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# Internal Affairs Issues for Small Police Departments

By SEAN F. KELLY

In the United States, most of what Americans know about the internal affairs of law enforcement agencies appears to come from the entertainment industry. Citizens generally believe that all police departments have a squad of officers assigned only to “police the police.” This may be true for large agencies, but not for the vast majority of police departments in the country. Eighty-seven percent of police departments in the United States consist of fewer than 25 sworn officers.<sup>1</sup> Yet, society holds these small agencies accountable for the conduct of their officers via the same laws and judicial review process that it holds departments with hundreds or even thousands of officers. How does an agency with very few officers meet this obligation?

One such agency, the Durham, New Hampshire, Police Department, has found that a step-by-step approach can help the small police department navigate its way through the internal affairs process. Located on Great Bay and the Oyster River, Durham was settled in



© Michael Bilodeau, Durham Police Department

1635 and incorporated 100 years later.<sup>2</sup> It has approximately 12,000 residents and serves as the host community to the main campus of the University of New Hampshire. During the school year, the population swells to nearly 25,000. The Durham Police Department has a rich and colorful history, including the first mention of the term *police officer* in a document dated in 1848. In the 1920s, the town created a yearly operating budget for the department of \$100. The first police chief served for 27 years and received an annual salary of \$50. Officers worked out of their homes until 1961 when the first floor of the

Town Hall became police headquarters. In 1997, the department moved to a new police station and currently has 18 full-time sworn officers who provide complete 24-hour service to the community. With the evolution of the department into a modern CALEA-(the Commission on Accreditation for Law Enforcement Agencies, Inc.) accredited agency, the issues surrounding internal affairs matters also have developed and currently take into account the disciplinary system; the internal affairs function; the mission, values, and ethics of the department; and the investigative process of a complaint.



Lieutenant Kelly serves with the Durham, New Hampshire, Police Department and currently is assigned as a leadership fellow at the DEA Academy.

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**Well-written, clearly defined policies and procedures represent the foundation of a successful police department.**

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## THE DISCIPLINARY SYSTEM

Any disciplinary system employed by a police department should have at least two principles as a basis. First, discipline constitutes a form of training, with the primary purpose being to change aberrant behavior and enforce desirable behavior. Second, any disciplinary program should promote self-discipline, rather than imposed discipline. Perhaps a somewhat naive outlook, nonetheless, managers should believe that their employees always would act in the best interest of the agency and the community; they should be horribly disappointed if that belief proves incorrect.

If an agency uses a thorough process to select only the best-qualified people as police officers, supports its employees with well-written specific directives, and promotes and enforces its published values, then self-discipline likely will prevail. Moreover, such actions can reduce an agency's need to employ its internal affairs

investigations procedures and, ultimately, to impose sanctions.

No disciplinary system proves effective without being administered fairly and consistently. Evaluations offer an excellent tool for monitoring the overall performance of employees. They give an agency, through its supervisors, a method to formally record its expectations of employees. Evaluations provide supervisors with an opportunity to encourage desired behavior and to notify employees that they have noted the unacceptable behavior and that the agency will expect positive change. However, evaluations are useless unless supervisors enforce the conditions contained in them between reporting periods.

## THE INTERNAL AFFAIRS FUNCTION

Nothing suggests that an agency has to have an officer dedicated solely to the internal affairs function. In fact, with the chemistry of a small agency, an objective internal affairs investigation may not be possible if only one officer

handles every case. Many factors, such as personal bias, grudges, and friendships, may cloud the judgment of even the most well-intentioned investigator. In most small agencies, the task falls to an uninvolved superior officer or detective who, ultimately, reports to the chief.

What do internal affairs investigators try to find out? The truth and, sometimes, the truth hurts. They try to learn whether an officer has violated departmental policies or any laws. In some instances, they discover that the officer acted within a certain policy, but that the policy itself is flawed. In most cases involving the investigation of a violation of law, the investigator has a clearly defined statute, ordinance, or judicial review by which to measure an officer's conduct. However, this may not be the case with departmental policy violations. Well-written, clearly defined policies and procedures represent the foundation of a successful police department. Agencies in the unfortunate position of defending themselves in a civil proceeding stemming from an internal affairs investigation often find that this comes from having been vague when preparing written directives for their officers.

What is conduct unbecoming to a police officer? If a policy is not specific, an agency may find that this "catch all" phrase does not. If an agency finds a certain behavior unacceptable, it should state it clearly in the policy. Agencies should specify exactly what their employees should not do and what they should do. Then, if an officer acts contrary to the policy, the chief has a "bright line" that measures the

officer's conduct and finds it faulty. This bright-line standard must apply to all policies, procedures, rules, and regulations before agencies can hold their officers truly accountable. Without rules specifying the conduct, any *perceived* shortfall resulting in charging an officer with conduct unbecoming will not be upheld.<sup>3</sup>

Due process requires that agencies provide their officers with guidance in their jobs that is not overly broad, vague, or ambiguous.<sup>4</sup> The courts have held that managers must tell their employees what they must do and what they are prohibited from doing. What then becomes difficult is walking the fine line between overregulation and allowing officers to exercise some discretion. Too much discretion and an agency finds that it cannot regulate behavior, promote professionalism, support integrity, or hold officers accountable when so-called violations occur.

It is not enough that the chief has a binder full of regulations; it is not enough to simply distribute these and expect officers to comply. To be effective, every agency member must have full access to agency policy manuals. All members must receive training and acknowledge their understanding of the regulations. Agencies must ensure that even the most junior member of the force can understand any policies and procedures and can use them as a comprehensive guide when attempting to accomplish a task without immediate supervision. Finally, every regulation must be legal, ethical, reasonable, and, most important, uniformly enforced.<sup>5</sup>

## MISSION, VALUES, AND ETHICS

An agency should have a clearly stated mission that describes its ultimate goal. An agency's employees should receive a copy of the mission statement, along with periodic training, and managers should review the statement to determine its continued validity. As

an example, the mission of the Durham Police Department is to improve the quality of life by preserving the peace and safety of the community through the formation of partnerships, creating positive interaction between the public and the police while continuing to serve the unique needs of the Durham community.

### Law Enforcement Code of Ethics

*As a law enforcement officer*, my fundamental duty is to serve mankind; to safeguard lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence and disorder; and to respect the constitutional rights of all persons to liberty, equality, and justice.

*I will* keep my private life unsullied as an example to all; maintain courage in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department. What I see or hear of a confidential nature or that which is confided in me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

*I will* never act officiously or permit personal feelings, prejudices, animosities, or friendships to influence my decision. With no compromise for criminals and with relentless prosecution of criminals, I will enforce the law courageously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence, and never accepting gratuities.

*I recognize* the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of police service. I will constantly strive to achieve those objectives and ideals, dedicating myself to my chosen profession—law enforcement.

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Source: *International Association of Chiefs of Police Law Enforcement Code of Ethics*

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What is important to an agency? What values are required of its officers? An agency should have a values statement that its employees can review. When selecting officers, agencies must remember that by the time individuals reach the age to become eligible for a position as an officer, they already have established their own set of values. Agencies cannot instill a values system in a new employee; they can only reinforce those preexisting values important to them. For example, the Durham Police Department's values statement indicates that the agency consists of dedicated professionals who are committed to a team environment, creatively solving problems. The department believes in the value of human life; the courage to do what is right; the members' accountability to themselves and to their community; the members' fairness, compassion, and approachability in the performance of their duties; and continuous improvement.

Ethics is simply the choice between right and wrong. When a community swears in police officers, it has expressed its trust and faith that the officers always will make the right choice, regardless of the cost. A few sentences spoken with their right hands held in the air represent these officers giving their word to their community that its citizens can trust them with all that they love and hold dear. To act unethically violates that trust.

Where do ethics break down? What signs reveal police corruption in its infancy? Many, both in the profession and in other occupations, agree that law enforcement work is dangerous and officers are

grossly underpaid.<sup>6</sup> This mantra, gone unchecked, can cause some officers to think that it is all right to accept half price meals or a free cup of coffee as long as no one expects something in return for this generosity. This seems benign, but where does it stop? Is this only a minor ethical dilemma better left to academicians? Or, is it the germ of corruption that each agency must address?

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***No disciplinary system proves effective without being administered fairly and consistently.***

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Simply stated, corruption in police work is the use of an officer's sworn authority for personal gain. When corruption occurs, regardless of the extent, the community will measure the future of the agency against its response. An untimely or ineffective response will leave the community with a sour taste in its mouth that could take a generation, or more, to overcome.

#### **THE INVESTIGATION**

It remains critical to the integrity of an agency that it accept and fully investigate all complaints. By accepting all types of complaints, regardless of the method of transmission, an agency tells its community that what citizens have to say is

important, that the agency is dedicated to quality police service, that it is open to constructive criticism, and that it is committed to continuous improvement.

Once an agency receives a complaint, it should ensure the integrity of the complaint by sending a letter of receipt to any identifiable complainant. Agencies should inform complainants that they have assigned an investigator and that complainants should contact this person if any member of the department has contacted them in an effort to get them to retract the complaint or, worse, if anyone has threatened them in any way.

#### **Subject Notification**

Before beginning any internal affairs investigation, an agency should notify the officer involved in writing that it has received a complaint. Notification should include the nature of the complaint and the name and rank of the officer assigned to the investigation. The only exception to this would occur when such notification would jeopardize the investigation.<sup>7</sup>

#### **Investigator Selection**

An agency should select the investigator based on the allegations. In all cases, an agency should handle the matter at the lowest possible level. In small agencies, the line supervisor also may fill the position of second in command, limiting the chief's choices. If a minor rule infraction, such as discourtesy or tardiness, is the nature of the complaint, then a line supervisor would prove an appropriate choice. However, if the complaint stems from a serious breach of conduct,

## Functions of the Internal Affairs Process

- **Protection of the public:** The public has the right to expect efficient, fair, and impartial law enforcement; therefore, any misconduct by department personnel must be detected, investigated, and properly adjudicated to assure the maintenance of these qualities.
- **Protection of the department:** The department often is evaluated and judged by the actions of its individual members. It is imperative that the entire organization not be subjected to public censure because of the misconduct of one member. When the public knows that the department honestly and fairly investigates and adjudicates all allegations against its members, it is less likely that the public will find the need to raise a cry of indignation over alleged incidents of misconduct.
- **Protection of the employee:** Employees must be protected against false allegations of misconduct. Although being the subject of an investigation may be unpleasant or uncomfortable, the best protection for an employee is a complete and thorough investigation conducted in a timely manner that clearly and unequivocally supports the employee's honesty and integrity.
- **Removal of unfit personnel:** Personnel who engage in serious acts of misconduct or who have demonstrated that they are unfit for law enforcement work must be removed for the protection of the public, the department, and fellow employees.
- **Correction of procedural problems:** The department constantly is seeking to improve its efficiency and its personnel. Occasionally, internal affairs investigations disclose faulty procedures that otherwise would have gone unnoticed.

*Source: Durham, New Hampshire, Police Department, Personnel and Administration Manual, February 2001.*

such as an alleged crime, excessive force, bias/discrimination, or a gross ethics violation, then a command-level officer trained to conduct this type of sensitive investigation should undertake, or at least oversee, the matter.

In a small agency, the closeness of its members, or "family" atmosphere, makes a serious complaint extremely difficult to investigate. Finding a truly objective investigator within the agency may prove impossible. Regardless of an agency's size, the emotional drain of a complex and difficult investigation can have long-term effects. In some cases, it may prove appropriate to invite an outside agency,

such as the local sheriff's department, state police, or district attorney's office, to conduct the inquiry.

### Investigation Type

After an agency receives a complaint, it must decide whether the alleged violation rises to the level of a crime or constitutes an administrative infraction of its policies. This decision can have far-reaching effects, so an agency must not take it lightly.

When deciding what path to take, an agency should consider the credibility of the complainant. Is the individual dissatisfied with the agency? Does the agency know that the person is credible? Has the

involved officer arrested the person, a friend, or a family member? Does the complainant have a history of being less than truthful? Does the complainant know the consequences of filing a false report?

Without question, an agency has a need to protect itself and the community it serves from alleged rogue employees. An administrative proceeding can prove essential in that effort. However, to sacrifice a criminal investigation for the purpose of conducting an administrative proceeding could create a gross miscarriage of justice.

Regardless of the action taken, assigned investigators need to apply

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basic investigative skills and practices. They also must have ample time to complete their investigations. Small agencies that have few resources could find that other tasks normally assigned to these officers may suffer. For the betterment of the agency, however, it remains critical to allow investigators to fully develop the case. Investigators will have enough pressure from investigating “one of their own” without additional pressure from the chief demanding results.

### Investigation Findings

Upon conclusion of an internal investigation, typically, one of four findings occurs for each allegation. Because the investigation may reveal that one or more of the allegations may have different conclusions, the investigator must have the flexibility to make a finding for each individual allegation, rather than for the entire complaint. Durham Police Department internal investigations allow conclusions for allegations as follows:

- Not sustained: Insufficient evidence exists to prove or disprove the complaint. This finding may be used for any complaint that has gone unresolved.
- Exonerated: The incident occurred, but the employee’s actions were justified, lawful, and proper.
- Unfounded: The complainant admits to making false allegations (e.g., the charges were false or the employee was not involved in the incident).
- Sustained: Sufficient evidence exists to indicate that the

employee, in fact, did commit one or more of the alleged acts.

Once a finding occurs, however, work still remains. For the internal affairs process to be complete, the chief must notify the involved officer and the complainant of the finding. If applicable, the agency may take disciplinary action against the involved officer. Conversely, if a finding concludes that

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the complainant falsely accused the officer, the agency may file criminal complaints against that person. Many agencies choose not to take criminal action against complainants. They base this choice upon the belief that it would discourage citizens from coming forward and informing them of future violations. No right or wrong choice exists. Instead, most agencies base these choices not on written policy but on a case-by-case basis.

### CONCLUSION

The need for all law enforcement agencies to hold members accountable for their actions and to impose high standards of conduct for their employees to consistently achieve constitutes one of the most

important aspects of the profession. However, no agency is exempt from internal problems. While large agencies may have a separate unit or division to handle such matters, small agencies must cope with these incidents with the limited resources at their disposal. Often, this proves a daunting task, but even the smallest agency must have mechanisms in place to either prove the allegations false or to ferret out wrongdoing.

The Durham Police Department, a small agency in New Hampshire, uses an approach that clearly delineate how its officers should conduct themselves, mission and values statements that set forth the department’s goals and objectives, a strong code of ethics that every officer must learn and follow, and an investigative process that ensures a fair and impartial evaluation of any complaint. This approach can help any agency, regardless of size, handle internal affairs investigations in a sensitive and judicious manner to better serve its employees and the community that it protects. ♦

### Endnotes

<sup>1</sup> International Association of Chiefs of Police (IACP) Research Center, *Big Ideas for Smaller Police Departments*, 2002.

<sup>2</sup> Information about Durham was retrieved on October 28, 2002, from <http://www.ci.durham.nh.us/>.

<sup>3</sup> *Whisenhut v. Spradlin*, 464 US 965 (1983).

<sup>4</sup> Captain Chuck Hemp, “Internal Affairs,” *New Hampshire Police Standard and Training*, February 2001.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> Durham, New Hampshire, Police Department, “Internal Affairs,” *Personnel and Administration Manual*, February 2001.

## Understanding the Terrorist Mind-Set

By Randy Borum, Ph.D.

*While nothing is easier than to denounce the evildoer, nothing is more difficult than to understand him.*  
—Dostoevsky

**T**he terrorist attacks on America on September 11, 2001, shocked millions who perhaps before did not realize there were people in the world that would take such violent actions, even those resulting in their own deaths, against innocent civilians. It dismayed and puzzled them that such individuals could hate Americans with such fervor that they would commit these large-scale acts of lethal aggression.

After the attacks, many Americans saw terrorism as a real hazard for the first time. However, extremist ideology and its use to justify violence are not at all new. Although the use of the term *terrorism* did not emerge until the late 18th century (identified with the French government's "Reign of Terror"<sup>1</sup>), the idea of terrorizing civilians to further a particular political, social, or religious cause has existed for centuries.<sup>2</sup>

As professionals in the law enforcement and intelligence communities increasingly direct their energies and resources to countering and preventing this type of extreme violence, they are working to acquire new knowledge and skills. In learning about terrorism, they not only should consider the specific ideology of those who commit or advocate acts of terrorism but also gain an understanding of the process of how these ideas or doctrines develop, as well as the various factors that influence the behavior of extremist groups and individuals.<sup>3</sup>

An investigator might reasonably wonder why such an understanding is important. The answer lies in the old military adage "know your enemy." In one of the many translations of *The Art of War*, Sun Tzu, a well-known Chinese general, is quoted as saying, "Know your enemy and know yourself; in a hundred battles you will never be in peril."

## Considering Ideological Origins

There likely is no universal method in developing extremist ideas that justifies terroristic acts of violence. However, four observable stages appear to frame a process of ideological development common to many individuals and groups of diverse ideological backgrounds. This four-stage process—a model designed as a heuristic (trial and error) to aid investigators and intelligence analysts in assessing the behaviors, experiences, and activities of a group or individual associated with extremist ideas—begins by framing some unsatisfying event or condition as being unjust, blaming the injustice on a target policy, person, or nation, and then vilifying, often demonizing, the responsible party to facilitate justification for aggression.

To begin with, an extremist individual or group identifies some type of undesirable event or condition ("it's not right"). This could be, for example, economic (e.g., poverty, unemployment, poor living conditions) or social (e.g., government-imposed restrictions on individual freedoms, lack of order or morality). While the nature of the condition may vary,

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those involved perceive the experience as “things are not as they should be.” That is, “it’s not right.”

Next, they frame the undesirable condition as an “injustice”; that is, it does not apply to everyone (“it’s not fair”). For example, members of a police bargaining unit may feel that their low pay scale is “not right”; however, when they learn that other, perhaps less-skilled, city workers are making more money, they also consider the circumstance “unfair.” In this regard, some use the United States as a comparison point to create a sense of injustice about economic deprivation; this holds true for some people in Middle Eastern countries who see the United States as a caricature of affluence and wasteful excess. For those who are deprived, this facilitates feelings of resentment and injustice.

Then, because injustice generally results from transgressive (wrongful) behavior, extremists hold a person or group responsible (“it’s your fault”), identifying a potential target. For example, racially biased groups in the United States often use this tactic in directing anger toward minority groups. Members of these groups seek out young white men whose families are poor. They then point to examples of minorities receiving economic assistance or preferences in employment as the reason the white family is suffering.

Last, they deem the person or group responsible for the injustice as “bad” (“you’re evil”); after all, good people would not intentionally inflict adverse conditions on others. This ascription has three effects that help facilitate violence.<sup>4</sup> First, aggression becomes more justifiable when aimed against “bad” people, particularly those who intentionally cause harm to others. Second, extremists describe the responsible party as “evil”; dehumanizing a target in this regard further facilitates aggression. Third, those suffering adverse conditions at the hands of others do not see themselves as “bad” or “evil”; this further identifies the responsible person or group as different from those affected and, thus, makes justifying aggression even easier.

When looking at the behaviors of emerging extremists in this way, investigators may better identify persons who represent desirable candidates for recruitment (“it’s not fair”), possible sites of indoctrination (“it’s not right,” and “it’s your fault”), and extremists or groups that may use violent tactics (“you’re evil”). The operational objective for this analysis and increased understanding is not to sympathize with or excuse terrorism but to comprehend and, thereby, prevent acts of terrorism. Thus, “the challenge for the analyst is to learn why the terrorists are doing what they’re doing and how deep it runs, then to look at the moral side and explain why we can’t approve of the politics of terrorism even when the motives of some involved are comprehensible.”<sup>5</sup>

### Understanding Motive

Fully “knowing one’s enemy,” specifically, understanding, anticipating, and forecasting another’s behavior, demands not only an ideological understanding but a behavioral one as well. Gaining insight as to how someone may resolve a particular dilemma or handle a given situation requires a consideration of the person’s entire perspective as influenced not only by their values and beliefs but by other factors, such as the information they have been exposed to, their assumptions, and their life experiences—in short, how they view the world. All people operate on their own

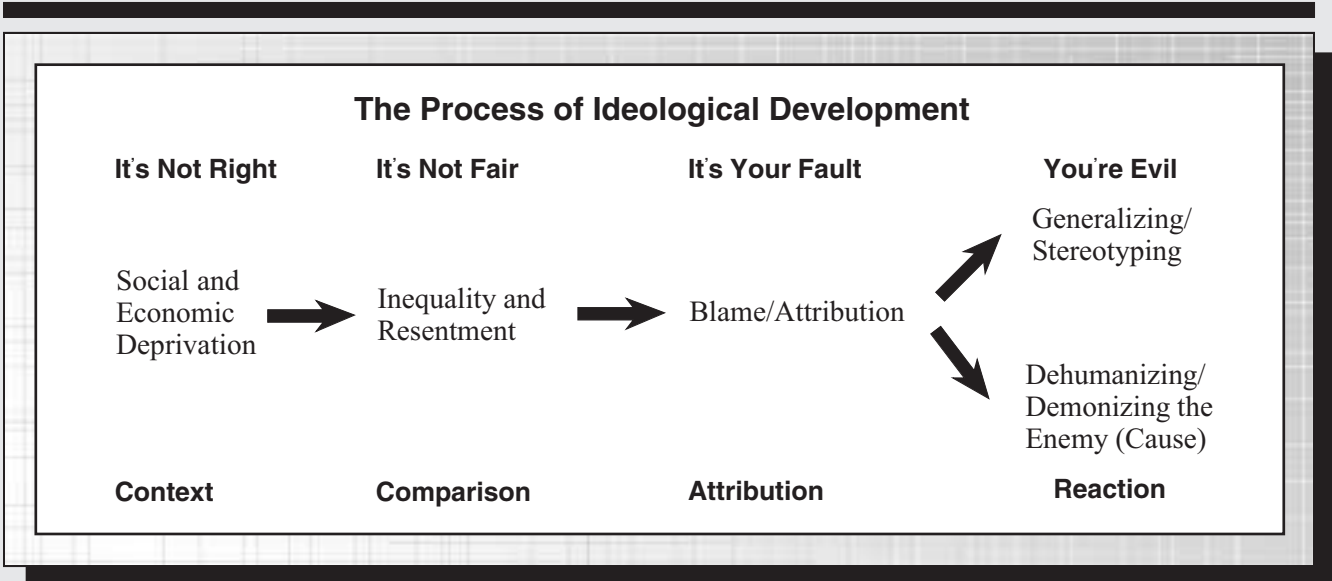
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**Fully “knowing one’s enemy,”...demands not only an ideological understanding but a behavioral one as well.**

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internal “map” of reality, not reality itself. This is a mental-behavioral phenomenon that psychologists refer to as “social cognition.”<sup>6</sup> If people understand their opponents’ “maps,” it becomes easier to understand and to anticipate their actions.

A good example of how this principle might apply involves considering the common misunderstanding of the tactic of “suicide bombings” used by Islamic extremists. The use of the term *suicide* to characterize these attacks reflects an outsider’s view. Those who commit or encourage these attacks do not associate these acts with suicide. Instead, they consider them heroic acts of martyrdom. What is the



difference? The motive, thoughts, feelings, responses of others, and preincident behaviors likely will differ for an act of suicide and an act of martyrdom.

People usually associate suicide with hopelessness and depression. The desire to end intense and unbearable psychological pain typically motivates the actor to commit such an act. Others who care for the actor typically view suicide as an undesirable outcome. Family and loved ones attempt to discourage the behavior and often struggle with feelings of shame if suicide does occur.

By contrast, people typically associate martyrdom with hopefulness about afterlife rewards in paradise and feelings of heroic sacrifice. The desire to further the cause of Islam and to answer the highest calling in that religion motivates the actor. Others who care for the actor see the pending act as heroic. Family and loved ones typically support the behavior, and, if the event occurs, the family is honored. Not only does the family of a martyr gain forgiveness of their sins in the afterlife but the supporting community often cares for them socially and financially. If investigators consider these attacks acts of suicide, the result could involve erroneous assumptions about how to anticipate the behavior and misguided ideas about how best to prevent it.

#### **Attributing Ideology as the Sole Motive**

Another investigative issue related to motive is the often-presumed role of ideology as the sole cause

for a particular violent act of extremism. Generally, when someone or some group that supports a radical idea commits such an act, the ideology is assumed to be *the* motive. In some cases, this attribution may be overly simplistic. In others, it simply may be wrong.

Some violent people, predisposed to criminality or aggressive behavior, simply use a particular cause or ideology to justify their acts. In the scheme of classifying terrorists as “criminals, crazies, and crusaders,” these are the criminals.<sup>7</sup> Threat assessment experts have referred to these individuals as “murderers in search of a cause.”<sup>8</sup>

Others truly do believe in extreme ideas, but the motive for a given act or series of acts may be broader. For example, in some Islamic fundamentalist movements, there is significant struggle for power that mixes with the religious ideas; specifically, conflicts exist over establishing the Caliphate that will unite dar al Islam.<sup>9</sup> In this regard, an Islamic fundamentalist leader may wish to support Islam and to defeat those who oppose the kingdom of Allah on earth, but his actions also may insert him in the Caliphate power struggle. From the perspective of strategic intelligence, it would prove inaccurate to see only the “holy warrior” and to miss the influence that the dynamics of this religious power struggle might have on, for example, decisions to act, target selection, and relationships between key figures or groups. Stated simply, the ideology may be *a* factor, but not necessarily *the* factor in determining motive.

## Conclusion

Professionals in the law enforcement and intelligence communities would do well to gain an understanding of how extremist ideas develop. By using a framework to organize behavioral information, counterterrorist analytic and threat assessments can become more accurate and more sophisticated.

Also, it is important to understand that analyzing counterterrorist intelligence requires an understanding of behavior, not just ideology. Investigators and analysts who must attempt to understand and anticipate how a person will act in a given situation should seek to understand that individual's "map," or perception, of the situation. Ideology may be a part of that, but other important dynamics and behavioral factors may contribute as well.

Extremist ideology is not at all new, although many Americans did not give the subject of terrorism proper attention until September 11, 2001. Those facing the task of safeguarding this nation and its interests, particularly important in this day and age, will do so most effectively when armed with a thorough understanding of terrorist ideology and behavior. ♦

## Endnotes

<sup>1</sup> The Reign of Terror, a period of the French Revolution between 1793 and 1794, was characterized by a wave of executions of presumed enemies of the state.

<sup>2</sup> Jonathan White, *Terrorism: An Introduction*, 3rd ed. (Belmont, CA: Wadsworth Publishing, 2002).

<sup>3</sup> The author serves on the Forensic Psychology Advisory Board for the Behavioral Science Unit at the FBI Academy and also is an instructor with the State and Local Antiterrorism Training Program (SLATT), a joint effort of the Institute for Intergovernmental Research (IIR) and the FBI.

<sup>4</sup> Albert Bandura and others, eds., "Mechanisms of Moral Disengagement in the Exercise of Moral Agency," *Journal of Personality and Social Psychology* 71(2), (1996): 364-374.

<sup>5</sup> Stephen Goode, interview by Christopher Harmon, February 5, 2001, "Harmon Details Terrorism Today," *Insight on the News*.

<sup>6</sup> S. Fiske and S. Taylor, *Social Cognition*, 2nd ed. (New York, NY: McGraw-Hill, 1991).

<sup>7</sup> Frederick Hacker, *Crusaders, Criminals and Crazies: Terror and Terrorism In Our Time* (New York, NY: Norton, 1976).

<sup>8</sup> Robert Fein and Bryan Vossekuil, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Protective Intelligence and Threat Assessment Investigations: A Guide for State and Local Law Enforcement Officials* (Washington, DC, 1998).

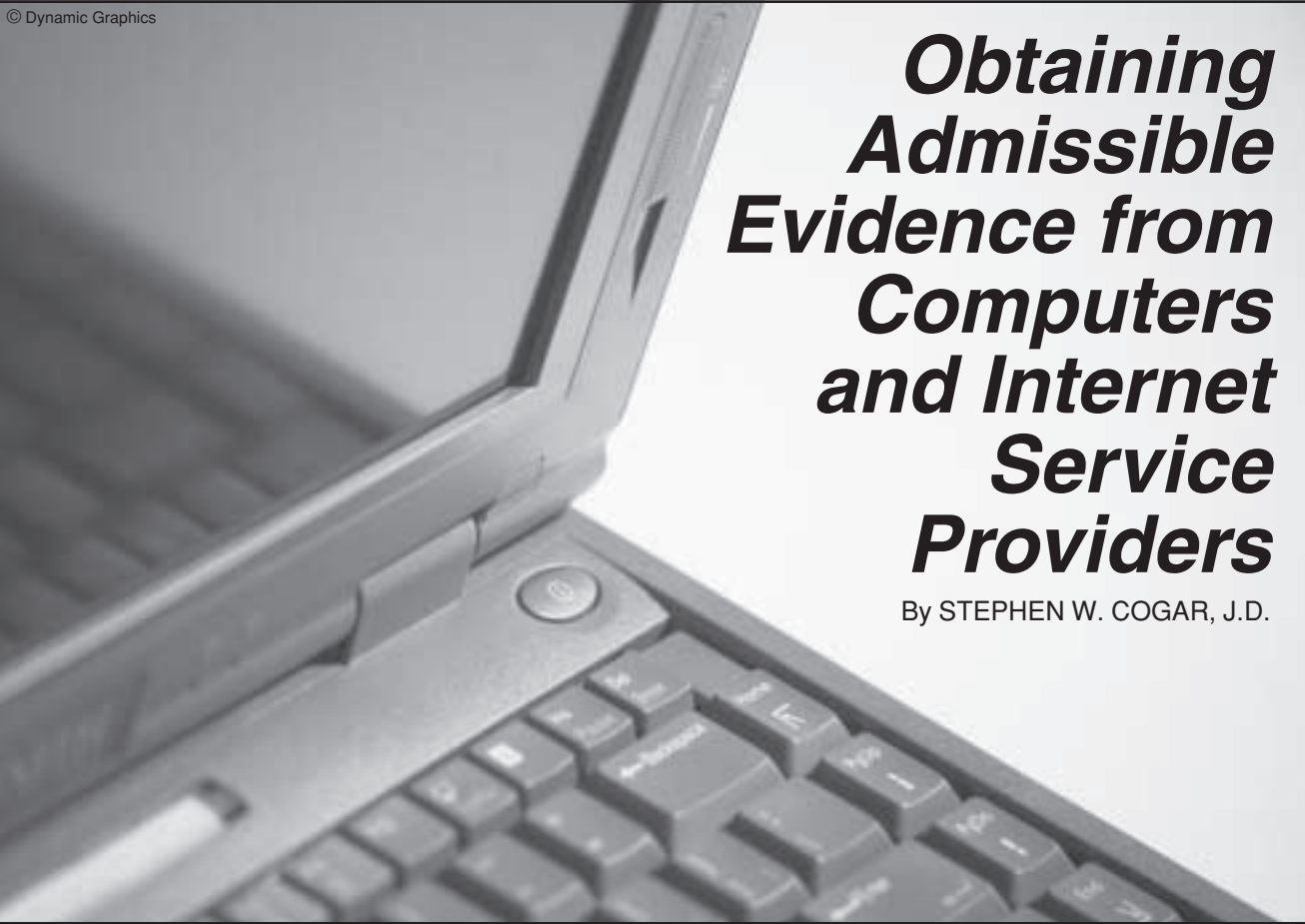
<sup>9</sup> Supra note 2. In this context, the Muslim Khalifa is the successor (in a line of successors) to Prophet Muhammad's position as the political, military, and administrative leader of the Muslims. This definition excludes Muhammad's prophetic role as the Qu'ran clearly states that he was the last of the prophets.

## Wanted: Notable Speeches

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

As with article submissions, the *Bulletin* staff will edit the speech for length and clarity, but, realizing that the information was presented orally, maintain as much of the original flavor as possible. Presenters should submit their transcripts typed and double-spaced on 8 1/2- by 11-inch white paper with all pages numbered. When possible, an electronic version of the transcript saved on computer disk should accompany the document. Send the material to:

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# ***Obtaining Admissible Evidence from Computers and Internet Service Providers***

By STEPHEN W. COGAR, J.D.

**T**he use of personal computers in homes and businesses has flourished during the 1990s due to the advent of user-friendly operating systems and the low cost of computer equipment. The U.S. Census Bureau reports that “54 million households, or 51 percent, had one or more computers, up from 42 percent in 1998.”<sup>1</sup> Moreover, “44 million households, or 42 percent, had at least one member who used the Internet at home in 2000.”<sup>2</sup> People use personal computers to conduct word processing, maintain financial accounts, and play games, as well as instantly access vast amounts of information through the Internet. Most important, computers facilitate

communication through e-mail, Web sites, chat rooms, and Internet phone. This transfer of information has impacted many aspects of daily life. While law enforcement officers know the importance of staying abreast of new technological trends and investigative practices, they also realize that lawfully obtaining admissible evidence from both computers and Internet service providers (ISPs) can be complicated in an ever-changing technological world. Thus, officers constantly must pay attention to new legislation and applicable investigation procedures.

Predictably, the phenomenon of unfettered access to personal computers did not go unnoticed by

criminals. Law enforcement officials in the United States and abroad have learned that criminals routinely use computers to more easily manage the business aspects of their criminal enterprises. Criminals keep records of transactions, document planned crimes, and communicate with their peers via personal computers. As a result, courts now are being asked to analyze searches and seizures of computer equipment, computer peripherals, and information obtained from ISPs based on the venerable Fourth Amendment to the U.S. Constitution. Although the drafters of the Fourth Amendment may not have predicted the quantum leaps in technology that led to the computer

generation, they composed the Fourth Amendment in such a way that it has proven to be exceptionally adaptable when applied to technological issues.

### The Workplace

When analyzing cases involving searches and seizures of computers and their stored files in the workplace, the justice system has used basic Fourth Amendment concepts. The initial inquiry normally involves determining the computer owner's or user's reasonable expectation of privacy with respect to the computer or the information stored in the computer. To prove a legitimate expectation of privacy, individuals must show that their subjective expectation of privacy is one that society is prepared to accept as objectively reasonable.<sup>3</sup> For example, in *United States v. Simons*, the Fourth Circuit of the U.S. Court of Appeals held that Simons, a government employee charged with receiving and

possessing child pornography on his work computer, "did not have a legitimate expectation of privacy with respect to the record or fruits of his Internet use in light of the FBIS<sup>4</sup> Internet policy."<sup>5</sup> The court permitted the employer's warrantless search of Simon's office computer because

The policy clearly stated that FBIS would "audit, inspect, and/or monitor employees use of the Internet, including all file transfers, all Web sites visited, and all e-mail messages as deemed appropriate." This policy placed employees on notice that they could not reasonably expect that their Internet activity would be private. Therefore, regardless of whether Simons subjectively believed that the files he transferred from the Internet were private, such belief was not objectively reasonable after FBIS notified him that it would be overseeing his Internet use.<sup>6</sup>

The possibility does exist, however, for an employee to have or develop a legitimate expectation of privacy with computer files in the work place. Therefore, a police officer must inquire if an employer has authority to give valid consent to search or seize an employee's computer or computer files. Even though obtaining consent to search or seize is legal and accepted, it is an exception to the search warrant requirement, and the U.S. Supreme Court strongly prefers search warrants to authorize searches instead of exceptions. Officers never should rely on exceptions when probable cause exists to support a warrant application.

### The Home

Complicating this issue is the reality that most crimes are not committed in the workplace. Home-based criminal enterprises, such as fencing stolen property, engaging in prostitution, and manufacturing controlled substances, often take advantage of the sanctity of the home to operate undetected by law enforcement authorities. The Fourth Amendment to the U.S. Constitution guarantees "the right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures."<sup>7</sup>(Emphasis added.) Reasonable expectations of privacy in computer files stored in home computers fall subject to the same protections afforded to all other items located within the home. Thus, officers normally cannot search or seize these files unless they have a search warrant authorizing both entry into the house and a search of the computer.<sup>8</sup> Officers



Mr. Cogar practices law in Charleston, West Virginia.

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***The best source for learning the identity of anonymous persons who access the Internet is through their ISP.***

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also may search or seize if they have probable cause and exigent circumstances that allow a warrantless entry and a search of the computer<sup>9</sup> or if they have freely and voluntarily received consent from someone who has the authority to grant consent. Furthermore, officers who see something on a computer monitor in plain view can seize that document if they have probable cause to believe that it is evidence of a crime.<sup>10</sup> However, the plain view doctrine is a separate seizure doctrine, not an exception to the search warrant requirement and, therefore, viewing one document that may be used as evidence of a crime does not necessarily permit the search or seizure of the entire computer.

Without consent, an officer cannot search or seize computer files unless probable cause exists showing that the computer contains files that constitute evidence of crime, was used in furtherance of or actually in committing a crime, or is subject to forfeiture. Multiple courts have held that “general searches for unspecified property are generally void. The affidavit should specifically state what is being sought and why it is believed to be on the premises. This applies to persons and property to be seized.”<sup>11</sup>

Officers completing an affidavit and complaint for a search warrant should describe the computer and peripherals, such as zip drives, CD back packs, scanners, digital cameras, Web cameras, and printers (some may have recoverable memory). Officers should include color, make, model, and serial number,

if available. Officers should include these items only if probable cause exists indicating that they are storing evidence of a crime or have been used to commit a crime. In the probable cause section of the search warrant affidavit and complaint, officers must link the computer to the crime by explaining how it helped commit the crime. For example, through officers’ experience, training, and knowledge, they may know that persons who operate ongoing criminal enterprises involving the purchase and sale of

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illegal narcotics or stolen property normally maintain records of those transactions in either written or electronic form. Thus, because keeping records is typical, officers may link a computer or its files to a crime. Similarly, reliable information from informants may indicate that they communicated with a suspect via a computer to purchase controlled substances or stolen property. Officers should include this type of information in their probable cause statement to show how the computer is or was being used in criminal activity, which, in turn, converts the computer from

lawfully held property to evidence of a crime.<sup>12</sup>

### Shared Computers

Officers also need to consider the issue of authority to consent when dealing with persons who have joint access to certain computer files. In *Trulock v. Freeh*, the Fourth Circuit held that persons who share a computer cannot provide consent to search password-protected files unless they normally have access to them.<sup>13</sup> Persons with joint use have the authority to consent to a general search of the computer, but that authority does not extend to password-protected files. The court’s decision in *Trulock v. Freeh* was based on its earlier ruling in *United States v. Block*,<sup>14</sup> wherein the court held that a criminal “defendant’s mother had authority to consent to a search of his room, which was located in the home that they shared.”<sup>15</sup> However, “the mother’s authority did not extend to a search of a locked footlocker located within the room.”<sup>16</sup> The court noted that the authority to give consent for shared or common areas does not automatically extend to such areas as a locked footlocker.<sup>17</sup>

### Evidence from ISPs

Obtaining evidence from a workplace or home relies on knowing persons’ names and contact information. However, officers routinely investigate crimes involving computer files, chat rooms, or e-mail messages where the only information available about the identity of the author is a screen name. The best source for learning the identity of anonymous persons who

## Expectation of Privacy in the Workplace

When determining expectation of privacy in the workplace, officers should ask questions similar to the following:

1. Is the employee's office shared with anyone else?
2. Does the computer's hard drive have password protection?
3. Is the computer physically locked?
4. Do any files on the computer have password protection?
5. Is the employee's office locked?
6. If so, who has keys and, thus, who has access (e.g., janitor or office manager)?
7. Does a network administrator or computer technician have unrestricted access to the computer or its files either because of policy or practice?
8. Can they access the files remotely over the employer's wide area network, local area network, or via the Internet using a similar remote access program?
9. Does the employer have a policy in place regulating computer use or notifying employees that their computer, files, e-mails, and Internet activity may be searched or monitored at any time?
10. Does the employer enforce the policy uniformly?
11. Does the employer have written or other proof indicating that the employee received, read, and understood the computer use policy?
12. Does the employer use software to monitor computer use, and are employees aware of this fact?
13. Do computer work stations have either a written or electronic message clearly visible while the machine is being used or when the machine boots indicating that computer usage is monitored?

access the Internet is through their ISP. Obtaining information from ISPs recently was addressed in *United States v. Hambrick*. The court held that

While under certain circumstances, a person may have an expectation of privacy in content information, a person does not have an interest in the account information given to the ISP in order to establish the e-mail account, which is noncontent information.<sup>18</sup>

Content information is the actual substance of the conversation or the e-mail. Noncontent

information includes such items as account information, telephone numbers dialed, and Internet sites visited. The Fourth Circuit, citing *Smith v. Maryland*, emphasized that a "person has no legitimate expectation of privacy in information...voluntarily turned over to third parties."<sup>19</sup> Third parties clearly control the information persons divulge when they open an Internet account. ISPs use the information for billing and advertising and often sell it to companies seeking addresses for targeted mailing lists. To identify the suspect or the accused, officers may seek account information from an ISP, such as "name; billing

address; home, work, and fax phone numbers; and other billing information" because this information is not protected by the Fourth Amendment.<sup>20</sup>

If the ISP refuses to voluntarily give an officer information, the officer has options. The Stored Wire and Electronic Communication and Transactional Records Act<sup>21</sup> (SWECTRA) deals with the release of the *content* of stored electronic communications. However, SWECTRA's provisions become powerful allies when attempting to obtain a person's *noncontent* account information. ISPs are required to disclose

content information to law enforcement officers pursuant to a search warrant, a court order, a grand jury subpoena, an administrative subpoena, or an official request in the case of investigations involving telemarketing fraud.<sup>22</sup> The content of stored electronic communications is clearly protected by the Fourth Amendment, as well as SWECTRA. Although noncontent account information stands unprotected by either, officers who encounter resistance from ISPs when requesting noncontent information may use SWECTRA's provisions to force disclosure.

Recent provisions in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) also have made more noncontent information readily available to law enforcement agencies. The use of a subpoena now can force the disclosure of a subscriber's "name; address; local and long distance telephone connection records, or records of session times and durations; length of service (including start date) and types of service utilized; telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and means and source of payment for such service of a subscriber."<sup>23</sup> These changes, along with SWECTRA's provisions, help to speed up investigations and provide law enforcement officers with more reliable information.

## Conclusion

As personal computer ownership continues to expand all over

the world, law enforcement officers will continue to seek and find evidence of crimes hidden in computers. Computers, in the workplace and the home, are becoming more accessible as evidence to law enforcement officers through the adaptability of such avenues as the Fourth Amendment, but officers must stay abreast of new laws and evolving technology. Like their predecessors who had to apply the Fourth Amendment to new technology, such as telephones, automobiles, and covert listening devices, law enforcement officers likely will succeed in finding lawful and innovative ways to obtain the evidence required to convict criminals who use computers. ♦

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## Endnotes

<sup>1</sup> U.S. Department of Commerce, *U.S. Census Bureau, Home Computers and Internet Use in the United States: August 2000* (Washington, DC, 2001).

<sup>2</sup> *Ibid.*

<sup>3</sup> *United States v. Simons*, 206 F. 3d 392 (4th Cir. 2000).

<sup>4</sup> The FBIS is the Foreign Bureau of Information Services, a Division of the Central Intelligence Agency (CIA), which employed Simons.

<sup>5</sup> *United States v. Simons*, 206 F. 3d 392, 398 (4th Cir. 2000).

<sup>6</sup> *Ibid.*

<sup>7</sup> U.S. Const. amend. IV.

<sup>8</sup> *Ibid.*

<sup>9</sup> Emergencies involving threats to life or safety require a showing of reasonable suspicion. *Maryland v. Buie*, 494 U. S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). Emergencies involving escape or the destruction or removal of evidence, however, require a showing of probable cause. *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967).

<sup>10</sup> *Arizona v. Hicks*, 480 U. S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). If the officer manipulates the computer mouse or keyboard to deactivate the screen saver and view the desk top or an open document, that manipulation would (most likely) constitute an unlawful search pursuant to *Hicks* unless the search of the computer was authorized by a search warrant, probable cause and exigent circumstances existed with respect to the computer, or the officer had the consent of an owner or user who had access to the files that constituted evidence of a crime.

<sup>11</sup> *State v. Bates*, 181 W. Va. 36, 380 S. E. 2d 203 (1989); *State v. Haight*, 179 W. Va. 557, 371 S. E. 2d 54 (1988) citing *Maryland v. Garrison*, 480 U.S. 79, (1987); *State ex rel. White v. Melton*, 166 W. Va. 249, 273 S. E. 2d 81 (1980); *State v. Greer*, 130 W. Va. 159, 42 S. E. 2d 719 (1947).

<sup>12</sup> Stephen W. Cogar, *West Virginia Law Enforcement Fieldbook*, (3rd ed. forthcoming)(manuscript at page 43, on file with author).

<sup>13</sup> *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001).

<sup>14</sup> *United States v. Block*, 590 F.2d 535, 539 (4th Cir. 1978).

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *United States v. Hambrick*, 225 F.3d 656 (4th Cir. 2000) (unpublished opinion).

<sup>19</sup> *Smith v. Maryland*, 442 U. S. 735, 743-44 (1979).

<sup>20</sup> *United States v. Hambrick*, 225 F.3d 656 (4th Cir. 2000)(unpublished opinion).

<sup>21</sup> 18 U.S.C.A. 2701 et. seq.

<sup>22</sup> 18 U.S.C. 2703(c)(1)(A)-(E)(c)(2)(A)-(F).

<sup>23</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 (eff. October 26, 2001).



## Responding to the Call

*Commencement addresses often refer to the future and what the new graduates possibly can achieve in their lives. The following two speeches contain similar thoughts, but also reveal the deep commitment to excellence and the heavy burden of responsibility that goes with public service. As the law enforcement community faces a future forever changed by the tragic events of September 11, 2001, the FBI Law Enforcement Bulletin presents these graduation speeches as a tribute to newly appointed and veteran officers alike who willingly and nobly have accepted the challenges, rewards, and sacrifices inherent in their profession—the “thin blue line” of strength and justice that safeguards the American public and the freedoms that all citizens cherish.*

### Not a Token Effort

By Kelly G. Walls, Ph.D.

As I began to think about what I would speak to you about today, I remembered some of the feelings that I had as I sat in a class not unlike this one at the West Virginia State Police Academy 28 years ago. I remember feeling a bit nervous, apprehensive, and, yes, scared of the career that I was embarking upon. I wondered if I’d be able to “cut” it. When the going got tough, would I have the intestinal fortitude to stand up? When I became scared (and you will), would I have the guts to do what needed to be done? And, there were still 26 years left in the 20th century at that time.

One of the biggest influences upon my law enforcement career was a man named Andrew L. Dodson, the first African-American police chief in the state of West Virginia and my first boss. He remained a professional in a very hostile climate, and I never saw him lose his cool. I was a college student in 1973, hanging out at the local pizza place with a friend who suggested that we take the police exam. Now, I was a fan of TV shows like “Dragnet” and “Adam 12,” but I hadn’t really given any thought to a police career. I was in school to become a teacher. To make a long story short, we took the

exam. I scored number two on the qualifying list. A few months passed, and the number one person was hired. A few more months go by and the number three person was hired. So, I made an appointment with Chief Dodson and asked, “Why are you hiring the

people below me on the list?” He responded, “You’re a college student; you really don’t want to be a police officer.” At that point, I asked myself why I couldn’t be both. That day in 1973 began the thought process that has culminated in my speaking to you today. I talked Chief Dodson into hiring me, completed my college degree, and through a very long and arduous process went to graduate school, retired from law enforcement, and came to Bluefield College, where we started the Semester at the Academy program, with the second,

third, and fourth students involved sitting before us today as part of this class.

As 21st century law enforcement officers, you will face some very tough challenges, some very different challenges, and some of the same challenges that I faced all those years ago. Terrorism, in 1974, was something that happened at the Olympics in Munich to the Israelis. We saw it on TV, but it didn’t

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really register, not like the gut impact we all felt when the Oklahoma City Federal Building exploded or when the World Trade Center collapsed and the Pentagon was attacked. You now have it, quite literally, in your backyard. In addition, cybercrime will present some new and unique challenges, and the old standbys of narcotics, theft, assault, rape, and robbery are perennial favorites.

I looked at my badge this morning. I haven't actually looked at it in quite some time (my days being filled with research papers, lectures, and trying to figure out how to get the campus safety golf cart running again). It's about 5 ounces of tin, about 3 inches long, and about 2 inches wide. But, I realized today that it supports and is responsible for the entire freedom of a nation. Why do I say that?

Two hundred and twenty-six years ago our ancestors fought the entire overwhelming might of the British empire at seemingly insurmountable odds for freedom of speech, of religion, of assembly; for freedom from unreasonable searches and seizures; and for all of the other "freedoms" implied or mentioned in the Constitution. In American society, nothing is more sacred to us than our freedom. And, in American society, only one segment of that society is given the authority, the power, and the responsibility to take that freedom away—the police. So, I say to you today that there *is no greater responsibility* than to be entrusted with the freedom of an entire free society.

So, when the going gets tough (and it will)...when the compensation, the pay, and benefits seem trivial (and they will, trust me)...when someone begins talking to you about staging a "blue flu" strike or other work stoppage (and they will)...remember what I have told you today and think back to this old retired cop standing in front of you telling you that the police profession is *above* work stoppages; it is *more noble* than trivial compensation; and it's *worth much, much more* than a token effort on your part. It was worth more than a token effort in 1829 when the first uniformed patrol officers took to the streets of London. It was worth more than a token effort on September 11, 2001, when so many law enforcement officers died at the World Trade Center, and it's worth more than a token effort on April 19, 2002. If you ever reach the point that you feel the need to only give law enforcement a token effort, then I urge you today, get out!

Remember to always make those who care about you proud and uphold the professional responsibility of your profession, even in the face of overwhelming personal and professional odds. Be on time for any assignment. Wear the uniform and badge with pride. ♦

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*Dr. Walls, assistant professor of criminal justice and director of campus safety at Bluefield College in Bluefield, Virginia, delivered this address to the graduates of the preemployment class at the Southwest Law Enforcement Academy in Bristol, Virginia, on April 19, 2002.*

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## ***Opportunities and Expectations***

By Russell J. Rice, Jr.

**T**oday, for this brief moment, you are paused between the exhaustion of what has been and the exhilaration of what is yet to be. You are not quite over your collective past and not yet into your respective futures. For some of you, this brief hesitation

may seem like the longest day of the last 10 months. I will try not to contribute substantially to that.

If you were like some of us were, way back when, you came to this academy with your heart full of hope and your hopes full of uncertainty. Not quite sure

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what to expect or what might be expected of you. The same may be true today as you await your career in public service.

Before Theodore Roosevelt became the 26th president of the United States, he served in a number of public roles, including that of commissioner of the New York City Police Department. Of a career in public service, he said, "Of those to whom much is given, much is rightfully expected."

Perhaps, at no other time in recent memory has the public's expectations of law enforcement been greater. And, perhaps, at no other time have so few in law enforcement done so much to undermine the public's confidence in our ability to meet those expectations.

To get some sense of that eroding confidence, you need only open a newspaper or turn on the television. It seems impossible to get through a news cycle without another story related to the withholding of evidence at the federal level or that seemingly endless corruption scandal at the local level. I am sure that many people in this country think that the Los Angeles Police Department has only one division and that it is staffed entirely with corrupt cops. Of course, nothing could be further from the truth.

Unfortunately, everyone who wears a police uniform has been painted with the same broad brush as those few who never should have worn one. You can help change that. When you leave here, you will have the opportunity and the obligation to restore public confidence to public service.

But, before you go to meet that obligation, I would ask that you take a moment to consider not only that which you have been given but also that which will be rightfully expected of you. During your time here, you have been given the very best that this academy and this staff have to offer. And, you have been given the opportunity to reach deep inside to find the very best that you have to offer.

In search of your best, you have been given the opportunity to examine the depth of your capacity and the content of your character. You have been given some sense of yourself by being required to sacrifice some of yourself. You have been given the opportunity to apply individual effort so that you, as a class, might share collective successes. You have been given the opportunity to support one another. And, you have been given the support of your families and your friends. But, for all that you have been given these past several months, perhaps, the greatest expectations have been your own.

When you began this endeavor, with your heart full of hope, you expected to succeed. And, although you may not have known what to expect back on that first day, you did expect to be here on this day to take your rightful place among the graduates of Class 19.

When you leave this place for your career in public service, you may find that some things have changed. While your heart still may be full of hope and your hopes still may be full of uncertainty, you may find the greatest expectations are no longer your own. Because when you are given the opportunity to serve, you will be expected to serve something bigger than your own self-interest.

When you are given the oath of office, you will be expected to uphold the Constitution and the individual rights it guarantees.

When you are given the badge of office, regardless of its shape or size and regardless of whether you wear it part time or full time, you will be given stewardship of the public trust. And, you will be expected to hold this gift as sacred because it is from our guardianship of this powerful but fragile trust that we derive the authority and the legitimacy with which we serve. When you wear the uniform of service, you will become the most visible and most accessible representatives of our government. And, you will be expected to be subject-matter experts in all matters, foreign and domestic.

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**I would ask that you take a moment to consider not only that which you have been given but also that which will be rightfully expected of you.**

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Now, having told you this, as I stand here today, the only thing I have to give you is advice. And, for whatever that is worth, it is given freely and without any specific expectations. My advice, however, is given with the hope that you might find it of some value as you strive to meet the expectations of public service.

I would first remind you that, as a law enforcement officer, your primary duty is to serve mankind. And, I would tell you that a life of service is a life of significance. I would caution you to be aware of the power and the potential of your position. As a law enforcement officer, you will have the opportunity to impact a culture. Never underestimate the impact of your words or your actions. People may forget what you say, but they never will forget how you made them feel.

Remember that your decisions can and will be called into question, but your word must never be. Be persistent. Don't give up as long as you still have something to give. Remember, nothing is really over until the moment *you* stop trying.

Be willing to compromise your opinions, but never your ethics. And, before you get too far along in your career, I would strongly recommend that you find a good friend to share things with—good things and bad. But, while I recommend that you share some of yourself with others, I also would advise you to save the best of yourself to take home at the end of your shift. Don't make the mistake of confusing how you make a living with how you make a life.

Temper your passion for justice with your compassion for others. Remember that the scales of justice need balance. Be kind in heart and generous in spirit. Every now and then do something for someone who never can do anything for you. And, always count your blessings before you count your money. Because if you've come to this business to get rich, you've come to the wrong place.

Be grateful for what you have and hopeful about what you have yet to become. Maintain your sense of humor and your sense of humility. Laugh at yourself every chance you get. And, believe me, you will get those chances often.

Be safe and vigilant. Remember that justice, valor, and service often involve peril and sacrifice. But, don't be afraid to encounter risks. It is by taking chances that we learn to be brave. And, at those times when things seem to be beyond your control, remember the two things of which you always have complete control: your integrity and your attitude. Never surrender either because these things will sustain you in good times and bad.

*Above all else*, be honest. Be true to your word, true to your ideals, true to your profession, and true to yourself. Remember the first law of holes—when you find yourself in one, stop digging. Through it all, stay centered and remember what you believe in. Hold onto your core values because, as the saying goes, “if you don't stand for something, you will fall for anything.” And, no matter where your career takes

you, don't forget where you came from and those who helped you get there. And last, but certainly not least, *have fun*. This is the best job in the world. If you are lucky enough to have it, you need to enjoy it.

As you leave here today, be proud—proud of your efforts, proud of your accomplishments, and proud of yourself. And, remember, whether you ultimately wear a badge or a business suit, you leave here with the potential to contribute something of significance. You leave here with the opportunity to *give* something back. I expect you will. ♦

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**Don't make the  
mistake of confusing  
how you make a  
living with how you  
make a life.**

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*Chief Rice, head of the Placentia, California, Police Department, delivered this speech to the graduates of Class 19 of the Police Academy at Fullerton Junior College in Orange County, California, on June 2, 2001.*

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## Corrections

The National Institute of Corrections (NIC) presents *Responding to Parole and Probation Violations: A Handbook to Guide Local Policy Development*, which leads agency policy teams through a series of activities to help them develop their own set of violation policies. Built around the experiences of 29 jurisdictions, this NIC handbook documents the processes they used to examine their violation practices and the subsequent work products that emerged. It gives an overview of critical issues to probation and parole violations and then addresses different aspects of each issue (e.g., collaboration, supervision, implementation, and outcomes). With the understanding that the violation process involves many parts of the criminal justice system, the handbook is directed at teams of local policymakers (e.g., criminal justice agencies, the local legislature, social service organizations, and the community). For availability and ordering information, contact the NIC Information Center at 800-877-1461 and ask for NIC accession number 016858. This handbook also is available electronically at <http://www.nicic.org/pubs/2001/016858.pdf>.

## Project ALERT

The National Center for Missing and Exploited Children (NCMEC) launched Project ALERT (America's Law Enforcement Retiree Team) in 1992 with the endorsement of 15 leading, nationally recognized law enforcement associations. This free, federally funded consulting resource recently celebrated 10 years of service to requesting agencies that need an emergency response team of seasoned investigators to provide specialized investigative skills and languages, critical resources and additional personnel to resolve recent or long-term missing-child cases, experts to provide training on various aspects of these complex types of cases, and experienced public speakers to make presentations on child safety issues and prevention strategies.

Project ALERT volunteers, consisting nationwide of retired federal, state, and local law enforcement experts, respond to and consult on cases upon request. By networking and combining resources, they ably have assisted in locating many missing children. Anyone interested in volunteering for or using the services of Project ALERT can call 1-800-THE-LOST or access <http://www.ncmec.org>.

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## Community Relations

*Satisfaction with Police—What Matters?* discusses a study that used survey data from the Project on Policing Neighborhoods, sponsored by the National Institute of Justice (NIJ) and the Office of Community Oriented Policing Services (COPS), to identify factors that influence public satisfaction with police. Perception of quality of life was shown to best predict public attitudes toward police. Neighborhood context and personal experience with police also were important factors. This NIJ report concludes that improving the quality of daily interaction between police officers and citizens may be the best option for police administrators as

they strive to improve public satisfaction with police. This report is available from the National Criminal Justice Reference Service (NCJRS) at 800-851-3420 and can be accessed electronically at <http://www.ojp.usdoj.gov/nij/pubs-sum/194077.htm>.

## Technology

*Law Enforcement Tech Guide: How to Plan, Purchase, and Manage Technology (Successfully!)* presents the best practices in strategic information technology (IT) planning and procurement. This comprehensive guide, presented by the Office of Community Oriented Policing Services (COPS), targets project managers, executives, and technologists whose agencies are preparing to implement such IT projects as computer-aided dispatch, records management, mobile computing, automated booking systems, automated fingerprint identification systems, crime analysis software, and various geographic information systems. It also reveals pitfalls to avoid and expands on various sources of information currently available to help create user-friendly products that serve law enforcement's IT goals. The U.S. Department of Justice Response Center provides availability and ordering information at 800-421-6770; this guide also is available electronically at <http://www.cops.usdoj.gov>.

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# Probationers, Parolees, and the Fourth Amendment

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**W**hen individuals are convicted of crimes, they are subject to a number of punishments chosen by the court. These punishments range from benign restrictions, such as community service, to extreme measures, such as solitary confinement in a maximum security prison. Parole and probation are two punishments between these extremes.

Probation is a sentence imposed upon a person after conviction, releasing the person into society in lieu of a prison term.<sup>1</sup> Parole, on the other hand, is the release from

prison after actually serving part of a sentence.<sup>2</sup> Both sentences are provisional, depending upon the person's compliance with terms and conditions imposed by the court.

This article explores the extent to which probationers and parolees are protected by the restrictions of the Fourth Amendment to the U.S. Constitution.<sup>3</sup> Some courts have said that probationers and parolees are in different positions regarding constitutional protections. The distinction is made because parolees have been sentenced to prison,

served part of their sentences, and then released, indicating a court's decision that parolees merit actual incarceration for their crimes. With probationers, however, courts have decided that their actions do not merit actual incarceration, indicating a decision that probationers pose less danger to the community. As one court put it, "...parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers."<sup>4</sup> While the difference is real, courts tend not to distinguish between parolees and


probationers when analyzing their Fourth Amendment protections.<sup>5</sup> The principles discussed in this article apply to both.

### LIMITED CONSTITUTIONAL RIGHTS

A logical starting point in this inquiry is to ask whether probationers and parolees are protected by the Constitution at all. The answer to the question is yes, but with limitations. For example, the U.S. Supreme Court has decided that parolees are entitled to limited Fifth Amendment due process rights before having their parole revoked.<sup>6</sup> The Court also has recognized that “[t]o a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy ‘the absolute liberty to which every citizen is entitled, but only...conditional liberty properly dependent on observation of special [probation] restrictions.’”<sup>7</sup>

The legal basis for denying probationers and parolees full constitutional protections has varied over the years.<sup>8</sup> In the case of parolees, many courts adopted the “constructive custody” theory. This theory holds that parolees remain in the custody of the state while on parole and, therefore, are entitled to only the same limited Fourth Amendment rights as inmates.<sup>9</sup> This legal fiction, however, has been discredited. The Supreme Court hinted at its view of the “constructive custody” theory in a case involving the search of a probationer’s home: “Although the parolee is often formally described

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as being ‘in custody,’ the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody.”<sup>10</sup>

Some courts have adopted the “act of grace” theory. Under this theory, probationers and parolees are viewed as free only through an “act of grace” of the state or, alternatively, through a grant of privilege by the authorities.<sup>11</sup> Because of their status, the theory goes, probationers and parolees cannot complain about the conditions established for their freedom, even a reduction or elimination of certain constitutional rights. This theory too has been discredited in recent years. The Supreme Court observed: “It is hardly useful any longer to try to deal with this problem in terms of whether the parolee’s liberty is a ‘right’ or a ‘privilege.’ By whatever name, liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.”<sup>12</sup>

Another legal theory used to justify the limitation of constitutional rights of probationers and parolees is express waiver, or consent. Commonly, probationers and parolees are required to acknowledge and accept certain conditions prior to their release into the community. Among the conditions is the agreement to submit to searches by various authorities under varying conditions. As with the “constructive custody” and “act of grace” theories, the express waiver, or consent theory, is an unsatisfactory basis for justifying probation and parole searches.<sup>13</sup> This issue will be discussed in more detail below.

### A FOURTH AMENDMENT PRIMER

Before examining the Supreme Court’s view of searches of probationers and parolees, a brief review of Fourth Amendment law is appropriate. The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches. Unfortunately, the concepts of “unreasonable” and



“search” as used in the Fourth Amendment never were defined when it was adopted. The Supreme Court struggled with these constitutional definitions for many years. Finally, in 1967, in the famous case of *Katz v. United States*,<sup>14</sup> the Supreme Court formulated the modern definitions of “search” and “unreasonable.” The Court said that a Fourth Amendment search occurs whenever the government intrudes into an individual’s reasonable expectation of privacy.<sup>15</sup> Justice Harlan, in a concurring opinion, established a useful two-prong test to determine if a reasonable expectation of privacy exists: 1) Do individuals have an actual (subjective) expectation that their activities will remain private? and 2) Is their subjective expectation of privacy one that society is willing to accept as reasonable (objectively reasonable)?<sup>16</sup> If the answer to both questions is yes, then a reasonable expectation of privacy exists, and any governmental invasion of that expectation is a search for Fourth Amendment purposes.

However, the Fourth Amendment does not prohibit all government searches, only unreasonable ones. Assuming the government does conduct a search as defined in *Katz*, is it reasonable or unreasonable? Unlike the question of whether a search has occurred, which can be difficult, the question of the reasonableness of the search usually is straight forward. If the search is conducted with probable cause and under the authority of a search warrant, or one of the recognized exceptions to the warrant requirement, the search is reasonable for Fourth Amendment purposes.<sup>17</sup>

The Supreme Court has recognized, however, that there are circumstances in which its preference for searches based upon probable cause and conducted under the authority of warrants is impracticable. These cases often are referred to as “special needs” cases. For example, police officers’ search (frisk) of persons they reasonably suspect to be armed is permissible without a warrant.<sup>18</sup> Likewise, the Court has held that public employers may conduct warrantless work-related searches of public workplaces without probable cause;<sup>19</sup> investigators

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may conduct regulatory searches in accordance with a regulatory scheme without the usual warrant and probable cause requirements;<sup>20</sup> and school officials may search some student property without a warrant or probable cause.<sup>21</sup>

### THE SUPREME COURT’S VIEW

In 1972, the Supreme Court decided the case of *Morrissey v. Brewer*.<sup>22</sup> While this case involved the application of Fifth Amendment due process to parole revocation

hearings (it does apply), several comments made by the Court bear on its later discussion of Fourth Amendment rights of probationers and parolees.

The Court recognized without much discussion that parolees and, by analogy, probationers are different from ordinary citizens. Because of their unique position, states lawfully may impose restrictions upon parolees and probationers that otherwise would be unlawful if applied to ordinary citizens.<sup>23</sup> This is not to say, however, that parolees and probationers have no constitutional rights. The Court stated in *Morrissey*: “By whatever name, the liberty [of the parolee] is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.”<sup>24</sup>

The *Morrissey* opinion also recognized the unique character of the parole and probation systems. Conditions of parole have a dual purpose, according to the Court. They prohibit behavior that poses both a danger to the public and to the parolee’s completion of the term of parole, as well as provide a mechanism for the parole officer to guide the parolee back into society. The Court recognized the parole officer as part of an “administrative system designed to assist parolees and to offer them guidance.”<sup>25</sup> This characterization of the parole system as administrative in nature, rather than penal, set the stage for the Court’s later analysis of the reasonableness of parole and probation searches.

In *Griffin v. Wisconsin*,<sup>26</sup> a 1987 case, the Supreme Court squarely

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faced the issue of the reasonableness of a search of a probationer's home. Joseph Griffin was convicted of a crime and placed on probation in the custody of the Wisconsin Department of Health and Social Services. A department regulation permits a probation officer to search a probationer's home whenever a supervisor approves and there are "reasonable grounds" to believe contraband is present.<sup>27</sup> While Griffin was on probation, a probation officer received information from the police that there "were or might be"<sup>28</sup> guns in Griffin's apartment. A warrantless search of the apartment, conducted by probation officers in accordance with Wisconsin probation regulations, located a handgun. Griffin was charged with possession of the weapon, a felony under Wisconsin law. He moved to suppress the gun, alleging an illegal search.

The trial court denied the suppression motion, and Griffin was convicted. The state supreme court affirmed, reasoning that probation reduced Griffin's reasonable expectation of privacy, permitting probation officer officers to search without a warrant and on less than probable cause. It decided that Wisconsin's "reasonable grounds" standard satisfied the Fourth Amendment requirement and that the search was conducted with sufficient information to establish "reasonable grounds."<sup>29</sup>

The Supreme Court affirmed the Wisconsin Supreme Court, but on slightly different grounds. In its opinion, the Supreme Court built on the theoretical groundwork established in *Morrissey*. The Court first

unequivocally stated that probationers' homes are protected by the Fourth Amendment, and, therefore, searches of their homes must be reasonable.<sup>30</sup> However, a state probation system presents "special needs beyond normal law enforcement"<sup>31</sup> that justify an exception to the Court's usual requirements of both a warrant and probable cause for reasonable searches. The Court favorably compared a state's operation of a parole system to the operation of a school, a government office, or a prison or its supervision of a regulated industry, where it has recognized exceptions to the warrant and probable cause requirements in the past.

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In the opinion of the Court, requiring probation officers to get warrants before they search probationers' homes would interfere with the operation of the probation system. It would make a magistrate, rather than the probation officer, the judge of how much supervision probationers need and would foreclose quick action by the

department when it learns of possible probation violations. The Court also was concerned that requiring a warrant would reduce the deterrent effect of quick searches.<sup>32</sup> A probable cause requirement also would reduce the deterrent effect of the probation program and would interfere with the supervisory relationship between officer and probationer.<sup>33</sup> In summary, the Court concluded that the search of Griffin's apartment was reasonable under the Fourth Amendment, although done without a warrant and based upon less than probable cause (reasonable grounds), because it was made in accordance with a valid state regulation that itself complied with the Fourth Amendment.

Before examining the Supreme Court's most recent case dealing with probation and parole searches, several points made in the *Griffin* decision should be emphasized. They will bear upon a discussion of recent issues regarding these searches later in this article.

The Court made it clear that it approved of this search on "reasonable grounds," a standard lower than probable cause, because it was conducted pursuant to a regulatory scheme with a nonlaw enforcement purpose that was itself constitutionally valid. In doing so, it deferred to the Wisconsin Supreme Court's decision that officers had sufficient information to constitute "reasonable grounds" as required by the state regulatory scheme and declined to review that determination. That leaves open the question of whether states are free to choose a different, or even lower, standard than reasonable suspicion for

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probation searches when creating their probation or parole regulatory schemes.<sup>34</sup>

The *Griffin* holding also makes it clear that the conditions of parole or probation established by a state's regulatory scheme are important. States apparently are free to give probationers and parolees more or less protection so long as the scheme does not offend the Constitution. When judging the reasonableness of any search conducted pursuant to such a regulatory scheme, courts are likely to view officers' compliance with those regulations as part of the reasonableness inquiry.

Despite the fact that three plainclothes police officers were present during the search of Griffin's apartment, the Court noted that the search was conducted entirely by probation officers under the authority of Wisconsin's probation regulation. It emphasized the supervisory relationship between probationers and their probation agents—"one that is not, or at least not entirely, adversarial..."<sup>35</sup> The Court dispensed with its warrant and probable cause requirements because of states' special needs beyond normal law enforcement when administering their probation and parole systems. This distinction between law enforcement and probation (and parole) programs continues to be a subject of legal debate.

Finally, the Court specifically refused to endorse the view that any search of a probationer's home is lawful when justified by reasonable grounds to believe contraband is present. The *Griffin* holding is limited to searches conducted pursuant to a valid regulatory scheme,

leaving unresolved the question of the reasonableness of searches of probationers' homes conducted in the absence of a valid regulatory scheme.

Recently, the Supreme Court again faced the issue of searches of probationers' homes. In *United States v. Knights*,<sup>36</sup> the defendant was placed on probation for a drug offense. As a condition of probation, he agreed to "[s]ubmit his...person, property, place of residence, vehicle, personal effects, to

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search at anytime, with or without a search warrant, warrant of arrest, or reasonable cause by any probation officer or law enforcement officer."<sup>37</sup> Subsequently, a police officer, aware of the search condition in Knights' probation order, developed reasonable suspicion<sup>38</sup> that Knights was involved in an arson. The officer searched Knights' residence without a warrant and found evidence of arson. The search was conducted without the knowledge, authorization, or participation of Knights' probation officer. Knights was indicted on federal charges of conspiracy to commit arson and

other crimes. He moved to suppress the evidence found in his residence, alleging the search violated the Fourth Amendment. The trial court granted the motion because it determined that the search was conducted for "investigatory," rather than "probationary" purposes, and the U.S. Court of Appeals for the Ninth Circuit affirmed.<sup>39</sup>

The Supreme Court reversed the holding of the Ninth Circuit, ruling that the officer's search was reasonable under the Fourth Amendment. The Court used the Fourth Amendment balancing test to determine the reasonableness of this search: "...the reasonableness of a search is determined 'by assessing on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"<sup>40</sup> The Court concluded that Knights' probation condition regarding searches significantly reduced his reasonable expectation of privacy. On the state's side of the balance, the search condition reasonably furthered Knights' rehabilitation and protected the public from his possible future criminal activity.<sup>41</sup> Given that balance, the Court concluded that this search, based upon reasonable suspicion and conducted without a warrant, was reasonable.<sup>42</sup>

It is important to note that the *Knights* case differs markedly from the *Griffin* case in several important respects. In *Griffin*, the Court reviewed a state regulatory scheme that set out specific procedural rules for probation officers to follow when conducting searches

of probationers' homes and even established what factors they may consider when developing reasonable grounds for searches. In *Knights*, the Court was not reviewing such a scheme, but simply applying general Fourth Amendment principles to a situation where a court had imposed search conditions on a probationer's release.

In *Griffin*, the Court was considering a state regulation that provides for searches of probationers' homes so long as reasonable grounds exist to believe that contraband is present. *Knights*, on the other hand, was released after agreeing to a condition permitting both probation and law enforcement officers to search for any, or no, reason. The government argued that the facts indicated that *Knights* consented to the search in question by accepting the broadly worded condition. In *Knights*, the Court declined to consider whether the search condition amounted to consent or even if the search condition reduced or eliminated *Knights*' expectation of privacy so that a suspicionless search would be permissible.<sup>43</sup>

Finally, *Griffin* involved a search conducted by probation officers as part of their probation duties. *Knights* involved a search by a police officer as part of a criminal investigation, but knowing that *Knights* was subject to a search condition as part of his probation.

## SEARCHES OF THE PERSON

The Supreme Court cases reviewed earlier deal with searches of probationers' and parolees' homes. The Court has not spoken directly on the issue of searches of their

persons, and federal case law is sparse. However, the application of the general principles established by the Court point to the same conclusion: searches of the persons of probationers and parolees may be done without a warrant and on less than probable cause in appropriate circumstances. As part of a regulatory or administrative scheme with a nonlaw enforcement purpose (the *Griffin* view), the government can argue that drug testing is necessary to assure the rehabilitation of probationers and parolees and to protect

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the public. Under general Fourth Amendment balance of interests principles (the *Knights* view), states can argue that probationers and parolees released with search conditions have a reduced expectation of privacy.

Courts generally have no problem enforcing drug testing for probationers and parolees. It is especially reasonable in cases where the underlying conviction is drug related.<sup>44</sup> Even where probationers and parolees have no history of drug use, courts are willing to enforce

drug-testing conditions to ensure compliance with a general prohibition against violating the law<sup>45</sup> or a general prohibition against drug use.<sup>46</sup>

More intrusive warrantless body searches also can be justified under the same rationales. For example, in *United States v. Thomas*,<sup>47</sup> the U.S. Court of Appeals for the Second Circuit upheld a warrantless search of a parolee's person and clothing. Upon discovering that Thomas had a 14-year-old narcotics conviction, during an office visit, his parole officer asked him to remove his jacket, roll up his shirt sleeves, and extend his arms. Seeing recent puncture marks, the officer had Thomas stand and face the wall while he frisked him and searched his trouser pockets. The parole officer then searched Thomas' jacket and found narcotics paraphernalia and several U.S. Treasury checks.

In approving the searches, the court used a combination of the two theories discussed earlier. The court first noted that Thomas' expectation of privacy was lowered because he had acknowledged a search condition as part of his parole agreement.<sup>48</sup> In addition, the court concluded that Thomas' expectation of privacy was diminished even further by the fact that he was in his parole officer's office at the time of the search.<sup>49</sup> Citing *Morrissey v. Brewer*, the court then said that a parole officer is charged with both guiding the parolee into constructive development and protecting the public. To do that, the court recognized that parole officers must have investigative powers, such as the search in

this case, to gather information regarding their clients.<sup>50</sup>

## SEARCHES OF VEHICLES

Federal courts and most state courts<sup>51</sup> have long treated motor vehicles differently from persons and residences. The way in which vehicles are used and the comprehensive way in which states regulate them have led to the recognition that people have reduced expectations of privacy in their motor vehicles. Consequently, the general rule in federal courts is that officers may search a motor vehicle without a search warrant if they have probable cause to believe evidence or contraband is inside.<sup>52</sup> Given this reduced expectation of privacy generally, courts have little problem justifying warrantless searches of probationers' and parolee' vehicles on less than probable cause under either the regulatory/administrative search theory or the Fourth Amendment balance of interest test.<sup>53</sup>

## CURRENT ISSUES

In keeping with its usual practice, the Supreme Court has decided probation and parole cases on the narrowest grounds possible. As a result, it has left open some important questions regarding searches of probationers and parolees.

### Suspicionless Searches

The Supreme Court has declined to decide whether there are circumstances in which probationers and parolees may be subject to searches with no factual basis whatever.<sup>54</sup> There are three legal theories that can be advanced to support such suspicionless searches.

### 1) Consent

Some argue that probationers and parolees consent to suspicionless searches as a condition of their release. Unfortunately, the Supreme Court has declined to decide the issue on two separate occasions,<sup>55</sup> and predicting how the Court will decide an issue always is risky business. However, it seems unlikely that the Court would condone suspicionless searches on this consent theory.

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Consent must be freely and voluntarily given.<sup>56</sup> It is difficult to argue with a straight face that someone given a choice between freedom, even severely restricted freedom, and incarceration would freely and voluntarily choose incarceration. A prominent legal commentator agrees and has criticized the consent theory as justification for suspicionless parole and probation searches.<sup>57</sup> The U.S. Court of Appeals for the Ninth Circuit also recently dismissed the theory: "To call this choice—either waiver or certain incarceration—'free and voluntary' would be to

misconceive the concept of meaningful consent."<sup>58</sup>

### 2) Special Needs

A second theory that might be used to justify suspicionless searches of probationers and parolees is the "special needs" theory as set out by the Supreme Court in *Griffin v. Wisconsin*. To review, in that case the Court recognized that state parole or probation systems represent special needs that are not primarily a law enforcement function. The function of those systems is to reintegrate criminals into society while, at the same time, ensuring that the public is protected from the real possibility that probationers and parolees could reenter a life of crime. Under these circumstances, the Court said that the Fourth Amendment probable cause and warrant requirements may be dispensed with and may even hinder the goals of probation and parole. Consequently, so long as probation or parole searches are conducted in accordance with the requirements of probation and parole regulations, meet constitutional requirements, and are reasonably related to the goals of probation or parole, no warrants are required, and searches may be conducted on less than probable cause. In the *Griffin* case, the Wisconsin regulation authorized warrantless searches of probationers' homes upon reasonable grounds to believe that contraband is present. The Court ruled that regulation passes constitutional muster.

As noted previously, the *Griffin* opinion seems to leave open the question of how low a standard state

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parole or probation regulations may establish to justify searches of participants.<sup>59</sup> Arguably, a state could decide that such searches may be conducted at anytime and for any or no reason. However, this issue is still in doubt.

In *Griffin*, the Supreme Court recognized that the supervision of parolees is a special need of the states permitting a “degree of impingement upon privacy that would not be constitutional if applied to the public at large. That permissible degree is not unlimited, however...”<sup>60</sup> That language implies that states’ regulatory schemes may not authorize unlimited invasions into their probationers’ and parolees’ privacy rights. The Court refused to consider the issue in the *Knights* case.

California has adopted this broad approach. It requires that its parolees accept a parole condition requiring them to submit to search or seizure by law enforcement officers “at any time of the day or night, with or without a search warrant, and with or without cause.”<sup>61</sup> In reviewing this condition in a recent appeal, a majority of a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled that a warrantless search of a parolee’s home on less than reasonable suspicion violated the Constitution.<sup>62</sup> In a dissenting opinion, one judge forcefully argued that this search was reasonable under California’s parole scheme.<sup>63</sup>

### 3) Fourth Amendment Law

Another way to analyze the question of suspicionless parole or probation searches is under basic

Fourth Amendment principles. This is the approach the Supreme Court used in the *Knights* case.

In *Knights*, the Supreme Court applied this general Fourth Amendment balancing test to a police officer’s search of a probationer’s apartment. It decided that upon a review of the “totality of the circumstances,”<sup>64</sup> *Knights*’ expectation of privacy in his residence was greatly diminished by virtue of his probation status, as well as his acceptance of California’s parole search condition. On the other side

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**Courts generally have no problem enforcing drug testing for probationers and parolees.**

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of the equation, the state had a very high interest in attempting to rehabilitate *Knights* and protecting the public from the very real possibility that he could slip back into a life of crime. The Court decided that in these circumstances, it is reasonable to permit police officers to search probationers’ homes without a warrant, based upon a reasonable suspicion to believe evidence of criminal activity will be found. While the Court in *Knights* had the opportunity to decide whether a parole or probation condition can totally extinguish an expectation of

privacy, thereby permitting suspicionless searches, it did not do so.

### Conclusion

Can probationers and parolees be searched for no reason? Unfortunately, there is no final answer to the question because the Supreme Court has not spoken on the issue. However, the weight of the current case law is against suspicionless searches, requiring some factual justification to search probationers and parolees.<sup>65</sup>

### The “Stalking Horse” Problem

When dealing with the issue of parole or probation searches, courts often face questions regarding the motivation of the officers conducting them. The allegation is that probation and parole officers, when conducting searches, are not acting in their capacities as officers of the parole or probation systems, but as surrogates for police. In other words, the searches are being conducted not to further the goals of probation or parole, but for law enforcement purposes, as a way to avoid the requirements of probable cause and warrants. In these situations, defendants allege that probation and parole officers are acting as “stalking horses” for the police.

Prior to the *Knights* case in the Supreme Court, many federal circuit courts of appeal recognized this argument and looked at the motivation behind parole and probation searches.<sup>66</sup> However, the “stalking horse” theory may have suffered a fatal blow in the *Knights* case.

*Knights* involved a warrantless search of a probationer’s apartment

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by a police officer (not a probation officer) based upon the officer's reasonable suspicion that Knights was involved in arson. The officer was aware of Knights' probation status from prior investigation. The district court found that the officer had reasonable suspicion to believe Knights was involved in criminal activity, but suppressed the evidence found because the search was investigative in nature, rather than probationary. The Ninth Circuit affirmed.<sup>67</sup>

The Supreme Court reversed. It concluded that the search of Knights' apartment was reasonable under an ordinary Fourth Amendment analysis: "When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly reduced privacy interests is reasonable. The same circumstances that lead us to conclude that reasonable suspicion is sufficient also render a warrant requirement unnecessary."<sup>68</sup> The Court declined to consider the question of the officer's motivation for conducting the search, noting that except in some "special needs" cases and administrative search cases,<sup>69</sup> the Court is unwilling to "entertain Fourth Amendment challenges based upon the actual motivations of individual officers."<sup>70</sup>

Citing *Knights*, the U.S. Court of Appeals for the Tenth Circuit recently held that even assuming a search by probation officers is a subterfuge for law enforcement, it is still reasonable under the Fourth

Amendment if the officers possess the requisite reasonable suspicion that contraband is present or that a crime is occurring.<sup>71</sup> In addition, the U.S. Court of Appeals for the Second Circuit recently said that the "stalking horse" theory is not a valid defense in that circuit,<sup>72</sup> and the U.S. Court of Appeals for the Ninth Circuit held that *Knights* overruled its prior holdings that probation searches done for law enforcement reasons violated the Fourth Amendment.<sup>73</sup>

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#### CONCLUSION

From a review of the cases concerning parole and probation searches, certain conclusions can be drawn. It is clear that probationers and parolees do have constitutional protections. However, because of their unique status, those protections do not rise to the level given ordinary citizens.

Regarding searches, probationers and parolees, as well as their residences, vehicles, and personal effects, are granted Fourth Amendment protection. Consequently, any

search of probationers and parolees or their property must be reasonable. In the probation and parole context, however, reasonable searches do not include the usual requirement of a search warrant based upon probable cause. Probation and parole officers, as well as police officers, may search probationers' and parolees' homes and property so long as they have reasonable suspicion to believe that contraband is present or criminal activity is afoot.

Whether probationers and parolees may be searched for no reason at all remains an open question. It is likely unwise to attempt to justify suspicionless searches on the theory of consent. Two other theories offer more hope. States can argue that suspicionless searches of their probationers and parolees are reasonable regulations or conditions because the searches are not a function of law enforcement and are reasonably related to the dual goals of rehabilitation and public protection. In addition, it is plausible to argue that the inherent nature of probation and parole combined with search conditions imposed as a requirement for release are sufficient to entirely extinguish any reasonable expectation that probationers and parolees may have.

Resolution of this suspicionless search question will have to await definite word from the Supreme Court. To date, the weight of legal authority favors the position that searches of probationers and parolees must be grounded upon reasonable suspicion of a parole violation, the presence of contraband, or criminal activity.

The “stalking horse” problem appears to be resolved. While not directly addressing the issue, the Supreme Court reminded courts that so long as the searches themselves are reasonable, it will not inquire into the actual motivations of officers conducting them.

Officers conducting warrantless searches of the persons or property of probationers or parolees must comply with all search conditions imposed. Whether the searches are justified as reasonable regulatory or administrative conditions, or simple reasonable Fourth Amendment searches, the conditions are important. In regulatory or administrative reviews, courts will first judge whether the conditions themselves are reasonably related to the goals of the parole or probation system and then consider whether officers complied with them. In straightforward Fourth Amendment cases, the search conditions are an important guide to the degree to which probationers’ and parolees’ expectations of privacy are diminished. ♦

#### Endnotes

<sup>1</sup> *Black’s Law Dictionary*, 6th ed. (1990) 1202.

<sup>2</sup> *Id.* at 1116.

<sup>3</sup> “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.” U.S. Const. amend. IV.

<sup>4</sup> *United States v. Cardona*, 903 F.2d 60 at 63 (CA1 1990); see also *Fahem-El v. Klinicar*, 841 F.2d 712 (CA7 1988) (en banc), finding a rational basis for regulations giving probationers more rights than parolees; *United States v. Hill*, 967 F.2d 902 at 909 (CA3 1992), finding

that restrictions on a parolee may be stricter than on a probationer “because the parolee has already been adjudged in need of incarceration.”

<sup>5</sup> *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

<sup>6</sup> *Morrissey v. Brewer*, 408 U.S. 471 (1972).

<sup>7</sup> *Supra* note 5 at 874, citing *Morrissey v. Brewer*, *supra* note 6, at 480.

<sup>8</sup> For a good examination of the development of these legal theories, see Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* (St. Paul, MN: West Publishing Co., 1996), Section 10.10.

<sup>9</sup> *State v. Hernandez*, 229 Cal.App.2d 143 (1964).

<sup>10</sup> *Supra* note 6 at 483.

<sup>11</sup> *People v. Chinnici*, 50 Misc.2d 570 (N.Y. 1966); *State v. Williams*, 486 S.W.2d 468 (Mo. 1972).

<sup>12</sup> *Supra* note 6 at 482.

<sup>13</sup> *Supra* note 8.

<sup>14</sup> 389 U.S. 347 (1967).

<sup>15</sup> *Id.*

<sup>16</sup> *Supra* note 14 at 361 (J. Harlan, concurring.)

<sup>17</sup> *Supra* note 14 at 357. The exceptions to the search warrant requirement recognized by the Supreme Court are the consent search (*Schneckloth v. Bustamonte*, 412 U.S. 218 [1973]); the search incident to arrest (*United States v. Robinson*, 414 U.S. 218 [1973]); the emergency search or exigent circumstances search (*Warden v. Hayden*, 387 U.S. 394 [1967]); the motor vehicle search (*Carroll v. United States*, 267 U.S. 132 [1925]); the inventory search (*South Dakota v. Opperman*, 428 U.S. 364 [1976]); certain administrative searches of regulated businesses (*New York v. Berger*, 482 U.S. 691 [1987]); and “special needs” searches (*Veronia School District 47J v. Acton*, 515 U.S. 646 [1995]).

<sup>18</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>19</sup> *O’Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>20</sup> *Camara v. Municipal Court*, 387 U.S. 523 (1967).

<sup>21</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1980).

<sup>22</sup> *Supra* note 6.

<sup>23</sup> *Supra* note 6 at 477 and 478.

<sup>24</sup> *Supra* note 6 at 482.

<sup>25</sup> *Supra* note 6 at 478.

<sup>26</sup> *Supra* note 5.

<sup>27</sup> Wis.Admin.Code HSS, Sections 328.21(4) and 328.16(1) (1981).

<sup>28</sup> *Supra* note 5 at 871.

<sup>29</sup> 388 N.W. 2d 535, at 539-544 (1986).

<sup>30</sup> *Supra* note 5 at 873.

<sup>31</sup> *Supra* note 5 at 875.

<sup>32</sup> *Supra* note 5 at 876.

<sup>33</sup> *Supra* note 5 at 878-879.

<sup>34</sup> See *United States v. Payne*, 181 F.3d 781, at 786 (CA6 1999).

<sup>35</sup> *Griffin v. Wisconsin*, 483 U.S. at 879.

<sup>36</sup> 534 U.S. 112 (2001).

<sup>37</sup> *Id.* at 114.

<sup>38</sup> The lower court found, and Knights agreed, that the officer was acting on reasonable suspicion. See *United States v. Knights*, 534 U.S. at 122.

<sup>39</sup> 219 F.3d 1139 (CA9 2000).

<sup>40</sup> *Supra* note 36 at 118-119, quoting *Wyoming v. Houghton*, 526 U.S. 295, at 300.

<sup>41</sup> *United States v. Knights*, 534 U.S. at 119-120.

<sup>42</sup> *Id.* at 121-122.

<sup>43</sup> *United States v. Knights*, 534 U.S. at 120, footnote 6.

<sup>44</sup> See *United States v. Leonard*, 931 F.2d 463 (CA8 1991): Drug testing condition reasonable where crime of stealing mail was motivated in part by drug use.

<sup>45</sup> *United States v. Duff*, 831 F.2d 176 (CA9 1987).

<sup>46</sup> *United States v. Wright*, 86 F.3d 64 (CA5 1996).

<sup>47</sup> 729 F.2d 120 (CA2 1984), *cert. denied Thomas v. United States*, 496 U.S. 864 (1984).

<sup>48</sup> *Id.* at 122-123.

<sup>49</sup> *Supra* note 47 at 123-124.

<sup>50</sup> *Supra* note 47 at 123.

<sup>51</sup> Some states have declined to interpret their state constitutions in a fashion that recognizes a reduced expectation of privacy in a motor vehicle. Readers should consult their legal advisers regarding the treatment of motor vehicles in their local jurisdictions.

<sup>52</sup> *Carroll v. United States*, 267 U.S. 132 (1925); *Ornelas v. United States*, 116 S. Ct. 1657 (1996).

<sup>53</sup> See *United States v. Payne*, 181 F.3d 781 (CA6 1999); *United States v. Baker*, 221 F.3d 438 (CA3 2000); and *United States v. Stokes*, 292 F.3d 964 (CA9 2002), *cert. denied* 123 S. Ct. 398 (2002).

<sup>54</sup> See also *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 at 362 (1998), footnote 3.

<sup>55</sup> See *Pennsylvania Board of Probation and Parole v. Scott*, and *United States v. Knights*.

<sup>56</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>57</sup> *Supra* note 8.

<sup>58</sup> *United States v. Crawford*, \_\_\_ F.3d \_\_\_, 2003 WL 735531 (CA9 2003).





# The Bulletin Notes

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



Officer Blackburn



Lieutenant Desrosiers

Early one morning, a domestic dispute caused a mother and her children to flee their apartment. The woman had been beaten and her husband, who claimed to have a 9mm handgun, had barricaded himself inside the apartment. Officer Steven Blackburn of the New Bedford, Massachusetts, Police Department was working as a dispatcher and maintained telephone contact with the man until Lieutenant Paul Desrosiers arrived on the scene. The suspect was threatening suicide and attempting to force the police to shoot him. Officer Blackburn's calming influence laid the foundation for Lieutenant Desrosiers to enter the conversation. Lieutenant Desrosiers talked with the man, gradually

reducing his anger and frustration. After 5 hours of intense negotiations, the man agreed to surrender, but only to Lieutenant Desrosiers. Officer Blackburn, whose shift as dispatcher had ended, arrived at the scene and helped Lieutenant Desrosiers convince the suspect to throw his gun out of the window. Once the weapon was outside the apartment, Lieutenant Desrosiers and Officer Blackburn, along with a Special Reaction Team, entered the apartment and placed the suspect under arrest. The diligence and professionalism of Lieutenant Desrosiers and Officer Blackburn diffused a dangerous situation without the use of force and prevented possible injury to or death of the suspect.



Officer Chenowith

While on patrol, Officer R. J. Chenowith of the Greenville, South Carolina, Police Department observed heavy smoke coming from a nearby house. Flames were visible, and neighbors informed Officer Chenowith that the elderly resident was still inside. Officer Chenowith ran to the rear of the house and forced entry. He searched the home until he found the 85-year-old resident, who was hearing impaired, asleep in his bed with the television on. Officer Chenowith woke the resident and escorted him to safety. If not for Officer Chenowith's alertness to duty and courageous efforts, the resident likely would have perished in the house fire.

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 209, Quantico, VA 22135.

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## **Patch Call**



The patch of the Pueblo, Colorado, Police Department features the Pueblo logo, which includes the rising sun, symbolic of the city's economic development and commitment to an excellent quality of life for its residents. Beneath the logo is the city seal, featuring the flags of the five territories and countries that have held dominion over the Pueblo area during the past two centuries. Below the five flags is Fort Pueblo, established in 1842 at the confluence of the Arkansas River and Fountain Creek.



The patch of the Baxley, Georgia, Police Department identifies Baxley as "The Turpentine City." Baxley had the first commercial turpentine still in Georgia in 1858, which is the only one continuing to operate today. The city was named after its founder, Wilson Baxley, and has served as the seat of Appling County since 1874.