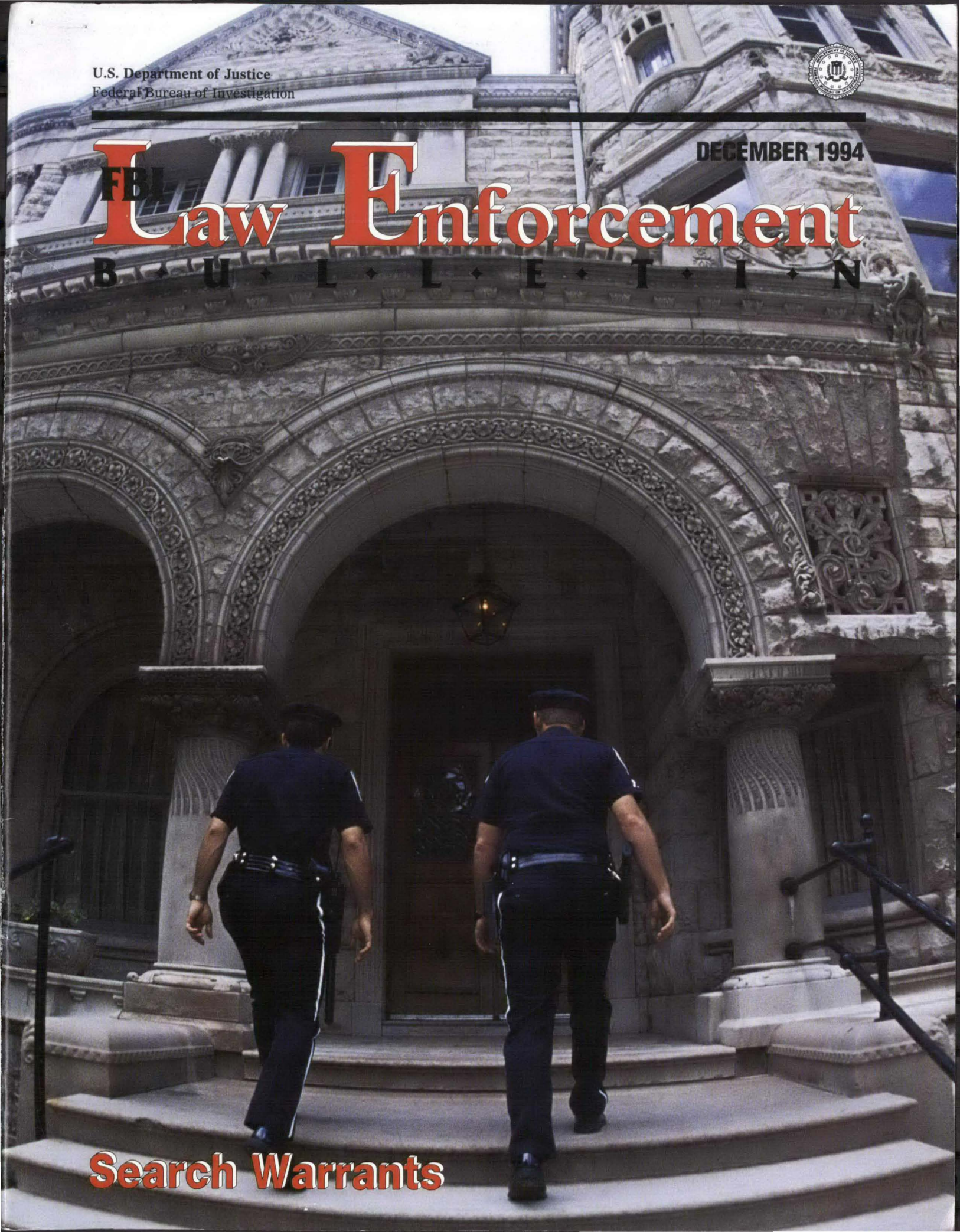
U.S. Department of Justice
Federal Bureau of Investigation

DECEMBER 1994

FBI Law Enforcement BULLETIN



Search Warrants

December 1994
Volume 63
Number 12

**United States Department of Justice
Federal Bureau of Investigation
Washington, DC 20535**

**Louis J. Freeh
Director**

Contributors' opinions and statements should not be considered as an endorsement for any policy, program, or service by the FBI.

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget.

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, FBI Academy, Quantico, VA 22135.

Editor
Dr. Stephen D. Gladis
Managing Editor
Kathryn E. Sulewski
Art Director
John E. Ott
Associate Editors
Andrew DiRosa
Julie R. Linkins
Kimberly J. Waggoner
Assistant Art Director
T.L. Wilson
Staff Assistant
Stephanie L. Lowe

FBI Law Enforcement B·U·L·L·E·T·I·N

Features

Departments

ISSN 0014-5688 USPS 383-310

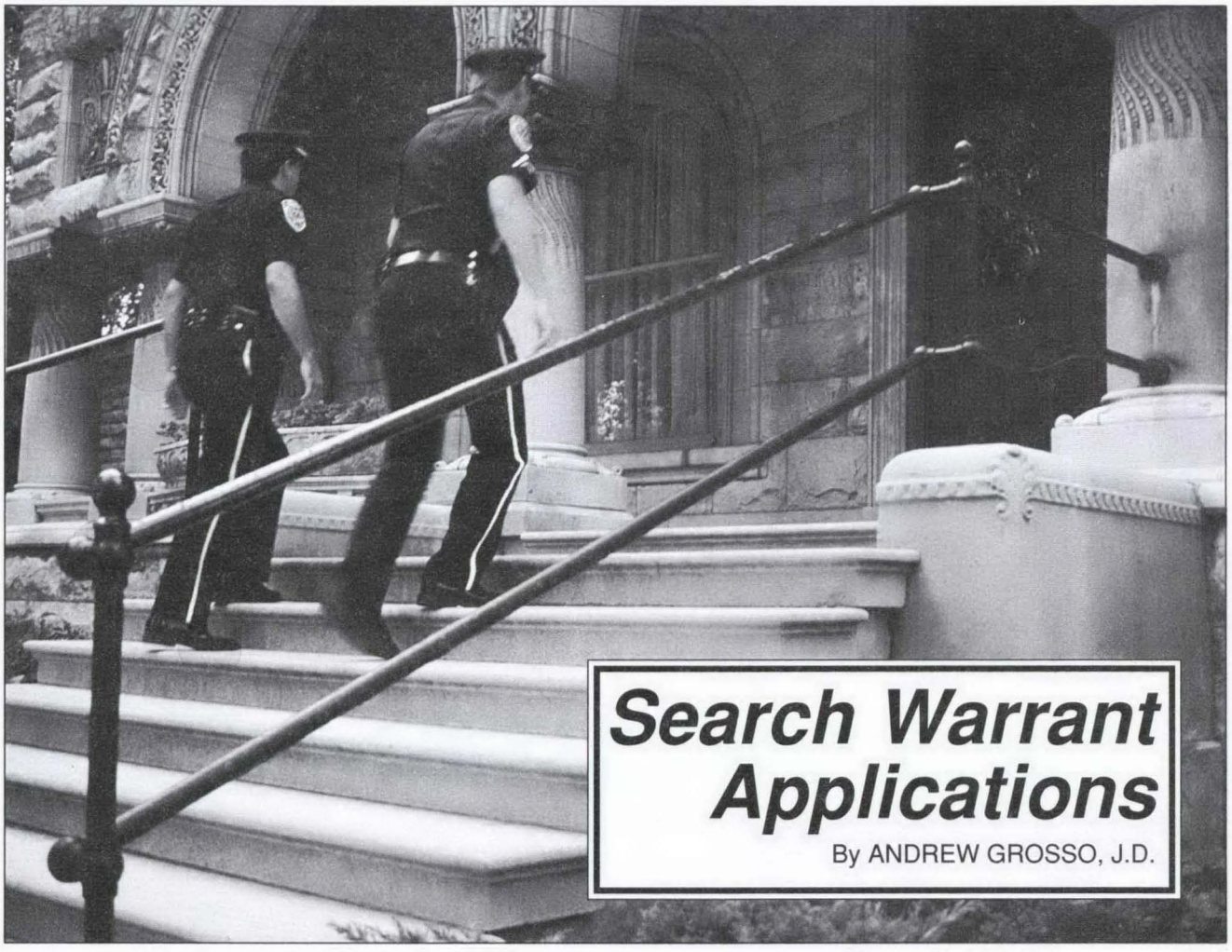


Photo © Peter Hendrie, Tribute

Search Warrant Applications

By ANDREW GROSSO, J.D.

Not all search warrants are equal. Using a warrant to locate and seize a single piece of evidence, such as a firearm or crack cocaine, may be a fairly simple matter. Using a warrant to obtain the business records of a corporation or an executive suspected of fraud is quite another.

Although the same body of law applies in both instances, the techniques used to draft the applications for these warrants and to carry out the searches differ significantly. This article addresses some of these differences and suggests ways investigators can accelerate the process of obtaining search warrants in fraud cases, while minimizing the possibility that errors will be found by a court after the search has been completed.

SEARCH WARRANTS

Search warrants are very powerful investigatory tools, as well as very restricted ones. They permit agents of the government to invade a person's home, personal papers, and privacy, in order to search for and remove particular items of evidence. In short, warrants are intrusive, and for this reason, they must be specific. In this regard, a search warrant differs from a subpoena *duces tecum*,[1] which permits subjects to conduct their own searches for requested items while permitting the government to embark on a fairly wide-ranging and speculative inquiry for possible evidence.

By contrast, in order to obtain a search warrant, investigators must demonstrate two things. First, they need to show probable cause that a specific crime was committed. Second, they must demonstrate probable cause that some type of physical evidence currently can be found in a particular place. Both of these requirements have their own nuances when applied in the context of fraud, as opposed to reactive crimes.

Identifying the Crime

Fraud is a crime of deception. Someone attempts, whether successfully or not, to deceive another party, usually for the purpose of obtaining money or something else of value. Obtaining the item of value is not the crime. Likewise, in a case where someone trades a worthless item for cash, the exchange is not the crime. In both scenarios, the act of deception, the "telling of the lie," is the crime.

An example may clarify this basic, but important, point.[2] The U.S. Air Force contracts "Aerospace, Inc.," to supply parts for military aircraft. Unknown to the Air Force, the company intentionally uses substandard metals in the manufacture of these parts. Investigators wish to obtain a search warrant to seize company plant documents that they believe will prove that Aerospace, Inc., is using substandard materials.

Because a search warrant will be issued only if probable cause exists that a crime has been committed, the investigators should first ask themselves, "What is the crime?" The answer may come as a bit of a surprise, for the crime is *not* the use of substandard metals, nor is it the fact that the suspected firm supplied parts made with the substandard metals to the Air Force. While both of these actions are clearly "unethical," simply acting in an unethical manner is not a crime. Investigators must search the criminal law in order to find a specific statute violation.

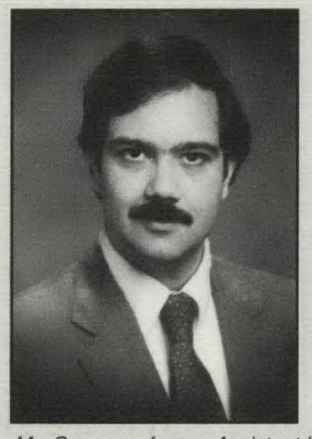
In fact, several Federal statutes may be available. All of them, however, have one thing in common. They are all fraud statutes. That is, they all require the company to have lied for the purpose of deceiving the Government into paying for, and accepting delivery of, substandard parts. This brings investigators to the first rule for drafting white-collar crime search warrants: They must identify "the lie."

More accurately, they must identify *a* lie. Typically, several may be available from which to choose. Although lies may be verbal in nature, in white-collar crime cases, they usually can be found in the documents used in the transaction. In this example, Aerospace, Inc., would have supplied some type of certification to the Air Force stating, directly or indirectly, that the parts had been manufactured with the correct materials. Such agreements are standard requirements in military contracts.

The lie may be straightforward. A document may state explicitly that "Aerospace, Inc., certifies that the metals used to manufacture these parts is 100 percent virgin alloy, consisting of 95 percent iron, 4.9 percent nickel, and 0.1 percent carbon." If the metals actually used some other mixture, then the certification is false. This certification of a false statement constitutes the lie.

In some cases, however, investigators may have to work a bit harder to find the lie. A document may state simply that "Aerospace, Inc., certifies that the parts meet all contract requirements."

Identifying deception now becomes a two-step process. Locating the company's certification merely represents the first step. The second step requires investigators to identify the contract, pursuant to which the parts are being provided, and the "requirements or specifications" contained in that contract. The specification for the metals to be used in



"Search warrants are very powerful investigatory tools, as well as very restricted ones."

Mr. Grosso, a former Assistant U.S. Attorney, is now in private practice in Washington, DC.

the manufacture of the parts usually will be found in this contract. Taken together, a company's contract specifications and certification will constitute the lie.

Ensuring the Lie is Material

In any case, though, this information is not enough. To constitute a crime, a lie must be material. In other words, the lie must be important to the party being deceived. This is not a trivial requirement. More than one criminal investigation has ended after many months of effort because the lie relied on by the prosecution turned out to be immaterial to the deceived party.

In the fictitious Aerospace, Inc., example, the contract between the company and the Air Force further states that the turbine blades must be forged at a temperature of 2000° F. The certification states that the forging took place at this temperature, but in fact, the forging took place at 2500° F, technically making Aerospace's certification false. However, the Air Force may not care about the temperature at which the forging took place, as long as the forging temperature did not drop below 2000° F. In such cases, the lie is not important. Therefore, it is not legally material and will not support a charge of criminal conduct.

A different example may further clarify this point. An investigation is initiated to determine whether "BigBank" has been defrauded by a brokerage agency that specializes in preparing and submitting loan applications to banks on behalf of clients in need of financial assistance. The loan applications used by BigBank require applicants to list their credit cards.

Among other deceits, the brokerage agency has stated falsely on the applications that each client holds two major credit cards. For several reasons, the lie may not be material. One reason may be that the application forms are outdated, and the bank no longer relies on credit card information when deciding whether to issue personal loans. Another reason may be that the loan amounts requested are small enough that the bank does not care whether these applicants possess credit cards. The significant point is that investigators must not take the importance of any false statement for granted. They must be sure that the lie upon which they are focusing is material.

> ***"Investigators should interview the party who has been deceived and ask explicit questions about the importance of each lie."***

The procedure used to ensure this point is fairly straightforward. Investigators should interview the party who has been deceived and ask explicit questions about the importance of each lie. When the defrauded party is a company or a government agency, then the person who is responsible for reviewing the relevant document on behalf of that organization should be interviewed. Alternatively, investigators should interview the person responsible for handling a specific matter tied directly to the lie. These two people may not be one and the same, and investigators will have to decide which one to interview.

For instance, in the Aerospace, Inc., example, a Government inspector may review each certification submitted by the company to ensure that on the face of each document, all requirements of the contract are met. This inspector may believe that it is important that the certification states that forging occurred at 2000° F. The inspector may tell investigators that if he had known that the certification was false and that the forging temperature was 2500° F and not 2000° F, he would have rejected the shipment of blades. However, the engineer responsible for designing the engine in which these blades are used may know that regardless of the contract requirements, a false forging temperature is not important as long as the actual temperature is above 2000° F.

Although interviewing either of these persons should be adequate for the purpose of proving probable cause for a search warrant, investigators must remember that at trial, the proof must be "beyond a reasonable doubt." Therefore, it will do the prosecution little good if a search warrant is obtained and executed based on the inspector's belief that the lie was important, only to discover later, perhaps on the eve of trial, that an Air Force engineer is

prepared to testify for the defense that the lie investigators consider a crime is not material. To avoid such a scenario, investigators may have to interview both persons to ensure the right answer to this crucial question.

When drafting the application for white-collar crime search warrants, investigators must describe in detail what documents and statements they are relying on to prove that a lie exists and explain why the lie is a material one. To avert later complications, investigators always should include their sources for this information.

WRITING FOR PROSECUTORS AND MAGISTRATES

Investigators commonly complain that prosecutors take too long to approve search warrant applications in white-collar crime cases. Among prosecutors, there is a common complaint that the applications submitted by investigators for such warrants require too much additional work before they can be approved. To a significant extent, these divergent complaints stem from the same root cause. Any search warrant application *must* explain clearly, precisely, and completely to a third person (a judge or a magistrate) what the crime is, what evidence establishes the crime, and what evidence the government wishes to seize during the proposed search.

A prosecutor reviewing a warrant application is acutely aware of two factors. First, any application submitted to a court must survive close scrutiny by the reviewing magistrate. Second, after the search has been executed, the application must survive the inevitable attack that will be brought by defense counsel. For these reasons, conscientious prosecutors take their time when reviewing warrant applications.

> ***"Investigators simply cannot request authority to search for all documents pertaining to the investigation."***

Speeding the Process

Investigators can take steps to help speed the process. First, they should remember that applications must be understandable. This is a deceptively simple statement. It is also the bane of most prosecutors.

A magistrate is not aware of the history of the investigation, the nature of the crime (the lie), or the regulations that the subjects attempted to evade through fraud. In a complex scheme, such as many Medicare frauds, the background necessary to convince a magistrate that the subjects' actions constitute a crime must be drafted carefully.

As stated above, the description must be clear, detailed, and complete. Putting these three elements together is not particularly easy. It takes time and effort, as well as a command of the written language and the intricacies of the investigation. To accomplish this goal, investigators must know what they plan to say in the application. They should put together an outline of what they need to establish and organize this in the same order that they intend to use in the application.

Having done this, investigators then should meet with prosecutors and discuss the outline. Together, they should decide the statute(s) with which to charge the suspects. This is a significant point, because many white-collar criminals violate more than one criminal statute.

For example, a scheme to defraud a federally insured financial institution may involve false statements to that institution, false statements to a Federal agency supervising that institution, mail fraud, bank fraud, and conspiracy. Given the status of the investigation, investigators may find it easier to establish probable cause for certain violations over others. Alternatively, the choice of a particular violation may permit investigators to search for and to seize valuable evidence, when choosing a different violation would not permit such search and seizure.

Once the statute is chosen, investigators should request that the prosecutor provide a list of the "essential elements" of that statute. Essential elements are generic facts that must occur to establish the violation of a particular statute.

Appellate courts often list these elements in their judicial opinions, and trial courts must describe them to juries in criminal cases before permitting deliberations to begin.

Therefore, these elements are readily available. In the warrant application, investigators should note the information they have to support each element, as well as the source of that information.

Next, investigators must decide what documents they need to seize during the search. As stated previously, a search warrant is not a subpoena. Investigators simply cannot request authority to search for all documents pertaining to the investigation. On the contrary, they must be very specific. Therefore, investigators should ask themselves and their cooperating witnesses the following questions:

- What documents does the company use that are relevant to this investigation?
- Why are these documents relevant? Or, in other words, how might these documents be used to prove this case against the company and its officers and employees?
- Where does the company maintain these records?
- For how long does the company maintain these records?

The first two points should be discussed with the prosecutor. Being familiar with the laws governing fraud, the prosecutor may recognize that a particular document is not worth the effort of conducting a search, or the prosecutor may suggest that additional documents are necessary to prove the case at trial.

Investigators often overlook the last two questions. They should remember that the warrant application must establish probable cause not only that a crime was committed but also that the documents that investigators wish to seize as evidence of the crime *currently* exist on the company's premises.

Usually two methods accomplish this task. The first involves the use of cooperating employees (current and former), who could provide investigators this information through firsthand knowledge. However, where former employees are the source of such information, their knowledge may not be current, and the information they provide may have to be updated through additional sources.

The second method is based on the required business practices of a company or profession. For example, Federal and State regulations require that medical doctors maintain the records of their patients for a specified number of years. If a physician bills insurance carriers on behalf of patients, the physician also is required to maintain the patients' financial records for another specified period of time. These regulations can be used in a search warrant application to establish probable cause that the physician under investigation maintains medical and financial files of current patients.

Investigators reasonably can assume that those files can be found at the physician's place of business. It should be noted, however, that doctors may maintain records of former patients at off-site locations. If investigators wish to seize these records, additional information as to where the files are maintained may be necessary.

Similarly, defense contractors, financial institutions, accountants, and numerous other businesses and professionals are required by statutes, regulations, or ethical rules to maintain records for varying periods of time. For this reason, it is

important that investigators learn under what requirements the suspect(s) may be operating and then put this information in their search warrant application.

Descriptions of the documents to be seized should be included in the warrant application in two places. First, they should appear in the general body. As investigators describe each portion of the fraudulent scheme, they should mention the pertinent documents that provide evidence of the scheme, along with the information they possess demonstrating how the company creates, uses, and maintains these documents. Again, investigators should include their sources for this information. In this way, the application will make clear that probable cause exists to seize the requested documents.

The end of the application includes a list of each type of document to be seized. Investigators should be specific when compiling this list. For example, if investigators only have probable cause to seize loan applications for home mortgages made from 1989 through 1991 for houses located in a particular community, then they should state this in the list. It would be counterproductive, for example, to seize all loan applications from 1985 for several communities.

In trying to do so, one of two things may happen. If investigators are fortunate, the prosecutor or the magistrate will refuse to approve the warrant application as written. Or worse, the warrant will be approved; investigators will seize the additional loan applications; the warrant will be attacked by defense counsel; the additional evidence may be suppressed; and the court may rule that the evidence has "tainted" the investigation and the government's prosecution.[3] Put simply, stretching probable cause in this way is not worth the potential cost.

> ***"By following a series of step-by-step procedures, investigators and prosecutors can reduce significantly the time necessary to draft warrant applications."***

Telling the Story Clearly

White-collar crimes can be intricate, and the investigation leading to a warrant application may be complex. Therefore, investigators should not expect a magistrate to read a tangled or technical treatise of the investigation and then spend time trying to decide if the warrant should be approved. Similarly, investigators should not expect a prosecutor to permit such an application to reach the magistrate.

An application must be written *simply*, describing everything clearly. Again, it is critical for investigators to assume that the prosecutor and the magistrate know nothing about the investigation. Hence, *everything* must be explained. Because fraud schemes often can be complex, investigators should first break down schemes into parts and then string the parts together to tell a story.

After completeing the first draft, investigators should give a copy to a fellow investigator who has not been involved significantly in the matter. The reviewer should identify portions that are unclear or confusing and make suggestions for improving the application. Investigators should then revise those portions of the application.

CONCLUSION

Search warrants are important investigatory tools. Investigators should not avoid securing warrants in white-collar crime cases merely because the process necessary to obtain them appears difficult and time-consuming.

By following a series of step-by-step procedures, investigators and prosecutors can reduce significantly the time necessary to draft warrant applications. As a result, both groups may consider the use of warrants more often. The ultimate result will be stronger prosecutions.✦

Endnotes

[1] Writ requiring that a party summoned to appear in court bring a document or other pieces(s) of evidence for examination by the court.

[2] This example examines only Federal criminal law. Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor.

[3] *State* v. *Novembrino*, 105 New Jersey, 519 A. 2d 820 (1987); *but see United States* v. *Leon*, 468 U.S. 897 (1984) (establishing good faith exception in Federal courts).

Criminal Investigation Assessment Unit

By Glenn A. Walp
and Malcolm L. Murphy

While a young woman slept, two intruders forced their way into the basement of her home in a small Pennsylvania community. They cut off the telephone and electricity. Then, for the next several hours, the subjects sexually assaulted the victim. They finally gagged and bound her in a chair and fled the scene with her vehicle and a small amount of cash. When interviewed by police, the victim was unable to furnish descriptions of her assailants, other than to say that one was taller than the other.

Considering the limited descriptions, the likelihood of apprehending the offenders seemed remote. However, the Pennsylvania State Police had recently established a new unit designed to help solve such cases. Investigators from the Criminal Investigation Assessment (CIA) Unit assisted in the investigation and carefully reviewed the incident and the crime scene. They also reinterviewed the victim with an emphasis on developing behavioral assessments of the offenders.

As a result of their analysis, CIA Unit personnel concluded that one or both of the subjects must have been in the victim's home at some point in the past. Investigators then asked the victim to provide a list of every person known to have entered her home within the past 3 years.

Meanwhile, investigators received a tip that placed an individual in a vehicle similar to the victim's shortly after the assault occurred. An investigation revealed that the driver had a friend whose last name matched the last name of an individual on the victim's list. The name was that of a handyman who had worked at the victim's residence. The investigation focused on the man seen in the vehicle and the handyman's son. Investigators determined that at some point in the past, the handyman must have taken his son with him to work at the victim's house.

The two subjects were arrested. When confronted with the physical and circumstantial evidence that investigators had collected, both offenders pled guilty and were sentenced to lengthy prison terms.

The investigative initiatives employed by the Criminal Investigation Assessment Unit contributed significantly to the apprehension and conviction of these offenders. CIA Unit methods did not supplant the efforts of the assigned case investigators. Rather, they furthered the investigation by providing an assessment of offender behavior during the crime, thus allowing case investigators to limit and focus their search for the assailants.

THE CIA UNIT

Background and Composition

In 1987, the first State criminal investigation assessment program in the United States was developed through the mutual efforts of the Pennsylvania State Police and the FBI. Via a special FBI fellowship grant, a Pennsylvania State trooper was assigned temporarily to the FBI Academy where he received training in criminal profiling and other innovative investigative assessment techniques.

Components of a Criminal Investigation Assessment

- Comprehensive study of the nature of the criminal act and the type of subject who commits similar offenses
- Thorough review of available crime scene data
- Indepth examination of the victim's background and activities
- Formulation of the suspect's probable motivating factors
- Behavioral and general physical description of the suspect.

Agencies that desire additional information regarding the CIA Unit may contact the Pennsylvania State Police, Bureau of Criminal Investigation, 1800 Elmerton Avenue, Harrisburg, Pennsylvania 17110.

On his return to the Pennsylvania State Police, the trooper became the supervisor of the CIA Unit, which at that time consisted of 25 officers. Located within the Bureau of Criminal Investigation, the unit provided specialized service to the 15 county troops of the State police.

In 1992, the unit's primary objective changed from investigative support of troop operations to active involvement in all facets of the investigative process. This included participation in the major crime task forces that had been established in each county troop. CIA Unit officers and troop criminal investigators began working together, thereby expanding the level of knowledge and expertise available to solve each crime.

To accomplish its expanded mission, the CIA Unit significantly augmented its staff. Currently, the unit is comprised of a supervisor, 3 regional coordinators, and 41 criminal investigative assessment officers located throughout the State. The supervisor directs statewide criminal assessment activities and assists in developing and implementing investigative strategies. The regional coordinators oversee and report on unit activities and also help to develop and implement case strategies.

Criminal investigative assessment officers must be proficient in several different areas. They plan case strategies and assist with major case analysis, behavior-based interviewing techniques, and search warrant preparation.

Officer Selection

To qualify for assignment in the CIA Unit, troopers must have served a minimum of 3 years with the State police. The selection process includes a formal interview and a written test. In addition, a certified psychologist evaluates each candidate's psychological and emotional stability, maturity level, and ability to cope with the stress of dealing with violent crimes. The candidates' levels of formal education, investigative experience, and ability to write and speak clearly also factor into the selection process.

Investigative Services and Techniques

The CIA Unit provides free assessment services to Federal, State, and local law enforcement agencies. The techniques used by the CIA Unit can be applied to single, multiple, or serial offenses. However, because fewer indicators of mood and behavioral traits can be determined from single-event crimes, the effectiveness of the assessment in these types of cases generally is reduced. Additionally, in order to conduct a useful assessment, a significant psychopathology—a behavioral or personality imprint—must be evident in the verbal statements or behavior exhibited by the offender during the crime.

Various types of investigations may benefit from offender assessment. These include homicides, stranger-to-stranger rape investigations, extortion, threats, kidnapings, child molestations, suspicious deaths, serial arsons, ritualistic crimes, and false allegations.

Benefits

CIA Unit administrators stress that the services provided by the unit should not be considered a substitute for a thorough, well-planned investigation; rather, their services augment traditional investigative crime-solving methods. CIA Unit officers provide a profile that describes the behavioral characteristics of

the unknown offender. These profiles characterize offenders in a manner that distinguishes them from other members of the population. In this way, case investigators gain valuable information that may allow them to narrow the scope of their investigation.

In addition to offender assessment, CIA Unit investigation offers another important advantage. Case investigators benefit from an independent review, both of the crime scene and of the initial investigatory steps, unbridled from the stress and fatigue often associated with the original police response.

CIA Unit members also may conduct an additional *personality* assessment of offenders. However, this process requires a detailed submission of data regarding the subject and demands extensive review and consultation by the assessor. During this process, CIA Unit officers identify personality characteristics of offenders based on a detailed analysis of the crime(s) they have committed. Only those cases that yield considerable evidence delineating an offender's behavioral activity are accepted for personality assessment.

CONCLUSION

Investigators often find themselves confronted by cases that offer few physical clues. And as with the case of the young Pennsylvania woman, even assault victims who are left alive may be unable to provide the police with detailed information regarding their attackers.

However, just as advances in forensic science have made once-insignificant physical evidence valuable, advances in behavioral science have made offender assessment a useful component of many investigations. The Criminal Investigation Assessment Unit of the Pennsylvania State Police enhances traditional investigations by providing unique insights into the minds of offenders. For, as any investigator knows, a clue that distinguishes an offender from the general population brings law enforcement one step closer to solving the case.✦

Colonel Walp is the commissioner of the Pennsylvania State Police. Corporal Murphy supervises the Criminal Investigation Assessment Unit of the Pennsylvania State Police in Harrisburg.

Bulletin Alert

Laser Sheds New Light on Case

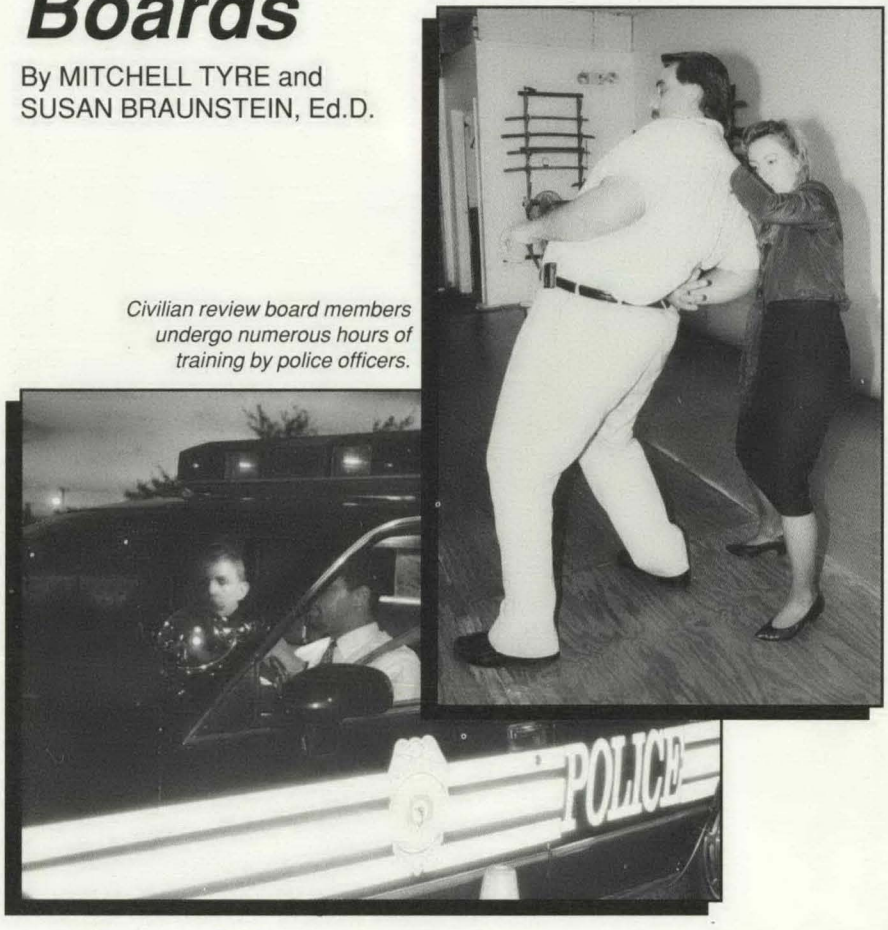
Arrow points to slap marks.

Investigators from the Raritan Borough, New Jersey, Police Department believed that speed played a major factor in a fatal accident involving a motorcycle and a passenger vehicle. However, although witnesses in the residential area "heard the motorcycle going fast," no one actually saw it exceeding the posted 25mph speed limit. The motorcycle's speedometer was removed and, with assistance from the Somerset County Prosecutor's Office, photographed using laser light. The photograph showed "slap marks" made by the speedometer's needle on impact, indicating that the motorcycle was traveling at 58-59 mph at the time of the collision. This evidence proved invaluable during the investigation.✦

Submitted by Det. Joseph Stansley of the Raritan Borough, New Jersey, Police Department.

Building Better Civilian Review Boards

By MITCHELL TYRE and
SUSAN BRAUNSTEIN, Ed.D.



Civilian review board members undergo numerous hours of training by police officers.

Consider this hypothetical, yet familiar, scenario. During an arrest, a police officer injures a suspect, resulting in brutality charges against the department. When the incident is made public, members of the community demand action: They want to establish a civilian review board.

Citizens often propose civilian review boards following incidents that involve the use of excessive force. In such cases, the community views the civilian review board as a means for placing restraints on overzealous police officers. At the same time, officers already may feel overburdened, overregulated, and evaluated unfairly by the public.

Police officers often believe that review boards are anticop.[1] They perceive citizens as too prone to bias and ignorant of actual police practices to make sound judgments.[2] Indeed, boards that are conceived hastily, selected hurriedly, and trained poorly often confirm the worst expectations of the police. When a board is assembled under pressure from angry members of the community and scathing editorial writers, the focus of attention becomes speedy implementation, rather than the careful selection of board members and the establishment of a viable mission.

Several problems can result when a board is assembled hastily. First, members of the board may come in with their own agendas instead of representing the greater good of the community at large. In addition, the board's goals may be designed poorly, resulting in a lack of focus and defined purpose. Further, training for board members may be deficient or absent altogether.

Under these circumstances, no one should be surprised if the board makes flawed decisions. Worse, everyone involved loses. The law enforcement agency loses the chance to obtain valuable input from concerned, legitimate sources in the community, and the community loses the opportunity to provide that input.

Fortunately, it is possible to build a better civilian review board. This article presents implementation and training models designed to help law enforcement executives create a board that best serves the interests of the community and the

agency. Both models emphasize thoughtful problem analysis and skilled communication.

IMPLEMENTATION MODEL

A law enforcement agency that takes the initiative to create a review board can have major impact in its design, implementation, and ultimate success. Police executives who do not direct the process allow others—government administrators, elected officials, community activists, etc.—to create a board that serves their own needs, which are not necessarily the needs of law enforcement or the community it serves.

When implementing a civilian review board, police executives need to consider several major factors. These include timing; goals, powers, and procedures; audience and stakeholders; and member qualifications.

Timing

When law enforcement administrators create civilian review boards in response to community demands following high-profile incidents, the public may view the administrators as reactionary and shortsighted. Worse, police executives' colleagues and subordinates, as well as some community members, may see them as merely yielding under pressure.

In contrast, proactive police executives who take the initiative and propose civilian review boards before their constituents demand them appear confident about their departments and open to dialogue with their communities. Ultimately, they exert greater control over the process and the final product than their reactive colleagues.

Chief Tyre heads the Juno Beach, Florida, Police Department.

Dr. Braunstein is an associate professor of communications at Barry University, Port St. Lucie, Florida.

Goals, Powers, and Procedures

The board's goals, powers, and procedures represent the lifeblood of the review board. The goals of the review board determine its powers which, in turn, affect the procedures it follows. For this reason, law enforcement administrators must consider these factors not only separately but also as a function of one another.

Goals

First and foremost, an effective review board must possess clearly stated goals. These objectives may range from broad areas, such as improving communication between the police and the community or increasing police accountability and credibility with the public, to specific purposes, such as reviewing all shooting incidents in a department. Or, the board may serve as a liaison between the community and all public service agencies—not merely law enforcement agencies.

A citizen review board can accomplish its goals better when the members know exactly what those goals are. However, clearly defined objectives mean little unless accompanied by the power to attain them.

Powers

When public officials form review boards in response to citizen protests, the resulting boards often lack the power to accomplish their goals. Without power, boards serve primarily a ceremonial function. Officials truly committed to improving service to the community establish review boards that are more than mere window dressing.

Although the method used to enact a board does not determine what powers the board will possess, it does dictate how the board's powers are established and modified. More important, it may reflect the

seriousness with which the board is viewed by its creators. Four commonly used means to enact civilian review boards are municipal ordinance, city or county code, resolution, and executive appointment; each method has advantages and disadvantages.

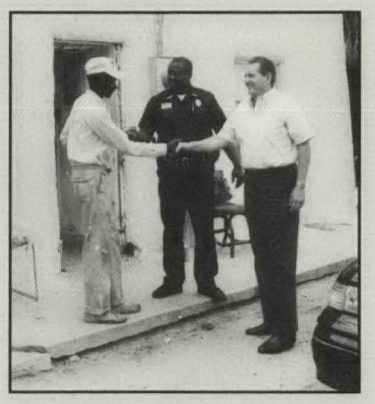
Establishing a citizen review board by ordinance signals that the government views the board as important enough to constitute it under law. Furthermore, ordinances require public hearings, which allow all interested parties to provide input. Unfortunately, the bureaucratic process may prove slow and cumbersome.

Boards instituted by city or county code possess legislative clout. However, as with ordinances, the bureaucratic process may hinder efficiency.

Boards founded by resolution can accommodate emerging needs quickly with minimal bureaucratic red tape. However, this flexibility increases the possibility of political manipulation.

Quick implementation and a safeguard against political influence ideally characterize executive appointments. However, when boards are formed in this manner, board members may be perceived as tame—representing the established viewpoints of the official who appointed them.

A review board's goals form the basis of its power and, ideally, determine the specific tasks it will perform. For example, a board created to improve all public services to the community might review the cases of other public offices, such as building and zoning or sanitation.



An officer introduces a board member to a local resident during a ride-along.

Or, a board with the goal of establishing fair and uniform discipline procedures might initiate independent investigations, subpoena witnesses, and conduct hearings[3] or recommend or mete out punishment. However, according to a 1991 survey, none of the boards in place in the 50 largest U.S. cities has the power to impose discipline. These boards serve only in an advisory capacity.[4]

Procedures

The procedures that a board follows depend on its powers. There are three major types of boards based on their methods of investigation.

In the first, police officers conduct the investigation and present their findings to the review board, which submits a recommendation to the department head. The second type calls for civilian investigators selected by the board to conduct the inquiry, with the board making the decision. In the third type of review board, the police complete the analysis and make recommendations to the department head, who makes the final decision. In this type, the board functions only as an avenue of appeal for citizens unsatisfied with the final decision.

Many boards combine elements from all three approaches. No one type of board is superior; police executives must decide which model will work best in their community. This may depend, in part, on whether the board was created as a proactive or reactive measure.

Audiences and Stakeholders

Communication models offer important insight to police administrators contemplating citizen review boards. These models demonstrate that different audiences perceive messages differently. As a result, speakers must identify their target audience for each message. Then, they determine its relevant perceptions, history, characteristics, and desires. This research allows speakers to tailor their messages accordingly.

Target audiences for criminal justice administrators establishing citizen review boards include the public; other police executives and their departments; government administrators, attorneys, and elected officials; special interest groups; and the media.[5] Once police executives identify their target audience, define the needs of the audience, and determine the goals of the board, they can refine their approaches to suit each audience. For example, a police executive might address police officers who fear that a civilian

review board given the power to recommend discipline will favor overly severe punishments.[6] In this case, the executive might provide evidence that review boards have proved more lenient in proposing punishments than police chiefs who discipline their officers without civilian review.[7]

Police executives also can learn a lesson from management theory. Individuals who participate in a change process adapt better than those who have change imposed from outside sources. Therefore, police managers should invite members of their target audiences to be stakeholders in the process of creating a review board.

Stakeholders provide input during the planning and construction phases and enhance the board in two distinct and important ways. They increase the board's responsiveness to those it serves, and they increase its legitimacy in the eyes of the community.

Board Member Qualifications

Members of citizen review boards are exactly that—citizens. Thus, the board should be a microcosm of the community, reflecting the diversity of its residents. In addition to this basic requirement, planners should consider other factors when establishing board member qualifications.

These include, but are not limited to:

- Imposing age and/or residency requirements
- Disqualifying convicted criminals, police officers' family members, elected officials, members of the governmental empowering board, and/or plaintiffs in legal actions against any governmental entity
- Requiring current or previous community involvement.

Once the stakeholders determine the member profile, they can begin to select individuals for positions, according to a previously established method agreed upon by all stakeholders.

TRAINING MODEL

Establishing and empowering a citizen review board, defining its operational goals and procedures, and selecting its members is only the beginning. Now, the members must be trained.

> ***"...the board should be a microcosm of the community, reflecting the diversity of its residents."***

Clearly, a properly trained review board will serve the community better. Equally important, board members who undergo a thorough training regimen enhance the board's credibility with the residents and the police. The program used to train the newly established civilian review board for the City of Stuart, Florida, may serve as a model to illustrate the principles and methods needed to prepare new board members properly.[8]

Training Principles

Prospective Stuart board members undergo 12 hours of training, as well as 24 hours of ride-along time. The training is divided into four sessions, and ride-alongs are individually scheduled with the department liaison officer. By design, the program exposes board members to some of the same training and street experiences of Stuart police officers. It also familiarizes board members with departmental policies.

In addition to classroom lectures, board members receive hands-on training. This is especially important in areas where officers risk injury and their departments face potential lawsuits, such as high-speed pursuits and searches and seizures. Hands-on training enables board members to see events from the officer's perspective—life on the other side of the windshield.

Board members also ride with patrol officers on all shifts and in at least a representative number of diverse zones or sectors. Citizens often have a much different perspective of how an officer handles a situation after they actually see and feel, for instance, the tension and hostility of a crowd outside of a bar following a shooting or stabbing. While board members still must hold officers accountable for their actions, they need to have a realistic view of police work.

In Stuart, members of neighboring departments train the board members under the direction of consultants. Trainers not associated

directly with the department are viewed as more objective and unbiased.

Training Sessions

The first training session for the Stuart citizen review board provides a brief overview and history of review boards and the heritage of this particular board. In addition, the city attorney discusses liability statutes and the laws applicable to public record concerns, internal affairs investigations, and confidentiality issues. The trainers and consultants review the upcoming training curriculum and establish a viable schedule to accommodate the needs of the board members.

The three remaining sessions include classroom lectures and demonstrations and hands-on training in the following areas:

- Defensive tactics—board members learn and practice takedowns and other techniques for controlling suspects
- Firearms familiarization—members play the part of the officer in an interactive shoot/don't shoot video
- Emergency vehicle operations—members drive police cars in a mini-emergency vehicle operations course.

All of the interactive courses and the classroom lectures include a question-and-answer period.

This training curriculum is based on the specific needs of the City of Stuart. Accordingly, each community should design a program that best suits its own needs.

CONCLUSION

Today's citizens expect both sensitivity and accountability from law enforcement. Civilian review boards represent a viable option for building a strong police-community relationship, especially when initiated prior to public demand.

Civilian review boards can enable law enforcement agencies and communities to open a dialogue that benefits all the stakeholders. Citizens become involved directly in accountability issues and better understand the nature of police work. At the same time, police officers feel less threatened by what they view as an uninformed public.

> **"While board members still must hold officers accountable for their actions, they need to have a realistic view of police work."**

Without proper implementation, however, citizen review boards are doomed to failure. Problem analysis and good communication remain the keys for initiating, constructing, and training a review board that is an asset to the police department and to the community.✦

Endnotes

[1] While conducting research in Florida from 1992 to the present, the authors found this opinion to be commonplace among police officers.

[2] Werner E. Petterson, "Police Accountability and Civilian Oversight of Policing: An American Perspective," *Complaints Against Police: The Trend to External Review*, ed. Andrew J. Goldsmith (Oxford, England: Clarendon Press, 1991), 270-1; and Douglas Perez, "Police Review Systems," *Management Information Service Report*, ICMA, vol. 24, no. 8, August 1992, 1.

[3] Framers need to consider potential legal conflicts with applicable police officer bills of rights and collective bargaining agreements. In addition, jeopardy to criminal cases might arise through granting immunity for subpoenaed testimony. *See, e.g.*, Judith E. Secher, "Legal Considerations Involving Civilian Review of Police Conduct," *Police Chief*, March 1993, 11-12.

[4] Samuel Walker and Vic W. Bumphus, "Civilian Review of the Police: A National Survey of the 50 Largest Cities, 1991," Department of Criminal Justice, University of Nebraska at Omaha, 1991, 4.

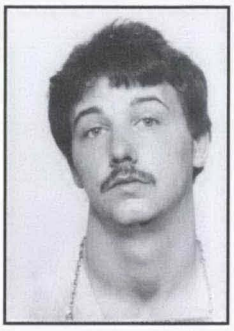
[5] Susan Braunstein and Mitchell Tyre, "Selling Your Community on a Citizen's Review Board," *PM: Public Management*, January 1994, 13.

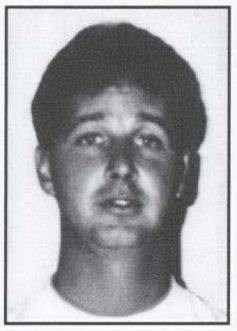
[6] *See* Perez, supra note 2, whose surveys found that a "wide majority" of police officers believe they are treated more fairly by internal review systems.

[7] Numerous studies support the conclusion that civilian review boards are less likely to sustain charges against police officers than chiefs acting on the results of police internal affairs investigations and that, furthermore, civilian boards are more lenient in disciplinary recommendations when officers are found guilty. *See, e.g.*, Wayne A. Kerstetter, "Who Disciplines the Police? Who Should?" *Police Leadership in America: Crisis and Opportunity*, ed. William A. Geller (New York: Praeger, 1985), 162; and Douglas Perez, "Police Accountability: A Question of Balance" (Ph.D. dis., University of California at Berkeley, 1978), 278-79.

[8] The authors worked closely with the city manager, the city commission, the police department, and the community from November 1992 to October 1993. Their work had three major components: Advising on the construction of the board, facilitating interaction between various stakeholders, and planning, delivering, and evaluating training. The board heard its first police case in February 1994.


10/85


10/85


3/94

GARY RAY BOWLES

Bowles, a bisexual male, is a fugitive wanted in three States for the murders of homosexual men. Arrest warrants have been issued for each of the offenses. In addition, Bowles is a suspect in another murder investigation but, to date, no warrant has been issued.

A Federal unlawful flight to avoid prosecution (UFAP) warrant also is outstanding for his arrest. His current whereabouts is unknown, but family members live in Missouri, Oklahoma, Arizona, and California.

CRIMES

On March 15, 1994, Daytona Beach, Florida, police discovered the body of a caucasian male, age 59, in his Daytona Beach residence. The victim sustained a blunt force injury to the head. The assailant took the victim's vehicle, which was recovered in Nashville, Tennessee, on March 25, 1994. Bowles is a suspect in this case because he resided with the victim at the time of the murder.

Then, on April 14, 1994, the body of a 38-year-old caucasian male was found in his residence by Montgomery County, Maryland, police. The cause of death was ligature strangulation. The victim's credit cards, keys, and vehicle were taken from the scene. Police recovered the vehicle on April 22 in Baltimore, Maryland.

The Savannah, Georgia, police found the body of a 72-year-old caucasian male on May 5, 1994. The body was located behind a golf cart shed at a local golf course. The victim died of strangulation with contributing blunt force injury.

Two weeks later, on May 19, 1994, the Nassau County, Florida, police discovered a caucasian male, 38 years old, with a gunshot wound to the head. The deceased victim met Bowles at a gay bar and allowed him to live at his residence for 1 week prior to the murder. Missing from the residence were the victim's automobile, wallet, and credit cards. That same day, Bowles attempted to use one of the credit cards at a local store, but failed to provide suitable identification. Three days later, police found the victim's automobile in Jacksonville, Florida.

MODUS OPERANDI

Bowles frequents homosexual bars, where he meets and befriends patrons. All known victims met Bowles in such establishments, and two victims permitted him to reside in their homes for a period of time.

Blunt force injury, strangulation, and/or gunshot wounds were the causes of death. Some victims were also gagged. Credit cards, cash, and automobiles, when available, were taken from the victims.

ALERT TO LAW ENFORCEMENT

This information should be brought to the attention of all patrol, homicide/crimes against persons, vice, and crime analysis personnel. Anyone with information concerning Bowles' recent whereabouts is requested to contact SA Harold Jones, 912-944-0773 or SA Dennis Regan, 912-232-3716, both assigned to FBI, Savannah; or Det. John Best, 912-651-6735/6658, Savannah, Georgia, Police Department. Law enforcement personnel having similar unsolved cases are requested to contact VICAP Lead Crime Analyst, Susan McClure, 703-640-1465, or Major Case Specialist Win Norman, 703-640-1207, at the National Center for the Analysis of Violent Crime, FBI Academy, Quantico, Virginia.

1) Daytona Beach, Florida (3/16/94)
2) Montgomery County, Maryland (4/14/94)
3) Savannah, Georgia (5/5/94)
4) Nassau County, Florida (5/19/94)

GARY RAY BOWLES

AKA: Gary Ray Boles, Gary Ray Bowels, Mark Ray Bowles, Gary Bowle, Joey Pearson (also used James, Mike, and Mark as first names)

DOB: 1/25/62 (also used 1/25/63 and 1/25/59)

POB: Clifton Forge, VA

SSAN: 338-58-7859 (also used 338-56-5709, 338-58-5878, 330-58-7859, 448-58-7859)

FBI no.: 561 161 V10

Height: 5'9"

Weight: 150 pounds

Tattoos: Heart and ribbon on left arm, cross/star on left wrist

Scars: Inside of left hand, left side of nose, right wrist, left side of chest

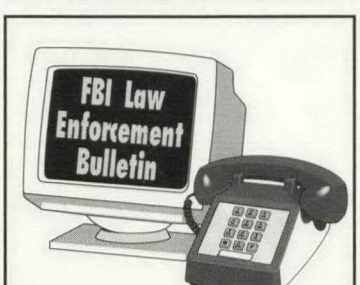
Periods of Incarceration: 6/5/82 to 12/28/83; 10/31/85 to 12/28/85; 10/7/86 to 12/27/86; 7/10/87 to 4/3/90; 8/10/90 to 1/30/91; 2/18/91 to 12/30/93

Occupation: Carpenter, construction worker, and agricultural worker

Education: Grade school dropout but completed GED in 3/83 while incarcerated in a Florida State prison

Other Descriptors: Smokes cigarettes (usually Marlboros or Kools), uses marijuana on a regular basis, admitted in previous probation reports as having an alcohol problem ✦

Dial Law Enforcement



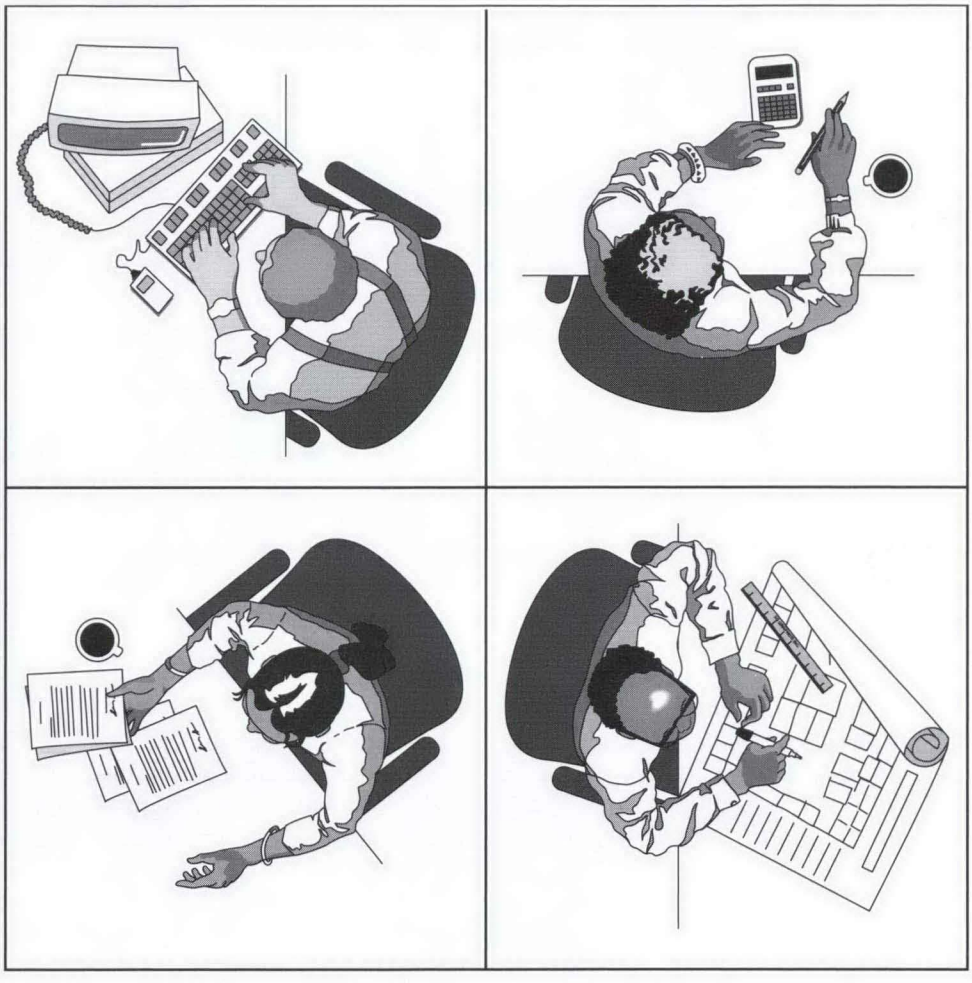
Law Enforcement is now available via three computer dial-up services. Authorized law enforcement practitioners and related professionals who have a personal computer and a modem can access, download, or print current issues of *Law Enforcement* in their homes or offices by contacting these services. Those interested in obtaining information regarding these services should dial the following numbers directly:

- SEARCH Group, Inc. (916) 392-4640
- IACP NET 1-800-227-9640
- CompuServe 1-800-848-8199 (Ask for Representative 346. *Law Enforcement* is available only through their restricted law enforcement library.)

Preferences in Hiring and Promotion

Courts Impose Heightened Scrutiny

By JOHN GALES SAULS

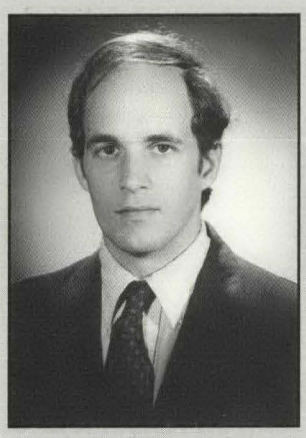


On May 6, 1993, the Fourth Circuit Court of Appeals issued its decision in *Maryland Troopers Ass'n, Inc.* v. *Evans*,[1] holding that the Maryland State Police had discriminated against non-blacks by complying with the terms of a court-approved consent decree entered into with the Coalition of Black Maryland State Troopers, in violation of the Equal Protection Clause of the 14th amendment and Title VII of the Civil Rights Act of 1964 (Title VII). This and other similar cases[2] are indicative of a significant shift in the judicial treatment of claims of so-called "reverse discrimination." These cases strongly suggest that employers who give preferential treatment in employment opportunities based on race, color, national origin, and/or sex to remedy apparent past discrimination and diversify their work forces should review those employment decisions to ensure compliance with the law.

This article discusses the legal standards courts now are using to assess the legality of "affirmative action" plans that extend preference in hiring and promotion. It also examines the challenges facing employers called on to defend legally such preferences.

Title VII Prohibitions

Title VII makes it unlawful for an employer "1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or 2) to limit, segregate, or classify



> ***"...Title VII prohibits employers from taking race, color, national origin, religion, or sex into consideration when making decisions on employment actions...."***

Special Agent Sauls is a legal instructor at the FBI Academy.

his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."[3] The U.S. Supreme Court described this prohibition in 1989 as "...the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[4] Put another way, Title VII prohibits employers from taking race, color, national origin, religion, or sex *into consideration* when making decisions on employment actions, regardless of their motives, unless an exception to the statute, such as preference to remedy past discrimination (affirmative action) or the Bona Fide Occupational Qualification (BFOQ) exception, permitting such consideration is applicable.[5]

Congress emphasized the impermissibility of considering these factors, other than in accordance with an affirmative action plan or as a BFOQ, in its 1991 amendment to Title VII, which provided that a *violation* is shown when an employee demonstrates that "race, color, religion, sex, or national origin was a motivating factor,"[6] in an employment action. Thus, the previously available defense that the employer *would have* made the same decision absent consideration of the forbidden factor has been eliminated.[7]

New Remedies for Intentional Discrimination

Employers who give preference in employment actions based on race, color, national origin, religion, or sex are using the forbidden factors intentionally. Congress, in its 1991 amendment to Title VII, raised the financial stakes for employers accused of intentional discrimination, thereby increasing the importance of ensuring that any preference extended is lawful.

Before passage of the Civil Rights Act of 1991, Title VII's remedies were limited to employment matters. Its design placed the burden on employers to put the victims of illegal discrimination in the employment position they would have occupied absent the discrimination. Available remedies for victims of illegal discrimination included reinstatement, back pay, and other measures, as well as injunctive relief to prevent further discrimination by the employer.

The amended statute retains these remedies and adds limited compensatory (and for defendants who are private employers, punitive) damages to remedy the effects of the emotional distress associated with employment discrimination. These damages are limited to $300,000 per plaintiff for employers with 500 or more employees and lesser amounts for those employing fewer people.[8] The statute also provides a right to have such damages determined by a jury.[9] The combination of compensatory damages and the right to have the matter decided by a jury increases the uncertainty and potential expense of litigation under Title VII.[10]

The Affirmative Action Exception

Title VII does not require employers to engage in affirmative action. Title VII expressly provides that nothing in the statute shall be interpreted to require employers to extend preference to remedy imbalances between the numerical representation of a particular group in the employer's work force and the numerical representation of that group in the community or community's work force.[11] Using this language, in part, as statutory support, the Supreme Court held in 1979 that Title VII did not prohibit race-conscious steps by employers to

eliminate manifest racial imbalances in traditionally segregated job categories.[12]

Although this decision was criticized as being contrary to the plain language of Title VII,[13] it formed the basis for the adoption, and judicial approval, of preferential hiring and promotional programs. The Supreme Court, in 1987, denoted a similar exception to the 14th amendment's command that States (and thus State and local governments in their role as employers) accord U.S. citizens equal protection.[14]

On a number of occasions in recent years, the Supreme Court has attempted to define the limits of the license it granted employers in 1979 to adopt preferences based on the very factors the consideration of which Title VII proscribes.[15] It is these limits that have put employers, such as the Maryland State Police, into the legal quandary of defending steps taken to eliminate apparent past discrimination against one group from legal challenges mounted by another group that claims the employer's discrimination remedy amounts to new acts of discrimination.[16]

The Elements of Proof for Lawful Preference

An employer who wishes to defend successfully a preference in employment based upon race, color, national origin, religion, and/or sex in order to remedy apparent past discrimination must be prepared to demonstrate two things factually. First, the employer must prove a strong basis for concluding that it apparently discriminated in the past against the specific group or groups being extended the preference.[17] Second, the employer must prove that the preference given was "narrowly tailored" to remedy the apparent past discrimination against the group being favored.[18]

In addition, it is important that an employer who extends a preference in hiring and promotion be in a position to take advantage of the safe haven provided by 42 U.S.C. 2000e-12(b)(1). This section provides that in "any action or proceeding based on any alleged unlawful employment practice, no [employer] shall be subject to any liability or punishment for or on account of the commission by such [employer] of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [Equal Employment Opportunity] Commission...."

> ***"If a preference is lawful, it must be 'narrowly tailored' to remedy the specific apparent discrimination that has been detected, and no more."***

This provision, read in concert with the Equal Employment Opportunity Commission (EEOC) guidelines on voluntary affirmative action,[19] provides a substantial insurance policy against legal liability for an employer if a court determines that the employer's grant of preference violates Title VII.[20] To enjoy this protection, the employer must extend, at a minimum, preference pursuant to a *written, dated affirmative action plan* that follows the EEOC guidelines discussed hereafter.

Evidence of Apparent Past Discrimination

It is not necessary for an employer to confess actual acts of discrimination in order to justify lawful preferences. Instead, many employers base the adoption of remedial preferences on statistical comparisons that establish apparent past discrimination. The process by which such a comparison is made is part of a "reasonable self-analysis" under the EEOC guidelines,[21] and the steps taken in such an analysis, as well as the results, must be made a part of the written, dated affirmative action plan.

In making such a comparison, it is essential that the employer compare the representation of the group in question in the employer's specific job category with the group's representation in the relevant, qualified work force (RQW).[22] Half of this equation is fairly simple. A police department can determine rather quickly the percentage of its police officers who are female, for example. Precisely determining the RQW often is more problematic.[23]

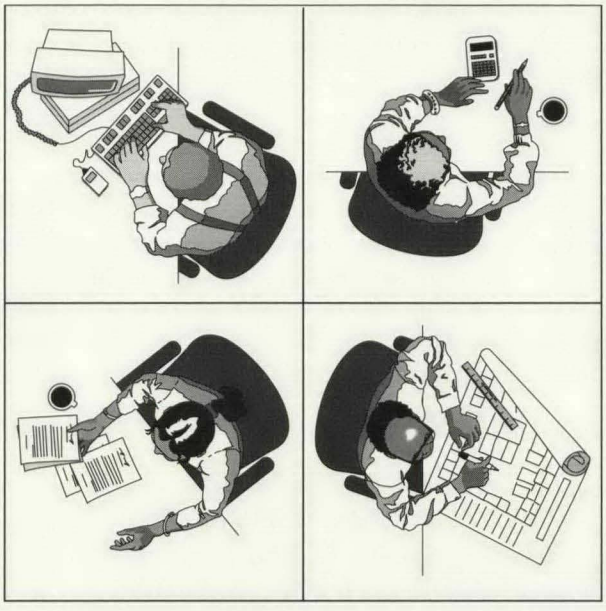
The critical concept of the RQW arises in two other instances in Title VII litigation—evaluation of allegations of disparate impact

and determination of whether past discrimination has been remedied (requiring that a Title VII-based preference be terminated). In each circumstance, a statistical comparison is made between the race, color, national origin, sex, or religion composition of an employer's work force and the like composition of the relevant, qualified work force.

An error in delimiting the RQW frequently renders the comparison equally erroneous. For example, in *Hammon* v. *Barry*,[24] the continuing legality of a preference for hiring blacks as District of Columbia firefighters was evaluated. To accomplish this, a determination had to be made regarding whether the effects of past discrimination favoring whites had been eradicated. The District Court compared the black/white composition of the District's firefighters (37%) with the black/white composition of the population of the District (76%) and concluded that the effects of past discrimination had not been eliminated.

The Court of Appeals, in reversing this judgment, held that the relevant, qualified work force consisted of "persons 20 to 28 years of age in the Washington metropolitan area, not just within the confines of [the city limits of] the Nation's capital." The Court of Appeals noted that 1980 census data indicated that only 29.3% of the statistically relevant population was black. Consequently, the Court of Appeals held that the effects of past discrimination against blacks by the District in hiring firefighters had been eliminated.[25]

To justify granting a preference in hiring or promoting a particular group,[26] the employer must identify a "manifest imbalance" between the



percentage of that group in its work force and that of the RQW. This apparently signifies something greater than a mere numerical shortfall.

For example, by 1991, the Maryland State Police had achieved a 17.1% representation of blacks in the trooper ranks, compared to the 18.8% of Maryland high school graduates between the ages of 21 and 59 in 1980 who were black. This 1.7% shortfall was not sufficient to support continuation of preference.[27] Conversely, in *Steelworkers* v. *Weber*,[28] the representation of blacks in the employer's job category at issue was 1.83%, compared to black representation in the work force of 39%.[29]

Narrowly Tailored Remedial Steps

If a preference is lawful, it must be "narrowly tailored" to remedy the specific apparent discrimination that has been detected, and no more. This concept is termed "reasonable action" under the EEOC guidelines.[30]

In *Hayes* v. *North State Law Enforcement Officers Ass'n*,[31] the key factors of this process were listed as "1) the efficacy of alternative race-neutral policies; 2) the planned duration of the policy; 3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force; 4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and 5) the burden of the policy on innocent third parties." The court stated, "The essence of the 'narrowly tailored' inquiry is the notion that explicit racial preferences, if available at all, must be only a 'last resort' option. Without evidence that the City considered race-neutral alternatives to achieve diversity, or that the use of a non-discriminatory policy would not achieve its goal, we simply cannot hold that the City's promotion policy was narrowly tailored."[32]

A reasonable review of nonpreferential alternatives and conclusions as to why they alone are unlikely to remedy the apparent past discrimination are essential components to a lawful preferential plan. Such nonpreferential

alternatives would include targeted recruiting, community outreach programs, and skill training programs. These alternatives also include taking the necessary steps to make sure the employer's work place is receptive, and *known* to be receptive, to persons of all races, colors, national origins, and both sexes.

So that preferences do not become "institutionalized," courts require realistic time limitations to be included in preferential plans. In *Detroit Police Officers Ass'n* v. *Young*,[33] the court, in declaring the continuation of a consent decree unlawful, noted the plan had been in effect for almost 19 years. The court stated, "Limiting the duration of a race-conscious remedy which clearly impacts adversely upon the plaintiffs is a keystone of a narrowly tailored plan as may be seen by recent Supreme Court decisions."[34] It also is important to note that it is impermissible to use a preference to preserve numerical balance once the effects of past discrimination have been eliminated.

Employers also must structure preferential plans that have a realistic relationship to statistics that established discrimination apparently occurred. For example, where 16% of the RQW is Hispanic, an employer might set as a target a 16% representation in its work force and seek to achieve this representation with a goal of 30% of its new hires being Hispanic.

It would be improper, however, for the employer who has identified a manifest imbalance only in regard to Hispanics to create a preference that favors all minorities. The remedy selected must have a direct relationship to the specific apparent past discrimination detected.[35]

An employer also must build elements of flexibility into a preferential plan to prevent compelled hiring or promotion of unqualified candidates. Provisions should be made for waiving numerical goals in the event an insufficient number of qualified candidates in the group receiving preference can be identified.[36]

An employer also must structure a preferential plan to permit some persons who are not in the group receiving the preference to succeed as well. This consideration relates to the limitation of the burden placed on innocent third parties. Even in aggressive plans, at least half of the positions at issue have remained available for persons not receiving preference.[37]

> **"...courts require realistic time limitations to be included in preferential plans."**

Conclusion

The judicial climate for employers' use of preferential treatment has changed dramatically.[38] An employer considering adoption of a preferential plan should seek competent legal assistance to assess critically the proposed plan for legal defensibility.

Employers presently extending preferences should critically assess their current plans and seek the legal protection provided through the use of a written, dated plan in compliance with EEOC guidelines.[39] These employers also should consider the following statement from *United States* v. *City of Miami*:[40]

> "Work force parity may never be achievable because of shifting demographics and imbalances in the numbers of qualified applicants for various jobs due to differing ambitions, education, language requirements, physical characteristics, etc. of persons in the favored groups. If there is work force disparity that cannot be attributed to past discriminatory employment practices..., such disparity is no reason for keeping in force [a] consent decree."[41] ✦

Endnotes

[1] 993 F.2d 1072 (4th Cir. 1993).

[2] *See, e.g., Hayes* v. *City of Charlotte*, 10 F.3d 207 (4th Cir. 1993); *Detroit Police Officers Ass'n* v. *Young*, 989 F.2d 225 (6th Cir. 1993); *Billish* v. *City of Chicago*, 989 F.2d 890 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 290 (1994).

[3] 42 U.S.C. 2000e-2(a)(1991).

[4] *Price Waterhouse* v. *Hopkins*, 109 S.Ct. 1775, 1784 (1989).

[5] The exception permitting consideration of race, color, national origin, religion, and/or sex to remedy apparent past discrimination by an employer is the subject of this article. It was created by judicial interpretation of Title VII. *See Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 480 (1986), and cases cited therein. The only other exception is part of the Title VII statute, the bona fide occupational qualification (BFOQ) exception. 42 U.S.C. sec. 2000e-2(e)(1991).

The BFOQ exception permits employers to consider the "...religion, sex, or national origin [of an employee] in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business...." 42 U.S.C. sec. 2000e-

2(e)(1991). The BFOQ exception does not permit the consideration of race or color.

This exception is quite difficult to use in practice. In *International Union, UAW* v. *Johnson Controls*, 111 S.Ct. 1196 (1991), for example, the employer, a manufacturer of electric storage batteries, sought to limit the exposure to toxic lead of its female employees who were able to bear children, in order to prevent injury to the unborn. In assessing this intended use of the exception, the Supreme Court ruled that manufacture of batteries, not protection of the unborn, was the business of Johnson Controls and therefore that protection of the unborn could be in no way necessary to the operation of the business. The Court noted that "[f]ertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility."

[6] 42 U.S.C. 2000e-2(m) (1991).

[7] One court has ruled that choosing a particular individual from a group of "equally qualified" candidates based on the individual's race or color for the purpose of achieving faculty diversity was an employment action in which one or more of Title VII's forbidden criteria was a motivating factor. Consequently, such a choice violated Title VII. *United States* v. *Bd. of Educ. of the Tp. of Piscataway*, 832 F.Supp. 836 (D.N.J. 1994). The U.S. Department of Justice, Civil Rights Division, as *amicus* in support of the school board's appeal, argues that racial diversity is a permissible objective under Title VII, even when not in direct response to past discrimination.

[8] 42 U.S.C. 1981a(b)(3)(1991).

[9] 42 U.S.C. 1981a(c)(1991).

[10] The provisions of the amended statute have not been given retroactive effect. *See Landgraf* v. *USI Film Products*, 114 S.Ct. 1522 (1994); *McKnight* v. *General Motors Corporation*, 114 S.Ct. 1826 (1994).

[11] The specific language states, "Nothing contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U.S.C. 2000e-2(j).

[12] *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979).

[13] *Id.* at 216-19 (Burger, C.J., dissenting). *See also*, *Johnson* v. *Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 657-77 (1987) (Scalia, J., dissenting).

[14] *Johnson* v. *Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987).

[15] *See United States* v. *Paradise*, 480 U.S. 149 (1987); *Johnson* v. *Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987).

[16] It now is clear that preferences based on race or color, and probably ethnicity, will be subjected to the highest level of judicial review. *See City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989); *Maryland Troopers Ass'n, Inc.* v. *Evans*, 993 F.2d 1072 (4th Cir. 1993). The appropriate level of review for sex-based preferential treatment is in dispute. *Compare Brunet* v. *City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *with Coral Constr. Co.* v. *King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 875 (1992).

[17] *See City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989); *Johnson* v. *Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987); *Maryland Troopers Ass'n, Inc.* v. *Evans*, 993 F.2d 1072 (4th Cir. 1993).

[18] *Id. See also*, *Billish* v. *City of Chicago*, 989 F.2d 890 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 290 (1994).

[19] 29 C.F.R. 1608.1 *et seq.*

[20] State and local governments, in their role as employers, should use caution in their reliance on the EEOC guidelines. To the extent that the Equal Protection Clause of the 14th amendment conflicts with Title VII and/or the EEOC guidelines, State and local governments are bound by the requirements of equal protection.

[21] *See* 29 C.F.R. 1608.4.

[22] *See Johnson* v. *Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987); *Maryland Troopers Ass'n, Inc.* v. *Evans*, 993 F.2d 1072 (4th Cir. 1993).

[23] *See Wards Cove Packing Co.* v. *Antonio*, 109 S.Ct. 2115 (1989); *Regner* v. *City of Chicago*, 789 F.2d 534 (7th Cir. 1986).

[24] 828 F.2d 73 (D.C.Cir. 1987), *cert. denied*, 108 S.Ct. 2023 (1988).

[25] Similarly, in *Wards Cove Packing Co., Inc.* v. *Atonio*, 490 U.S. 642 (1989), the Supreme Court reversed a finding of disparate impact, holding that the courts below had improperly defined the relevant, qualified work force for the jobs at issue. There, the Court stated, "Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected 'the pool of qualified job applicants' or the 'qualified population in the labor force.' Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other 'skilled' noncannery positions found to exist by the District Court...—by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites." 109 S.Ct. at 2122.

[26] EEOC guidelines for voluntary affirmative action are found at 29 CFR 1608.3(b) *et seq.*

[27] *Maryland Troopers Ass'n, Inc.* v. *Evans*, 993 F.2d 1072, 1078 (4th Cir. 1993).

[28] 443 U.S. 193 (1979).

[29] *Id.* at 199.

[30] *See* 29 C.F.R. 1608.4 (b).

[31] 10 F.3d 207 (4th Cir. 1993).

[32] *Id.* at 217.

[33] 989 F.2d 225 (6th Cir. 1993).

[34] *Id.* at 228.

[35] *See City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706 (1989).

[36] *See United States* v. *Paradise*, 480 U.S. 149 (1987).

[37] *Id. See also*, *Steelworkers* v. *Weber*, 443 U.S. 193 (1979).

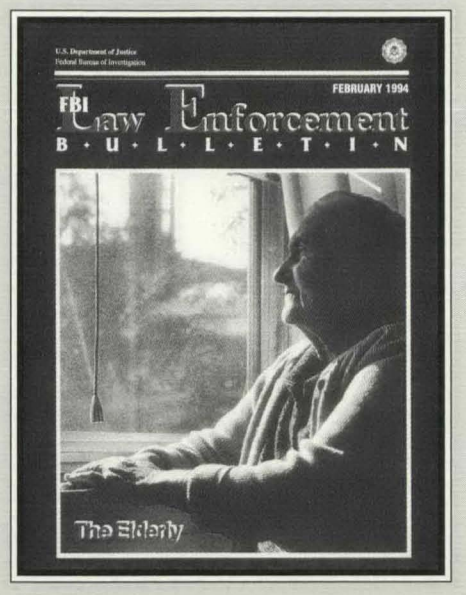
[38] In addition to the cases discussed previously, *see Ensley Branch, N.A.A.C.P.* v. *City of Birmingham*, 31 F.3d 1548 (11th Cir. 1994) (en banc).

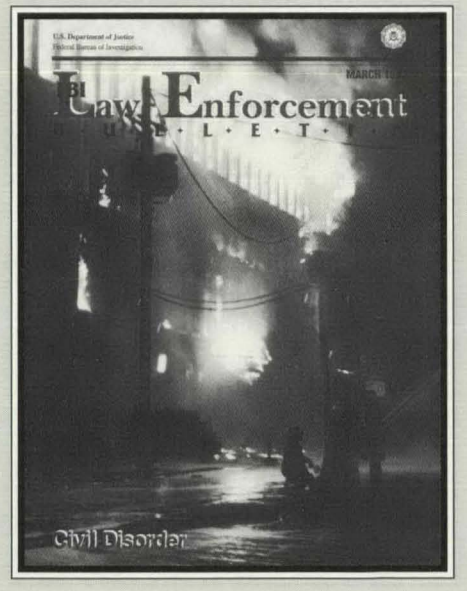
[39] An employer who determines that preferences no longer are appropriate should carefully examine how its personnel system is likely to operate once the preferences are removed. If the selection devices used, when preferences are stripped away, have a disparate impact on persons of a particular race, color, sex, national origin, and/or religion, then the employer must be prepared to demonstrate the "business necessity" of the selection device. *See Brunet* v. *City of Columbus*, 1 F.3d 390 (6th Cir. 1993).

[40] 2 F.3d 1497 (11th Cir. 1993).

[41] *Id.* at 1508.

1994 Subject Index





"Controlling Public Protest: First Amendment Implications," Daniel L. Schofield, November, p. 25.

"Entering Premises to Arrest: The Threshold Question," John C. Hall, September, p. 27.

"Grooming and Weight Standards for Law Enforcement: The Legal Issues," William U. McCormack, July, p. 27.

"Legal Issues in Crisis Management," Jeffrey Higginbotham, June, p. 27.

"News Media Participation in Law Enforcement Activities," Kimberly A. Crawford, August, p. 28.

"Obtaining Consent to Enter by Deception," John Gales Sauls, January, p. 28.

"The 'Plain Feel' Doctrine," A. Louis DiPietro, February, p. 27.

"Preference in Hiring and Promotion: Courts Impose Heightened Scrutiny," John Gales Sauls, December p. 17.

"Search of Abandoned Property: Fourth Amendment Considerations," John Gales Sauls, May, p. 27.

"Search Warrant Applications," Andrew Grosso, December, p. 1.

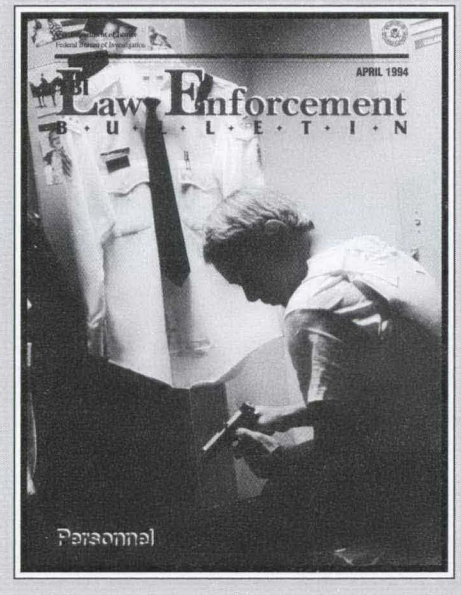
"Supreme Court Cases: 1993-1994 Term," William U. McCormack, October, p. 27.

"Use of Deadly Force to Prevent Escape," John C. Hall, March, p. 27.

MANAGEMENT

"Community Policing: Leading Officers into Danger?" (point of view), Stephen M. Springer, July, p. 9.

"Police Organizational Design and Structure," (point of view) Robert A. Johnson, June, p. 5.



"Reflections on Police Privatization," Dennis O'Leary, September, p. 21.

OPERATIONS

"Bomb Squads: Developing Mutual Aid Agreements," David K. Jernigan and Martin S. LaBrusciano, October, p. 18.

"Crisis/Hostage Negotiation Team Profile," Mitchell R. Hammer, Randall G. Rogan, and Clinton R. Van Zandt, March, p. 8.

"Drug Laboratory Efficiency: Shifting Paradigms," Shiv K. Soni, August, p. 15.

"Handle With Care: Dealing with Offenders who are Mentally Retarded," Arthur L. Bowker, July, p. 12.

"Police Intervention at Child Day Care Centers," (focus), Joseph H. Maddox, October, p. 6.

"Roadblocks to Crime: Travel Restrictions for Convicted Prostitutes," John M. Gnagey, III, and Chase Leonhard, June, p. 16.

PERSONNEL

"ASPIRES: A Solution to the Midcareer Plateau," Scott A. Johnson, April, p. 1.

"Civilian Services," Bruce Wilkerson, November, p. 21.

"Countering Abusive Absenteeism," (focus), Michael J. Gwaltney, March, p. 24.

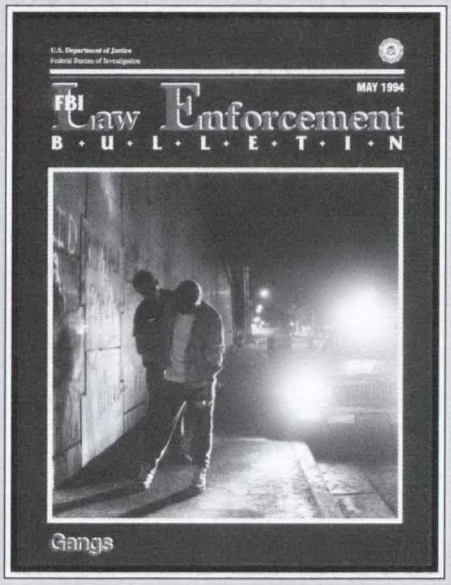
"Higher Education for Law Enforcement: The Minnesota Model," Michael G. Breci, January, p. 1.

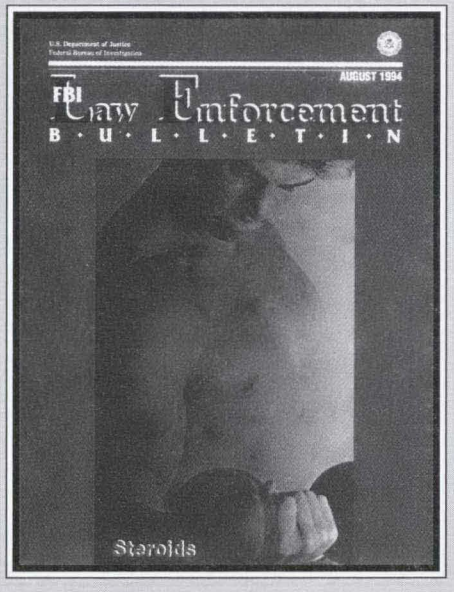
"On Troubled Waters: Promotion and Advancement in the 1990s," Ira Grossman and Jack Doherty, April, p. 10.

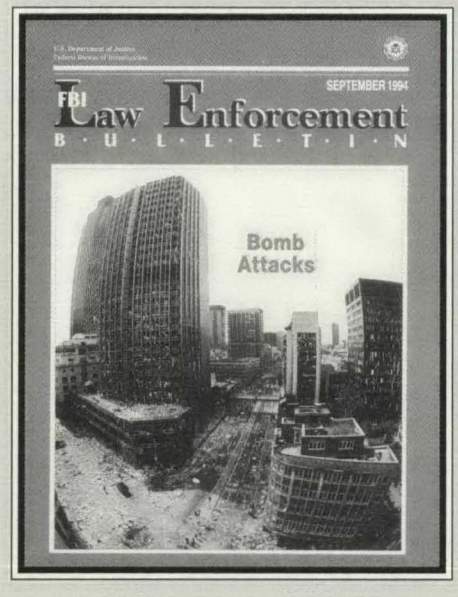
A

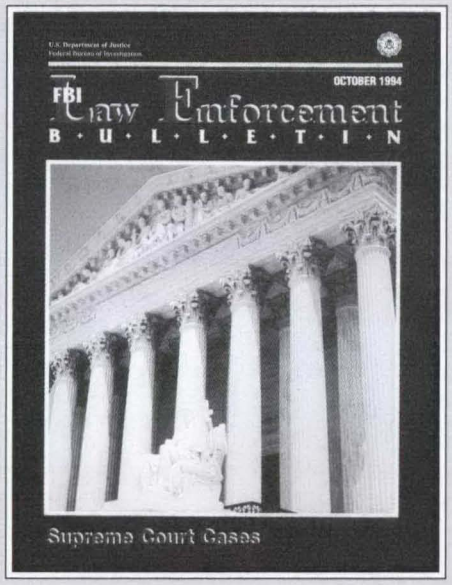
B

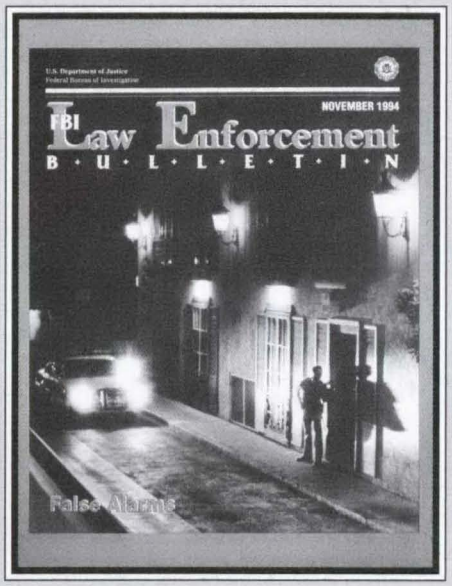
1994 Author Index











Wanted: Photographs

The *Law Enforcement* staff is always on the lookout for dynamic, law enforcement-related photos for possible publication in the magazine. We are interested in photos that visually depict the many aspects of the law enforcement profession and illustrate the various tasks law enforcement personnel perform.

We can use either black-and-white glossy or color prints or slides, although we prefer prints (5x7 or 8x10). Appropriate credit will be given to contributing photographers when their work appears in the magazine. We suggest that you send duplicate, not original, prints as we do not accept responsibility for prints that may be damaged or lost. Send your photographs to:

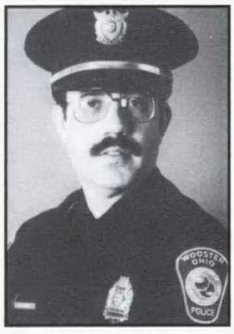
John Ott, Art Director,
FBI Law Enforcement Bulletin, Law Enforcement Communication Unit, FBI Academy,
Quantico, VA 22135.

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 their exemplary service to the law enforcement profession.

Colonel Moore

While off-duty and in civilian attire, Col. Gregory D. Moore, chief of the Pagedale, Missouri, Police Department, apprehended two armed shooting suspects in a neighboring city. He came to the aid of a shooting victim who was being beaten by one of the suspects. With gun in hand, Colonel Moore identified himself as a police officer. Subsequently, a struggle ensued with the assailant who was beating the victim. After restraining this subject, Colonel Moore convinced the other assailant to drop his weapon. He then held both suspects until additional police officers arrived.



Patrolman Austen

Sergeant Hinton

Patrolman Dan Austen of the Wooster, Ohio, Police Department observed flames and smoke coming from a local boarding house. Sgt. Gerald Hinton of the same department joined Patrolman Austen, and both officers entered the home to assist the occupants in evacuating. By making repeated trips in and out of the burning home, Sergeant Hinton and Patrolman Austen succeeded in saving six people. As burning debris rained down, the officers attempted to reach the second floor but were driven back by the intense flames. Two men on the second floor perished in the fire. The brave and tenacious actions of Sergeant Hinton and Patrolman Austen helped to prevent a greater tragedy.

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 writeup (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*, Law Enforcement Communication Unit, Quantico, VA 22135.

U.S. Department of Justice
Federal Bureau of Investigation

Second Class Mail
Postage and Fees Paid
Federal Bureau of Investigation
ISSN 0014-5688

Washington, D.C. 20535

Official Business
Penalty for Private Use $300

Subscribe Now