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Offenders' Perceptual Shorthand

What Messages Are Law Enforcement Officers Sending to Offenders?

By ANTHONY J. PINIZZOTTO, Ph.D., and EDWARD F. DAVIS, M.S.

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Predatory animals always have displayed certain adaptive behaviors. For example, the leopard possesses an amazing ability to look into a large grazing herd of gazelle and instantaneously single out from this vast gathering the one most vulnerable to attack. The leopard may observe a slight limp, indiscernible to the human eye, or some other equally susceptible characteristic unrecognizable to anyone but a predator. Because

its very existence depends on the ability to perceive slight weaknesses in otherwise-unremarkable behavior, a predator's actions must remain definitive, quick, and effective.

Much like the predators found tracking the untamed jungles for easy victims, human predators stalk urban jungles for equally vulnerable targets. Similar to the beasts of the jungle, human predators look into crowds and search, consciously

or unconsciously, for some weakness. Unlike the leopard who kills only for physical nourishment, however, human predators pick their prey for a variety of reasons. Law enforcement officers know all too well the unpredictability of the human predator, but do they realize that they, the public's protectors, can become victims through their own actions?

ANALYZING THE RESEARCH

Over the past 10 years, the FBI has researched various aspects of law enforcement safety. From this research and from studies on law enforcement training, several important issues have emerged. One issue relates to the perceptions that offenders have of police officers. The research illustrates that the way offenders perceive officers impacts how they interact with them.¹

To begin with, studies in social psychology have indicated that the way humans carry themselves—including how they walk, speak, gesture, move, and look—communicates various messages.² These messages range from signaling their apparent happiness to their preoccupation, at any given time, with what they consider “weighty matters.” This preoccupation may make them appear awkward in their

footing or hesitant in their movements. Whatever is going on within the individual is played out in external behavior. These internal struggles may prove easily recognizable or well hidden, but they nonetheless affect behavior in some way.

Additionally, criminal justice literature has attempted to examine situations where officers can detect deception based on the verbal and nonverbal cues suspects and offenders exhibit.³ Further, law enforcement training academies teach officers to observe the body gestures and movements of individuals they question. For example, watching for potential “runners” while questioning suspects alerts officers to those suspects possibly preparing to escape. Through such indicators as shifting their feet, moving their eyes, and tilting their bodies, suspects may suggest their intentions to flee. This “perceptual shorthand” gives officers a quick and effective

means of preparing themselves for potential threats to their safety.

According to the FBI’s research and studies by other professionals, offenders also engage in perceptual shorthand during the commission of their crimes.⁴ This discovery warrants closer examination for two main reasons. First, officers should become more aware of the nonverbal signals and messages they send to suspects with whom they interact. Second, a greater degree of interest within the law enforcement research community may prompt additional study into this important area of officer safety. Three major cases from the FBI’s research illustrate the need for such scrutiny.

The Articulate Robber Case

The first murderer of a police officer to bring this matter of the offender’s perceptual shorthand to the FBI’s attention was an articulate young man, only 18 years old at the time of the killing. He had robbed a

convenience store at gunpoint and fled on foot. During the suspect’s escape, a uniformed officer noticed that he fit the description of the suspect given in a radio broadcast. The officer called to the young man to stop. The offender stated that the officer “was not authoritarian, was very polite, and did not take control of me or make any attempt to control my actions.” The offender remarked that as the officer approached him—a suspected armed robber—the officer’s gun remained in his holster. The offender stated that after ignoring commands from the officer to stop and put his hands up, he turned and shot him.

The offender stated that he believed the officer “did not perceive me as a threat, and so [he] made no attempt to protect himself.” After evaluating the officer’s behavior and tone of voice during this encounter, the offender decided that he had the edge, which resulted in the officer’s death. By his own admission, the offender perceived a vulnerability in the officer’s actions and took advantage of it.

The Voice of God Case

In another case, an offender stated that he had “planned to kill an officer” on the day he actually murdered one. This offender was a small-time drug dealer and a major drug abuser. He stated that he had received a message from God that he should kill a police officer because the police were ruining his drug business. To accomplish this, he proceeded to a busy intersection near his home to find an officer to kill. Because of his degree of drug abuse, his plan lacked clear



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and precise thinking. He neither considered how he would confront an officer at this particular location, nor did he obtain a weapon to use.

However, arriving at his pre-determined location, he observed a uniformed sergeant at a service station having a tire repaired on his marked patrol vehicle. By his admission, the offender approached the sergeant intending to kill him. However, he stated that “by looking at him, I could tell that he would be too difficult to overcome.” When questioned about how the sergeant looked or what aspects of his appearance or demeanor caused the offender to believe that he could not “overcome” the sergeant, he was unable to say anything except “he looked too difficult to take.” When questioned further about his perception of the sergeant’s appearance, the offender stated that he was not particularly large in size or menacing in appearance but “just looked like he could handle himself.”

The offender remained at this location for approximately 2 hours until a traffic accident occurred, and a one-officer patrol vehicle responded to the scene. The offender observed the officer for only a short time before he “knew this was my victim.” Having made that decision, the offender casually walked over to the officer and struck him with his fist. As the officer fell to the ground, the offender removed the officer’s service weapon and shot him six times.

When asked what criteria he had used to evaluate the officer, the offender again had difficulty putting his thought process into words. He could recall only that the officer appeared “overweight and looked

easy.” What the offender did not know was that the victim officer, with 10 years of law enforcement experience, had refused to wear his department-issued soft body armor and recently had received a substandard performance evaluation. In addition, in another incident the year before, a subject had taken the officer’s service weapon, but the officer’s partner had shot and killed the subject. Apparently, the victim officer had sent assorted nonverbal messages to a variety of individuals—officials, fellow officers, and offenders—before his death.

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...nonverbal behaviors and actions can communicate the internal disposition of an individual.

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The “Dope Boys” Case

The last incident involves an individual who assaulted a law enforcement officer in order to “send a message to the cops in my city.” He decided to deliver his message, “quit messing with the ‘dope boys,’” by killing an officer. During a community celebration, the armed offender approached one of several officers assigned to the parade route for traffic and crowd control, intending to shoot him. However, he stated that after looking at the first officer he approached, “I knew he’d be a difficult target,” so the offender

moved through the crowd. After observing the next officer he came upon, the offender removed his gun from his pants pocket and shot the officer in the head. This officer stated that he saw the offender’s gun “at the last second...just prior to the shot.” His quick hand movement shifted the weapon from between his eyes, deflected the path of the bullet, and saved his life.

The first officer never realized that the offender had targeted him. Nor did he know that whatever he was doing—whether the way he looked, the way he walked, or the way he spoke to those around him—had sent a message that he was in control. Further, the offender stated that he had no prior contact with either of these officers before the incident. As in the other cases, this offender had difficulty articulating exactly what cues he perceived from these two officers that affected his decision.

IMPLEMENTING THE FINDINGS

In many of the cases examined, the offenders could not articulate the exact cues they perceived regarding the targeted officer’s appearance, gait, or behavior. However, killers and assaulters alike stated that if their victims generally gave the impression that they appeared authoritative (not authoritarian), seemed resolute, or acted professionally, then the offenders were reluctant to initiate an assault.⁵ This statement does not mean that officers should not have a personable approach with the public or that they should not employ community policing practices. It does mean, however, that all officers must

consider the messages that their actions and behaviors send. Also, they must maintain a high level of vigilance and preparedness in carrying out their assigned duties. Two rules remain true: officers should treat everyone the way they would like to be treated, and they should protect themselves so they can continue to protect their communities.

Moreover, these findings demonstrate the need for greater research in the area of perceptual shorthand used by offenders when they encounter law enforcement officers. Existing research indicates that nonverbal behaviors and actions can communicate the internal disposition of an individual. For example, a depressed individual often exhibits slow body movements, a lack of energy, and the inability to concentrate or focus. These external behaviors send certain messages, and observers receive those messages for good or ill. An officer's casual, "routine" approach to a vehicle during a traffic stop may communicate to the offender a possible mental or emotional distractibility. Further, the absence of certain appropriate behaviors on the officer's part also might communicate dangerous messages to the offender. For example, situations in which officers neglect to follow suspects' body movements during questioning, especially hand movements or shifts in body positions, may communicate their lack of readiness to act. When received by human predators, such messages could prove deadly to officers who remain unaware of the impact of their behaviors and actions. Therefore, the law enforcement

community should conduct additional research to find the key to unlock the cues that offenders observe in officers they choose to attack.

CONCLUSION

Just as predatory animals search out the weakest prey, human predators employ the same tactic. Law enforcement officers must remember that while they observe

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nonverbal messages from the individuals they question, these individuals also gather information from them. Subtle nuances that others would not view as weaknesses become opportunities for human predators to exploit. Law enforcement officers must protect themselves against such individuals who search for easy prey and strike with little or no warning.

The law enforcement community must ban together to make officers aware of the importance of understanding how their behaviors and actions impact their survival even when performing the most basic, and sometimes mundane, official duties. Only then will

officers no longer fall victim to predatory offenders using perceptual shorthand to select the most vulnerable targets. ♦

Endnotes

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² R.A. Hinde, ed., *Nonverbal Communication* (Cambridge, MA: Cambridge University Press, 1972); E.E. Jones, *Interpersonal Perception* (New York: Freeman, 1990); S.T. Fiske and S.E. Taylor, *Social Cognition* (New York: McGraw-Hill, 1991); and W.B. Pearce, *Nonverbal Communication* (New York: Harper Collins, 1994).

³ C.G. Brougham, "Nonverbal Communication: Can What They Don't Say Give Them Away?" *FBI Law Enforcement Bulletin*, July 1992, 15; J.P. Buckley and P.A. Mullenix, "Use of Behavioral Symptoms in the Search for the Truth: A Tool for the Prosecutor," *Polygraph* 15 (1986): 40; D.K. Mills, "Deception," *American Probation and Parole Association Perspectives* 15 (1991): 6; and F.W. Winkel, L. Koppelaar, and L. Greuel, "Police Officers' Beliefs About Cues Associated with Deception in Rape Cases," in *Psychology and the Law: International Perspectives*, ed. F. Losel, D. Bender, et al. (Germany: Walter de Gruyter & Company, 1992).

⁴ B.A. Jacobs, "Undercover Deception Clues: A Case of Restrictive Deterrence," *Criminology* 31 (1993): 281 and "Crack Dealers and Restrictive Deterrence: Identifying Narcs," *Criminology* 34 (1996): 409.

⁵ *Supra* note 1.

Assessing the Patterns of Citizen Resistance During Arrests

By Darrell L. Ross, Ph.D.

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Whether it entails stopping a speeding car, moving a group of rowdy youths on a street-side, quieting a family dispute, or arresting a dangerous felon, police work frequently involves actual or potential resistance. In seconds, officers interpret the behavior of the individuals they confront and select an appropriate level of force in response. Deciding whether the use of force is objectively reasonable requires careful balancing of the nature of the intrusion on the suspect's Fourth Amendment rights against the countervailing interests of the state to maintain order. Noting that no precise definition or mechanical application for this test of reasonableness exists, the U.S. Supreme Court established five important factors to evaluate the facts in alleged cases of excessive force.

- 1) What is the severity of the crime at issue?
- 2) Was the suspect an immediate threat to the officers or others?
- 3) Were the circumstances tense, uncertain, and rapidly evolving?

4) Was the suspect attempting to evade arrest by flight?

5) Was the suspect actively resisting arrest?¹

Recognizing the importance of these factors and using the fifth factor as the basis for research, the author analyzed various types of citizen resistance against officers during common types of arrest circumstances. Officers define resistance as verbal or physical behavior that opposes, hinders, prohibits or diminishes the capacity of the officer to verbally or physically control that individual during a lawful arrest. During an arrest, citizens may manifest a range of overt resistive behaviors, including verbal abuse; hostile and threatening demeanor; passive actions (such as actions taken during a protest); actions that allow the suspect to escape the officer's physical control; and physical actions of assault, including serious bodily injury or death.

Research on the use of force has increased significantly over the last two decades. Past researchers primarily focused their efforts toward deadly force and firearm issues due to their high profile, potential for liability, and more accurate record-keeping capabilities that simplified data collection.² In comparison, limited research exists on the nature and extent of less-than-lethal police force.³ Even less research has been conducted into the dynamics of police-citizen encounters and the types of resistive behavior police officers routinely confront during arrest.⁴ Identifying common types of resistance may enhance an officer's ability to better assess an arrest situation and an individual's demeanor in order to determine and justify the appropriate degree of force.

METHODOLOGY

Instrumentation and Data Collection

In order to analyze the variables found in police-citizen encounters, the author designed a subject resistance inventory (SRI). The author used this inventory to collect data on the citizen and the officer and to address three research questions, specifically, during what type of arrest circumstance most officers can expect resistance, what types of resistance officers encounter in these arrest circumstances, and whether the citizen was under the influence or

suspected to be under the influence of alcohol or drugs during the arrest.

The author used six components of subject resistance to identify the types of resistance encountered during arrest. Designed to assist police in assessing citizen resistance during arrest,⁵ a force continuum gives officers a clearer picture of the force that they lawfully may use in a given situation, which they cannot glean by reading statutes or case law.⁶

B. K. Siddle designed a resistance continuum using six generic levels of subject resistance. This continuum assists police administrators in designing a use of force policy and guides officers in making justifiable decisions regarding appropriate levels of force. The resistance continuum also recommends various types of control measures to employ, ranging from verbal control to lethal force. This study compared the FBI's eight arrest circumstance variables⁷ with the following six variables of the SRI:

- 1) Psychological intimidation—nonverbal cues from citizens that indicate their behavior, appearance, body language, and physical readiness (e.g., stance, arms folded across chest, clenched fists, etc.).
- 2) Verbal noncompliance—verbal expressions or responses that indicate the suspect's unwillingness to comply with the officer's commands.
- 3) Passive resistance—physical actions that do not prevent the officer's attempt to control (e.g., sitting in protest, becoming physically limp, etc.).
- 4) Defensive resistance—physical actions that attempt to prevent the officer's control without harming the officer (e.g., pulling away from the officer's grip, twisting away, running away, etc.).
- 5) Active aggression—physical actions of assault with the intent of harming the officer physically (e.g., assaults using personal weapons).

- 6) Aggravated active aggression—actions intended to cause serious bodily harm or death to the officer (e.g., attacks usually involving a weapon).

The police departments participating in this study used this resistance continuum as a matter of practice and policy to help officers select a level of force in either an arrest or confrontation. All patrol officers and their supervisors received at least 4 hours of annual training by certified instructors in the force continuum for 2 years prior to the study. Officers completed a use of force form when they employed force during an arrest. These forms listed the six levels of resistance from the resistance continuum, and reporting officers checked the appropriate level of resistance on the form, as well as provided a narrative description of the force incident.

The SRI used these six types of resistance to identify types of citizen resistance. A supervisor from each department transferred the information from the use of force report to the database. This information included citizen and officer characteristics, all types of

resistance encountered by the officer, the circumstances under which the arrest occurred, and whether the citizen appeared to be under the influence of alcohol or other drugs.

The reporting officers, due to their perceptions, may have reported some arrests in a biased manner. Additionally, for similar reasons, the individuals entering the information could have coded it in a biased manner. Therefore, the findings reflect reported arrest or resistance situations based on the officer's perception of the incident, the reporting accuracy of the arresting officer(s), and the level of accuracy ensured by the individual entering the information. At the end of the study, the author analyzed all of the submissions from each of the departments.

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The use of force by the police remains a critical issue for both the police and the public.
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Other Variables

In 1995, the FBI reported eight common types of circumstances in which officers are assaulted.⁸ The author used these eight arrest circumstances as the variables in which the six types of resistance were examined. The FBI's eight circumstances include arrest situations (i.e., both misdemeanor and felony arrests); disturbance calls; traffic stops; suspicious person calls; calls involving individuals who are mentally unstable; prisoner handling, transport, and custody; ambush situations; and civil disorder. The author also analyzed the variable of chemical influence (i.e., under the influence or presumed to be under the influence of alcohol or other drugs) to determine its relationship between the type of arrest circumstance and the type of resistance.

Sample

Fifty police departments use Siddle's resistance continuum as a matter of policy. The author selected a random sample of 25 of these agencies to participate in the study and sent a letter to each department explaining the nature of the research and requesting their voluntary participation. Seventeen of the agencies agreed to participate, including 12 municipalities, 4 county sheriff's offices, and 1 state police agency. Geographically dispersed, these agencies employ from 100 to 1,000 sworn patrol officers with a majority of the departments employing 326 officers.

FINDINGS

Characteristics of Patrol Officers

Analysis revealed that white officers who are male and have served an average of 7.6 years as police officers remain more likely to experience resistance as compared to other officers. Additionally, white officers accounted for approximately 76 percent of the incidents reported, compared to 22 percent involving black officers and 2 percent involving Hispanic officers. In approximately 68 percent of the

incidents, one officer encountered one citizen; in 24 percent of the incidents, two officers encountered one citizen; and in 8 percent of the incidents, three or more officers encountered one citizen.

Characteristics of Citizens

Analysis showed that patrol officers encountered resistance predominately from male citizens approximately 22 years old. In approximately 89 percent of the incidents, the officer encountered citizens under the influence, or suspected to be under the influence, of alcohol or drugs. Fifty-one percent of the resisting suspects were white, 43 percent were black, and 6 percent were Hispanic. One officer encountered more than one individual in fewer than 10 percent of the incidents.

The study found that officers experienced defensive resistance more than any other type. Resistance during handcuffing and active aggression, where citizens made physical contact with the officer, accounted for other significant types of resistance. The most common form of active aggression toward the officer was a punch, followed by a push and a kick. In approximately 46 percent of the incidents, the subject

confronted the officer with verbal noncompliance to the arrest orders.

The data indicated that during an arrest, an officer may experience more than one type of resistance with no order or pattern. At any time during the arrest, the officer may confront resistance, and depending on the dynamics of the arrest, the resistance may escalate in severity or de-escalate into complete cooperation.

Resistance and Arrest Associations

The author also analyzed the relationships between the arrest circumstance, the six types of resistance, and the influence of alcohol or drugs. The results show that five of the resistance types are associated with six of the eight arrest circumstances. In 27 percent of the arrest circumstances, misdemeanor arrests (e.g., disorderly persons, moving

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violations, etc.) remained the most common types of arrest circumstances in which patrol officers encountered resistance. The study revealed that the second most common type of arrest circumstances were disturbance calls (24 percent), which can involve bar fights, domestic disputes, person with a gun, and the like, followed by traffic stops (15 percent) and felony arrests (14 percent). These four arrest circumstances accounted for 80 percent of citizen resistance.

The author excluded resistance in the form of psychological intimidation from the analysis because it was reported in only eight of the incidents. Disturbance calls proved the strongest correlation with verbal resistance, defensive resistance, and active aggression. This combination suggests that officers will encounter an escalation from verbal statements to higher forms of physical resistance when responding to these calls. The research also revealed strong associations between defensive resistance and verbal noncompliance and misdemeanor arrests, disturbance calls, and traffic stops. A moderate association existed between these types of behavior and felony arrests.

The study found that people who are mentally ill frequently do not resist verbally but exhibit higher levels of physical resistance. This type of arrest circumstance involved defensive resistance, active aggression, and aggravated active aggression and revealed a moderate association with alcohol or drug influence. Felony arrests showed higher levels of physical resistance, including active aggression and aggravated active aggression.

The influence of alcohol or drugs affects the nature of citizen resistance during arrest. Disturbance calls and traffic stops represent two of the most common types of arrest circumstances associated with alcohol or drugs and resistance. Investigating suspicious persons or circumstances also may be associated with subjects under the influence, particularly when the subject exhibits defensive resistance

and active aggression. While alcohol and drugs showed a significant relationship with several types of resistance and arrest circumstances, these findings were based on the perception of the reporting officer. Officers seldom administered a blood or chemical test to measure the actual amount of substance in the body.

DISCUSSION

The influence, or suspicion of influence, of either alcohol or drugs was strongly associated with citizen resistance. This factor becomes important because in 68 percent of the incidents of resistance, one patrol officer encountered one suspect, and the likelihood of potential resistance increases. Strong relationships existed between responding to disturbance calls, conducting traffic stops, and investigating suspicious persons or circumstances and the citizen's being under the influence of alcohol or drugs. These three arrest circumstances accounted for 47 percent of the arrest situations where severe forms of resistance

(defensive resistance and active aggression) occurred.

Not only can these types of arrest situations produce higher levels of physical resistance, but they also can necessitate higher forms of control measures than other arrest circumstances. Therefore, patrol officers should remain aware of the arrest environment and citizen behaviors under these circumstances, cuing in on the demeanor of the suspect.

Resistance also may occur when officers confront a sober person. On many occasions, sober individuals offer resistance, and officers must remain cognizant of their demeanor, stance, and proximity, as well.

This research has found that the types of resistance police commonly encounter occur in combinations or patterns, although not in any sequential order. The most common pattern of resistance involves verbal noncompliance, escalating to defensive resistance, and proceeding to active aggression. This behavior pattern occurred in approximately two-thirds

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of the arrest circumstances. The influence of alcohol or drugs increases the possibility that a citizen will resist physically, challenge verbally, or use profanity against the officer prior to, during, and/or after the officer makes the arrest. Combining these four factors (i.e., verbal noncompliance, defensive hostility, active aggression, and intoxication) in an arrest circumstance will require that the officer escalate the amount of force needed to control the resistant individual. However, not every arrest circumstance will progress in this fashion. Officers may encounter active aggression or other forms of resistance in any manner as different variables enter the arrest circumstance. Officers must realize that the nature of resistance is

dynamic and rapidly evolving and involves various combinations of resistance in a significant percentage of incidents. Therefore, justifying the most appropriate course of action must start with the nature of the arrest, the actions of the suspect, the perception of threat by the officer, and the resources available to the officer to make the arrest. Principles of escalation and de-escalation of force—including verbal diffusion and restraint techniques and the use of proper equipment—remain instrumental to the officer in controlling various forms of resistance.

Interestingly, veteran officers may be more likely to encounter resistance from a citizen under the influence of alcohol or drugs. It appears that over

Types of Resistance and Forms of Active Aggression

Resistance Type	Percentage of Incidents (N=567)
Psychological intimidation	1.4 (8)
Verbal noncompliance	46.2 (262)
Passive resistance	19.6 (111)
Defensive resistance	65.3 (370)
Active aggression	47.6 (270)
Punch	28.1 (76)
Push	24.4 (66)
Kick	21.5 (58)
Slap	17.0 (46)
Headbutt	6.3 (17)
Attempt to disarm	2.6 (7)
Aggravated active aggression	8.6 (49)

(The percentages do not total 100 because one incident could involve different types of resistance.)

time, some veteran officers have become somewhat lax in recognizing and remaining alert to certain body language manifested by suspects prior to physical resistance. In slightly fewer than 50 percent of the incidents, subjects physically attacked officers prior to arrest. Patrol officers who encountered resistance predominately worked alone and may have deviated from established patrol and arrest procedures, which could increase the vulnerability of the officer in the mind of the resisting individual. Citizen resistance and officer seniority also may reflect different patrol assignments and may result from an officer's ability or inability to defuse a potentially resistant encounter.⁹

Although incidents of handling a suspect with a mental illness accounted for 12 percent of the resisting circumstances, officers more likely encountered more severe physical resistance—such as defensive resistance, active aggression, and aggravated active aggression—with such suspects. Drugs or alcohol can have a significant influence in these encounters, as well. Patrol officers working alone who respond to calls of this nature must remain alert to the behavioral cues of the person and request backup when practical. These types of arrest situations remain unpredictable due to the emotional state of the individual, the potential for higher levels of physical resistance, and the presence of alcohol or drugs.

RECOMMENDATIONS

Upon initial contact, officers should keep a safe distance between themselves and the suspect in order to determine the behavior of the individual and to decide a proper course of action if the suspect suddenly attacks them. Due to the unpredictable nature of suspects under the influence and the likelihood that resistance may occur, paying attention to the behavior of the suspect and the dynamics of the arrest circumstance becomes paramount for officer safety.

The development or revision of use of force policies remains a significant concern for the police administrator. Administrators should develop policies that direct officers to use reasonable force based on the resistant behavior of citizens. Police administrators can redesign their current use of force policy by integrating a resistance continuum into the policy. A written policy cannot cover every situation an officer may face, but this study revealed that officers will encounter combinations of resistance patterns in varying arrest circumstances. By integrating a resistance continuum into a force policy, officers can recognize types of resistance that will guide them toward the appropriate force response in an arrest situation. This type of policy also can assist in setting the standard for administrators to use in evaluating proper decision making when officers decide to use force.

Beyond policy implications, study findings demonstrate that veteran officers should receive refresher training in departmental force policy that emphasizes resistance, threat recognition, and appropriate force methods for controlling resistance. Administrators, as a matter of policy, should conduct annual or biannual training for all veteran officers (in a resistance continuum) that will enhance officers' perceptions of resistance and,

in turn, direct them toward appropriate force decision making. Police trainers should design classroom training based on prior arrest reports or actual videotaped confrontations, using this material to evaluate and recognize various types of arrest resistance patterns. Trainers, at a minimum, should structure safe role-playing exercises around resistance encountered during traffic stops, disturbances, and misdemeanor or felony arrests. This type of realistic training will enhance officers' abilities when responding to resistance situations, allowing them to apply objective, reasonable force measures based on the situation. Instructors should videotape the training for later evaluation and discussion in the classroom.

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...an officer may experience more than one type of resistance with no order or pattern during an arrest.

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CONCLUSION

The use of force by the police remains a critical issue for both the police and the public. Inappropriate responses by the police to perceived resistance have led to deaths, citizen and officer injuries, riots, a widening gap of distrust between communities and police agencies, and an increase in criminal and civil liability. Officers must base their use of physical force response on verbal threats and physical behaviors demonstrated by the suspects they encounter.

By implementing a force policy that integrates a resistance continuum and by providing regular training for their officers, departments provide guidance to officers. This two-pronged approach can enhance law enforcement officers' abilities to identify types of citizen resistance and determine appropriate force options. By developing applicable policies and training programs, departments demonstrate their concern for their officers' safety while preparing them to make the best choices possible. ♦



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Blind Reporting of Sexual Violence

By SABRINA GARCIA, M.A., and
MARGARET HENDERSON, M.P.A.



Imagine a woman having car trouble. She accepts a ride with a man, and he rapes her. Afterward, she feels foolish, hurt, ashamed, vulnerable, and frightened. She questions her judgment. Perhaps the rapist threatened to hurt her if she told anyone; perhaps she fears the reaction of her friends or family if they find out about it. Perhaps she has followed enough rape cases in the media to know that victims often are revictimized by the legal and judicial processes.

What if she never tells anyone about the assault? What if the assailant rapes again? Indeed, up to 84 percent of all sexual assaults go unreported,¹ leaving victims with unresolved trauma, assailants unaccountable for their crimes, and law enforcement officials uninformed about the complete picture of sexual violence in their communities.

Now imagine that she has an option that allows her to share critical information with law enforcement without requiring her to

sacrifice the confidentiality she deserves. In fact, an anonymous reporting system enables law enforcement investigators to gain information about crimes of sexual violence that likely otherwise will go unreported, while it allows victims an opportunity to gather legal information from law enforcement without having to commit immediately to an investigation. Victims have a chance to find out what the process is like, what chance they have of filing successful charges,

and what it will be like to work with the investigator. In the long run, victims, investigators, and the community all benefit from blind reporting.

Benefiting from a Blind Reporting System

According to the FBI, only 16 percent of sexual violence victims report the crime to law enforcement.² Victims of stranger rape remain more likely to report the crime than victims who get raped by people they know. Even victims who report the crime often choose not to report the circumstances of the assault, the identity of the assailant, or the nature of the violence. As a result, when law enforcement officers review the reported incidents within the community, the numbers reflect only a fraction of the violence that actually occurs. Law enforcement may not have the most important information about local offenders' patterns of behaviors or the characteristics of emerging high-risk situations or locations. Therefore, law enforcement benefits from accepting blind reports because investigators have a clearer picture of sexual violence in their communities. Moreover, when investigators can pinpoint dangerous scenarios, they can better educate the public, thus improving community relations and possibly garnering information on other neighborhood crime problems.

Blind reporting also provides other benefits. In the immediate aftermath of a trauma, a victim simply may not have the emotional or physical capacity to make a commitment to a full investigation and a court trial. The victim may equate



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talking to an investigator with losing control again, a repeat of what happened during the sexual assault. Having evidence collected, risking a breach of confidentiality, being disbelieved or criticized by others, or enduring a cross-examination by a hostile defense attorney all may blend together as one potential threat to the victim. Yet, if the process feels safe to victims, they will be more likely to cooperate with a formal investigation. Blind reporting lets victims take the investigative process one step at a time, allowing time to build trust between the investigator and the victim and making the whole process feel more manageable.

Describing the assault to a law enforcement professional gives the victim an opportunity to affirm that the assailant did, in fact, commit a crime, which helps in the personal process of healing from the trauma and can help build the victim's confidence in filing charges against the rapist. At the same time, the

investigator gains the opportunity to provide the appropriate community services of sharing information, answering questions, and making referrals for services to such agencies as health clinics or rape crisis centers.

In some states, victims who file blind reports can receive rape victim's assistance, which provides compensation for the costs associated with an emergency rape examination or other related expenses.³ Some victims may be reluctant to have medical evidence collected because they cannot afford the \$600–850 expense for the emergency room or because they do not want the treatment to show up on insurance and billing records.

Even victims who decide not to pursue legal charges alone may come forward willingly to support other victims of the same assailant. Victims who initially hesitate to file a formal report at the time of the assault may change their minds when given the option of supporting

or being supported by other victims of the same assailant. The testimony of a prior victim can help the investigator build the case and the district attorney prove it by establishing a pattern of behavior by the accused.

Establishing a Blind Reporting System

A blind report requires the same sensitivity and patience from officers that a formal police report does. Investigators achieve successful reporting by granting victims the respect and dignity given to any crime victim and, in this case, anonymity, as well. To develop a successful blind reporting system, law enforcement agencies should

1) *establish a policy of confidentiality.* The key to a successful blind reporting system is building trust between the rape victim and the investigator, who must understand that the assailant betrayed the victim's trust in people. The law enforcement agency must define clearly and uphold unconditionally its policy of confidentiality.

2) *accept the amount of information offered.* Investigators must allow victims to disclose as little or as much information as they desire. By asking victims to clarify particular points, investigators let them choose to do so. In contrast, putting pressure on victims to convey more information than they want may cause a breakdown. Any amount of information given, even if less than the

investigator prefers, represents more than would otherwise be available and may prove useful in building other cases.

3) *accept the information whenever the victim might offer it.* A delay in disclosure is not an indicator of the validity of the statement. Rather, feelings of self-blame, shame, isolation, fear, or denial may motivate victims to remain silent about their assaults. Yet, when victims have support from people who validate that the assault was, in fact, a crime, they become more likely to choose

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The key to a successful blind reporting system is building trust between the rape victim and the investigator...
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to report the assault immediately. Otherwise, victims may wait until they begin to heal or until they gather the personal strength necessary to trust law enforcement with their disclosures. Other victims may come forward only when they hear of a similar crime occurring or of the same assailant hurting someone else.

4) *accept information from third parties.* Some victims

may be so afraid of losing confidentiality that they will disclose information only through a third party, such as a rape crisis center or battered women's shelter. This option allows the victim to maintain a comfortable distance from the law enforcement process while still conveying information to the appropriate officials.

5) *clarify options for future contact.* Victims may prefer to be contacted again under specific conditions or not at all. For example, if the offender later is charged with another assault, would the victim want to be notified to consider filing a formal report? Would the victim offer additional clarification if doing so became critical for another case? On the blind report, investigators should document where, how, and under what circumstances the victim may be contacted. The report should specify clearly whether officers can leave messages on answering machines or with other people who may answer the phone.

6) *maintain blind reports in separate files.* The blind report is not an official police report. Keeping it in a separate file within the investigative division or with a designated sexual assault investigator avoids inappropriate use of the information it contains and maintains the confidentiality promised the victim. The blind

report should not become available to the records division until the victim chooses to file a formal report. Until that time, only officers assigned specifically to sexual assault cases should have access to the blind report.

7) *categorize the information contained within the blind report.* Analyzing the information in the report helps the investigator identify specific case and offender characteristics—such as names of perpetrators, locations and times of assaults, types of lures, traits of offenders, and processes of victim selection—and categorize this information in a way that eases retrieval and helps match case aspects to other investigations.

Overcoming Resistance to Blind Reporting

Law enforcement agencies initially may feel inclined to dismiss the benefits of establishing a blind reporting system solely because of the time investment it requires. Yet, the 1 hour or so that it takes to talk to a victim and complete a 2-page report pales in comparison to the potential benefits. Sex offenders tend to be repeat offenders. Depending on the typology of the offender, behavior may escalate in intensity and frequency over time. Building a case against an assailant becomes much easier when officers have information about three incidents instead of one or if officers recognize that the actions of a nameless stranger seem similar to those described by another

The Benefits of Blind Reporting—

- builds trust between officers and victims, who may decide to proceed with a full investigation;
- provides information about the patterns of behavior of repeat offenders, which can be used to identify assailants or build cases for court;
- presents a better view of the degree of sexual violence in the community by providing more information on more assaults;
- may help prevent crime by educating the public about high-risk scenarios or locations gleaned from both blind and full reports; and
- garners trust in the community, possibly allowing officers to gain vital information on other cases.

victim who provides identifying information.

The following real-life example demonstrates how a blind report may aid an investigation of this type. Law enforcement became aware of a series of rapes in town. The assailant selected his victims carefully. He preferred white, blond college students in their 20s. Climbing through windows in their homes, he assaulted the women while they slept. After overpowering the victims and raping them, he wiped away his seminal fluid with any towel available, then ordered the victims to shower, keeping their faces directed away from him, while he supervised the process. The victims identified him as a man in his late 20s to mid-30s.

The time of the assaults (5 to 7 a.m.) suggested that the rapist did shift work. His careful actions to remove bodily fluids and hair indicated that he had knowledge of evidence-collection techniques, suggesting a background in a medical field. The personal mannerisms and

verbal expressions he used indicated he had spent time in the military or law enforcement.

About the same time, the victim of an acquaintance rape came in to make a blind report. She was afraid to prosecute, primarily out of fear of retaliation from the assailant, but also because she did not want her family to learn that she had used drugs with the assailant. She made the blind report, providing identifying information on the suspect, including his name and where he worked.

He did shift work in the medical field, his background included a stint in the military, and his age fell within the range suggested by the serial rape victims. He had no criminal record. Police officers did not have a photograph of the subject, so they took one of the serial rape victims to the suspect's place of employment, and she picked him out in the parking lot during a shift change. Police then brought the suspect in for questioning. He denied committing the rapes.

Unfortunately, insufficient DNA existed to confirm or deny a match and not enough other evidence was available to support prosecution. Interestingly, the rapes stopped after this confrontation, despite the lack of confirmation that he was, indeed, the assailant. Although this suspect got away, the blind reporting process can help capture others in a similar manner.

Conclusion

Sexual violence cases require special handling. Victims may be hypersensitive to real or perceived threats to their safety or their confidentiality. At the same time, investigation and prosecution invite threats to confidentiality and the physical and emotional safety of the victim, and victims who disclose their experience open themselves up for additional violations. As a result, many victims choose to focus on their own healing rather than on trying to achieve justice in systems that historically have not been supportive of victims of sexual violence. To overcome the threat that reporting represents to victims, officers have to work harder to make the reporting process feel safe.

In addition, ensuring the safety of the community represents the primary goal of law enforcement. Law enforcement agencies that remain ill-informed about the true crime picture in their communities are ill-equipped to provide appropriate services. In order for the legal system to hold criminals accountable for their actions, it first must discover the crimes that they have committed. Blind reporting can give victims of sexual violence, and other sensitive crimes, a safe haven

to file a report at the same time that it removes that refuge from their assailants.

All officers want to close out their cases, both for their own satisfaction and to meet the department's need to document its workload. Investigators who work in an environment in which effectiveness is measured only by immediate quantifiable gain may be reluctant to institute a blind reporting system. In reality, they will spend time taking blind reports that will not result in anything more than witnessing the victims' accounts of their assaults. Not only is it of no immediate benefit to them, but the experience may disturb them as much as it does the victim.

However, some blind reports become full reports and lead to investigations and successful prosecutions. Others provide useful information for investigation in other cases. All of them help officers build relationships and gain a true picture of sexually violent crimes committed in the community.

Officers who accept the potential for delayed gratification may become the most ardent supporters of blind reporting systems. The payoff for the effort eventually will be demonstrated through improved community relations and, over time, more effective investigations and prosecutions. ♦

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Teaching Criminal Justice Ethics: Strategic Issues, edited by John Kleinig and Margaret Leland Smith, published by Anderson Publishing Co., Cincinnati, Ohio, 1997.

The results of a recent International Association of Chiefs of Police needs assessment regarding the perceived justification for and effectiveness of ethics training for law enforcement officers indicated that significant interest exists in the topic. Yet, some critics of ethics training express the belief that "tigers can't change their stripes," or they wonder why law enforcement agencies hire supposedly ethical individuals then presume to teach them ethics.

The editors of *Teaching Criminal Justice Ethics: Strategic Issues* address these and related questions and concerns using relevant research and academic analysis. Many of the questions addressed and answered—often from both sides of the issue so that readers may choose—remain important for law enforcement practitioners, academy trainers, and executive managers alike. Some of the questions addressed include: why teach ethics to individuals hired to police ranks because, among other reasons, background investigations show them to have reputations for ethical behavior? Does a sufficient distinction exist between basic morality and law enforcement ethics to justify expenditures of time, money, and effort by already-burdened agencies toward an understanding and genuine practice of the latter? Will such emphasis make a difference? Once adapted within curricula, how should law enforcement ethics be structured, what should be pre-supposed and emphasized, and to what end?

Admittedly, *Teaching Criminal Justice Ethics* analyzes most of these

issues from the point of view of college/university departments that have a bit more luxury of time and reflection than fast-paced, results-oriented law enforcement academy programs. The issues and proposed resolutions are nonetheless extremely well reasoned and explicated and, therefore, should be reviewed by managers and practitioners within law enforcement academies.

The editors set the tone for this collection by stating that “a well-executed course [in law enforcement ethics] could provide *measurably* heightened sensitivity, improved reflection, and *better performance*” (emphasis added). This is precisely what the public rightly demands of its officers and agents, what the media and oversight groups pounce on if they fail, and what the contributors to this edition provide with varying degrees of success. For example, although law enforcement relies heavily on informants, some of whom have criminal backgrounds, officers cannot merely use and discard them or otherwise violate their dignity. Although this book does not draw the line between such important performance issues and the more significant moral concerns of informant handling, it can help practitioners better understand how to structure police ethics courses so that students, officers, and agents will come to know, for example, what constitutes appropriately aggressive, productive, and ethical informant development.

Some of the book’s more abstract discussions may be of little benefit to the academy instructor. However, without exception, the thematic articles warrant close review. Michael Davis’ “Teaching Police Ethics: What to Aim At?” offers particular insight into such issues as what the FBI (borrowing from the Australians) refers to as the “golden thread” approach to teaching ethics, which requires weaving an ethical emphasis or scenario, practicum, or something of the sort into each instructional component. This “pervasive method,” as Davis calls it, coupled with a freestanding ethics course, represents a dual

approach that the FBI and other agencies have adopted already. In addition, Professor Joan C. Callahan’s important contribution to this collection provides insight for those setting up or refining academic ethics components in their academies.

Many recent law enforcement ethics initiatives, to include those structured by the FBI, U.S. Customs, and the New York Police Department, are developing instructional techniques and curricula in concert with behavioral science perspectives and findings. *Teaching Criminal Justice Ethics* speaks, albeit indirectly, to this trend. Serious police managers who want the best results from their integrity initiatives should read carefully Professor Elizabeth Reynolds Welfel’s “Psychology’s Contribution to Effective Models of Ethics Education in Criminal Justice.” Her treatment of mistakes by professionals, especially those in law enforcement, is excellent: “Truly ethical professionals will not be perfect persons, but they should be equipped to take responsibility for their mistakes.” On first reading, a truism, perhaps, but Welfel chooses her words carefully and then unpacks them. How does law enforcement “equip” its ranks to tell the truth and to understand the limits of dedication and loyalty, while not “denying or running away from their problems?”

Indeed, this collection examines what are perhaps the two most important factors that contribute to ethical conduct in law enforcement, how agencies ethically equip their personnel and how they ethically structure their organizations. Law enforcement administrators owe it to the profession to seek out and put into practice much that this timely release offers.

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Policing the Internet

By SCOTT SULLIVAN, J.D.

Children grow up hearing the warning “Don’t talk to strangers,” and as adults, they usually remain wary of people they do not know. Yet, every day, adults and children alike invite strangers into their home. By signing on to the Internet, they give strangers the opportunity to crash their computers, access and misuse personal information, manipulate their finances, and threaten their safety. Moreover, as the Internet grows and becomes more a part of individuals’ daily routines, their

potential exposure to Internet crime increases.

When computer users connect to the Internet, they link their computers to a server’s computer, which, in turn, connects to thousands of other servers. These computers provide the framework of the Internet. As millions of users sign on to their respective servers and transmit and receive bits of information, they create a maze of connections comparable to a web. From this analogy comes the concept of the World Wide Web.

From a criminal’s point of view, the Web offers anonymity and a buffer from getting caught, which, in turn, creates an opportunity for the “perfect” crime. Indeed, the Internet has become a breeding ground for crime. Thieves transfer funds from victims’ bank accounts to their own. Vandals send computer viruses to destroy computers. Pedophiles exchange child pornography with others or chat with minors, building their trust so they can set up meetings under false pretenses. These offenses represent

merely a few of the crimes currently being committed on the Internet. Media headlines such as “The Pirates of the Internet,”¹ “Prosecutors Put Sting into Online Search for Pedophiles,”² and “Defense Drops Bombshell in Cybersex Case,”³ serve as evidence of the peril computer users face daily. The perpetrators are men and women from all walks of life. All they need to commit their acts is a computer, an online service, and a victim.

As history has proven, freedom and technological and societal advances usually come with a price. For example, the advent of the automobile offered a new freedom of travel and connected the nation like never before. However, along with these advantages came many new, unforeseen risks and dangers. To address these problems, the government created volumes of laws and regulations and a myriad of commissions and bureaucracies.

Similarly, the popularity of the Internet has spawned online dangers not previously foreseen. While the debate continues on whether new laws and commissions should address Internet crime, law enforcement does not need to wait. Instead, law enforcement agencies can attack new high-tech crimes with familiar, well-established laws.

COMBATING INTERNET CRIME

Based on a common belief system, state and federal criminal laws often overlap and complement one another. Accordingly, every state penal code and many federal statutes address most crimes. While crimes differ in name, threshold, or

degree of punishment, the culpable behavior remains the same.

For example, larceny represents a crime in every criminal code. Accordingly, whether the object of desire is a car, money, or an article of clothing, the theft represents a violation of a larceny statute. But what if the thief steals money from a bank account using the Internet? Vladimir Levin did just that when he used the Internet to access Citibank customers’ identification codes and passwords and transfer \$10 million dollars to his own accounts.⁴

Although no criminal statute expressly prohibits Internet larceny, the FBI investigated the crime and tracked down Levin. Federal prosecutors for the Southern District of New York indicted him under a criminal statute that long predates the Internet—bank robbery. After an international effort to bring him to justice, Levin was extradited to the United States from Great Britain and pleaded guilty.⁵

When the federal bank robbery statute does not cover Internet larceny, federal prosecutors can choose from an arsenal of applicable criminal statutes. For example, the federal Wire Fraud Act proscribes using the wires to further a fraudulent scheme.⁶ This statute applies to most Internet larcenies. Although the interstate nature of Internet crime usually lends itself to federal prosecution, federal prosecutors still may decline to prosecute. When they do, state prosecutors need to take the lead in fighting Internet crime.

Congress has created many laws designed to protect organizations engaged in interstate commerce, and federal law enforcement uses its resources to investigate and prosecute criminals who violate these laws. With the advent of the Internet, federal law enforcement’s responsibilities have increased significantly. And, increasingly, the federal government has had to protect itself from cyber criminals. For

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Many law enforcement agencies have recognized the increased responsibility that the Internet has bestowed on them

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example, in February 1998, the U.S. Department of Defense admitted that unclassified computer networks had been under attack by cyber hackers. The deputy secretary of defense characterized these recent cyber assaults as “the most organized and systematic attack the Pentagon has seen to date.”⁷

As the number and types of crimes committed online and facilitated by the Internet continue to grow, state and local law enforcement must join the fight against cyber crime. Like their federal counterparts, state and local officers can apply their penal codes to prosecute Internet criminals. In some cases, applying these laws to the Internet becomes simply a matter of creative analysis. For example, a crime such as criminal mischief, which prohibits a person from intentionally damaging another person’s property,⁸ does not specifically address electronic means. Still, online vandals who send individuals viruses that damage their computer hardware or software are guilty of criminal mischief, with the value of the computer or the extent of the damage caused determining the extent of culpability. Just as the law would hold a person responsible for smashing someone’s computer with a sledgehammer, it would do the same if someone destroyed a computer with a virus—the equivalent of an electronic sledgehammer.

On the other hand, some laws apply directly to Internet crime. For example, the crime of harassment, in its most basic form, proscribes intentional harassing, annoying, threatening, or alarming behavior,⁹ and legislators have provided for

increased sentences where the harassment occurs electronically.¹⁰ Although such laws predate the Internet, they can be applied to online harassment. When individuals receive online threats, they can file harassment complaints with the local police. If the threats are serious and credible, the police, if they have Internet capabilities, can investigate the source of the threat and charge the perpetrator with the crime of aggravated harassment. Unfortunately, in jurisdictions where departments are unprepared to handle Internet crime, offenders remain unpunished.

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...in jurisdictions where departments are unprepared to handle Internet crime, offenders remain unpunished.

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Patrolling the Internet

Officers on the beat do a great deal more than merely make arrests. They take and investigate complaints and reports of suspicious activity, provide public safety information, and act as deterrents against crime. Accordingly, the Internet needs beat officers. Contrary to the Orwellian image of Big Brother, officers on the Internet would act as the liaison between the online public and the law enforcement agency, policing the Internet in much the same way as they police the streets.

Many law enforcement agencies have recognized the increased responsibility that the Internet has bestowed on them. At the same time, they find that they can use the Internet as a tool for fighting not only Internet crime but other crimes, as well. The law enforcement Web page represents perhaps the best and most common example of this trend. Online users can connect to the Web page to report both Internet and other criminal activity. In turn, law enforcement agencies can post public safety information and communicate with online users. Moreover, law enforcement’s visible presence on the Internet enhances public safety awareness and may deter crime.

Internet officers also can use traditional law enforcement tools to conduct Internet crime investigations. Search warrants can serve as an effective means to track down online users. Commercial Internet providers keep records of all online transactions that come through their servers. So, when one user sends an e-mail message to another user, the service provider of each user will have a record of where the e-mail came from and where it was sent. Depending on the law in their states, officers can obtain consent from the sender and/or the recipient or obtain a warrant or grand jury subpoena to access the records. In one case, both the prosecutor and the defense attorney sought access to e-mail messages to support their arguments. The prosecutor wanted to use the e-mail to help prove that the defendant sexually assaulted a Bernard College student. The defense wanted to use the e-mail to prove consent.¹¹

In some states, Internet service providers are obligated by law to turn over records to law enforcement upon request or when they become aware of online criminal activity.¹² Either way, Internet officers can rely on a number of methods to track down the perpetrators of illicit Internet activities.

In addition, Internet officers must patrol the Information Superhighway, and a number of agencies are doing just that. Still, according to one source, only federal law enforcement agencies and the New York City Police Department "maintain squads of investigators to ferret out computer crimes."¹³ These full-time units investigate and surf the Web for crime 24 hours a day.

Child pornography and pedophilia represent a mere sampling of the crimes that these squads target. In one instance, investigators from the district attorney's office in Westchester County, New York, posed as young teens in online chat rooms. Their interaction with adults led to solicitations and arranged meetings. As a result of this online law enforcement effort, investigators arrested four pedophiles and are investigating more.¹⁴

CONCLUSION

Law enforcement is springing into action to fight Internet crime. Federal agencies have set the tone, with the FBI, U.S. Secret Service, and U.S. Customs Service heading the Internet crime-fighting initiative. Many state and local agencies are joining in by implementing Internet programs and giving their personnel online law enforcement



training. However, the true effort comes from agencies that have dedicated resources to maintaining online crime-fighting units. They have acknowledged that law enforcement must enter the 21st century as an online force.

The future of the Internet holds many uncertainties. Who, if anyone, will control it, how online users will pay for their access, and to what degree society will incorporate the Internet into everyday life remain unclear. But one thing is certain, Internet crime represents a real and serious threat to the well-being of the public. Ultimately, the extent of the threat posed by Internet crime will be measured by the abilities and successes of the officers charged with combating it. ♦

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Focus on Investigations

Investigative Planning Creating a Strong Foundation for White-collar Crime Cases

By Arthur L. Bowker, M.A.



Few individuals would feel comfortable constructing a building without blueprints or plans. This holds particularly true when the structure is complex, will take years to construct, and will be expected to stand the test of time. Construction experts know that without thorough planning, they may miss or unnecessarily repeat important steps.

Ironically, many law enforcement officers have no qualms about hastily building cases with little or no planning, expecting their investigations to weather attacks by defense counsels and survive years of appellate review. And, given their complexity, white-collar crime cases especially require thorough, documented investigative plans.

THE NEED FOR AN INVESTIGATIVE PLAN

Consider the following scenarios:

A detective receives an embezzlement allegation from a company's officers. He promptly submits suspected checks for analysis. Over the next 2 years, he directs his efforts only at getting the suspect to

take a polygraph and interviewing the suspect's boyfriend, who is rumored to have received money from the suspect. The statute of limitations finally tolls on the crime.

Another detective has spent 6 months investigating an insurance fraud case. She has interviewed hundreds of victims of an unscrupulous insurance agent. She has written up many of the interviews, while others remain in dictation, and still others only exist as her rough notes. Unexpectedly, she dies, and the case gets assigned to another detective. Before proceeding, the new detective first must determine what records still need to be examined and who needs to be interviewed. The investigation is delayed several months during this transition period.

A third detective investigates a kickback case. For 3 months, he interviews witnesses and examines financial records. He writes a final report and refers the matter for prosecution. He subsequently receives a call from the prosecuting attorney, who notes that witness interviews and financial records examined do

not fully substantiate the major offense cited in the report. The detective must reinterview all witnesses regarding the unsubstantiated issues.

Had these fictional detectives devised written investigative plans, many of these problems could have been minimized, if not eliminated entirely. Documented plans provide a frame of reference for the investigation to ensure that all aspects of the crime are covered in a timely manner. Specifically, a properly formulated plan

- focuses the investigative process to ensure that all offense elements are addressed;
- limits unnecessary procedures and step duplication;
- coordinates the investigative activities of numerous personnel on large cases;
- provides stability to the investigation if staff changes occur;
- enhances communication with prosecuting officials by providing an outline of the investigation and identifying strengths and weaknesses in the case;
- provides a framework for the final report; and
- becomes a training aid for inexperienced staff members.

It takes no special skill to create and follow an investigative plan; rather, investigators must have a working knowledge of the statutory elements of the crimes under their agency's purview; any special penalty enhancements for certain offenders, offenses, or victimizations; and basic investigative techniques. Investigators must keep the plan objective and not reflect that they already have established the suspect's guilt.

COMPONENTS OF AN INVESTIGATIVE PLAN

A written investigative plan contains four basic components. These are the predication, elements to prove, preliminary steps, and investigative steps.

Predication

An investigative plan must include a predication, or brief statement justifying why the case initially was opened. Predications have three features: the basic allegation, the source of the allegation, and the date the allegation was received. For example, after receiving an embezzlement allegation, the investigator might write this predication: "On June 1, 1998, received information from ABC Union Auditor Jane Smith that she discovered that former bookkeeper Tom Roberts had written \$20,000 in unauthorized checks to himself during 1997."

In short, predications clearly identify what particular offense(s) may have been committed. This initial step gives investigators a foothold for the elements they must prove in order to establish that a criminal act has occurred.

Elements to Prove

The plan must reflect all of the elements that the investigator needs to prove for the case to be prosecuted successfully. This component must clearly reflect what is needed to establish a criminal violation, thus focusing the investigation and providing a framework for the steps that follow. At a minimum, this component should contain all of the statutory elements and any special jurisdictional issues, such as venue and statutes of limitations. Special penalty enhancements represent another area that this component might include, particularly for federal offenses.¹

The following example illustrates the possible elements to prove for a federal investigation of union embezzlement.²

- 1) The victim was a labor organization as defined by the Labor Management Reporting and Disclosure Act of 1959 (as amended).
- 2) The suspects were officers and/or employees of the labor organization.
- 3) The suspects unlawfully took funds and/or assets belonging to the victim.

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...a properly formulated plan focuses the investigative process to ensure that all offense elements are addressed....

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Functions of an Investigative Plan—

- focuses the investigative process to ensure that all offense elements are addressed;
- limits unnecessary procedures and step duplication;
- coordinates the investigative activities of numerous personnel on large cases;
- provides stability to the investigation if staff changes occur;
- enhances communication with prosecuting officials by providing an outline of the investigation and identifying strengths and weaknesses in the case;
- provides a framework for the final report; and
- becomes a training aid for inexperienced staff members.

4) The suspects converted the assets or funds taken to their own, or someone else's, personal use.

5) The violation was willful.

6) The violation occurred within the last 5 years.

The plan must clearly reflect the issues that must be proven but remain fluid enough to change if the investigation leads in another direction. Thus, any modification to the initial plan should not be a major overhaul but merely should represent a refinement as the investigation develops.

For cases involving multiple violations, investigators should outline only the most serious offenses and refer to the others as violations that also may be considered during the investigation. In any case, delineating the elements to prove and other important issues, such as sentencing enhancements, helps investigators identify the steps they need to take to complete the investigation. These steps encompass two types: preliminary and investigative.

Preliminary Steps

Preliminary steps represent the methods the investigator will employ to obtain basic background information on the victim, the complainant, and the suspects. These include such procedures as reviewing files on prior allegations or investigations; conducting an in-depth interview of the complainant; obtaining and reviewing public records, such as incorporation papers or financial reports filed with government agencies; and conducting a criminal background check of pertinent parties. Typically, step completion

under this component does not require a great expenditure of time or personnel.

Investigative Steps

The investigative plan also must include the steps necessary to resolve the issues and complete the investigation. These investigative steps lay out the general parameters needed to establish that a crime has occurred and include who will be interviewed and what records will be obtained and examined. Investigative steps should parallel the elements that need to be proven. For example, in an embezzlement case, the investigator would need to examine bank records and interview bank tellers to prove that the suspect converted agency funds to personal use. For other investigations, a partial list of applicable steps includes interviewing victims; serving subpoenas; obtaining and serving search warrants; gaining access to financial records; examining records; identifying and interviewing key witnesses; obtaining exemplars; forwarding questionable documents for analysis; identifying and interviewing suspects; briefing prosecuting officials; and preparing a final report.

In large cases involving multiple investigators, individual steps could be assigned to specific individuals, who become responsible for their completion. In addition, when investigators need to interview numerous witnesses, they can compile an itemized list, keep it separate from the investigative plan, and merely refer to the list in the plan. Specifically, the investigative step would read "identify and interview key witnesses (see list)." As a general rule, the plan lists the steps to be completed in generic terms

without including such specifics as names. However, the investigator could modify the plan later to incorporate such information.

HELPFUL HINTS

Investigators should seriously consider keeping copies of investigative plans on computer. Once they develop a plan for a particular case, they can continue to use it as a model, or boilerplate, for similar cases. Good boilerplate plans greatly reduce the initial time needed to develop new plans for offenses investigated frequently. Storing the plan on computer also allows investigators to easily note when they complete or modify steps or procedures.

Still, a hard copy of the plan should remain in the case file. By consulting the plan on a periodic basis, the case officer keeps the investigation on the right track. As important, anyone reviewing the file can determine the status of the investigation.

CONCLUSION

The word "routine" is fast disappearing from the law enforcement lexicon. Even investigations that once seemed simple are growing increasingly complex, especially in the area of white-collar crime.

Without a frame of reference, investigators may find themselves becoming overwhelmed by these often-complicated investigations. Documented plans focus an investigation from the start while providing a blueprint for investigators to follow. Using written plans, law enforcement officers provide a firm foundation for the investigation and prosecution of white-collar offenders. ♦

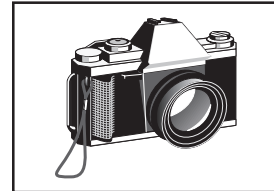
Endnotes

¹ Felony sentencing in the federal system is governed to a large extent by the U.S. Sentencing Guidelines. Each offense has a base offense level assigned to it, with points being added or subtracted for aggravating or mitigating circumstances present in the offense conduct. For example, pursuant to section 3B1.3, two points are added to the base offense level for offenders who violate a position of trust during the commission of their crimes. The higher the offense level, the more severe the penalty the individual faces. The second part of the equation factors in criminal history. Also, the more points assigned for criminal history, the harsher the penalty.

² Union embezzlement violates 29 U.S.C. § 501(c).

Mr. Bowker is a U.S. probation officer for the Northern District of Ohio in Cleveland.

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Drug Conspiracies

By EDWARD M. HENDRIE, J.D.

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drug laws.¹ Where there is an apparent agreement between a police informant and a suspect to violate the drug laws, such an agreement will not constitute a conspiracy because the informant is not being sincere.² In that case, there is not a true meeting of the minds between the informant and the suspect; the informant actually is trying to thwart the criminal enterprise. There must be at least two suspects who have criminal intent entering into an agreement in order for that agreement to be a conspiracy.

If a suspect is involved in a conspiracy and then decides to cooperate with the police, perhaps because he or she has been arrested, the pre-arrest agreement with the other suspects would constitute a conspiracy.³ Any future agreements, on the other hand, between the newly cooperative informant and any single suspect would not constitute a conspiracy but could be used as evidence to prove a past or present conspiracy between the suspect and other conspirators. Increasingly though, states are enacting unilateral conspiracy statutes that allow a suspect to be charged with conspiracy if the suspect agrees with an informant or undercover agent to commit a crime.⁴

An agreement between two or more people to commit a crime constitutes a conspiracy. Illegal drug trafficking commonly involves the agreement of several people working in concert to manufacture and distribute drugs. In order to best address the problem of drug trafficking, police

and prosecutors must recognize and properly charge drug conspiracies.

Sincere Agreement

Most states follow the federal rule that in order for suspects to be properly charged with a drug conspiracy, they must sincerely agree with each other to violate the

Impossibility

Drug traffickers can be charged and convicted of conspiracy even though they have not completed the drug crime they agreed to commit. This is true even if the police, by

arresting the conspirators, make it impossible for them to complete the offense. The courts have defined two types of impossibility—factual impossibility and legal impossibility. A crime is factually impossible if the conspirators would be thwarted by the prior intervention of the police. It is not a defense to conspiracy that the crime that the conspirators agree to commit was factually impossible to complete.⁵

A crime is legally impossible to commit if the planned conduct of the conspirators is not a crime. The general rule is that legal impossibility is a complete defense to a charge of attempt. There is a split in the courts, however, as to whether legal impossibility is a defense to conspiracy.⁶ Of course, it would be a manifest injustice if a court convicted someone of conspiracy for agreeing to do something that is not a violation of the law.

Overt Acts

In most cases, persons involved in a conspiracy will take steps to commit the agreed-upon crime. The common law rule, however, is that it is not required that the government prove that the suspects committed an overt act in furtherance of the conspiracy in order to prove the crime of conspiracy. If a conspiracy statute does not expressly require an overt act, then a court likely will follow the common law rule that an agreement alone will be sufficient to prove the conspiracy. For example, the federal drug conspiracy statute, 21 U.S.C. § 846, simply provides that those who conspire to violate the federal drug laws are to be punished to the same degree as they could be for the drug crime

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Drug traffickers can be charged and convicted of conspiracy even though they have not completed the drug crime they agreed to commit.
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they agree to commit. In *United States v. Shabani*,⁷ the U.S. Supreme Court ruled that because § 846 does not expressly require evidence of an overt act in order to prove a drug conspiracy, the U.S. Congress intended to codify the common law standard that an agreement alone is sufficient to prove conspiracy. The general federal conspiracy statute, 18 U.S.C. § 371, on the other hand, expressly requires proof of an overt act in furtherance of the conspiracy. Regardless of the language in a particular statute, as a practical matter, overt acts are the most convincing evidence of the sincerity of an agreement. It would be a rare conspiracy prosecution that did not involve overt acts in furtherance of the conspiracy.

Wharton's Rule

As a general rule, individuals can be charged and convicted of both conspiracy and the completed crime that they agreed to commit. There is, however, an exception to that general rule. The exception, known as Wharton's Rule, provides

that a conspiracy cannot be charged if the commission of the substantive offense requires concert of action between two people.⁸ For example, in order to distribute illegal drugs, there must be both a deliverer and a recipient of the drugs. Under Wharton's Rule, if two people engage in a one-time sale of a small quantity of an illegal drug, the buyer and seller cannot be charged with conspiracy.⁹

There is, however, an exception to Wharton's Rule. If an additional party who is not necessary for the commission of the offense is involved in the transaction, then the rule will not preclude a conspiracy charge.¹⁰ For example, if a drug trafficker employs another to assist him in a drug sale to a buyer, Wharton's Rule would not preclude the assistant from being convicted for conspiracy.¹¹

Another way to defeat a Wharton's Rule defense is to establish sufficient evidence that the buyer and seller have a long standing criminal relationship that involves repeated sales of large quantities of illegal drugs. Such facts

would be circumstantial evidence that there is an agreement beyond a simple one-time transaction. Consequently, the buyer and seller could be charged with conspiracy in addition to the substantive drug charge.¹²

Some courts do not apply Wharton's Rule at all to drug cases; they permit a buyer and seller to be convicted of conspiracy even though there is not a third party present or any other exception to the rule.¹³ Those courts rely on the U.S. Supreme Court decision of *Iannelli v. United States*,¹⁴ in which the Court stated that Wharton's Rule is merely a judicial presumption that is to be applied in the absence of legislative intent to the contrary. For instance, in *United States v. Bommarito*,¹⁵ the U. S. Court of Appeals for the Second Circuit determined that because the federal drug conspiracy statute, 21 U.S.C. § 846, provides that it is a violation to conspire to commit *any* of the crimes under Title 21, the U.S. Congress did not intend that conspiracy charges under § 846 were to be limited by Wharton's Rule.

Circumstantial Evidence

In order to prove a conspiracy, it is not necessary to have direct evidence from a witness who was present and actually heard the criminal agreement. A conspiracy can be established through circumstantial evidence. For example, in *United States v. Iglesias*,¹⁶ the defendant handed a white object to a person on a dry docked boat as others on the boat craned their necks and looked around. A later search of the boat by U.S. Customs agents found that it contained 521

kilograms of cocaine wrapped in white burlap bags. The court found that sufficient evidence existed to support the defendant's conviction for conspiracy to possess with intent to distribute cocaine.

In *United States v. Alvarez*,¹⁷ the entire bench of the U.S. Court of Appeals for the Fifth Circuit ruled that, based on circumstantial evidence, the defendant, Alvarez, was guilty of conspiracy to import marijuana into the United States. An illegal drug supplier arrived in Miami from Colombia and stayed at

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Mere presence during conspiracy discussions is not sufficient to implicate a person in the conspiracy.

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Alvarez's house. Alvarez arrived with the supplier at a meeting with undercover DEA agents. As Alvarez was loading some appliances onto the undercover plane, one of the DEA agents asked Alvarez if he would be present at a remote landing strip to help unload the plane when it returned. Alvarez nodded his head indicating that he would be there. The plane was to return with the marijuana from Colombia, but no mention of the illegal cargo was made to Alvarez by the DEA agent who asked him the question. As Alvarez and the others were leaving, DEA agents arrested

them. The *Alvarez* court ruled that absent Alvarez's head nod, there would have been insufficient evidence that Alvarez was involved in the conspiracy. His agreement, however, to be available to off-load a plane at a remote airfield indicated that he knew of the illegal enterprise and was a willing participant.

Those courts that follow Wharton's Rule ordinarily would not permit a single act of purchasing or selling illegal drugs to be the basis for a charge of conspiracy unless there is some additional circumstantial evidence from which it can be inferred that the actor is part of a larger conspiracy. The additional evidence must establish that the suspect had knowledge of the larger conspiracy and intended to join it.¹⁸ For example, in *United States v. Barlin*,¹⁹ the defendant was found in possession of approximately 1/4 kilogram of 86 percent pure cocaine and \$5,000 in cash. She had just left an apartment that served as the center of a drug distribution network and her name was found on a list of names of people in the network prepared by one of her fellow conspirators. The court held that sufficient evidence existed, in addition to the possession of cocaine, to infer that the defendant was part of a larger conspiracy.

A key fact in determining whether a single transaction is an isolated purchase or actually part of an established conspiracy to distribute illegal drugs is the quantity of the drugs involved in the transaction. The larger the quantity of drugs, the more reasonable it is to infer that the transaction is not an isolated sale, but an act that is part

of a larger conspiracy. In *United States v. Boone*,²⁰ the court ruled that a single transaction involving 383 grams of cocaine along with conversations between the purchaser and wholesaler indicating there would be future sales was enough to infer a conspiracy between the buyer and the seller. Such evidence suggested that the wholesaler had a direct interest in seeing that the buyer successfully resold the drugs.

Mere Presence

Mere presence during conspiracy discussions is not sufficient to implicate a person in the conspiracy. On the other hand, it is not necessary that a person actually say anything at a conspiracy meeting in order to be charged with conspiracy if other circumstantial evidence indicates that the silent person tacitly has agreed to participate in the conspiracy. For example, in *United States v. Baptista-Rodriguez*,²¹ the defendant was at several meetings set up in order to plan a cocaine importation operation between Colombian cocaine traffickers and boat drug transporters. The defendant was identified at one of those meetings as one of the “boat people.” The court affirmed the defendant’s conspiracy conviction after making the commonsense observation that “[i]t is highly unlikely that conspirators attempting a 500 kilogram smuggling operation would have tolerated the recurrent presence of a mere bystander, especially during the operational stage of the scheme.”²² Even though the defendant never said anything during the meetings, it was reasonable to infer that he was a

participant in the conspiracy rather than a mere bystander.

In *Baptista-Rodriguez*, the defendant was found to be a conspirator because he was at a meeting arranged for the sole purpose of planning the crime. If, on the other hand, a suspect is present with drug conspirators, but there is a plausible innocent explanation for his presence, then his mere presence would not be enough to infer that he is part of the conspiracy. For example, in *United States v. Pantoja-Soto*,²³ five subjects were in a gas station after business hours. DEA agents

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had probable cause to believe that there was methaqualone inside the station. A DEA undercover officer and an informant had previously negotiated with two of the five people in the station for the delivery of 50,000 methaqualone tablets. The informant went into the station and returned with a sample of three methaqualone tablets. When the agents entered the station to make the arrests, two of the subjects tried to run but were caught. The illegal drugs were found in a box in one of

the service bays. The court ruled that the three subjects who had no previous dealings with the informant merely were present in the station and were not guilty of conspiracy. There was no evidence that they had agreed to assist in the delivery of the drugs. The court felt that there was no evidence that the three even knew that the drugs were in the station, even though two of the three tried to run when the DEA raided the garage to make the arrests.

Mere Knowledge

Even if the suspects in *Pantoja-Soto* knew that the drugs were in the station, that knowledge alone would not be sufficient to prove either conspiracy or possession. In order to prove a conspiracy charge, there must be some evidence, either direct or circumstantial, that the person joined in an agreement with others to violate drug laws. Mere association with criminals without agreeing to assist in the commission of a crime is not enough to prove conspiracy. For instance, in *United States v. Vasquez-Chan*,²⁴ the defendant was a live-in housekeeper who knew that the homeowner was involved in large-scale drug trafficking. The police found approximately 600 kilograms of cocaine in the house. The housekeeper admitted that she knew the drugs were in the house. The court reversed her conspiracy conviction because the evidence proved only that she was a housekeeper and there was insufficient evidence that she had agreed to assist in the illegal venture.

In fact, a subject who knows that another person possesses illegal drugs is not in a conspiracy with

the possessor, even if he discusses the drugs with the criminal possessor, as long as he does not offer assistance or advice on how to distribute the drugs or commit other crimes. For example, in *United States v. Kelly*,²⁵ the court ruled that an attorney had not conspired with his client to violate the federal drug laws even though the attorney knew that the client had a kilogram of cocaine and advised him not to meet with others who wanted to take delivery of it. The attorney feared that his client was being “set up” to be arrested.

The court felt that once the attorney in *Kelly* knew about the cocaine, he was in a Catch-22. If he told his client to deliver the cocaine, he would be guilty of conspiracy; but if he told him not to deliver it, he could be (and he was) accused of conspiring to assist the client in concealing the substance from the government. The court also ruled that the attorney was not guilty of aiding and abetting the possession with intent to distribute the illegal drugs. In order for the government to prove that a person is in a conspiracy it is not sufficient for the government to prove that the suspect knew of the planned crime or even that the suspect discussed the crime; the government must prove that the suspect agreed with another person to play a role in the successful completion of the crime.

Individuals who know about a conspiracy and supply commodities that flow without restriction in commerce to a confederate of the conspiracy would not themselves be members of the conspiracy. For example, in *United States v. Falcone*,²⁶ suppliers sold yeast and

sugar to a member of an illegal distilling conspiracy. The U.S. Supreme Court in *Falcone* found that, while the evidence showed that the suppliers knew that the recipient of the yeast and sugar was making illegal alcohol, that alone did not put them in a conspiracy with the bootlegger. While the government must prove that a person knew of the conspiracy in order to prove a conspiracy charge, such knowledge by

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The secretive nature of conspiracies often necessitates that the evidence be circumstantial.

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itself is insufficient to establish that a person is guilty of conspiracy. To sustain a conspiracy conviction, there must be evidence of an agreement. The *Falcone* Court stated that there was no evidence of an agreement between the suppliers and the bootlegger.

In another U.S. Supreme Court case, *Direct Sales v. United States*,²⁷ the evidence showed that a mail-order wholesaler continued to supply a small-town doctor with morphine after the Bureau of Narcotics warned the wholesaler that the doctor illegally was supplying the morphine to addicts. In addition to the government warning, the circumstances indicated that the morphine was being dispensed unlawfully. The morphine was sold to the

small-town doctor in large quantities with great frequency and over a long a period of time. The sales consisted almost exclusively of morphine and had increased to an average monthly quantity sufficient for 400 average doses a day. Finally, the drug wholesaler offered special inducements to the doctor to purchase large quantities. The U.S. Supreme Court ruled that the mail-order wholesaler and the doctor were in a conspiracy to violate federal drug laws. The conspiracy was established even though none of the wholesaler’s representatives had personal communication with the physician. The supplier had more than mere knowledge of illegal activity; a continuous pattern of conduct established a tacit agreement between the doctor and the wholesaler to illegally distribute a controlled substance.

The difference between the *Direct Sales* case and the *Falcone* case is that the commodities sold in *Falcone* were articles of free commerce, whereas the morphine in *Direct Sales* was a restricted commodity that was incapable of further legal use except by compliance with rigid regulations. In addition, the *Direct Sales* wholesaler was supplying a controlled commodity in such large quantities, and he was encouraging future large purchases. Circumstantial evidence showed that the supplier had more than mere knowledge of the illegal resales; the wholesaler actually had a stake in the success of the illegal distribution of the drugs.

The *Direct Sales* Court stated that it made no difference that no express agreement existed between the wholesaler and the doctor. The

secretive nature of conspiracies often necessitates that the evidence be circumstantial. It is the fact of the illegal agreement and not the form of the agreement that matters.²⁸

Therefore, where suppliers encourage the purchase of supplies that ordinarily are difficult to obtain and often are used in the production of illegal drugs, it can be reasonably inferred that they are implicitly promoting the illegal drug enterprise. For example, in *United States v. Grunsfeld*,²⁹ the court ruled that a chemist was in a conspiracy with illegal drug manufacturers because he supplied large amounts of chemicals and equipment on three to four occasions to individuals who the chemist knew were illegal PCP manufacturers. The supplier in *Grunsfeld*, like the defendant in *Direct Sales*, did more than merely supply the conspiracy; in fact, he promoted the illegal enterprise and made large profits on the sales of the chemicals. Unlike the defendant in *Falcone*, the chemist in *Grunsfeld* supplied materials that were difficult to obtain and often were used in the production of illegal drugs.

Vicarious Guilt (*Pinkerton* Rule)

The criminal jeopardy suffered by a person who enters an agreement with another to commit a crime goes beyond simply the charge of conspiracy. In *Pinkerton v. United States*,³⁰ the U.S. Supreme Court held that if individuals enter into a conspiracy, they are not only guilty of the conspiracy but each also are vicariously guilty of the object crimes committed in furtherance of the conspiracy by any of the other conspirators. In addition,

under *Pinkerton*, conspirators are vicariously guilty of crimes committed by any of the other conspirators that are reasonably foreseeable consequences of the conspiracy. The *Pinkerton* Rule is the law in the federal courts and in many state courts,³¹ but some states have chosen not to adopt the rule.³²

If a person joins a conspiracy well after its inception, such a late joiner is guilty of conspiracy to the same degree as the early joiners, even if the late joiner only played a minor role in the conspiracy.³³ A late joiner, however, would only face vicarious guilt under *Pinkerton* for substantive offenses committed by other conspirators after he joined the conspiracy.

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One factor in determining the foreseeability of a substantive crime for which a suspect is to be held vicariously accountable under *Pinkerton* is the degree of the suspect's involvement in the conspiracy.³⁴ A person who plays a minor role in a conspiracy is less likely to be held vicariously accountable for the substantive crimes committed during a conspiracy than would

the major participants in that same conspiracy.³⁵

The Connecticut Supreme Court case of *State v. Diaz*³⁶ provides an example of the application of the *Pinkerton* Rule. In *Diaz*, the defendant was one of five street-side drug dealers who opened fire with a hail of 33 nine millimeter rounds and seven .45 caliber rounds at a car that was driving past them. One of the rounds killed a customer who had stopped to buy illegal drugs. The Supreme Court of Connecticut ruled that under *Pinkerton*, once *Diaz* and the others entered into the conspiracy to murder, all of them were guilty of conspiracy to commit murder, and in addition, each was also vicariously guilty of the murder itself, regardless of who actually fired the round that killed the victim.

In *Diaz*, the defendant was found vicariously guilty of a murder that was the object crime of the conspiracy. What if a conspirator commits an unplanned murder during the course of a drug crime? Would such an unplanned murder be a reasonably foreseeable consequence of the drug conspiracy that could be pinned to each of the drug conspirators? In *United States v. Alvarez*,³⁷ the U.S. Court of Appeals for the Eleventh Circuit ruled that the murder of an undercover federal agent during a shootout at a motel drug bust was a reasonably foreseeable consequence of drug trafficking. While the court limited the liability for the murder under the *Pinkerton* rule to those members that played major roles in the drug conspiracy, the court ruled that the three defendants in that case were, in fact, major participants in the drug

conspiracy. One defendant was an armed lookout; a second was the leader of the drug conspiracy, who introduced the agent to the drug sellers; and a third was the motel manager, who acted as interpreter for some of the drug negotiations. The court ruled that all three were properly convicted of the agent's murder, even though none of them actually took part in the shooting.

If a suspect is found vicariously guilty of an unintended but foreseeable crime, the fact that the suspect did not participate in the unforeseeable crime would be relevant when determining the sentence. In *Alvarez*, for instance, the shooters each received life imprisonment plus 50 years, whereas the armed lookout received 22 years imprisonment, the drug deal leader received 25 years imprisonment, and the hotel manager received 30 years imprisonment.

Conclusion

Drug trafficking usually involves an agreement between two or more people to cooperate in an illegal drug enterprise. One effective way to address the drug trafficking problem is through the conspiracy laws. Drug traffickers can be charged and convicted of conspiracy, even though they have not completed the drug crime they have agreed to commit. In addition, in many jurisdictions, a person who is a member of a conspiracy is vicariously guilty of any reasonably foreseeable crimes committed by the members of the conspiracy even though those crimes were not part of the plan. ♦

Endnotes

¹ *E.g.*, *United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986); *State v. Gruillon*, 562 A.2d 481, 484-86 (Conn. 1989); *State v. Pacheco*, 882 P.2d 183, 185-88 (Wash. 1994).

² 803 F.2d at 1126.

³ *Id.*

⁴ *See e.g.*, *New York v. Schwimmer*, 394 N.E.2d 288 (N.Y. 1979) (defendant conspired with an undercover officer and an informant to steal diamonds); *Ohio v. Marian*, 405 N.E.2d 267, 270 (Ohio 1980) (defendant conspired with an informant to murder his wife); *State v. Null*, 526 N.W.2d 220, 229 (Neb. 1995) (defendant was in conspiracy with party who feigned agreement).

⁵ *United States v. Jannotti*, 673 F.2d 578, 591 (3d Cir. 1982), *cert. denied*, 457 U.S. 1106, *overruled in part on other grounds by Mathews v. United States*, 485 U.S. 58 (1988).

⁶ *See United States v. Bosch*, 951 F.2d 1546, 1550 (9th Cir. 1991) (rejecting legal impossibility as a defense to conspiracy). *Contra, Montana v. Houchin*, 765 P.2d 178, 180 (Mont. 1988) (legal impossibility is a defense to conspiracy). *See generally* Jeffrey F. Ghent, Annotation, *Impossibility of Consummation of Substantive Crime as Defense in Criminal Prosecution for Conspiracy or Attempt to Commit Crime*, 37 A.L.R.3d 375 (1971).

⁷ 115 S. Ct. 382 (1994).

⁸ *See United States v. Varelli*, 407 F.2d 735, 748 (7th Cir. 1969) (conviction for conspiracy reversed because the single crime of purchasing stolen goods required an agreement between the buyer and seller).

⁹ *E.g.*, *United States v. DeLutis*, 722 F.2d 902, 905 (1st Cir. 1983); *State v. Utterback*, 485 N.W.2d 760, 770 (Neb. 1992), *overruled in part on other grounds by State v. Johnson*, 256 Neb. 133, ___ N.W.2d ___ (Neb. 1999). *But see Johnson v. State*, 587 A.2d 444, 452 (Del. 1991) (Wharton's Rule does not prohibit the charging of conspiracy in addition to a charge of possession with intent to distribute drugs because possession with intent to distribute does not require concert of action between two people in order to commit it).

¹⁰ *Curtis v. United States*, 546 F.2d 1188, 1190 (5th Cir. 1977).

¹¹ *United States v. Jones*, 801 F.2d 304, 311 (8th Cir. 1986).

¹² *See United States v. Moran*, 984 F.2d 1299, 1302-04 (1st Cir. 1993).

¹³ *E.g.*, *United States v. Philips*, 959 F.2d 1187, 1190 (3d Cir. 1992); *Commonwealth v. Cantres*, 540 N.E.2d 149, 152 (Mass. 1989).

¹⁴ 420 U.S. 770 (1975).

¹⁵ 524 F.2d 140, 144 (2d Cir. 1975).

¹⁶ 915 F.2d 1524 (11th Cir. 1990).

¹⁷ 625 F.2d 1196 (5th Cir. 1980) (en banc).

¹⁸ *United States v. Miranda-Ortiz*, 926 F.2d 172, 176 (2d Cir. 1991).

¹⁹ 686 F.2d 81, 90-91 (2d Cir. 1982).

²⁰ 641 F.2d 609, 611-12 (8th Cir. 1981).

²¹ 17 F.3d 1354 (11th Cir. 1994).

²² *Id.* at 1374.

²³ 739 F.2d 1520 (11th Cir. 1984).

²⁴ 978 F.2d 546, 553 (9th Cir. 1992).

²⁵ 888 F.2d 732, 740-42 (11th Cir. 1989).

²⁶ 311 U.S. 205, 211 (1940).

²⁷ 319 U.S. 703 (1943).

²⁸ *Id.* at 714.

²⁹ 558 F.2d 1231, 1236 (1977).

³⁰ 328 U.S. 640 (1946).

³¹ *E.g.*, *State v. Tyler*, 840 P.2d 413, 424 (Kan. 1992); *State v. Romano*, 456 A.2d 746, 761 (R.I. 1983); *Commonwealth v. Roux*, 350 A.2d 867, 871 (Pa. 1976); *State v. Bridges*, 628 A.2d 270, 281 (N.J. 1993).

³² *E.g.*, *State ex. rel. Woods v. Cohen*, 844 P.2d 1147, 1151 (Ariz. 1992); *People v. McGee*, 399 N.E.2d 1177, 1182 (N.Y. 1979); *Commonwealth v. Stasiun*, 206 N.E. 2d 672, 679 (Mass. 1965).

³³ *United States v. Alvarez*, 625 F.2d 1196, 1198 (5th Cir. 1980) (en banc).

³⁴ *United States v. Christian*, 942 F.3d 363, 367 (6th Cir. 1991); *United States v. Johnson*, 886 F.2d 1120, 1123 (9th Cir. 1989); *United States v. Moreno*, 588 F.2d 490, 493 (5th Cir. 1979); *United States v. Chorman*, 910 F.2d 102, 112 (4th Cir. 1990).

³⁵ *See United States v. Castaneda*, 9 F.3d 761, 766-68 (9th Cir. 1993) (It was a violation of due process to find the defendant vicariously guilty of a 18 U.S.C. § 924(c) gun/drug violation where she played only a slight role in the drug conspiracy. The court ruled that because of her minor role in the conspiracy, she could not have reasonably foreseen that the other conspirators would use firearms during the drug conspiracy.)

³⁶ 679 A.2d 902, 911-12 (Conn. 1996).

³⁷ 755 F.2d 830, 849-51 (11th Cir. 1985).

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

The Bulletin Notes

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



Officer Baker

While on patrol early one morning, Officer Mark Baker of the Moon Township, Pennsylvania, Police Department was stopped by a truck driver. Officer Baker observed an automobile had crashed into the back of a gasoline tanker truck. Officer Baker told the driver to pull his truck off the car, which was beginning to burn. Officer Baker found the driver of the car slumped over the steering wheel still in his seat belt. The officer gained entry through the passenger door, unbuckled the driver's seat belt, and removed him from the vehicle. Within minutes, the car became engulfed in flames. Officer Baker's quick, decisive actions saved the man's life.



Officer Ingram

Shortly after midnight, Officer Carl Ingram of the Glens Ferry, Idaho, Police Department responded to an apartment fire. Arriving before the fire department, Officer Ingram entered the building and found the resident unconscious and on fire. He rescued her and then reentered the apartment several times to extinguish the fire. The victim suffered third-degree burns over 30 percent of her body and had to have one arm amputated. However, without Officer Ingram's prompt, unselfish intervention, she probably would have died, and the entire apartment complex may have burned, resulting in additional injuries.



Officer Dronsfield

Durham, New Hampshire, Police Department Officer Thomas Dronsfield responded to an assistance call from officers of the Lee Police Department, who were at the scene of an accident. A motor vehicle had crashed into a utility pole and was submerged in a local pond. Upon arrival, Officer Dronsfield observed one officer in the water attempting to free a man trapped in the window of the vehicle. Officer Dronsfield immediately dove into the cold water and helped rescue the man. Officers then learned that another man was in the submerged vehicle. Officer Dronsfield repeatedly dove into the murky water, finally locating the man, but he was unable to remove him. Minutes later, however, the Lee Cold Water Rescue Team arrived, and Officer Dronsfield's efforts enabled them to locate and rescue the second victim. Without Officer Dronsfield's persistent and brave actions, both men may not have survived.