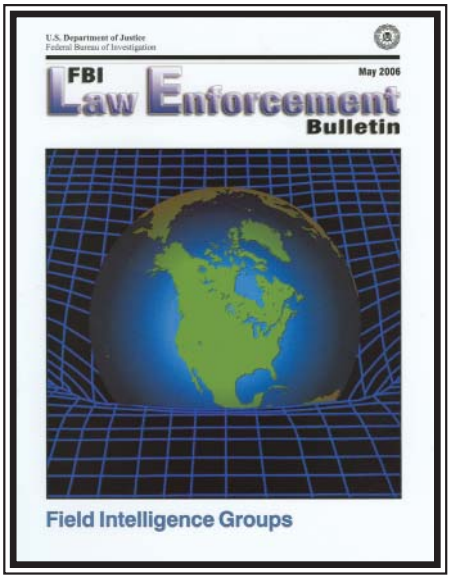

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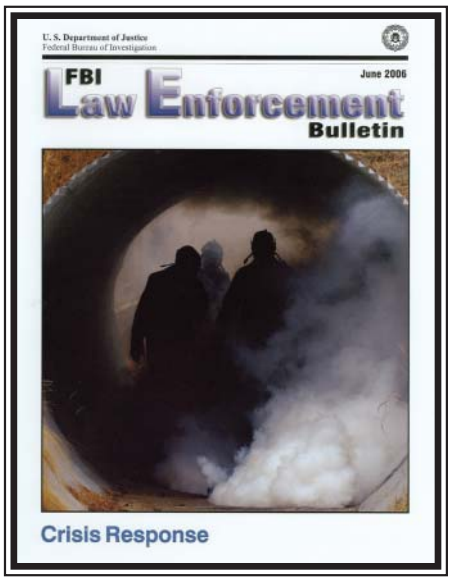

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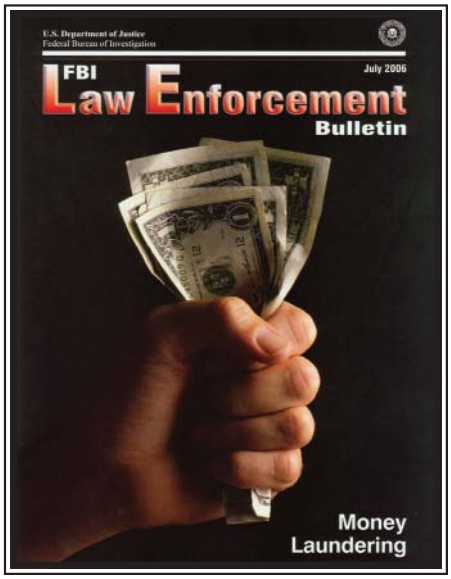

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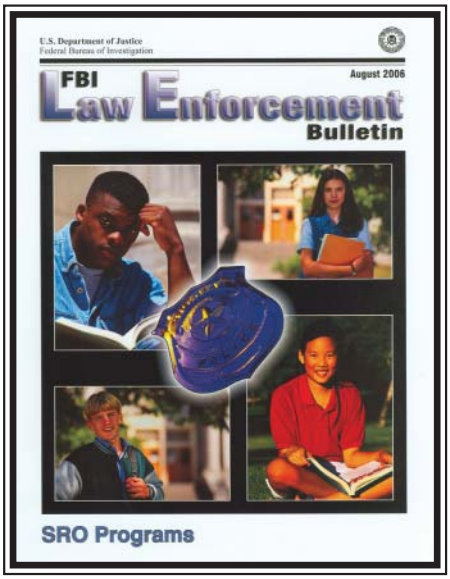

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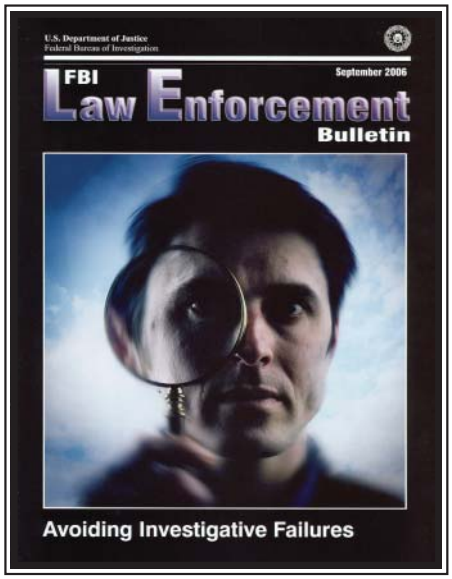

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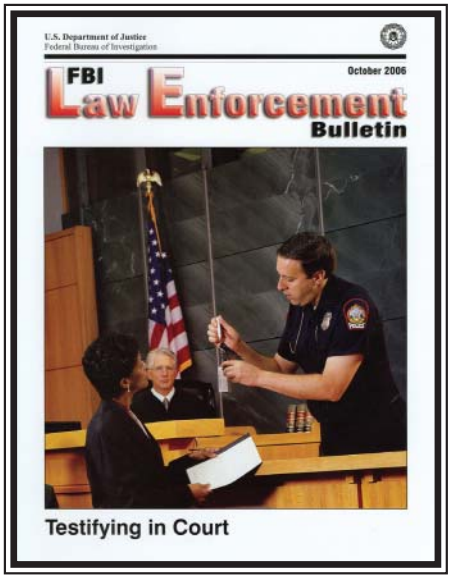
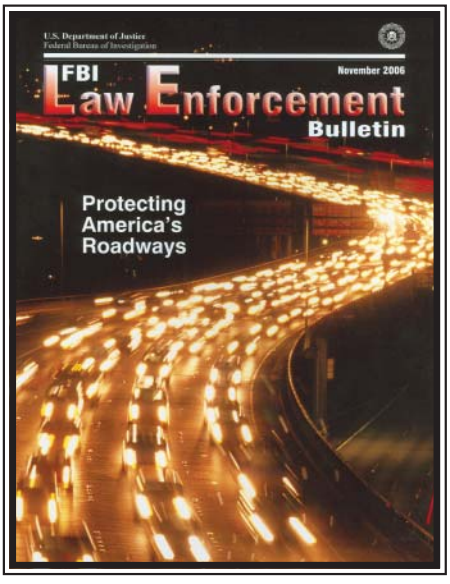
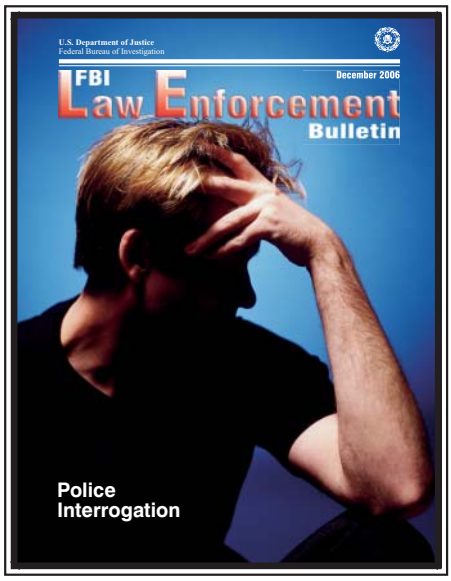
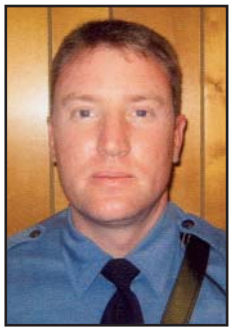




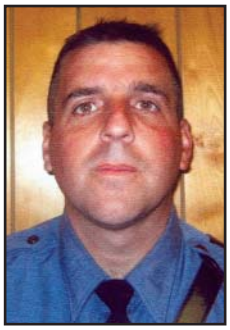


The Bulletin Notes

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.



Trooper Brophy



Trooper Boag

While on patrol, Troopers Kevin Brophy and Sean Boag of the New Jersey State Police noticed a fire at a local hotel. After going inside the facility to talk with employees, they realized that hotel personnel were unaware of the situation. Immediately, the troopers requested dispatch of local fire and police personnel and began evacuating the hotel occupants, making their way through smoke-filled corridors to help approximately 275 guests to safety. The troopers did not leave until everyone at risk was removed. Although they later required medical attention, the selfless actions of Troopers Brophy and Boag resulted in many saved lives.

Officer Kiesheuer

Officer Modica

While patrolling during a holiday season, Officers Peter Kiesheuer and Luigi Modica of the Suffolk County, New York, Police Department saw a residence on fire. They forced entry through the front door and found an elderly woman lying on the floor. The officers picked her up and carried her outside to safety. The victim advised the officers that her sister remained inside the dwelling. The two officers reentered the home and found the other woman on the stairs. The removed her as well. The bravery and quick actions of Officers Kiesheuer and Modica saved the lives of these two inidividuals.

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

The Greenwood, Mississippi, Police Department serves the cotton capital of the state. Its patch features a cotton boll and a depiction of Mississippi. Within the state outline are the Yalobusha and Tallahatchie Rivers, which form the Yazoo River—important to the shipment of cotton in earlier days.

The patch of the Baltimore, Maryland, Police Department features the Great Seal of Maryland, brought over from England in Colonial times, which bears the Calvert and Crossland Arms quartered. In front of the shield is the Battle Monument of Baltimore, the city's official insignia.