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November 2012

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A man wearing a red hoodie and a grey beanie is looking intently at a laptop screen. His hands are on the keyboard. The background is blurred, suggesting an indoor setting.

**Social Media Risks
to Law Enforcement**



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Robert S. Mueller III
Director

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FBI Law Enforcement Bulletin

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Social Media and Law Enforcement Potential Risks

By GWENDOLYN WATERS

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Law enforcement always has been a dangerous profession because officers risk their lives to form a barrier between criminals and society. In the past, police could to some extent protect themselves and their loved ones from threats. Today these risks have changed. The power of the Internet—social media in particular—has brought danger home to officers and their families. They cannot shield themselves as easily from the

repercussions of their jobs defending the community.

The Internet has been available for widespread public use since the early 1990s.¹ In its two decades of existence, the Web has become an integral part of everyday life. It is difficult to recall how society functioned without it. Compared with the lifespan of the Internet, social media, which began to evolve in 2003, remains in its infancy. Users add their own content to any

social media site that allows it.² Web pages, such as Facebook and Wikipedia, are not static; individuals continually modify them by adding commentary, photos, and videos. The Web no longer is a fixed object for passive observation. It has become a dynamic venue for proactive—often passionate—interaction. The growth, power, and influence of social media have proven phenomenal as evidenced by the decline of traditional newspapers and the

outcome of the 2008 presidential election.³

Law enforcement agencies recognize the influence of social media. Many departments are drafting and adopting policies addressing the use of networking engines.⁴ In many cases, however, these plans miss a crucial part of the issue. While departments are concerned with minimizing the negative impact that speech not protected by the First Amendment may have on the department's interests, they sometimes may neglect their responsibility to protect their employees.

Characteristics

Information obtained from public records (e.g., birth, death, and real estate) has been available online for years. By increasing exposure of personal information, social media has

raised the threat level. This new entity has a unique nature that makes it powerful and unpredictable. Several characteristics combine to make it especially threatening to law enforcement.

The structure of social media encourages self-promotion.⁵ It offers easy access to an unlimited pool of potential "friends."⁶ Individuals who crave validation can achieve a feeling of connection not available in their offline lives. People who have a desire for attention, notoriety, or fame are attracted to it. To get noticed, they often post entertaining or provocative information.

Constraints do not exist for social media. Anyone can post anything online with little fear of repercussion. The anonymous online environment can encourage inflammatory and shocking behavior. Individuals

sometimes create screen names or new identities that allow them to act outside their normal inhibitions and sometimes participate in caustic and less ethical activities they otherwise would avoid. Anonymity hampers efforts to control these actions.⁷

Pooling of like minds often occurs online. This bolsters confidence and gives the impression of support for socially unacceptable conduct. Copycat behavior can make the first well-publicized transgression the impetus for many more. Social media can engender a mob mentality wherein one small stimulus spurs a wide-scale reaction that feeds on itself and grows out of control.⁸ Incidents develop faster, reach farther, and spread more rapidly than anything society has dealt with before.

In the past, simple things, such as post office boxes and license plate confidentiality, provided protections. These are ineffective today. Instant access to private information makes it easier for an individual to learn personal facts about an officer. This also eliminates any "cooling off" period during which individuals might reconsider their retaliatory actions. Outraged offenders easily could get to officers' doorsteps before their patrol shifts end, leaving them unable



Captain Waters serves with the San Bernardino, California, Police Department.

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to defend their homes or families. The combination of these factors—narcissism, anonymity, lack of restraint, copycat behavior, crowd mentality, and lack of a cooling off period—makes social media a uniquely significant force that constantly seeks a point of focus.

Focal Point

Characteristics intrinsic to law enforcement make it a natural focal point for this trend. In this public profession, officers' duties occur in a societal arena allotting them no privacy. Social media significantly has increased officers' community exposure. Police often are surrounded by cameras and amateur reporters who broadcast every action and their opinion of it to a worldwide audience. Due to its public nature, policing is an easy topic for network discussion.

To the community, law enforcement can be fascinating and contentious. It involves drama, intrigue, and excitement that society finds captivating. The number of crime dramas on television and in theaters validates this. Additionally, the police officer's role often is ambiguous to the public. Wrongdoers do not appreciate officers and may resent them. Police can represent controversial figures to some people.

Conflict with criminals is inherent to law enforcement. On

a regular basis, police officers face lawless individuals. With increased exposure of personal information through social media, preventing these antagonists from crossing the line that separates officers' professional and personal lives is difficult. Prevention relies on self-restraint or respect for the law, neither of which are strengths of criminals.

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***Anyone can
post anything online
with little fear of
repercussion.***

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Impact

The nature of social media and law enforcement makes their relationship particularly volatile. Few significant issues have been noted; however, the potential exists for police to be impacted by attacks on their credibility or through “cop baiting.”⁹

Personal credibility is essential for law enforcement. Through social media, people easily can attack a police officer's character. If an officer's integrity is compromised, courtroom testimony and investigations are at risk. Law

enforcement officers can find their honor under serious attack online at any time. Even erroneous information can reach a significant audience, to include potential jurors and internal affairs investigators, possibly causing irreparable damage to officers' reputations.

Cases have occurred where comments posted online by officers have led to disciplinary actions. These behaviors have been the key focus of social media policies currently in place. Postings by the public—over which departments have no control—can be more damaging. Regardless of their level of truth, negative comments create lasting impressions.

Empowered by social media, cop baiting presents a crisis for law enforcement. Questionable videos of police officers are popular on sites, such as YouTube, and can be financially rewarding to malefactors who file claims or lawsuits. For some individuals, a citation or jail time is worthwhile if a cash payoff results. Cop baiting could become so common that officers may not know whether they are facing a situation that is legitimate, staged, or exaggerated for someone else's benefit. This puts officers' personal and professional well-being at stake.

Threat

Considerable problems can occur, with the greatest danger



being the personal threat to officers and their families. Because of social media, law enforcement officers are public figures more so than ever before. Barriers between their professional and personal lives have been diminished. Police may have no expectations that their homes and families will be protected from the dangers they face on the job.

Motivated individuals could destroy a law enforcement officer's sense of security without breaking any laws. With cell phone Internet access and a police officer's name, an antagonistic traffic violator could have a satellite image of the officer's home displayed on the phone by the time the officer returns to issue the citation. While this is not a violation of law, it certainly would send an intimidating message to the officer. A note could be left on the front door, or a photo of a child could be

posted on a social networking site with a seemingly innocuous comment, such as "Isn't officer so-and-so's daughter cute?"

Management

To protect their people, agencies can implement internal management mechanisms to lessen this potential threat. To provide the most effective protection, departments should designate a social media manager to handle specific core functions.

Ongoing training on current issues, the hazards of social media, and self-protection is essential. Due to the Web's rapidly changing environment, one-time training is not sufficient. Individuals alone cannot keep up with social networking's constant evolution. A dedicated manager must ensure personnel are updated through e-mails, memoranda, briefings, and trainings.

The social media manager must facilitate the elimination of employees' personal data from social networking sites and guarantee consistency for all personnel. Most of these Web sites will remove information if petitioned to do so. Each has its own procedures for making that request. These sites must be monitored to ensure the files do not reappear.

Internet and social media alerts provide e-mail notification any time a specified word is mentioned or searched online. Many search engines offer these services free of charge. Personnel alerts could be directed to private e-mail accounts to avoid conflict with employee unions over privacy of off-duty activities. The social media manager would monitor agency alerts.

Many businesses have realized that paying attention to social media conversations can provide a wealth of information on consumer trends and product strengths and weaknesses. Law enforcement agencies could benefit from listening for commentary about the department and its programs and personnel. This would allow them to capitalize on their strengths and to identify and mitigate negative images or potential dangers. Providing the most effective protection against an impending attack requires identifying the risk early and strategizing a defense. Consistent

monitoring of networking sites would provide an early warning system against any threats being developed or discussed online.

Monitoring trends and incidents that might precipitate copycat behavior is crucial. Attention must be paid to these activities because one quickly could precipitate others. Social media issues develop rapidly and spread extensively. The best defense against a threat is to recognize it early and identify ways to bolster the agency's defenses against it.

Agencies serve their best interests by protecting officers from dangers easily propagated through social media. Departments are impacted by claims or lawsuits, compromised officer credibility, damaged department image, and relocation expenses associated with plausible personal threats. Social networks present risks that law enforcement agencies must acknowledge. Hoping that large-scale impacts will not occur does not lessen the costs when they do; proactively addressing the possibility will.

Departments should initiate programs to foster awareness, education, and diligent management of employees' online exposure. These actions may not protect officers and agencies from the hazards social media presents, but they will minimize exposure and provide the greatest level of defense currently available.

Conclusion

It can be more cost effective to develop solutions after problems occur, rather than taking preventive actions that might not prove necessary. The concern with this approach is that the relationship between the police and social media is volatile. Social networks generate momentum, and law enforcement agencies provide a

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implement management
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this potential threat.
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stimulus for that energy. Departments must take responsibility for protection from this threat before they become blindsided by a sudden viral attack on their officers. ♦

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⁸ Christian Russ, “Online Crowds—Extraordinary Mass Behavior on the Internet,” http://i-know.tugraz.at/wp-content/uploads/2008/11/8_online-crowds.pdf (accessed September 10, 2012).

⁹ Cop baiting is when individuals intentionally create confrontational situations with officers to exploit them for personal or political motives.

Leadership Spotlight

The Leader Knows Best?

When describing a megaproject being built on the Las Vegas strip, a business executive referred to it as “the sort of project God would build if He had the money.”¹ This quote proved ill fated because the project fell on hard times and teetered on the verge of bankruptcy in 2009. Like many other businesspeople at the time, this individual took the point of view that growth would occur despite relevant economic indicators showing otherwise. As a leader, this executive approved spending millions of investors’ dollars based on his positive assessment of the economy.

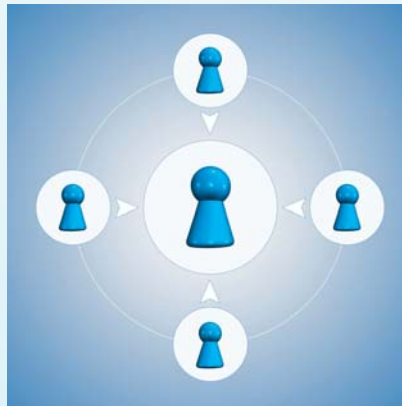
Although an industry leader, another longstanding company failed to foresee the threat of a new digital revolution, despite employees’ suggestions to position the company for success. “Of course all the people buried in the hierarchy who saw the oncoming problems and had ideas for solutions made no progress. Their bosses and peers ignored them.”²

As in the case with these companies and others, leaders often assume they know the best course of action, regardless of statistics and the voices of contrarian advisors. Based on their past accomplishments, executives sometimes assume that any decision they make will lead to success.

Leaders must realize that they will not have a proper solution for every problem the organization faces. The mistake made is succumbing to the myopic belief that alone they can overcome every obstacle in the way.

While important to have confidence in ourselves as leaders, it holds equally critical to recognize the need to trust the opinions of our subordinates and advisors. Having such trust accomplishes multiple objectives across the leadership spectrum. First and foremost, an open atmosphere where people can present contrary advice prevents overconfidence while allowing for the consideration of different perspectives and perceptions. Another important ancillary benefit is that the participant becomes vested within the organization through this same expression. By creating a sense of ownership among members, the flow of relevant information through an organization will increase and allow the leader to make better, more informed decisions in difficult times.

Does someone in your organization have an idea that could save money, lives, or both? Is that person confident enough to come forward and present the idea to you? As a leader, make sure the answer is “yes.”♦



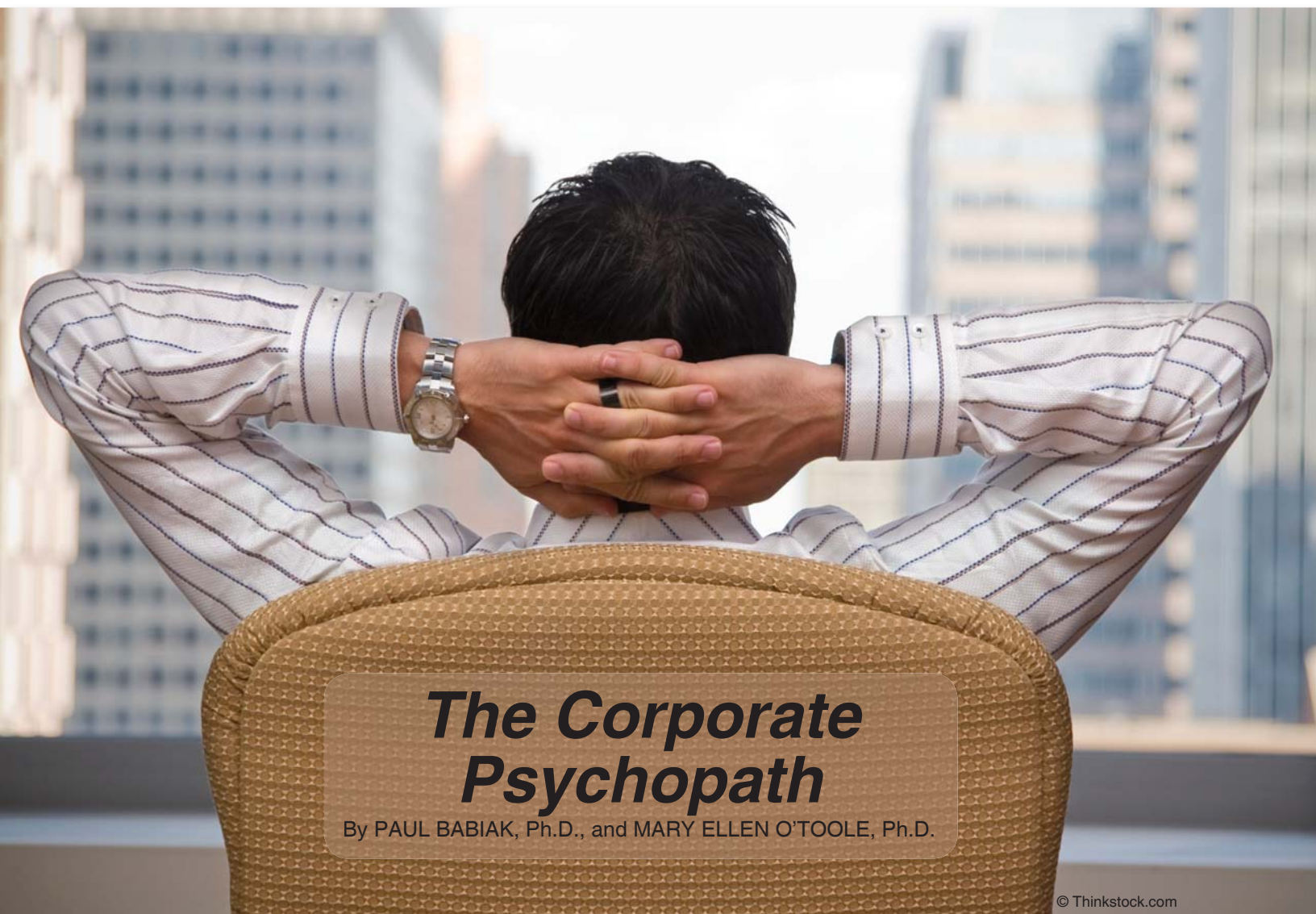
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Special Agent M. Bret Hood, an instructor in Faculty Affairs and Development at the FBI Academy, prepared this Leadership Spotlight.



The Corporate Psychopath

By PAUL BABIAK, Ph.D., and MARY ELLEN O'TOOLE, Ph.D.

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Psychoopathy is one of the most studied personality disorders. It consists of variations of 20 well-documented characteristics that form a unique human personality syndrome—the psychopath. Many of these traits are visible to those who interact with the psychopath who possess some or all of these characteristics. For some, superficial charm and grandiose sense of self make them likable on first meeting.

Their ability to impress others with entertaining and captivating stories about their lives and accomplishments can result in instant rapport. They often make favorable, long-lasting first impressions. This personality disorder is a continuous variable, not a classification or distinct category, which means that not all corporate psychopaths exhibit the same behaviors.

Beneath the cleverly formed façade—typically created by

psychopaths to influence their targets—is a darker side, which people eventually may suspect. They can be pathological liars who con, manipulate, and deceive others for selfish means. Some corporate psychopaths thrive on thrill seeking, bore easily, seek stimulation, and play mind games with a strong desire to win. Unlike professional athletes moved by a desire to improve performance and surpass their personal best,

psychopaths are driven by what they perceive as their victims' vulnerabilities. Little research exists on their inner psychological experiences; however, they seem to get perverted pleasure from hurting and abusing their victims.

Functional magnetic resonance imaging (fMRI) research indicates that psychopaths are incapable of experiencing basic human emotions and feelings of guilt, remorse, or empathy.¹ This emotional poverty often is visible in their shallow sentiment. They display emotions only to manipulate individuals around them. They mimic other people's emotional responses. Some lack realistic long-term

goals, although they can describe grandiose plans. The impulsive and irresponsible psychopath lives a parasitic and predatory lifestyle, seeking out and using other people, perhaps, for money, food, shelter, sex, power, and influence.

Psychopathy is a personality disorder traditionally assessed with the Psychopathy Checklist-Revised (PCL-R).² Often used interchangeably with psychopathy, the term *sociopathy* is obsolete and was removed from the Diagnostic and Statistical Manual (DSM) in 1968. Currently, there is no formal diagnosis of psychopathy in the DSM-Fourth Edition-Text Revision (DSM-IV-TR); however,

it is being considered for the 2013 DSM-V list of personality disorders.

Façade

It is fascinating that psychopaths can survive and thrive in a corporate environment. Day-to-day interactions with coworkers, coupled with business policies and procedures, should make unmasking them easy, but this does not always hold true. Large companies' command-and-control functions ought to make dealing with them simple and direct; however, this may not be the case.

Psychopathic manipulation usually begins by creating a mask, known as psychopathic fiction, in the minds of those targeted. In interpersonal situations, this façade shows the psychopath as the ideal friend, lover, and partner. These individuals excel at sizing up their prey. They appear to fulfill their victims' psychological needs, much like the grooming behavior of molesters. Although they sometimes appear too good to be true, this persona typically is too grand to resist. They play into people's basic desire to meet the right person—someone who values them for themselves, wants to have a close relationship, and is different from others who have disappointed them. Belief



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Dr. O'Toole has served with the FBI's Behavioral Analysis Unit and is a private forensic behavioral consultant and an instructor at the FBI Academy.

in the realism of this personality can lead the individual to form a psychopathic bond with the perpetrator on intellectual, emotional, and physical levels. At this point, the target is hooked and now has become a psychopathic victim.

Corporate psychopaths use the ability to hide their true selves in plain sight and display desirable personality traits to the business world. To do this, they maintain multiple masks at length. The façade they establish with coworkers and management is that of the ideal employee and future leader. This can prove effective, particularly in organizations experiencing turmoil and seeking a “knight in shining armor” to fix the company.

Con

How is it possible for psychopaths to fool business-savvy executives and employers? They often use conning skills during interviews to convince their hiring managers that they have the potential for promotion and the knowledge, skills, and abilities to do an outstanding job. Using their lying skills, they may create phony resumes and fictitious work experience to further their claims. They may manipulate others to act as references. Credentials, such as diplomas, performance awards, and trophies, often are fabricated.

Once inside the organization, corporate psychopaths capitalize on others’ expectations of a commendable employee. Coworkers and managers may misread superficial charm as charisma, a desirable leadership trait. A psychopath’s grandiose talk can resemble self-confidence, while subtle conning and manipulation often

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Psychopathic manipulation usually begins by creating a mask, known as a psychopathic fiction, in the minds of those targeted.

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suggest influence and persuasion skills. Sometimes psychopaths’ thrill-seeking behavior and impulsivity are mistaken for high energy and enthusiasm, action orientation, and the ability to multitask. To the organization, these individuals’ irresponsibility may give the appearance of a risk-taking and entrepreneurial spirit—highly prized in today’s fast-paced business environment. Lack of realistic goal setting combined with grandiose statements can be misinterpreted as visionary

and strategic thinking ability; both are rare and sought after by senior management. An inability to feel emotions may be disguised as the capability to make tough decisions and stay calm in the heat of battle.

Damage

Evidence suggests that when participating in teams, corporate psychopaths’ behaviors can wreak havoc. In departments managed by psychopaths, their conduct decreases productivity and morale. These issues can have a severe impact on a company’s business performance.

There also is the risk for economic crimes to be committed. For the corporate executive and the criminal justice professional, the issue is the possibility of fraud. Today’s corporate psychopath may be highly educated—several with Ph.D., M.D., and J.D. degrees have been studied—and capable of circumventing financial controls and successfully passing corporate audits.

Investigation

Investigators should familiarize themselves with the typical traits and characteristics of psychopaths. They must understand the manipulation techniques used to create and manage the psychopathic bonds established with victim organizations. Their reputations, as judged by those in

Additional Resources

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power with whom they have bonded, known as patrons, often provide added protection from closer investigation. As a result, the investigator may need to build a case with management for the use and broad application of more sophisticated techniques.

Psychopaths can be expert liars often immune to traditional deception-revealing techniques. Some practice

avoiding detection in anticipation of being caught and interrogated. Therefore, investigators independently should corroborate any information provided by these individuals.³

Psychopaths often compartmentalize their behavior, enabling them to present themselves differently to various people. This can help them hide their manipulation and control over victims. Coworkers may

have knowledge or suspicions about the psychopath's actions that can be useful to the investigator. However, they either may fear repercussions or fall under the influence of the psychopathic bond. If investigators establish rapport and trust with coworkers, information that will make their work easier may be forthcoming. The difficulty comes when these associates are persons

of interest. Fortunately, some companies have hotlines for employees to report coworker fraud and other complaints. This information provides an invaluable source of leads.

Corporate psychopaths with exceptional verbal skills make crafty interviewees. This ability provides an opportunity embraced by many of them to fool law enforcement officers. In these cases, investigators should proceed with caution.⁴ Specific interview strategies should focus on exposing psychopaths' vulnerabilities. Possession of a sense of superiority and lack of empathy can enable them to boast about the brilliance of their latest fraud scheme. They often believe that only someone equal in intelligence to them could understand their actions. Strategies specifically designed to elicit such boasting can result in a wealth of information for the investigator.

Corporate psychopaths are successful because they single out and isolate their targets. They sometimes manipulate several victims at the same time. Investigators never should assume they are immune to a psychopath's approach. One conversation may be enough for the bond to be established. Investigators must know themselves so that psychopaths' attempts at bonding fail. It is

valuable for investigators to allow psychopaths to believe they have established rapport with someone inside law enforcement.

Investigators must work as a team, communicate openly, and take all observations seriously. This is necessary for personal self-defense, proficient investigative work, and

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Corporate psychopaths use the ability to hide their true selves in plain sight and display desirable personality traits to the business world.

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successful prosecution. Officers must take heed to avoid being impressed with a suspect's credentials and success.

Occasionally, when psychopathic white-collar offenders are identified, they seek out the media and give interviews. They may believe their skills of persuasion are effective enough to convince the public that they have done nothing wrong and are being targeted unjustly by law enforcement. To prevent

serious problems with the investigation and prosecution, investigators must remain prepared for all possibilities.

Conclusion

Psychopathy, one of the most studied personality disorders, can cause numerous problems for investigators. Therefore, law enforcement officers must become familiar with psychopaths' traits and characteristics, prevent psychopathic bonds from forming, corroborate information, and take all observations seriously. Investigators must know themselves, work together, communicate with one another openly, and be prepared to deal with the corporate psychopath. ♦

Endnotes

¹ Functional magnetic resonance imaging (fMRI) registers blood flow to functioning areas of the brain.

² Hare's Psychopathy Checklist-Revised (PCL-R) is an assessment tool. Psychopathy, as determined by the PCL-R, is indicated by an overall score of 30 or above out of a possible 40. Many point configurations could result in the overall score, determined by adding up the total points for each of the 20 individually listed traits.

³ Research on psychopathy and lie-detection equipment has yielded conflicting results and remains inconclusive.

⁴ Once established that a perpetrator truly is a psychopath, reviewing the videotaped interrogation can be a lesson in their subtle, yet sophisticated manipulation techniques. This is the same method used by psychopathy researchers.

Attention

*Violent Crime, Cold Case,
and Crime Analysis Units*

MISSING PERSON

*Mary Ann Ruth Switalski, missing since
7/15/63 from Chicago, Illinois.*



Mary Ann at age 15 in 1961



NCMEC Age Progression Photo 2011

Race: White

Sex: Female

Age: 16

Height: 5'2"

Weight: 102 lbs.

Hair: Blonde

Eyes: Hazel

Clothing: Black, sleeveless blouse, white shorts, straw sandals

Agency case #: B200225

Mary Ann Ruth Switalski last was seen at a carnival at St. Priscilla's Catholic Church in Chicago, Illinois, on 7/15/1963. Two days after her disappearance, Mary Ann's parents received a letter postmarked from Oak Park, Illinois, and believed to be from her. The letter (apparently in her handwriting, but not her writing style) stated that she was fine and planned to make some money to support them. No further

contact was made. It is believed that Mary Ann may have been coerced to join a door-to-door sales group that was headed to California.

To provide or request additional information, please contact Detective Mark Czworniak, Chicago Police Department, at 312-744-8261 or mark.czworniak@chicagopolice.org or the FBI's Violent Criminal Apprehension Program (ViCAP) at 800-634-4097 or vicap@leo.gov.

Documenting a Suspect's State of Mind

By PARK DIETZ, M.D., M.P.H., Ph.D.



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Many investigators have interviewed suspects who seemed to know exactly what they were doing but learned a year later that the individuals claimed insanity. Or, perhaps, officers have obtained confessions only to discover that the defendants subsequently claimed themselves incapable of voluntarily confessing.

Violent crime and sex crime investigators in the United

States typically obtain as many details as possible from suspects about actions committed during the crime. However, these details do not always include relevant information about the defendant's mental state, and such omissions may introduce uncertainties that make mental defenses more likely to arise and succeed. When the suspect has confessed to the act, evidence of the voluntariness and competency of the confession

may become critical to preserve its admissibility. Even when the suspect denies committing the crime or claims amnesia for the time of the act, documentation of the defendant's mental state at the time of commission could prove important in subsequent legal proceedings. To this end, the author offers investigators an interview protocol to assist them in documenting the critical issues regarding a suspect's state of mind at the time of the

offense and the confession, thus preparing them for potential battles in the courtroom.¹

A USEFUL TOOL

The Dietz Mental State Interview (DMSI) helps collect and document evidence regarding the issues that may play an important role in subsequent charging decisions, suppression hearings, trials, and sentencing.

- Voluntariness of confessions
- Competence to confess
- Insanity defenses (e.g., M’Naghten Rule, Model Penal Code, Irresistible Impulse Rule, Durham Rule, and Deific Decree Exception)²
- Diminished capacity

- Diminished actuality
- Guilty but mentally ill³
- Sentencing

The author developed the DMSI based on over 30 years of experience addressing insanity and other mental state defenses and advising law enforcement on active investigations. The questions are designed to anticipate the legal defenses available in various state jurisdictions, as well as in federal prosecutions.

Administration

Investigators should administer the DMSI immediately after obtaining a confession from a suspect or during the overall interview and preserve this evidence. The author advocates video recording as the most effective means of preservation—which allows all

necessary parties to evaluate the evidence and the methods used to obtain it—followed by audio taping.⁴ Even if agency procedures do not include recording the initial interview, the author recommends doing so. As the exact words spoken constitute a valuable part of the evidence to be preserved, microphone quality and placement are important determinants of the ultimate evidentiary value of this interview protocol.

Suspects Who Claim Amnesia

As many as 65 percent of defendants referred for psychiatric examination claim amnesia for a crime.⁵ Such amnesia claims often arise in crimes involving alcohol or other drug intoxication and in highly emotional crimes. Some offenders feign amnesia.

If suspects claim amnesia but acknowledge that they may have done the crime, they probably will admit to recalling portions of the offense. Thus, investigators should ask all of the DMSI questions, even though suspects may respond to some of them by saying that they do not know or remember. These instances call for additional questions.

- Have there been other times in which you couldn’t remember what you’d done? (If so, the investigator



“
The Dietz Mental State Interview (DMSI) helps collect and document evidence regarding the issues that may play an important role....
”

Dr. Dietz, a clinical professor of psychiatry and biobehavioral sciences at the University of California at Los Angeles, is president of a private forensic consulting firm in Newport Beach.

should obtain examples and ask about corroborating witnesses.)

- What is the last thing you remember before the crime?
- What is the first thing you remember after the crime?
- What can you remember between those two times?
- If you did this, why do you think you did it?

Suspects Who Deny Commission

When encountering suspects who deny committing the crime, investigators still may find DMSI questions 1 to 3, 15, 23, and 27 to 38 valuable. Further, interviewers should ask other important questions.

- Why do you think whoever did this selected this victim?
- Why do you think the person responsible decided to harm the victim?
- Do you think the individual who did this knew what he was doing?⁶
- Do you think the person responsible knew he was hurting someone?
- Do you think whoever did this knew he was doing something wrong?
- What do you think should happen to the person who did this?

Interpretation

Defense counsel and the prosecutor will evaluate individuals' answers to these questions. If suspects give no evidence of an impaired mental state in their responses, the case probably will not involve a mental defense. If suspects do show evidence of an impaired mental state, both the defense counsel and the prosecutor likely will

“

Even when the suspect denies committing the crime or claims amnesia for the time of the act, documentation of the defendant's mental state at the time of commission could prove important....

”

seek consultation and evaluation from a qualified forensic psychiatrist or psychologist. Importantly, if this interview produces evidence of an impaired mental state, the investigator immediately should ask the prosecutor to obtain a warrant to collect urine, blood, and hair samples for toxicological analysis.

Documentation of the questions asked and the suspects' responses generally will provide attorneys, consulting or examining forensic mental health experts, and, ultimately, the jury and judge with the most immediate and best documented evidence of mental state—as reported by the suspect—that will become available in the case. Investigators do not need to interpret the results of this interview protocol, and they should seek consultation with a qualified forensic psychiatrist or psychologist if they require a professional interpretation before continuing the investigation.

As an important advantage of including these questions in the original interviews by investigators, suspects will answer them before they have had an opportunity to enlist the aid of cellmates, publications, family, friends, or other sources constructing a mental defense or receiving guidance on how to phrase their answers to feign a mental illness. Also, the answers may suggest further avenues of investigation through interviews with those who know the suspect, as well as through important documents and materials (e.g., diaries, journals, writings, and drawings) for specification on search warrants.

Dietz Mental State Interview Protocol

For many of these items, the suspects' response should elicit follow-up questions to ensure that the answer is complete, the interviewees provided all willingly offered information, and the investigator clearly understands the suspects' claims. Some possible lines of follow-up questions are suggested (in parentheses), but these do not represent the only relevant ones. Many will flow from the facts of the case, available evidence, and previous answers by the suspects. When faced with answers that contradict known evidence, investigators should delay any challenge until the end of the interview because confrontational questioning, skepticism, or judgmental behavior may jeopardize suspects' willingness to continue the interview.

- 1) Do you know where you are?
(Where?)
- 2) Do you know who I am? (Who?)
- 3) Do you know why I've been talking to you? (Why?)
- 4) Do you understand that you have just confessed to a crime?
- 5) Do you understand that your confession will be used against you in court?
- 6) Did you confess voluntarily?
- 7) Did anyone threaten you if you didn't confess?
- 8) Did anyone promise you anything in exchange for your confession?
- 9) What do you think will happen to you as a result of confessing to the crime?
- 10) Why did you decide to confess?
- 11) Do you feel guilty about the crime to which you just confessed? (If so, why?)
- 12) Did you do the crime on purpose? (If so, why?)
- 13) What were you trying to accomplish with this crime?
- 14) When did you decide to do it?
- 15) What did you think of (victim's name)?
- 16) What kind of person did you think (victim's name) was when you committed the crime? (Confirm that the suspect recognized the victim as a human.)
- 17) When you did this, did you think your actions could hurt the victim? (Confirm that the suspect knew the actions were injurious)
- 18) When you did the crime, did you know it was wrong? (How did you know this?)
- 19) When you did the crime, did you know it was against the law? (How did you know this?)
- 20) Did you expect to get away with it?
- 21) Did you think you might be caught? (Why did you think that?)

Dietz Mental State Interview Protocol (Continued)

22) What did you do to protect yourself from getting caught?

23) Have there been times you wanted to do something like this but decided against it? (If so, why didn't you do it then? How was this time different?)

24) Would you have done this if a uniformed officer had been standing next to you? (Confirm the individual wouldn't have done it with a police officer nearby.)

25) Did anyone tell you to do this? (Confirm that they do not believe God told them to do it.)

26) When you did the crime, did you know that society would condemn your actions even if they knew everything you know?

27) Did you have any strange or unusual mental experiences around the time of the crime? (If so, what were they? When did this begin?)

28) Have you ever heard or seen things that weren't really there? (If so, has this been when taking drugs? Has this ever happened without drugs? Were you falling asleep or waking up when it happened? What did you see or hear? Has that happened while we've been talking? Did that happen on the day of the crime?)

29) Do you have any ideas or beliefs that other people think are crazy? (If so, what are they? How long have you

believed that? Does that affect your actions? How does this affect your actions?)

30) Do people ever have difficulty understanding you? (If so, why do you think this is?)

31) Have you ever been told you had a mental illness? (Who told you this? Have you been treated? Have you been hospitalized? Were you given a diagnosis? Do you think you have a mental illness?)

32) Were you drinking or using any drugs at the time of the crime? (If so, what, how much, and when?)

33) Were you drinking or using any drugs when you were arrested? (If so, what, how much, and when?)

34) Do you have any illnesses? (If so, what?)

35) Were you taking any medications before you were arrested? (If so, what?)

36) Were you taking any medications at the time of the crime? (If so, what?)

37) Have you ever had a seizure or fit? (If so, did you have one the day of the crime?)

38) Have you ever been knocked unconscious? (If so, when? Where were you treated?)

Source: Park Dietz, "Documenting a Suspect's State of Mind," FBI Law Enforcement Bulletin, November 2012, 13-18.

CONCLUSION

Some persons charged with crime challenge their own confessions or assert an impaired mental state pertaining to commission of the act. Such claims may prove valid or invalid. Justice is served best if the truth prevails, and including the Dietz Mental State Interview when interviewing suspects will increase the odds of clarifying the too-often-murky issues of mental state. ♦

Endnotes

¹ The DMSI does not serve as a substitute for mental health training or appropriate mental health evaluations, which must be delayed until after a defendant is represented by counsel according to the ethical codes of both psychiatrists and psychologists. American Psychiatric Association, *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (Arlington, VA: American Psychiatric Association, 2008); and Committee on Ethical Guidelines for Forensic Psychologists, "Speciality Guidelines for Forensic Psychologists," *Law & Human Behavior* 15, no. 6 (1991): 655-665.

² R.D. Miller, "Criminal Responsibility," in *Principles and Practice of Forensic Psychiatry*, ed. R. Rosner (New York, NY: Chapman and Hall, 1994): 198-215.

³ Ibid., 202-205.

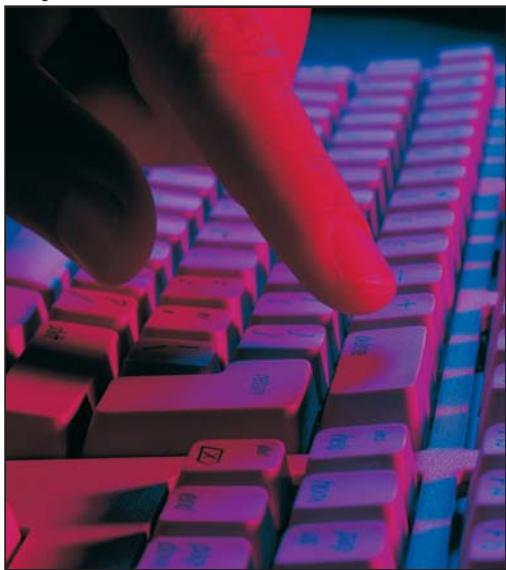
⁴ S.E. Pitt, E.M. Spiers, P.E. Dietz, and J.A. Dvoskin, "Preserving the Integrity of the Interview: The Value of Videotape," *Journal of Forensic Sciences* 44 (1999): 1287-1291.

⁵ J.W. Bradford and S.M. Smith, "Amnesia and Homicide: The Padola Case and a Study of Thirty Cases," *Bulletin of the American Academy of Psychiatry and Law* 7 (1979): 219-231.

⁶ Male examples are used strictly for illustrative purposes.

The *Bulletin's* E-mail Address

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The *FBI Law Enforcement Bulletin* staff invites you to communicate with us via e-mail. Our e-mail address is leb@ic.fbi.gov.

We would like to know your thoughts on contemporary law enforcement issues. We welcome your comments, questions, and suggestions about the magazine. Please include your name, title, and agency on all e-mail messages.

Also, the *Bulletin* is available for viewing or downloading on a number of computer services, as well as the FBI's home page. The home page address is <http://www.fbi.gov>.

Bulletin Honors



American Police Hall of Fame Memorial, Titusville, Florida



In 1960, retired Police Chief Gerald Arenberg established the American Police Hall of Fame Memorial and Museum in a 3,000-square-foot building in Northport, Florida. It relocated in 1989 to a 38,000-square-foot, 3-story building in Miami, Florida, previously occupied by the FBI. In 2003 land was purchased in Titusville, Florida, an area known as the Space Coast, where a new 50,000-square-foot facility was built. It is the nation's first and largest museum and indoor memorial dedicated to law enforcement officers nationwide who were killed in the line of duty. The name, rank, and department of over 8,300 officers killed from 1960 to the present, with a few predating 1960, are engraved on Italian marble walls. The engraving is done one time per year by a local artist/engraver. In the center of the octagon-shaped memorial, a handmade, stained-glass dome hangs over the tomb of the unknown peace officer. The statue of an officer with two small children stands watch at the head of the tomb. Above the entrance to the memorial is the inscription "Good Men and Women Must Die, But Death Cannot Kill Their Names." The exterior of the building consists of twin waterfalls flowing down the walls onto huge North Carolina river rock. The current facility is open to the public every day except Christmas, Easter, and Thanksgiving.

Bulletin Reports

Mobility of Criminal Groups

In this study the main objective is to identify push and pull factors to help explain how and why criminal groups, organizations, and general organized crime patterns are present across a variety of settings (e.g., geographical locations, criminal markets, and legitimate industries). Push factors refer to forces that drive criminal groups *from* a setting. Pull factors refer to forces that draw criminal groups *to* a setting. There is a distinction between contexts where offenders organize around available opportunities (the strategic context) and circumstances where opportunities induce greater organizational levels among offenders (the emergent context). The present exercise indicates that opportunities matter more than the group itself. What the authors demonstrate is that the problems concerning geographical locations, criminal markets, and legitimate industries that are vulnerable to organized crime are persistent and stable over time. On the other hand, groups that seize such opportunities are transient and often short-lived. Aside from reviewing past research of such factors, the authors also apply the general understanding that emerges from analysis to critically assess case studies that reflect popular images of organized crime threats. The concluding section identifies the key issues to address within this area.

For more information on this report (NCJ 236707), access the National Criminal Justice Reference Service's Web site, <http://www.ncjrs.gov>.

Deter, Detect, Defend, Avoid Identity Theft

This toolkit from the U.S. Federal Trade Commission is for use by organizations working to raise awareness and educate people about the dangers of identity theft. The toolkit includes a 24-page booklet with information on how to plan and organize a Protect Your Identity Day workshop. These workshops can be used by local government officials and community organizations to educate people on the dangers of identity theft and how to protect themselves from becoming victims. The toolkit also includes a DVD and a CD-ROM. The DVD contains videos available for television broadcast on the theme of deter, detect, defend, the three Ds of identity theft protection. The CD-ROM contains videos on the three Ds for use in computer broadcasts and downloadable materials for use in planning and hosting a Protect Your Identity Day.

To read the full report (NCJ 236428), access the National Criminal Justice Reference Service's Web site, <http://www.ncjrs.gov>.

Gang Resistance Education and Training Program (G.R.E.A.T.)

The Gang Resistance Education and Training Program (G.R.E.A.T.), taught by uniformed police officers, is a school-based life-skills curriculum designed to enable youths to make sound decisions, be accountable, resist peer pressure, and establish positive attitudes toward law enforcement. The goal of the program is to prevent violence and gang activity. The instruction focuses on four areas: middle school, elementary school, summer, and families. The school sessions offer skills-based classes that focus on changing attitudes and behaviors. The summer component presents fun, constructive activities that add structure when children are on their school break. The G.R.E.A.T. families segment provides group interaction and activities for parents and children. For more information go to <http://www.great-online.org>.

The Importance of Evidence Collection Guidelines in Developing a Prosecutable Case

FBI Crime Scene Forensic Documentation Guidelines should be routinely applied to every crime scene regardless of size or complexity. The narrative reviews each crime scene guideline and identifies the documentation that the prosecutor should anticipate being present. Omitted guideline citations should be questioned because they may imply a defect in the forensic evidence acquisition process. These omissions may provide points of attack by the defense and, consequently, present a reasonable strategy. The FBI documentation guidelines include steps for proper crime scene evidence collection: 1) *approach scene*—discusses the initial approach to the crime scene by the first responder and requires noting temperature and other environmental conditions, any artifacts that may represent evidence, and locating potential witnesses; 2) *secure and protect*—discusses protecting the crime scene in its pristine form; 3) *preliminary survey*; 4) *guideline narrative description*—the survey taken to support the management, organization, and logistical elements of the crime scene; 5) *photograph scene*—examines how to portray the crime scene evidence through photography; 6) *sketch scene*—explains how a crime scene sketch provides spatial relationships that supplant and complement the two-dimensional photographs; 7) *physical evaluation of the scene*; 8) *continuing evaluation of the evidence*—evaluations that are ongoing throughout the scene processing; 9) *conduct search*; 10) *collect, record, mark, and preserve the evidence*; 11) *conduct final survey*; and 12) *release the crime scene*.

To read the full report (NCJ 236848), access the National Criminal Justice Reference Service's Web site, <http://www.ncjrs.gov>.

Online Author Guidelines



FBI Law Enforcement Bulletin

In October 1932 the Bureau of Investigation began publishing the magazine *Fugitives Wanted by Police*. This publication marked the first time a list of fugitives was compiled and disseminated nationwide.

In 1935 the Federal Bureau of Investigation was created, and the magazine was renamed the *FBI Law Enforcement Bulletin*. For over 80 years, it has featured articles written by law enforcement experts. The printed magazine has reached an estimated 200,000 readers in over 150 countries.

In January 2013, the *Bulletin* will become exclusively an online publication offering readers worldwide a more dynamic, expansive Web experience. As always, the *Bulletin* accepts articles on virtually any topic of interest to the criminal justice community. The magazine does not publish articles previously featured or

currently under consideration by other magazines. The *Bulletin* does not accept articles that advertise products or services.

PREPARING ARTICLES

To better accommodate our anticipated revised online format, articles should contain approximately 1,200 to 1,500 words, or total about 4 to 5 pages, double-spaced. We will continue accepting longer articles based on the previous guidelines, approximately 2,000 to 3,500 words, for the time being, but longer articles may be published in two or more parts over a period of days.

For proper endnote citation format, authors should refer to *A Manual for Writers of Term Papers, Theses, and Dissertations*, 7th ed., by Kate L. Turabian. For grammar and style issues, authors should follow *The New York Public Library Writer's Guide to Style and Usage*.

Online Author Guidelines

Bulletin staff members and FBI subject-matter experts judge articles according to relevance to the audience, factual accuracy, analysis of the information, structure and logical flow, style and ease of reading, and length. Personnel edit all manuscripts for length, clarity, format, and style.

Relevance to the Audience

The *Bulletin* provides a forum for information exchange throughout the criminal justice community. Readers consist mostly of midlevel to executive managers in agencies of various sizes worldwide.

These individuals have various levels of English language comprehension and reading abilities. Further, most of them have limited time for reading articles. Therefore, authors always should present material in clear, concise, and understandable terms, keeping several questions firmly in mind.

- Are readers familiar with my organization or profession?
- How much do readers know about my topic?
- Will readers find this information important?
- What do I want readers to learn from or do with this information?
- What can I do to make the article easy for readers to understand?

Authors should write with an appropriate tone, never talking down to readers, writing over their heads, or using inappropriate humor. They should avoid biased language (e.g., *he*, *manpower*), remain sensitive (e.g., *offender with paranoid schizophrenia*, not *paranoid schizophrenic*), and avoid clichés.

Factual Accuracy

Authors should support their articles with accurate, concise, and appropriate details, providing sufficient background information, detailed explanations, and specific examples. Also, they should limit jargon (i.e., technical or specialized

language) and provide in-text explanations for any terms that readers might find unfamiliar or confusing.

Source citations must accompany facts, quoted or paraphrased ideas or works, and information generally not well known. Unlike newspapers and other commercial publications that regularly quote experts, the *Bulletin* prefers to paraphrase speakers, usually without naming them directly, then give credit to them in endnotes.

Analysis of the Information

Authors should analyze the information they provide, make appropriate recommendations for its use, and explain its benefits to readers. For example, an article on a new shift schedule could emphasize cost savings and improved morale.

Also, authors should check their articles for missing material or confusing elements and provide necessary clarification. To this end, a subject-matter expert, a grammarian, and someone unfamiliar with the topic could offer valuable assistance. Authors also should try reading their articles out loud to help uncover problem areas.

Structure and Logical Flow

Articles on worthwhile topics but without organization or a unifying theme generally do not receive favorable consideration. To develop a central thesis to guide the presentation, which helps to avoid such problems, authors should answer four questions.

- 1) Why am I writing this?
- 2) Who are my readers?
- 3) What do I want my readers to do?
- 4) Why should my readers care about this?

Answering these questions can help authors focus their thoughts, decide how much information they will require, and tailor documents to fit readers' needs. In turn, these answers will lead authors to their main point or central thesis.

Online Author Guidelines



Authors should begin their articles with an intriguing scenario, interesting statistic, fascinating fact, quotable quote, or some other attention-getting device. Next, authors will want to explain the article's content, why the material is important to readers, and how it will benefit them.

The specific strategy chosen for logical article construction largely will depend on the subject matter. In some cases, chronological order will prove appropriate. Articles that present topics readers will be receptive to may call for starting with a general thesis before supporting it with specific facts. However, when introducing subjects that readers might resist, authors may want to begin by citing specific evidence before revealing their general arguments.

Articles should feature a balanced approach of the topic. Authors should devote similar amounts of attention to all areas and cover opposing viewpoints. Then, a strong, carefully planned conclusion should wrap up the article (without introducing new information), restate the article's main points, give readers a sense of completion, and leave a lasting impression.

Style and Ease of Reading

Authors should maintain a straightforward, direct writing style, favoring concise language and avoiding unnecessary words (e.g., *to develop*, not *in order to develop*). Further, authors should write in active voice (e.g., *they developed the strategy*,

not *the strategy was developed by them*), which conveys information directly, powerfully, and clearly.

The *Bulletin* generally prefers to publish articles in the third person (e.g. *the department employs 300 officers*)—a neutral vantage point. However, in other instances, the second person (e.g., *you may employ 300 officers*) or the first person (e.g., *we employ 300 officers*) prove appropriate.

Most important, authors should present their ideas in a positive manner, rather than pointing out only the negative aspects. Berating readers does little to endear authors or their topics to the very people they wish to reach with the message.

To further enhance readability, authors should avoid long sentences and paragraphs. Effective sentences generally contain fewer than 30 words and comprise no more than 2 lines. Authors should keep paragraphs as short as possible while addressing ideas completely.

Linking paragraphs together by using transitional words and phrases can help readers follow an article's flow and present a clear relationship between ideas. Finally, brief, informative, relevant, and parallel (i.e., using the same parts of speech) headings help to create logical sections and guide readers through the main points.

SUBMITTING ARTICLES

Authors may submit a query letter with a detailed 1- to 2-page outline; however, this does not guarantee acceptance of any article. Those submitting completed manuscripts will be notified of the receipt of the material. Further, the *Bulletin* accepts full-face, passport-style photographs of authors, as well as images that visually depict subject matter. After reviewing queries or articles, *Bulletin* staff members will advise authors of acceptance or rejection.

The editor receives all materials at leb@ic.fbi.gov. For additional assistance, authors can contact *Bulletin* staff members at 703-632-1460. ♦

Supreme Court Cases

2011-2012 Term

By KEVIN CHECHAK, J.D.

During the current term, the Supreme Court decided cases of importance to law enforcement, including those involving procedure, substantive law, and law enforcement liability. In one case with immediate consequences, the Court ruled that attaching a Global Positioning System (GPS) device on the undercarriage of a car constituted a Fourth Amendment search. The

Court elaborated further on the role of *Miranda* in interviews occurring in a prison setting, as well as the government's duty to produce potentially exculpatory evidence under *Brady*. In a civil suit against law enforcement officers, the Court addressed the proper role of qualified immunity and whether the law was clearly defined at the time the government acted. Also, the Court struck down a substantive

criminal statute as being violative of the First Amendment.

This article provides a brief synopsis of each of these cases, as well as a summary of cases of interest to law enforcement that the Supreme Court has agreed to hear in the 2012-2013 term. As always, law enforcement agencies must ensure that their own state laws and constitutions have not provided greater protections than the U.S. constitutional standards.

DECIDED CASES

United States v. Jones, 132 S. Ct. 945 (2012)

In this case the U.S. Supreme Court revived the doctrine that a physical intrusion by the government into a constitutionally protected area for the purpose of gathering information is a Fourth Amendment search, a principle most courts had considered subsumed by the reasonable expectation of privacy standard. As part of a drug conspiracy investigation, officers obtained a warrant from the U.S. District Court for the District of Columbia to install a tracking device on a vehicle used by Jones but registered to his wife. The tracking device was to be placed on the vehicle within 10 days. Eleven days after the court

order was issued, officers placed the GPS device on the vehicle while it was in Maryland.¹ The device provided officers with 2,000 pages of location data over the next 4 weeks. Jones' motion to suppress the GPS information was denied; he was convicted and then appealed. The court of appeals reversed the conviction, finding the warrantless use of the GPS device in violation of the Fourth Amendment.² The appellate court held that the use of the GPS device was a search where Jones had a reasonable expectation of privacy in his movements over an extended period of time.³

The U.S. Supreme Court unanimously agreed that the use of the GPS was a search under the Fourth Amendment, but filed separate opinions with divergent reasons in support of that conclusion. The majority opinion written by Justice Scalia relied on an originalist interpretation finding the vehicle to be an "effect" within the meaning of the Fourth Amendment and the attachment of the GPS device to a vehicle by government agents to gather information to be a trespass and, therefore, a search within the meaning of the Fourth Amendment. "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered

a 'search' within the meaning of the Fourth Amendment when it was adopted."⁴ The opinion expresses that the original theory of governmental trespass as a basis for a Fourth Amendment violation had not been replaced by the theory of "reasonable expectation of privacy" developed in *United States v. Katz*.⁵ In *Katz* the court found that the government had violated the Fourth Amendment by placing without a warrant a covert microphone on a public phone booth to overhear a suspect's telephone conversation. *Katz* and cases following it expanded the protection of the Fourth Amendment beyond "persons, houses, papers and effects" (as expressly listed in the Fourth Amendment) and held that the amendment protected people and their reasonable expectation of privacy in less concrete matters, like conversations, telephone calls, and e-mails.

Prior to *Jones* several federal circuit court decisions held that people had no reasonable expectation of privacy in the movement of their vehicles on public streets because those actions are readily observable by anyone—including the government—and, therefore, use of a GPS device to monitor a vehicle's movement on public streets did not violate any reasonable expectation of privacy.⁶ In each of those cases, the courts held that the act of the physical installation itself of a



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slap-on or magnetic GPS device on the vehicle did not independently constitute a search under the Fourth Amendment. *Jones* overrules such decisions when placing a tracking device on the vehicle requires a physical touching of the vehicle with the intention of gathering information. The Court did not overrule prior decisions where the tracking device already was in place before the subject took possession of the object to be tracked because there was no trespass.⁷ In addition, the decision leaves open the question of the constitutionality of electronic tracking, which is feasible by nonphysical means, such as monitoring a subject's movements through GPS signals emitted by a subject's cellular telephone.⁸

Justice Sotomayor joined with the majority opinion in holding that here the physical trespass on a constitutionally protected "effect" (the vehicle) constituted a Fourth Amendment search, but filed a concurring opinion agreeing with Justice Alito's concurrence that long-term GPS monitoring would infringe on an individual's reasonable expectation of privacy. Justice Sotomayor also expressed that in other cases not involving physical intrusion, the *Katz* approach should be applied given concern regarding data aggregation and government accumulation of information. Justice Sotomayor



stated, "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."⁹

Justice Alito filed a concurrence in the result, joined by three other justices, but believed the case should be decided by applying the *Katz* reasonable expectation of privacy analysis. Alito reasoned that the long-term monitoring of the movement of Jones' vehicle violated his reasonable expectation of privacy. Alito's opinion indicates the reasonable expectation of privacy analysis would encompass all types of surveillance, including

old fashioned physical surveillance with cars and aircraft, as well as tracking, which could be achieved remotely as opposed to the need to physically intrude into a protected area. It also indicates the expectation that how long citizens can be followed would differ based on the offense being investigated. While not setting down a matrix of what time limits would be allowable, Justice Alito indicated that 28 days was too long in this drug investigation.

This case was decided based on simple trespass analysis. However, five justices signaled readiness to expand the protections of the Fourth Amendment in future cases to limit government collection and aggregation of publicly available information where such efforts may violate the public's reasonable expectation of privacy.

***Howes v. Fields*,
132 S. Ct. 1181 (2012)**

Defendant Fields was serving a sentence in a Michigan jail where he was questioned by sheriff's deputies about alleged child sex abuse unrelated to the crimes for which he was incarcerated. Fields was brought from the general population into a separate section of the facility and put in a conference room with the deputies. The deputies did not read Fields his *Miranda* rights, but did advise him at the beginning and at several other times during the 5 to 7 hour interview that he was free to leave at any time and return to his cell. Fields was not handcuffed or restrained, and the door to the room sometimes was open and sometimes closed. At no point did Fields indicate that he wanted to return to his cell. He eventually confessed, and at the conclusion of the interview, he had to wait 20 minutes while a guard was called to return him to his cell.

The Sixth Circuit Court of Appeals applied a categorical rule in concluding that his statements should be suppressed, holding that a prisoner always is in custody for *Miranda* purposes when pulled from the prison population and questioned about criminal conduct.¹⁰ The Supreme Court rejected this categorical rule, concluding that incarceration in and of itself is not “custody” for purposes of the *Miranda*

warnings. *Miranda* custody requires analysis of whether based on the objective circumstances a person would feel free to terminate the interview and leave and whether the limitations on movement present a coercive environment. The Court noted three factors of confinement that normally contribute to a coercive environment, but do not apply to a person serving a jail or prison sentence. An incarcerated individual, as opposed to someone just arrested, is not experiencing any “shock” of custody. In addition, incarcerated individuals (as opposed to those awaiting trial) are unlikely to be lured into speaking by hope for a quick release. They also know that the questioning officers cannot affect the length of their confinement. Applying these factors to the facts in the present case, the Court held that Fields

was not in custody for purposes of *Miranda*. As stated by the Supreme Court, “Taking into account all of the circumstances of the questioning—including especially the undisputed fact that respondent was told he was free to end the questioning and return to his cell—we hold that respondent was not in custody within the meaning of *Miranda*.”¹¹

***Smith v. Cain*,
132 S. Ct. 627 (2012)**

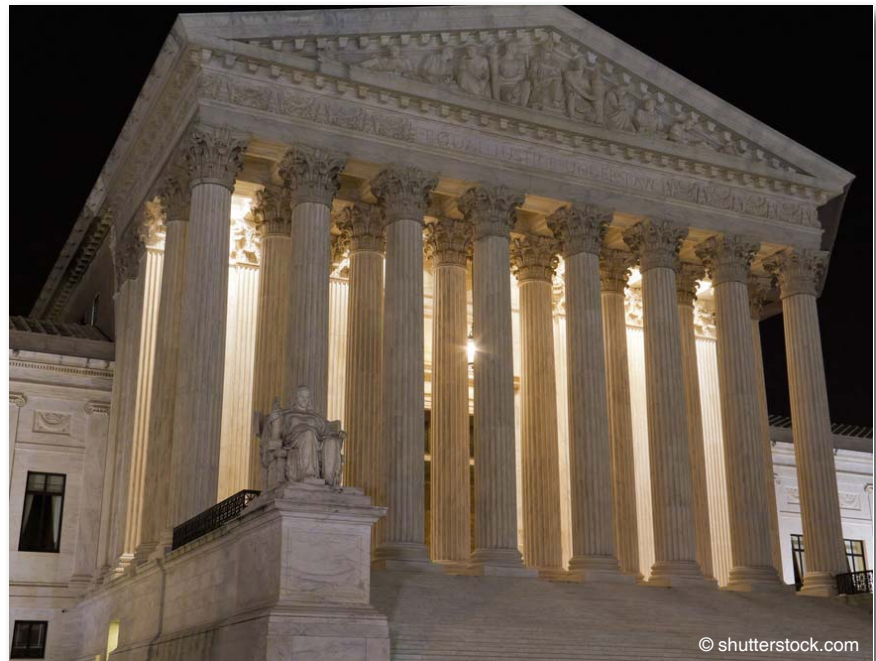
In *Smith* the Court ordered a new trial after concluding that the government violated *Brady v. Maryland* by failing to disclose potentially exculpatory material to the defense.¹² In 1992 Larry Boatner was the victim of a home invasion robbery during which five of his friends were killed. Boatner was the only survivor in a position to see the perpetrators. Juan Smith eventually was charged in the crime and prosecuted. The principle evidence against Smith was testimony by Boatner identifying him as one of the assailants. Notes of the lead detective responding to the scene indicated that Boatner stated shortly after the crime that he could not identify any of the murderers, and his report of a re-interview of Boatner 5 days later indicated the same. These notes made by the detective were not produced to the defense before trial. Based on this omission, the Court found a *Brady* violation,



reiterating that *Brady* established a due process violation where evidence withheld is material to a determination of the defendant's guilt. Evidence is material where there is a reasonable probability that the result of the proceeding would have been different if it was produced. A defendant need only show that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.¹³ Here Boatner testified at trial that he had "no doubt" Smith was the gunman he stood "face to face" with the night of the murders, and Boatner's testimony was the only evidence linking Smith to the crime. The Court found Boatner's contradictory statements that he could not identify anyone plainly material.¹⁴

***Messerschmidt v. Millender*,
132 S. Ct. 1235 (2012)**

This case is a civil action under Title 42, Section 1983, U.S. Code for damages against officers, including Detective Kurt Messerschmidt, alleging violation of Millender's Fourth Amendment rights by an improper search and seizure. Shelly Kelly was moving out from the residence she shared with her boyfriend Jerry Bowen when he attacked her and shot at her with a black sawed-off pistol-grip shotgun as she drove away, striking her car. Detective Messerschmidt researched Bowen,



found gang affiliations, and prepared affidavits for a search warrant at the home of Augusta Millender, Bowen's foster mother, where he was believed to be staying. The warrant sought any and all weapons or ammunition, indicia of gang affiliation, and articles showing who controlled the premises. The warrant was executed while Augusta Millender was home, resulting in the seizure of Millender's shotgun, a social services letter addressed to Bowen, and a box of .45-caliber ammunition. Millender subsequently filed a civil action alleging that the search violated her Fourth Amendment rights. The officers sought to dismiss the lawsuit on the basis of qualified immunity. The district court and an en banc Ninth Circuit Court of Appeals denied

the officers' claim of qualified immunity, concluding that no reasonable officer would have relied on the warrant because it was facially overbroad where it sought all firearms, ammunition and related articles, and a wide variety of gang-related materials where the crime had no relation to gang activity.¹⁵

The Supreme Court reversed, granting the officers qualified immunity. The Court reiterated that officers are entitled to qualified immunity unless their actions violated clearly established statutory or constitutional rights using objective legal reasonableness to evaluate the legal rules established at the time of the conduct. The Court agreed with the principle articulated by the Ninth Circuit that while a warrant may be signed by a neutral

magistrate, thus establishing a strong indication of objective reasonableness of the officers' behavior, the shield of immunity conferred by the warrant may be lost where the underlying affidavit is so lacking in indicia of probable cause as to render belief in its existence unreasonable.¹⁶ Given the facts and logical inferences that could be drawn in this case, the Court concluded that the warrant met the objective reasonableness test. The Court reasoned that an officer could infer that Bowen might have additional weapons and pose a continuing threat with them and that his gang affiliation could bear both on his motive and credibility. Noting the number of supervisors and other officials who reviewed the affidavits, the Court stated that the officers were not required to parse through and make a precise

probable cause determination by comparing the facts in the affidavit with the items listed in the warrant application.¹⁷ Finding that the warrant application was not so obviously lacking in probable cause such that the officers could be considered plainly incompetent for concluding otherwise, the Court ruled they were entitled to qualified immunity.

***United States v. Alvarez,*
132 S. Ct. 2537 (2012)**

Defendant Alvarez had made verbal false statements claiming to be a recipient of the Congressional Medal of Honor. He was charged under Title 18, Section 704, U.S. Code, which makes it a crime to falsely represent verbally or in writing to have been awarded any decoration or medal authorized by Congress for the U.S. Armed Forces. Four justices joined the majority

opinion, and two justices joined in a concurring opinion with the plurality decision finding that the statute did not meet the "exact-ing scrutiny" applied to content-based speech restrictions.¹⁸ The Court held that the statute did not fit within any of the three recognized exceptions to the First Amendment for false statements and distinguished it from cases, such as fraud and defamation, where legally cognizable harm resulted from the falsehood.¹⁹ While all nine justices acknowledged the importance of properly recognizing the heroism and sacrifice of service members, the plurality found that the government did not establish that a new exception to the First Amendment was merited where less restrictive means were available to control the false speech. Effective means to limit the effect of the false speech included counterspeech and resulting public ridicule and establishing a publicly accessible database of actual medal recipients.

**CASES OF INTEREST
FOR 2012-2013**

***Florida v. Harris*, case below
Harris v. Florida, 71 So.3d 756
(Fla. 2011), cert. granted, 132
S. Ct. 1796 (2012)**

This case asks what facts, if any, must be presented by the government to establish the reliability of a drug dog's alert beyond the dog's basic training



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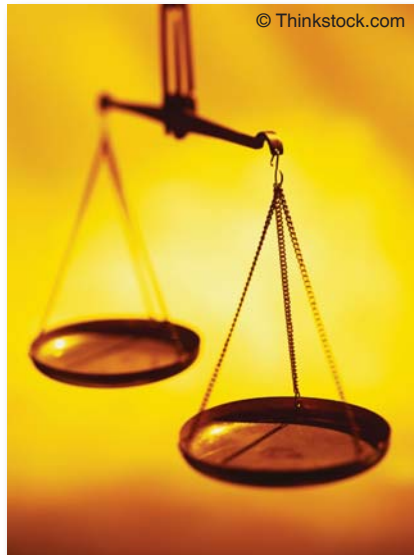
and certification. The Florida Supreme Court held in a case involving the warrantless search of a vehicle after a dog alerted positive to the presence of narcotics to establish probable cause to support a search; relying on the training and certification of the dog *alone* is not sufficient.²⁰

***Florida v. Jardines*, case below *Jardines v. Florida*, 73 So.3d 34 (Fla. 2011), cert. granted, 132 S. Ct. 995 (2012)**

In another Florida drug dog case, the court has agreed to consider whether the use of a drug detection dog at the front door of a premises is a search within the meaning of the Fourth Amendment and if so whether probable cause is required. The Florida Supreme Court decided that it was a search and that an evidentiary showing of wrongdoing establishing probable cause (not reasonable suspicion) was required before such a search could take place.²¹

***Bailey v. United States*, case below *United States v. Bailey*, 652 F.3d 197 (2nd Cir. 2011), cert. granted, 132 S. Ct. 2710 (2012)**

The Court will determine whether during the execution of a search warrant targeting premises officers may detain occupants of those premises who have left the location during or immediately before the warrant was executed. Evidence obtained



during the detention was admitted at trial over objections that the detention violated Bailey's Fourth Amendment rights.²² In *Michigan v. Summers* the Court construed the Fourth Amendment to allow officers executing a search warrant targeting premises to detain an occupant of those premises when they encountered him leaving the location while they were preparing to execute the warrant.²³ In *Bailey*, officers were preparing to execute a search warrant when they observed Bailey and a friend leave the target residence. Other officers followed them for about a mile, pulled the vehicle over, and detained them. The subjects made incriminating statements during the detention encounter indicating that the search location was Bailey's residence, and keys were taken from Bailey that matched the residence being

searched. During the detention, officers at the premises began execution of the search warrant and found a gun and drugs. Bailey sought to suppress the evidence derived from the detention, claiming it was an unreasonable seizure under the Fourth Amendment and not justified as part of the execution of the search warrant. The Second Circuit Court of Appeals concluded that the detention was reasonable under the Fourth Amendment.²⁴ The Supreme Court has agreed to hear this case in light of the conflict that exists at the federal circuit court level.²⁵

***Vance v. Ball State University*, case below *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011), cert. granted, __ S. Ct. __ (2012)**

This is a case of interest to law enforcement managers. The Court will decide whether for purposes of establishing vicarious liability under the *Faragher-Burlington Industries* standard a supervisor is limited to those who have the power to take a final employment action, such as to fire, demote, transfer, or discipline, or can include any person who can direct and oversee the victim's daily work.²⁶ ♦

Endnotes

¹ As noted by the Court at footnote 1, the government conceded noncompliance with the warrant and argued that it did not need a warrant. *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

² *United States v. Maynard*, 615 F.3d 544 Cir. (D.C. 2010).

³ The government did not argue below that if using the GPS was a search that it was, nevertheless, “reasonable” under the Fourth Amendment, and both the appellate and Supreme Court held that this argument had been waived. *See Maynard*, 615 F.3d at 567; and *Jones*, 132 S. Ct. at 954.

⁴ *See Jones*, 132 S. Ct. at 949.

⁵ *Katz v. United States*, 389 U.S. 347 (1967).

⁶ *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007); *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010); and *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010).

⁷ *Jones* at 951-952.

⁸ For example, in *United States v. Skinner*, No. 09-6497, 2012 WL 3289801 (6th Cir. Aug. 14, 2012), a post-*Jones* case, the defendant was trafficking marijuana from Arizona to Tennessee and using a pay-as-you-go cell phone to coordinate with other coconspirators. DEA agents identified the defendant’s cell phone and “pinged” the phone to obtain GPS data from it and to locate and arrest the defendant. The court held that there was no Fourth Amendment violation because the defendant had no reasonable expectation of privacy in his publicly visible location traveling on a highway and no expectation of privacy in the information emitting from the phone he chose to use. The court noted that, unlike *Jones*, no device had been attached to the defendant’s vehicle.

⁹ *See Jones*, 132 S. Ct. at 957.

¹⁰ *Fields v. Howes*, 617 F.3d 813 (6th Cir. 2010).

¹¹ *Howes v. Fields*, 132 S. Ct. 1181, 1194 (2012).

¹² *Brady v. Maryland*, 373 U.S. 83 (1963).

¹³ *Smith v. Cain*, 132 S. Ct. 627, 630 (2012).

¹⁴ *Id.* at 630.

¹⁵ *Millender v. County of Los Angeles*, 620 F.3d 1016 (9th Cir. 2010).

¹⁶ *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012).

¹⁷ *Id.* at 1250.

¹⁸ *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012).

¹⁹ Those exceptions are prohibition of false statements to a government official, perjury, and falsely claiming to be speaking as a government official or on behalf of the government. *Id.* at 2545-2546; and *Id.* at 2545.

²⁰ *Harris v. Florida*, 71 So.3d 756 (Fla. 2011).

²¹ *Jardines v. Florida*, 73 So.3d 34 (Fla. 2011).

²² *United States v. Bailey*, 652 F.3d 197 (2nd Cir. 2011).

²³ *Michigan v. Summers*, 452 U.S. 692 (1981).

²⁴ *See Bailey*, 652 F.3d 197, 206-207.

²⁵ *See United States v. Cochran*, 939 F.2d 337 (6th Cir. 1991); *United States v. Cavazos*, 288 F.3d 706 (5th Cir. 2002); *United States v. Bullock*, 632 F.3d 1004 (7th Cir. 2011) (extending *Summers* to include occupants detained a short distance from the search location); *United States v. Sherill*, 27 F.3d 344 (8th Cir. 1994); and *United States v. Edwards*, 103 F.3d 90 (10th Cir. 1996) (refusing to extend *Summers* to detentions of occupants away from the search location).

²⁶ *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998); and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) [Establishing liability for the harassment caused by supervisors and managers, but permitting employers to assert an affirmative defense demonstrating that they had adequate corrective and preventive policies in place that the victim-employee failed to take advantage of in cases where the harassment did not lead to a tangible employment action].

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.

Wanted: Photographs



The *Bulletin* staff always is looking for dynamic, law enforcement-related images for possible publication in the magazine. We are interested in those that visually depict the many aspects of the law enforcement profession and illustrate the various tasks law enforcement personnel perform.

We can use digital photographs or color prints. It is our policy to credit photographers when their work appears in the magazine. Contributors sending prints should send duplicate copies, not originals, as we do not accept responsibility for damaged or lost prints. Send materials to:

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FBI Law Enforcement
Bulletin, FBI Academy,
Quantico, VA 22135.

leb@ic.fbi.gov

Bulletin Notes

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



Sergeant Copeland



Officer Bamford

Sergeant Andrew Copeland and Officer Rodney Bamford of the Keizer, Oregon, Police Department responded to the scene of a motor vehicle crash. Upon arriving, they discovered an overturned vehicle in the street, adjacent to another vehicle engulfed in flames and an active power line down in the immediate area. The officers determined that the driver of the overturned vehicle was still inside. Sergeant Copeland and Officer Bamford attempted to assist the driver out of his vehicle, but he was uncooperative. The officers also were forced away several times by the intense heat

emanating from the nearby burning car. Knowing that the overturned vehicle was in danger of catching fire and that the driver's life was in jeopardy, Sergeant Copeland and Officer Bamford persisted, pulled him out of the vehicle, and moved him to a safe location. Fortunately, no injuries were sustained in the crash or during the rescue.



Officer Lindsey

Conservation Enforcement Officer Timothy Joe Lindsey of the Alabama Department of Conservation's Wildlife and Freshwater Fisheries Division was off duty at a local airport when he witnessed the crash of a small plane holding a family of four. Though his wife and son were with him at the time, Officer Lindsey immediately drove to the crash site to provide assistance. Entering the burning and potentially explosive wreckage, he found a 7-year-old boy, the sole survivor of the crash, who was severely injured. Officer Lindsey's quick and decisive action as a first responder enabled him to move the boy a safe distance away from the crash and ensure his survival. When EMTs arrived on the scene and the situation was stabilized, Officer Lindsey felt he was no longer needed and left the area without divulging his

name to anyone. It was only due to local TV news footage that his identity was revealed. For his actions, he was awarded the Alabama Legislature's Medal of Honor.

Nominations for *Bulletin Notes* should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions can be mailed to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Quantico, VA 22135, or e-mailed to leb@ic.fbi.gov. Some published submissions may be chosen for inclusion in the Hero Story segment of the television show "America's Most Wanted."

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Patch Call



The patch of the Port Aransas, Texas, Police Department prominently features a marlin jumping from the waters of the nearby Gulf of Mexico, representing the city's popularity with avid sports fishermen. Beach tourists and college students on spring break also flock to Port Aransas annually, increasing the city's population of 3,500 to as much as 60,000 in the summer months.



The interesting shape of the Manchester, Connecticut, Police Department patch resembles a white mulberry leaf, commonly fed upon by the silkworms providing the silk that contributed to the growth, culture, and fame of the town. Named after the major textile center in England, Manchester was the center of the silk industry throughout the 19th and early-20th century.