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## **Human Source Development**





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# ***Proactive Human Source Development***

By ROBIN K. DREEKE and KARA D. SIDENER

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**F**or years, many local, state, and federal law enforcement agencies have employed tried-and-true methods for investigating and solving both large and small cases. Most of these approaches relied on identifying human sources and witnesses derived from investigative case information. Law enforcement personnel found these individuals

by reacting to this information, as well as by receiving details from Good Samaritans who felt it their civic duty to step forward.

In today's society and law enforcement climate, investigators need to adapt and update this model. In mainstream investigative work, this methodology remains effective for developing the kind

of information needed while reacting to new details gleaned through investigation. But, as law enforcement professionals encounter more complex investigations in the areas of terrorism, cyber crime, and counterintelligence, *reacting* to new investigative information is simply not good enough. By the time organizations develop the information that may lead to

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a specific individual, it may be too late. A terrorist attack could have happened, financial losses from a major cyber intrusion may have occurred, or classified national security information may have reached a foreign adversary. The challenge of countering these threats and avoiding the messy cleanup in their aftermath is to proactively develop a confidential human source base to help thwart individuals and groups that do not hold the best interests of the United States or its allies in their thoughts and actions.

Law enforcement training academies and continuing professional development opportunities throughout this nation do an excellent job of emphasizing and teaching the skills needed to both interview

and develop a quality human source base identified by solid investigative work. It is widely accepted that no great case will be made without a great human source. However, law enforcement organizations need to shift their focus by emphasizing a more proactive approach to source development. Instead of employing a reactive mentality, they must look for sources of information *before* crimes occur. This leads to the stressful question for both veteran officers and new hires, “Where do I find a human source *without* having a crime to tell me where to look?” With seasoned law enforcement professionals in short supply to share this type of knowledge, the authors present one methodology for proactively identifying and finding

a confidential human source. Having to get in front of the criminals is not a new problem for law enforcement; rather, the authors offer a refreshing approach to an ever-increasing demand to prevent violence, which—to do so—requires effective human sources.

### The Situation

Susan Clark, a seasoned agent, has been assigned to a joint terrorism task force for the past 10 years. During her tenure, she has had some solid successes and is well respected by both peers and managers. Throughout her career, Clark has produced significant results because she paid attention to details and quickly reacted to new information as it developed during the course of her investigations.

Clark’s good friend and partner, Smith, has worked on the squad for many years, even more than she. During their years as partners, Smith taught Clark a great deal about human source development and had become a true master of proactively finding and developing the types of sources and information needed to counter threats to national security. Clark believed that Smith enjoyed a high level of success because of his sincere interest in people and his ability to suppress his ego, two of the strongest attributes of an



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effective interviewer and source developer.

As one of the leading investigators, Clark was asked to join a new cyber task force her office was forming to better address these issues that crossed multiple criminal and national security programs. Looking for a new challenge, Clark accepted the transfer, thinking that she could aptly adjust her tried-and-true skills as an investigator to counter the ever-increasing cyber threat. After a few months on the squad, however, she began to feel a bit frustrated. Accustomed to routinely receiving tips or leads from multiple investigative sources, Clark quickly found that this did not occur. As she learned more about cyber threats, she discovered that the perpetrators of these crimes are not particularly obvious.

Hiding in technology can be effective, making it difficult for law enforcement to identify the actual criminals behind the computers. In addition, victims of cyber crimes, whether individuals or corporations, are not as forthcoming as those in other types of crimes. For example, if a major bank discovers a cyber intrusion, even with no apparent crime having occurred, it does not want this to become common knowledge as it could cause clients to lose confidence in the bank's ability to protect their information. The bank



would rather handle the matter internally and avoid any public disclosure. The same holds true not only in the banking industry but also with defense contractors, colleges and universities, private corporations, and nonprofit organizations. To further this problem, even if cyber criminals do not succeed, potential victims may not share how they discovered the efforts of these perpetrators or the activity they have observed and identified by those attempting to compromise their systems.

What Clark learned from her colleagues with more experience working cyber-related crimes was that these cases involved more offensive effort than defensive. The key was developing relationships with people who could provide

trends and techniques of cyber criminals to proactively educate and inform others to prevent such occurrences. So, Clark had to find a way to get out in front of the cyber criminals.

### **The Guidance**

Feeling somewhat overwhelmed by what she had learned and beginning to miss the days of inherently knowing what to do, Clark realized the value of having worked with Smith for years and decided to talk to him about how she might tackle her new challenge. His approach differed from hers, but because of a common objective, they brought their mutual strengths to a problem and complemented each other. Clark viewed herself as a "by the book" individual who knew

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the rules and procedures inside and out. Once given a piece of information, no matter how small, she had the tenacity for running it to its logical conclusion and the acumen for piecing all of the elements together to solve a case.

On the other hand, Smith was an “idea guy.” Clark would start briefing him on the details of a case, and immediately all sorts of ideas would pop into his

talents they both had for granted until she found herself without his added skills.

Clark walked down the hall to Smith’s office. Smith turned from his paperwork and said, “Hey, what’s up with you?” Clark bit her lower lip and took a deep breath. Smith offered her the chair he always kept next to his desk for guests. She flopped down with another sigh. Smith commented that he had not seen

do I find sources with no crime to lead me to them?” Smith just sat and listened in his patient way and kept encouraging her to talk. When she finished, he gave her a lopsided smile and said, “I was worried at first that you had a problem. This is an easy fix for you and me.”

Smith asked Clark if she ever thought about why they were so successful together. She admitted that she had not until she recently remembered his ability to come up with ideas on finding human sources. Smith asked her if she ever considered how he came up with his ideas. She sat back, thought for a moment, and realized that she was starting to piece it together. Clark recalled that she would determine the information they needed based upon the specifics of the case. “Correct,” responded Smith, “then I took the need you identified and created what I thought of as the ideal resume of an individual who would know what you said we needed to find out.” Clark nodded, smiled, and recounted how he had told her to do the same thing when looking for her spouse by creating the ideal resume for someone she thought would be a good match. “The same process works here as well,” said Smith, who then asked what she did next. “Well,” said Clark, “I thought about where that type of person might enjoy socializing

***Smith taught Clark a great deal about human source development and had become a true master of proactively finding and developing the types of sources and information needed to counter threats to national security.***

head. A patient person, Smith generally waited until Clark finished and then adeptly added his thoughts about what they should do with the case. His forte included identifying where they might find human sources of information and coming up with how to further their objectives. Not so concerned with the details and administrative requirements for working cases, Smith saw the “big picture.” Clark had taken these natural

her look so stressed in many years. Clark explained that she could not get very far on her new squad without first proactively establishing a significant human source base willing to lend a hand. She noted the challenge of the cyber-threat world and how victim companies often are reluctant to come forward. Exasperated, Clark said, “I just need people to tell me what they’re seeing, even if no crime has been committed. How

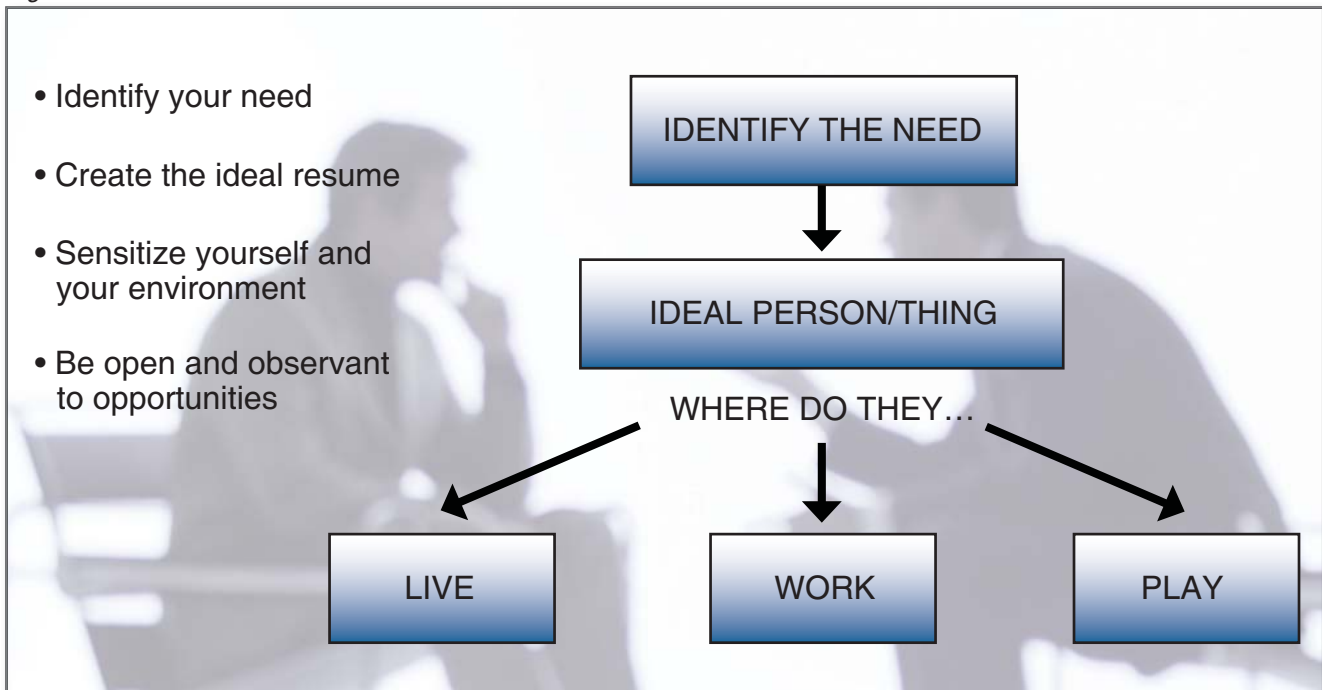
or hanging out.” “Excellent,” said Smith, who went on to explain what she knew but had yet to realize. “Once we have the ideal resume of the person we are looking for—that is, the person who can fill a need or information gap—we can start sensitizing ourselves and our environment to our needs and where these individuals may live, work, and play.”

Clark asked, “What do you mean by ‘sensitizing’?” Smith replied, “You recently purchased a new car, didn’t you?” Clark furrowed her brow and gave Smith an inquisitive look as she responded, “Yes, so?” Smith commented that it involves the same process. Smith took out a piece of paper and

drew a pyramid-shaped flow chart (figure 1). At the top, he wrote the words *identify the need* inside a rectangular box. He then drew an arrow straight down to a second rectangular box where he wrote the words *ideal person/thing* inside. Smith paused and said, “What kind of car did you decide to purchase?” Clark named the make and model and Smith asked, “Why that car?” Clark replied that it had the proper amount of space she needed for her family, good fuel economy, and high safety ratings. Smith stated, “You just identified your need and then the ideal thing to fit that need.” Smith referred Clark to boxes one and two on his diagram. Smith asked what she

did next. Clark explained that she had looked in classified ads and told her friends and family about the kind of car she wanted. Smith said, “Great, what you began doing was sensitizing yourself and your environment to your need. Did you start seeing that make and model of vehicle everywhere?” Clark responded that she had and that it seemed strange. Smith pointed out that it was not because a lot of people had suddenly purchased the same vehicle but because Clark had sensitized herself to her designated need and started to immediately recognize opportunities. Smith continued, “You then expanded your sensitizing by letting your friends and family know of

Figure 1



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your identified need.” Smith explained that by sensitizing her friends and family, they, in turn, started recognizing opportunities for her as well. He advised that this was exactly what they had done together when working on the terrorism task force. Clark would identify the need, and Smith would proactively find a source who could fill it.

Smith said that they would tackle her challenge using the

solid relationships will continue to grow when a quality exchange of giving and receiving by both parties takes place. This concept is not limited to material items. In fact, in most cases, giving and receiving often involves just our time and listening to one another. Smith reminded Clark of the types of human sources they had developed in the past and how most of the time, they would sit for

we have our model started, let’s take a look at your situation and start applying it to your new challenge. What type of information do you need in your investigations to be proactive?” Clark began, “I need an individual who sees the type of activity that indicates someone trying to get access to a network, even if that person doesn’t have a specific crime to report. Someone like a network security administrator who not only has the technical know-how but also the access to describe the kind of activity. Someone who could say, ‘Yeah, last week someone attempted to hack into our network, and this is how they tried to do it.’ Perhaps even someone who is active in Web chatting or blogging, following different types of groups that may proactively share this kind of information with each other.” “Excellent,” Smith commented, “now that we know what you need, let’s create an ideal resume of the type of person who can give us that type of information.” Clark replied, “That’s easy, obviously someone in the IT industry who, perhaps, came in without a 4-year degree and got it later after gaining job experience and various computer certifications. I would bet someone who has spent time gaming, too. A network or systems administrator with management and

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***Smith reminded Clark of the types of human sources they had developed in the past and how most of the time, they would sit for hours listening to these individuals talk about the concerns and issues in their own lives.***

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same model after she explained how she eventually found the vehicle. Clark said, “A friend who I had told about the type of vehicle I wanted informed me that her neighbor was selling one.” Clark elaborated, “I was so happy and thankful that my friend had found the car for me that I sent her a nice gift basket.” Smith commented, “You naturally did one of the most important things we need to do in any relationship: give when receiving.” He explained that

hours listening to these individuals talk about the concerns and issues in their own lives. Clark said that she remembered all too well how they had listened to one excellent source talk for over 3 hours about the problems at his work when all they needed from him took only 10 minutes to find out.

### **The Solution**

Smith nodded his head, remembering that particular meeting, and said, “Now that

security experience and access who could speak more openly with me than those not in a management position.” Smith quickly smiled before Clark even finished. She asked, “Why are you smiling at me?” Smith said, “I have someone for you to meet.”

Smith described his casual conversation with the person seated next to him on a recent plane trip. He explained that even though he often finds it exhausting, given that he is in the business of working with people, he always attempts to speak with individuals he encounters, make a favorable impression, and find out a little bit about them and where they work. Smith did not need to remind Clark of their motto, “Assess everyone you meet in your life as a potential source.” Smith described the woman he had met on the plane, explaining her personality and what he assessed as her preferred communication style and sharing some details about where she grew up, her family situation, and other identifying personal information he had elicited during the conversation.<sup>1</sup> Clark asked, “Great, how does that help me?” Smith smiled as he said, “She is the network administrator for a major defense contractor right here in our city.” Smith gave Clark the woman’s business card,



### Ideals to Remember

- Exhibit selflessness, tolerance, genuineness, sensitivity, integrity, and humility.
- Refrain your desire to correct or improve anyone else with whom you are speaking.

explaining that at the end of their flight, he had told the woman about his line of work and she, in turn, had said that she had really enjoyed chatting with him. Then, she had stated that if he ever needed anything, just call or e-mail her. Smith then asked Clark, “So, what do you think just happened?” She replied that by identifying her need and sensitizing her environment to that need (i.e., telling Smith the kind of source and information she needed and, in the process, externalizing her need and expanding the sensitized environment), she had produced a result.

Although extremely appreciative for the great start Smith had given her, Clark realized that she definitely needed a few more leads to start making a dent in her work. Smith said, “After we have sensitized our environment, we need to take a few more proactive steps to

increase our chances of success. In this next step, we will come up with ideas about where this ideal person/thing might live, work, and play. Once we have identified some possible locations, we again will sensitize our environment in those types of venues. For example, let’s go back to your car purchase. You sensitized your environment and your friend came up with your solution. What would you have done next if your friend hadn’t found someone selling the car you wanted?” Clark thought for a minute and said she would have identified some car dealerships selling that type of car. “That’s exactly right,” exclaimed Smith. He added that a few years back when he was car shopping, he had done exactly that: selected the type of vehicle, identified some car dealerships, and sensitized a few salesmen to his needs. Within days, he had multiple

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calls and offers. “In other words,” said Smith, “I went to where my ideal thing might live or work and sensitized the environment.”

Smith turned the conversation back to Clark’s issue and said, “Now that we have identified the ideal type of person, let’s focus on where that person might work and play.” Smith asked Clark to think about what types of groups, organizations, and clubs the individuals she was looking for would belong.

Clark thanked Smith for taking time with her and asked him if he had any last thoughts. Smith took out a worn 3" x 5" card from his wallet. Clark immediately recognized it as the one he looked at prior to every source meeting that the two had conducted. Smith stated, “I know you know the stages of the relationship-building process, but it’s always good to remind ourselves of these ideals before we converse with the individuals we need to help

## The Result

A few weeks later, Smith took a break from his work and strolled down the hall to Clark’s office. He had not seen her since their last conversation and was curious about how she was doing. She was not at her desk, but it was piled with a stack of newly opened files, scribbled with notes, that exuded an overall sense of organized chaos that he had seen in their years of working together when cases were going well.

Smith looked up to see Clark briskly walking down the aisle toward her desk with a broad smile. She greeted Smith and stated, “Simple genius.” “Huh?” responded Smith. Clark quickly commented that all of the things they had talked about were common sense but seemed like a mystery until thinking about them and writing them down. Clark described how she went to the InfraGard meeting and made a few friends. A week later, she received several leads and ideas from these people and many others willing to help. She said, “I now have more work than I know what to do with. I just finished speaking with our management regarding more resources for our ever-increasing workload.” “Congratulations,” said Smith with a wry grin, “be careful what you wish for, you might just get it.”

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***She replied that by identifying her need and sensitizing her environment to that need (i.e., telling Smith the kind of source and information she needed and, in the process, externalizing her need and expanding the sensitized environment), she had produced a result.***

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Clark sat silently for a moment as she thought through her mental lists and came up with a quick match. “InfraGard meetings,” she exclaimed.<sup>2</sup> “Perfect,” said Smith. Clark said that she would attend an upcoming meeting the following week and try to sensitize the environment to her need. “That sounds like a great place to start,” said Smith.

us.”<sup>3</sup> Smith then read the words *selflessness, tolerance, genuineness, sensitivity, integrity, and humility* and the phrase *refrain your desire to correct or improve anyone else with whom you are speaking* from his worn card. Clark thanked Smith for the insights and the fun of working together again and went off with renewed energy.

## Conclusion

While leveraging collective strengths is an obvious benefit of teamwork, being able to adapt that symbiotic relationship to different, ever-changing challenges is a talent that the law enforcement community has embraced. As law enforcement professionals, we need to continue our efforts in proactively developing human sources who can provide us with the types of information that will allow us to combat crime, of any nature, before criminals have the opportunity to act.

The methodology of identifying a need, sensitizing the environment, and then

externalizing that need to others, along with expanding the environment in which we look for an answer to the need, is one of many ways we can proactively identify people who can help us before crimes occur. It helps to articulate the need and go through the steps of who would be the ideal person to provide the information to fill that need and then go about finding that person in a variety of environments (i.e., where they live, work, and play). In today's ever-changing and challenging environment, it is important for law enforcement to employ as many tools as possible to stay ahead of the criminals. ♦

## Endnotes

<sup>1</sup> Robin K. Dreeke and Joe Navarro, "Behavioral Mirroring in Interviewing," *FBI Law Enforcement Bulletin*, December 2009, 1-10.

<sup>2</sup> InfraGard is an association of businesses, academic institutions, law enforcement agencies, and other participants dedicated to sharing information and intelligence to prevent hostile acts against the United States. Its Web site is <http://www.infragard.net>.

<sup>3</sup> Robin K. Dreeke, "It's All About Them: Tools and Techniques for Interviewing and Human Source Development," *FBI Law Enforcement Bulletin*, June 2009, 1-9.

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## ***Preserving Community-Oriented Policing in a Recession***

By Zach Friend, M.P.P., and Rick Martinez



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**W**idespread budget cuts have forced governments and law enforcement agencies to do more with less. Many police departments have had to lay off officers, and some have eliminated all prevention and education programs. During such tough periods, officials often find it easy to go after programs that consume time and resources—even if they yield tangible results.

Yet, even with a need to slash budgets, an important question remains. Can law enforcement agencies really afford to cut community-oriented policing programs? For the Santa Cruz, California, Police Department (SCPD), which has less than 100 sworn officers in a town of 56,000 residents, an established community policing program saved the agency from having to fully lay off officers for the first time in over 140 years.

### **Obtaining Funding**

Community-oriented policing focuses on fostering prevention, building partnerships, and establishing trust. It empowers community members to become stakeholders in their own safety and transforms the image of an agency in the minds of those who support it financially and otherwise—local elected officials, community members, and the federal government.

For the Community Oriented Policing Services (COPS) program, the U.S. Department of Justice awarded over \$1 billion in Recovery Act money intended for hiring, rehiring, or retaining officers, encompassing a 3-year funding mechanism to insulate agencies against further budget cuts. But, how do departments tap into such sources of money? What mechanisms can agencies create to

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ensure that they more likely will succeed when future opportunities arise?

### **Establishing Community Relationships**

Public safety is both a primary responsibility of local government and a core expectation of community members. This highlights the importance of agency interaction with the community. By doing so, officers can develop relationships and build trust with citizens. They can cultivate community members' understanding of police services and procedures, as well as their involvement. Also, officers gain firsthand exposure of community concerns and perceptions. Further, they increase both the quality of the agency's work and the amount of public support.

Establishing these relationships may be simpler than many people think. Officers can start by finding several community-minded people interested in building strong ties among neighbors and with law enforcement regarding issues, such as a Neighborhood Watch program. These individuals then can reach out to other citizens and neighborhoods and, with local law enforcement, build the infrastructure for a strong community policing program. The framework includes informational meetings to introduce officers to their areas of responsibility, educational gatherings to address specific localized problems, and management-level sessions from a broader perspective that involve community and police leaders.

Often, upon implementation of community policing principles, such as holding regular meetings, tangential benefits arise as well. For example, elected officials generally attend these events

and can become significant allies in framing an agency's image. In addition, local businesses—generally the lifeblood of a city tax base—eagerly will partner with police agencies that emphasize this type of outreach. Thus, a department can benefit by staying on top of important issues, as well as positively impacting its reputation. Officers become friends, neighbors, and colleagues. SCPD has strived to develop and maintain relationships with key stakeholders, including all sectors of the business community.

### **Building Media Relationships**

Police agencies must build positive relationships with members of the media in view of their influence on popular opinion and public policy. Of course, implementing a successful community-based policing model will result in more coverage. And, when law enforcement personnel speak to the media, they really communicate with the public at large. Any media coverage of community safety issues exerts a powerful influence on the public's perception of how the police have addressed its needs.

Through the establishment of a public information officer (PIO) and media training for management staff, SCPD has strived to effectively communicate with the community. Creating a PIO allows an agency to centralize its message and to have someone who can focus fully on providing information to the public and media. This position can remove a great burden from supervisory staff members generally tasked with this function. In addition, the PIO can handle communication duties at crime scenes, allowing investigators to deal with the issue at hand.

**“ Preserving community-oriented policing in a recession can be accomplished, but it will require changes to traditional outreach methods. ”**

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## Developing Rapport with Elected Officials

Law enforcement leaders should strive to build solid relationships and open communication with elected officials so they can educate them about the agency's strengths and challenges. This will help government leaders make sound budgetary decisions that can impact the department's operations.

How can police agencies develop these relationships? They must proactively establish dialogue *before* a crisis or major budgetary decision arises. Department leaders can reach out to local city council members and assume that they do not have a strong understanding of the agency. Whether or not police executives anticipate the support of elected officials, they still must get to know them individually. What are their values, life experiences, and background? How will those factors shape their perceptions of public safety issues and performance? Departments can proactively maximize opportunities for interaction through invitations to participate in, for instance, roll calls,

departmental events, ride-alongs, and community meetings. Anything that develops background knowledge about the agency or creates a sense of shared mission and personal relationships will provide benefits.

## Preserving Community Policing After Cuts

In healthier economic times, SCPD staffed its Community Services Unit (CSU) with a manager, supervisor, three patrol officers, and three community service officers. During those fully staffed years, CSU hosted or attended weekly community meetings and hosted three citizen police academies, one designed solely for Spanish speakers. Later, budget constraints resulted in the elimination of CSU. However, that did not end SCPD's community outreach.

Now, a handful of managers working out of the patrol division oversee community policing efforts. SCPD divided patrol areas and assigned



*Local youths participate in an early gang prevention program.*

© Santa Cruz Police Department

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them to police managers who ensure that citizens have a single point of contact. To preserve some semblance of community policing in the department, managers partner with citizen groups to help conduct outreach efforts, mobilize neighborhoods, and facilitate meetings. The partnership equates to an ad hoc community policing partnership that has many strengths and provides a replacement—albeit imperfect—for the former fully funded program.

Besides the obvious cost savings, use of citizen groups to continue the community policing message helps maintain a constant level of communication and partnership with the community as a whole. And, with many agencies transitioning from a traditional field training officer (FTO) program into a police training officer (PTO) system, innovation gleaned from the PTO program easily can be integrated into the ad hoc community policing partnership. With a call for citizens to step up and participate in public service endeavors nationally, now is the time for community policing agencies to use the newly emerging resource. Agencies like SCPD, struggling to financially support a viable community policing program, have found community-law enforcement partnerships the most effective way to maintain the level of service citizens expect. Ultimately, it also has demonstrated a commitment to the community-oriented policing philosophy that has greatly aided the department in receiving federal grant funds and insulated the police from local cuts.

Preserving community-oriented policing in a recession can be accomplished, but it will require changes to traditional outreach methods. To this end, the authors suggest four steps.

- 1) Meet with community groups.
- 2) Establish a PIO to improve media relations.
- 3) Communicate with elected officials proactively, *before* a crisis.
- 4) Implement creative procedures and policy changes that maintain community-oriented policing practices.

### Conclusion

Without question, police agencies must make difficult decisions during trying budgetary times.

However, the Santa Cruz Police Department's emphasis on maintaining community-policing partnerships actually brought in financial benefits. The agency received nearly \$2 million in federal COPS grants, which preserved five positions slated for layoffs.

In addition, the city has found that the department's relationship with the community has allowed for a more amenable bond measure environment and greater support for tax increases

that support public safety. Beyond the financial benefits, officers have experienced a tangible improvement in their general working relationship with the public. Many officers have found that a simple "thank you" comes more often during their day-to-day patrols. ♦

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**Can law enforcement agencies really afford to cut community-oriented policing programs?**

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# ***Policing Liquor Establishments***

## ***A Holistic Approach***

By JOHN L. GRAY

A small American town of 17,000 residents had one of the highest crime rates in the county. By day, it was a vibrant cluster of small retail shops with residents and visitors enjoying the friendly feeling. At night, however, a different personality emerged: a climate of street fights,

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open-air drug deals in the parking lots of bars, impaired drivers, property damage from vandalism, and minor thefts had existed for several years.

One bar in a large building had live music and catered to patrons in their early 20s. This establishment had fights that often included the bar's employees nearly every night in the parking lot. Rumors of sexual activities and drug dealing constantly surfaced. In another part of town, local residents patronized three bars in close proximity to each other known as the Bermuda Triangle. When told to leave one establishment, they would walk to another and continue drinking. Police received numerous complaints of drug dealing, fights, and property damage.

Nearly every night, all of the town's police officers, with assistance from state and county personnel, would go from one call to another about alcohol-related crimes, which depleted resources from other areas and increased response times. The town needed a new approach as the police leadership and the city's elected officials continued to hear complaints from the community and crime statistics were not improving.

## THE STRATEGY

One proven method of making a community safer

involves attacking the locations of crime and disorder. Being proactive early to prevent problems offers the most options for success. To this end, the author presents a strategy for police executives to consider that includes adopting the right mind-set, knowing who is responsible, partnering with other authorities, establishing a point of contact, agreeing upon expectations, training business employees, visiting the establishments, and documenting service calls.

## The Right Mind-Set

The idea that assisting a bar in becoming successful, addressing issues of over service, or preventing disorder in such establishments belongs exclusively to the state's licensing authority on alcoholic beverages constitutes a common

misconception. These state agencies often are underfunded and have insufficient personnel to effectively monitor the vast number of licensees. The agents often can handle only the "biggest fire" and, therefore, must react to problems.

When police departments adopt the mind-set, from the executive to the patrol officer, that this is our problem and, therefore, our responsibility, real and lasting results can happen quickly. This mind-set will help form relationships, inspire working partnerships, and create determination to achieve success. Without this foundation, everything that follows will have inconsistent and temporary results.

## The Responsibility

First, police leaders should research the state's laws and

***“When police departments adopt the mind-set...that this is our problem and, therefore, our responsibility, real and lasting results can happen quickly.”***



*Mr. Gray, a retired police chief, is a speaker, trainer, and author of leadership- and management-related materials.*

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court findings to determine the responsibilities of the liquor establishment. When police managers know the powers and responsibilities of the business establishment and the state's regulating agency, as well as what tools their own departments have, they will be better equipped to make an effective plan and to engage in a working partnership.

For example, is the business accountable for the behavior of customers outside its building and in its parking lot? Who has the power to immediately suspend the business' operations? Can police officers make an arrest for a minor misdemeanor that did not occur in their presence?

### **The Partnerships**

Liquor control agents are the experts and an essential resource in the management of a bar. Many of the state's licensing agencies have a database that provides information that can assist the police department and may include documentation of administrative violations, owners of record, and arrests of impaired drivers that came from the business. Meeting with representatives will encourage sharing information about a bar's problems and its successes.

The licensing agency often has resources for training the employees of bars to prevent

overservice and manage problems. The police department should learn about this training and participate in it.

Most liquor establishments will make the required changes necessary to improve business safety and will work with the police to create observable results. For the problem business,

***“Police leaders should appoint one supervisory-level employee as the point of contact on all issues regarding liquor establishments....”***

the police leader can bring in more partners who have regulatory authority, such as building inspectors, fire marshals, health inspectors, public works officials for street and parking issues, gambling enforcement agents, and state and federal revenue officials.

The police department should enforce codes fairly, firmly, and impartially. It should communicate with the prosecuting attorney about the history of problems and the proactive approaches that did not bring the desired compliance because the

prosecutor can seek maximum accountability.

Challenging the renewal of a license, either by suspending or revoking it, is the last regulatory option for government. Similar to terminating an employee, this proves appropriate when all other courses of assistance, training, and progressive steps of accountability have failed. A huge undertaking, it will require the political will and financial commitment of the jurisdiction because ramifications concerning loss of tax revenue or the perception that government is “being heavy handed” against a business can occur. The success of the police department in this regard is based upon the timely and ongoing sharing of information with the elected officials; they need to be kept continually informed. The process of taking away a problem establishment's license may be long and full of obstacles, but, when successful, substantial lasting benefits to the community include reduced crime and disorder and the availability of public safety resources for other priorities.

### **The Point of Contact**

Police leaders should appoint one supervisory-level employee as the point of contact on all issues regarding liquor establishments so the business owners, the licensing agency, and the police administration

can give and receive information. Larger jurisdictions may have to divide their communities into areas with several points of contact.

As the police department's watchdog for emerging problems, the point of contact also is the face and voice of the department when dealing with the business and partnering with other government organizations. The value of this approach is the consistency of information, care, and communication from the police that can help keep issues firmly in focus.

### **The Expectations**

Being proactive means that the police department's point of contact meets with the owners and managers of liquor establishments before problems occur. Generally, owners want a successful, profit-making enterprise viewed as an asset to the community and, therefore, usually will cooperate with the police department.

The first step involves delivering a personal invitation to the business for a group meeting of liquor establishment managers. This represents a valuable tool because police leaders and owners can get to know each other. This meeting is about explaining what the police department can and cannot do, what it expects from the establishments on addressing problems, and what it can offer in the way of

training and assistance to meet the common goal of a crime-free community and a safe business for patrons and employees.

From this meeting, the police department's point of contact should schedule individual meetings with the owner and the business' management team to help create the relationships, address unique issues, and establish the avenues of communication. The management team members should be informed about the principle that if a crime or disorder is predictable in their business,

it also is preventable, and they may be held accountable for failing to take appropriate action. The police point of contact should describe how the department will conduct proactive bar checks, how it will handle problems, and what assistance it can provide.

Having an agenda and distributing the minutes of these meetings will create valuable documentation. A written, formal working agreement between the department and the establishment represents a higher level of documentation



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that can help hold the business accountable.

### **The Training**

Employees cannot be held accountable for what they do not know. By helping to train the wait staff and bartenders about dealing with problems and understanding expectations, the police department can increase the impact of the value of the lessons. After all, most workers want to be successful and avoid problems that could lead to criminal liability. This training may pay other benefits as well. For example, when officers respond to the business for a complaint, the employees often will be more comfortable cooperating and may provide more information when they have a relationship with the department.

### **The Visits**

Knowing that a police officer likely will stop by can prevent many problems. Defensiveness and skepticism often diminish when these visits are not a surprise. These checks are intended to see whether employees are using the training that they received, to communicate to potential problem patrons that the police are available to take action, and to deepen the communication relationship with the department. A worthy goal is to have every bar visited by a patrol

officer at least several times a week.

Officers need to know from the department's command staff the importance of doing this work. Conducting bar checks may cause resistance and noncompliance from officers who never have done such duties or fail to see their value. They should be trained

***The immediacy of feedback and accountability between the business and the police can prove valuable.***

on how to conduct patrol checks of bars, what problems to look for, how to deal with intoxicated persons who are not committing a crime, and what solutions and tools they have at their disposal.

The department should inform liquor establishments that undercover operations also will occur throughout the year at different times. It should consider adopting the practice of making immediate custodial arrests for employees who commit crimes because these have a chilling effect on establishments that allow crime to happen. One effective operation, the underage

patron sting, often involves a male and female couple underage by more than 12 months. Of course, the department should craft a comprehensive policy and procedure that meets legal standards and the current professional practice.

### **The Documentation**

A 1-page, check-the-box form for officers to document every call to a liquor establishment creates a climate of fairness. In addition to a normal police report, this form includes information as a cross-reference. What makes this tool especially useful is that it requires the officer to determine whether or not the business could have prevented the event. The completed document is distributed to the department's point of contact who does a follow-up conversation with the establishment's management team.

The immediacy of feedback and accountability between the business and the police can prove valuable. For example, when a liquor license is up for renewal or is being challenged, these documents and the department's case reports become the evidence to present at the administrative hearing. Also, reliable data on liquor establishments within the jurisdiction helps to ascertain if perceptions are accurate. Wise leaders will listen carefully to their employees for the reasons

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behind their judgments but will use sound data before making a decision to target any location of crime for extra attention.

## CONCLUSION

For the town in the opening scenario, change occurred when the police department decided to own the problem. Conversations began with the state liquor control agents and the business owners, and a police lieutenant

became the point of contact for all information and conversation with the businesses.

An order, backed up by training, was given to all the patrol teams, and the frequency of routine checks increased. The department started undercover operations, and one resulted in 18 arrests on one night alone. The media accompanied officers and publicized the businesses where arrests occurred.

Within 2 years, two of the Bermuda Triangle bars had changed ownership or management, and their operations improved. The ultimate result of the new approach was that the city's crime rate dropped by 25 percent. The sales tax revenue lost by the closure of several bars was offset by the reduced costs of jail and court costs and rebounded within 12 months. ♦

## Bulletin Honors

### *Contra Costa County, California*

The Contra Costa County Peace Officers Monument is located in Martinez, California. Rather than honoring fallen officers, it recognizes all peace officers past, present, and future who dedicate their professional lives to serving citizens and making communities safe. It was unveiled during National Police Week in May 2002.

The circle of badges and shields, placed in the order in which each agency was established, at the statue base signify both the perpetual unity and equality of each police agency in Contra Costa County. The bronze statue features a peace officer standing next to a little boy. It represents service, respect, and community, which form the foundation of a successful partnership between law enforcement and those served.



# Leadership Spotlight

## Lessons from the Living Room

**W**e all recognize that the leaders of the future are the children of today. We also see how our childhoods differ from those of our kids. Our children face constant stimulus from the Internet, cable television, and gaming systems. Their generation prefers to communicate via text, e-mail, or a social networking Web site. All of these modern conveniences seem to suggest that the resulting void in face-to-face communication threatens the ability of our children to lead later in life. It is our responsibility to discover ways to enrich these skills while recognizing that we live in an ever-changing world.

My sons are captivated by the *Star Wars: The Clone Wars* series. Every Friday, it is pizza night on the living room floor as they prepare for the next battle between the Republic (the good guys) and the Separatists (the bad guys). Each episode begins with a quote that vanishes into space. Our family does something that differs, perhaps, from others. We discuss the meaning of the quote, not only as it relates to the episode but to real life.

My sons have favorites. "A wise leader knows when to follow." "Great leaders inspire greatness in others." Interestingly, both also selected this quote: "The first step to correcting a mistake is patience." They said that every episode features someone making a mistake while trying to do something good. I have taught them not to fear mistakes or

failures for, if they do, they will never have the opportunity to

# OPPORTUNITY

succeed. In the series, characters discuss and address mistakes. The individuals do not face ridicule or severe discipline. Instead, they are given the opportunity to develop and grow, much like I hope these simple discussions will help my boys grow.

These simple quotes and lessons resonate with my family and, more important, provide an opportunity to engage each other in active dialogue. They also may resonate with your officers. Taking the time to engage them in dialogue, maintain their interest, build their trust, and give them an opportunity to develop and grow always prove worthwhile. ♦

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*Special Agent Art Gonzales of the FBI Leadership Development Unit at the FBI Academy prepared this Leadership Spotlight.*

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# Supreme Court Cases

## 2009-2010 Term

By LISA A. BAKER, J.D.

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In the most recent term, the U.S. Supreme Court decided several cases of interest to law enforcement. Three addressed legal issues implicated in the taking of statements in criminal investigations. In these cases, the Supreme Court provided additional clarification and guidance concerning the long-standing requirements set forth in *Miranda v. Arizona*, including 1) the circumstances

governing when law enforcement may initiate contact with a subject who previously has invoked the *Miranda* right to counsel; 2) what will constitute a waiver of the *Miranda* right to silence; and 3) what must be conveyed to a subject to satisfy *Miranda*.<sup>1</sup>

Another case considered the constitutionality of a warrantless entry into a residence due to concerns about the safety and

well-being of occupants inside. The Supreme Court also addressed the reasonableness of a search conducted by a police department targeting an officer's department-issued pager, the constitutionality of a civil commitment statute allowing for the continued commitment of federal inmates determined to be sexually dangerous, and whether the Second Amendment applies to states.

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This article provides a brief synopsis of these cases. 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

### ***Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010)**

In this case, the Supreme Court addressed the impact that silence has on attempts to interrogate an in-custody subject and whether officers could proceed with a custodial interview in the absence of an explicit waiver of *Miranda* rights. The subject in this case was arrested for his involvement in a murder, and detectives, after advising him of

his *Miranda* rights, attempted to interrogate him. The subject largely remained silent; then, about 2 hours and 45 minutes into the interrogation, a detective asked if he believed in God, which the subject indicated he did. The detective then asked, “Do you pray for God to forgive you for shooting down that boy?” The subject responded, “yes.”<sup>2</sup> Authorities sought to use this admission against him. The lower courts allowed the statement to be used, but the Sixth Circuit Court of Appeals ruled in favor of the defendant.<sup>3</sup> The Supreme Court reversed this decision and found no *Miranda* violation.<sup>4</sup>

The Supreme Court explained that the subject’s mere silence in the face of questioning was not a clear and unambiguous invocation of his right to remain silent. Previously, the Court had ruled that to effectively invoke the *Miranda* right to counsel, a subject must do so clearly and unambiguously.<sup>5</sup> In *Berghuis*, the Court acknowledged that there was no reason to apply different standards, depending on whether the subject invokes the *Miranda* right to counsel or right to silence. Accordingly, the invocation of either the right to silence or the right to counsel must be clear and unambiguous to be effective.

The Supreme Court also considered the defendant’s

claim that his statement still should be suppressed because he never adequately waived his right to silence. At first blush, this argument appears to have merit in light of the language in the original *Miranda* opinion emphasizing the heavy burden imposed on the government to demonstrate that a valid waiver was obtained and that “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.”<sup>6</sup> However, the Supreme Court has clarified its position in post-*Miranda* cases, emphasizing that *Miranda* is designed to ensure that the subject is advised of and understands certain rights and that, if invoked, these rights are safeguarded.<sup>7</sup> In *Berghuis*, the Court held that “Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.”<sup>8</sup> By responding to the detective’s question, the suspect demonstrated a willingness to waive his right to silence.

The Supreme Court also rejected the defendant’s argument that even if he provided a valid waiver, the detectives were not permitted to question him until they obtained the waiver first. The Court noted that there are



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practical reasons why a waiver should not be required for an interrogation to begin as the interrogation can provide the subject with additional information to help the subject decide whether to invoke or to talk with law enforcement. As stated by the Court, "As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate."<sup>9</sup> *Miranda* is satisfied "if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions."<sup>10</sup> Accordingly, "after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights."<sup>11</sup>

***Maryland v. Shatzer*,  
130 S. Ct. 1213 (2010)**

In *Maryland v. Shatzer*, the Court ruled on the legal significance and definition of a break in custody within the context of the Fifth Amendment privilege against self-incrimination.<sup>12</sup> Post-*Miranda* cases expanded on the protections afforded an in-custody subject. In *Edwards v. Arizona*,<sup>13</sup> the Supreme Court ruled that once defendants invoke their *Miranda* right to counsel, any interrogation must cease, and there can be no

further police-initiated interrogation without the presence of counsel. *Edwards* creates a presumption that once in-custody subjects invoke their right to counsel, any subsequent waiver of *Miranda* rights prompted by police-initiated interrogation is itself the result of improper police coercion and, thus, not voluntary.<sup>14</sup> The *Maryland v. Shatzer* case presented an opportunity to clarify at what point the *Miranda-Edwards* protection would be lifted, permitting police-initiated interrogation following an invocation of the *Miranda* right to counsel.

In *Shatzer*, the defendant was serving a sentence stemming from a child sexual abuse prosecution. A detective attempted to interview the incarcerated

subject regarding allegations that he sexually abused his 3-year-old son. Shatzer initially waived his rights, believing that the detective was there to talk with him about why he was in prison, but, upon realizing the detective was there to talk about the new allegation, Shatzer declined to speak without his attorney present. Shatzer was returned to the general prison population. Nearly 2 ½ years later and after developing new evidence, another detective went to the prison to talk with Shatzer about the allegations that he molested his son. The detective advised him of his *Miranda* rights, and, this time, Shatzer waived his rights in writing. Subsequently, Shatzer made incriminating statements.



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He later was charged with various sexual abuse charges and sought to have the statements he provided suppressed.

Shatzer argued that because he remained in continuous custody following his invocation of his *Miranda* right to counsel, law enforcement could not initiate any contact with him while he remained in custody and that any waiver of his *Miranda* rights provided at the request of law enforcement was not valid. The trial court disagreed with Shatzer's assertion, concluding that given the passage of time, a sufficient break in custody occurred, permitting detectives to reinitiate contact with Shatzer despite his continued incarceration.<sup>15</sup> The Maryland Court of Appeals reversed the trial court's ruling, holding that the passage of time alone will not suffice to create a break in custody for purpose of the *Miranda-Edwards* rule.<sup>16</sup> The Supreme Court agreed to hear the case to clarify what will constitute a sufficient break in custody and the impact of incarceration on the *Miranda-Edwards* protection.

The Supreme Court ruled that a break in custody alone will not end the *Miranda-Edwards* protection. The Court instead called for a "cooling off" period, prohibiting law enforcement from attempting to interview a subject who previously invoked his *Miranda* right

to counsel for 14 days from his release from custody. According to the Court, 14 days gives "plenty of time for the suspect to get reacclimated to his normal life, consult with friends and counsel, and shake off any residual coercive effects of prior custody."<sup>17</sup>

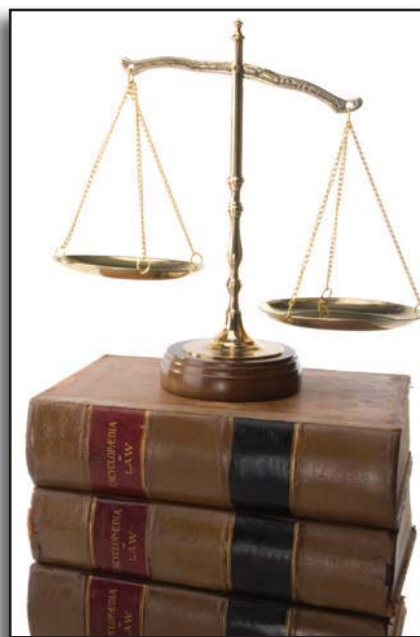
Applying this principle to Shatzer who was incarcerated, as opposed to pretrial detention, the traditional freedom-of-movement test does not resolve the issue of custody. The Court distinguished between incarceration in the general prison population and pretrial detention and found that there was a sufficient break in custody (over 14 days) following Shatzer's initial interrogation until the detective reinitiated contact

with him.<sup>18</sup> Thus, the waiver obtained from Shatzer was not the product of coercion, and his statements were admissible.

***Florida v. Powell*,  
130 S. Ct. 1195 (2010)**

In this case, the Supreme Court addressed the adequacy of *Miranda* warnings contained within standard advice-of-rights forms used by the Tampa, Florida, Police Department (TPD). The defendant alleged that the form insufficiently advised him of his right to have counsel present during an interrogation. In *Miranda*, the Supreme Court held that prior to custodial interrogation, a defendant must be advised that he has, among other rights, "the right to consult with a lawyer and to have the lawyer with him during interrogation."<sup>19</sup> The TPD form did not expressly state this, but, rather, advised the defendant of his right to talk with an attorney before answering any questions and that he could invoke this right "at any time...during the interview."<sup>20</sup>

The Florida Supreme Court concluded that the form did not satisfy the mandate of *Miranda*.<sup>21</sup> The U.S. Supreme Court reversed, holding that the form communicated the essential message of *Miranda* despite the lack of adherence to its precise language. The Supreme Court again refused to require rigid compliance to precise language,



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instead focusing on whether, taken as a whole, the language adequately communicated to the defendant that he had the opportunity to consult with counsel during the interview.<sup>22</sup> The defendant was advised of his right to consult with counsel before answering any questions and that he could invoke this right during the interrogation. The Supreme Court stated, “in combination, the two warnings reasonably conveyed [the] right to have an attorney present, not only at the outset of interrogation, but at all times.”<sup>23</sup>

***Michigan v. Fisher,*  
130 S. Ct. 546 (2009)**

Police officers responded to a disturbance call, and, as they approached the area, a couple directed them to a residence where they said a man was “going crazy.” The officers continued to the home and found property damaged, as well as drops of blood on the hood of a pickup truck parked in front, clothes sitting inside of it, and one of the doors leading into the house. Through a window, they could see Jeremy Fisher inside the house, yelling and throwing objects.

The officers knocked on the door, but Fisher refused to answer. He also ignored their inquiries as to whether he needed medical attention and directed them to get a search warrant. One of the officers then pushed

the front door partially open and saw Fisher pointing a gun in his direction. Eventually, the officers gained control over Fisher and secured the premises.

Fisher was charged with assault with a dangerous weapon and possessing a weapon during the commission of a felony.<sup>24</sup> The trial court granted Fisher’s motion to suppress the gun, agreeing with him that it was



seized in violation of his Fourth Amendment rights. This was upheld by the Michigan Court of Appeals after it concluded that the warrantless entry violated Fisher’s Fourth Amendment rights as the situation “did not rise to the level of an emergency justifying the warrantless intrusion into a residence.”<sup>25</sup> The court continued by noting that

while there was some indication of a possible injury, “the mere drops of blood did not signal a likely serious, life-threatening injury.”<sup>26</sup> The Michigan Supreme Court agreed to hear the case, but, after hearing oral arguments, vacated its order and let the lower court ruling stand.

The Supreme Court reversed, concluding that the state courts rulings were inconsistent with its long line of cases interpreting the Fourth Amendment in the context of exigent circumstances, particularly the Court’s recent ruling in *Brigham City v. Stuart*.<sup>27</sup> In *Brigham City*, the Supreme Court recognized the need for law enforcement to make warrantless intrusions into a person’s home “to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”<sup>28</sup> In considering the reasonableness of the entry, the officer’s subjective motivation behind the entry—what did the officer really want to look for—and the seriousness of the crime for which they were originally investigating are not relevant. The relevant consideration is whether the officer has an “objectively reasonable basis for believing that a person is in need of aid.”<sup>29</sup>

Applying this standard to the facts of the case, the Court found ample support for application of the emergency aid exception, stating, “Officers



do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception.”<sup>30</sup> The Court concluded by stating:

It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But “[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering aid to casualties.”<sup>31</sup>

***City of Ontario v. Quon,*  
130 S. Ct. 2619 (2010)**

A police officer sued his agency and the city he worked for on the grounds that the

department’s review of text messages sent to and from his department-issued pager violated his Fourth Amendment rights. The Ninth Circuit Court of Appeals concluded that the officer maintained an expectation of privacy in the contents of the pager and that the review of the messages constituted an unreasonable search.<sup>32</sup> The Supreme Court agreed to hear the case.

The pager at issue was provided to the officer by the department to facilitate communication among SWAT team members. The agency had a “Computer Usage, Internet and E-Mail Policy” that did not specifically include pagers, but the department made it clear to employees that it would treat text messages the same as e-mails.<sup>33</sup> The department’s contract with the service provider covered a

specific number of characters. For several billing cycles, the officer exceeded his allotted character limit. His supervisor informed him that while he could review the messages, he would refrain from doing as long as the officer paid for the excess charges. After several months of exceeding the character limit, management decided to review the messages to determine the necessity of a contract modification. The service provider supplied transcripts of the messages, which, with respect to Officer Quon, were found to contain numerous nonwork-related, inappropriate messages.<sup>34</sup>

The Supreme Court refrained from addressing the issue of whether the officer had an expectation of privacy in the messages sent to and from the pager. The Court noted that the department made it clear that the pager was considered within the scope of the computer use policy. However, it recognized that whether an expectation of privacy existed was uncertain given the impact of statements by the officer’s supervisor that he did not intend to review the pager’s messages as long as the officer paid the overage. The Supreme Court stated:

Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed

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by employees when using employer-provided communication devices.<sup>35</sup>

The Supreme Court instead based its holding on the reasonableness of the search, assuming there was an expectation of privacy in the contents of the pager. Applying the long-standing workplace search principles set forth in *O'Connor v. Ortega*,<sup>36</sup> the Court concluded that the review of the text messages was reasonable in light of the work-related, noninvestigatory purpose—to determine the adequacy of the contract with the service provider—and that it was conducted in a reasonable manner. The Court saw the review of the transcripts as “an efficient and expedient way to determine whether Quon’s overages were the result of work-related messaging or personal use” and not overly intrusive.<sup>37</sup>

***United States v. Comstock*,  
130 S. Ct. 1949 (2010)**

Federal inmates challenged the constitutionality of a federal civil-commitment statute authorizing the U.S. government to detain a federal inmate certified as sexually dangerous beyond the time the individual otherwise would be released. The Supreme Court concluded that the statute is consistent with Congress’ authority to enact laws that are “necessary and proper” for carrying out

the powers vested to the federal government by the Constitution.

The statute at issue passed as part of the Adam Walsh Child Protection and Safety Act and codified at Title 18, U.S. Code, section 4248 and allows a federal district court to order at the government’s request the civil commitment of an inmate determined to be sexually dangerous.<sup>38</sup> The inmate is afforded a hearing in which the government must support the claim by presenting clear and convincing evidence.

Inmates targeted by this statute challenged its constitutionality on a number of grounds, including that it amounted to a criminal, not civil, action, thus violating the Double Jeopardy Clause,

and contained an insufficient legal standard asserting this type of action required proof beyond a reasonable doubt. In addition, they asserted that it exceeded Congress’ authority under the Commerce Clause.<sup>39</sup> The district court agreed with the challengers’ contentions.<sup>40</sup> On appeal, the Fourth Circuit Court of Appeals declined to address the standard-of-proof question, instead agreeing that the statute exceeded congressional authority.<sup>41</sup> The government sought Supreme Court review.<sup>42</sup>

The Supreme Court rejected the Commerce Clause challenge to the statute, holding that the Constitution provides Congress with ample authority to enact the civil commitment

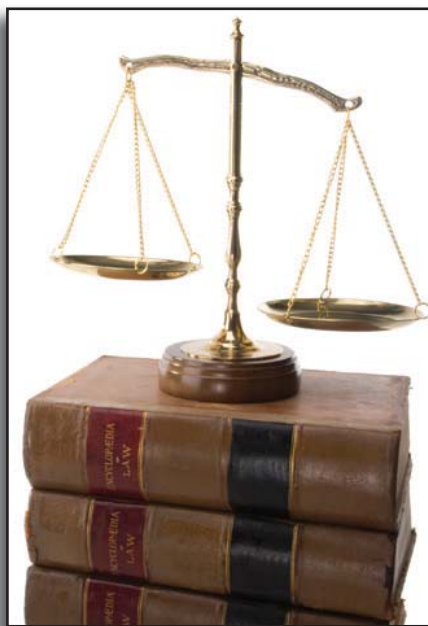


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statute at issue.<sup>43</sup> The Court concluded that consistent with congressional authority under the Commerce Clause, the statute is “rationally related to the implementation of a constitutionally enumerated power.”<sup>44</sup> The Court referenced the inherent authority Congress has with respect to matters relating to the handling of federal prisoners, including decisions pertaining to the provision of mental health care and the need to act to protect the public from the dangers these prisoners may pose, and concluded that the statute in question is rationally related to Congress’ authority.<sup>45</sup> In addition, the Court rejected the argument that the statute violated the Tenth Amendment to the Constitution, which states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Finding that the statute is within the scope of congressional authority, this area, thus, is not within those matters “not delegated to the United States.” Further, the statute takes into account the interests of the states by requiring coordination with the state in which the prisoner is domiciled or tried and encourages the state to assume custody of the individual.<sup>46</sup>

***McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010)**

In this case, the Supreme Court ruled that the Second Amendment right to keep and bear arms for the purpose of self-defense applies not only to the federal government, as determined by *District of Columbia v. Heller*,<sup>47</sup> but to the states under the Due Process Clause of the Fourteenth Amendment. In reaching this decision, the Court concluded that the right to bear arms for self-defense is “fundamental to our scheme of ordered liberty” and “deeply rooted” in this nation’s history.<sup>48</sup> Consistent with *Heller*, the Court emphasized that this right is not absolute and that the holding “does not imperil every law regulating firearms.”<sup>49</sup>



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**CASES FOR NEXT TERM**

Several cases of interest to the law enforcement community are already scheduled to be heard by the Supreme Court. These include the five presented here.

***Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009), cert. granted, *Connick v. Thompson*, 130 S. Ct. 1880 (2010)**

In a lawsuit brought against the New Orleans District Attorney’s Office, a former criminal defendant sued and was awarded 14 million dollars after a jury determined that the prosecutor’s office failed to adequately train the prosecutor in the handling of exculpatory evidence. The Supreme Court will consider whether liability imposed on the D.A.’s office for failing to train the prosecutor in a single case is contrary to the traditional strict culpability standards by the Court in *Canton v. Harris*<sup>50</sup> and *Board of Commissioners of Bryan County v. Brown*.<sup>51</sup>

***People v. Bryant*, 768 N.W.2d 65 (2009), cert. granted, *Michigan v. Bryant*, 130 S. Ct. 1685 (2010)**

The Supreme Court again will address the parameters of the accused’s Sixth Amendment right to confront witnesses against him in a case involving statements made by a victim shortly after a shooting. The

defendant was prosecuted for shooting the victim, who died shortly after being shot and after telling the police that it was the defendant who shot him. The Michigan Supreme Court held that the statements made by the victim were testimonial in nature within the Supreme Court's rulings in *Crawford v. Washington*<sup>52</sup> and *Davis v. Washington*<sup>53</sup> and, thus, could not be used against him in his trial given he could not confront the witness against him.

***Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009), cert. granted, 130 S. Ct. 2089 (2010)**

This case explores the scope of liability under the Uniform Services Employment and Reemployment Rights Act. The Court will consider whether a supervisor's discriminatory animus against an employee's military service should be imputed to the employer, even if that supervisor is not the ultimate decision maker with respect to the employment action taken against the employee claiming discrimination.

***Thompson v. North American Stainless LP*, 567 F.3d 804 (6th Cir. 2009), cert. granted, 130 S. Ct. 3542 (2010)**

In recent terms, the Supreme Court has taken a number of cases to clarify what constitutes unlawful retaliation within the meaning of Title VII of the

Civil Rights Act.<sup>54</sup> For the next term, the Supreme Court has agreed to hear another retaliation case to address who may claim retaliation within the meaning of the statute. The Court will consider whether the Sixth Circuit Court of Appeals was correct in ruling that the statute requires a party claiming retaliation to have actually been engaged in a protected activity within the meaning of



the statute. This would require a showing that the person either complained of discrimination or opposed the employer's discriminatory practices. In this case, an employee complained of discrimination, and 3 weeks later, her fiancé was fired. The fiancé filed his own action alleging retaliation. The

Sixth Circuit Court of Appeals dismissed his suit, finding that he did not engage in a protected activity and rejecting a theory of associational retaliation.

***Snyder v. Phelps*, 580 F.3d 206, cert. granted, 130 S. Ct. 1737 (2010)**

This case stems from protest activity by members of the Westboro Baptist Church at the funeral of a soldier killed in combat. This group contends that the deaths of U.S. soldiers are punishment for this country's tolerance of homosexuality and presence of gays in the military. The father sued for the pain the protest activity at his son's funeral caused him. A federal judge awarded the father 5 million dollars. The Supreme Court will consider whether a private individual is permitted state protection from this type of activity and the scope of the First Amendment protection afforded. ♦

#### Endnotes

<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court created a set of procedural safeguards that must be provided to a suspect once in custody and prior to engaging in interrogation to protect the Fifth Amendment privilege against compelled self-incrimination.

<sup>2</sup> *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

<sup>3</sup> *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008).

<sup>4</sup> For a more thorough discussion of the *Berghuis* decision see Jonathan L. Rudd, "You Have to Speak Up to Remain Silent: The Supreme Court Revisits the *Miranda*

Right to Silence,” *FBI Law Enforcement Bulletin*, September 2010, 25-30.

<sup>5</sup> *Davis v. United States*, 512 U.S. 452 (1994).

<sup>6</sup> *Miranda* at 475.

<sup>7</sup> See *Colorado v. Connelly*, 479 U.S. 157 (1986); *North Carolina v. Butler*, 441 U.S. 369 (1979).

<sup>8</sup> *Berghuis* at 2262.

<sup>9</sup> *Id.* at 2264.

<sup>10</sup> *Id.* at 2263.

<sup>11</sup> *Id.* at 2264

<sup>12</sup> For a more thorough discussion of the *Shatzer* decision see Kenneth A. Myers, “Miranda Update: Fifth Amendment Protection and Break in Custody,” *FBI Law Enforcement Bulletin*, May 2010, 26-32.

<sup>13</sup> 451 U.S. 477 (1981); *Minnick v. Mississippi*, 498 U.S. 146 (1990).

<sup>14</sup> *Arizona v. Roberson*, 486 U.S. 675 (1988).

<sup>15</sup> *Maryland v. Shatzer*, 130 S. Ct. 1213, 1218 (2010), referring to the trial court’s opinion at No. 21-K-06-37799 (Cir. Ct. Washington City, Md., Sept. 14, 2006).

<sup>16</sup> *Shatzer v. State*, 405 Md. 585, 954 A.2d 1118 (Md. 2008).

<sup>17</sup> *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010).

<sup>18</sup> The Supreme Court distinguished between incarceration and pretrial detention, noting that coercive pressure exists in the context of pretrial detention as subjects may be focused on what impact their cooperation has on a pending prosecution. This is in contrast to incarceration where subjects are not influenced by these coercive pressures and when interaction with law enforcement is over they are returned to the general prison population where they live in “their accustomed surroundings and daily routine [where] they regain the degree of control they once had over their lives.” *Shatzer* at 1224.

<sup>19</sup> *Miranda* at 471.

<sup>20</sup> *Florida v. Powell*, 130 S. Ct. 1195, 1199-1200 (2010).

<sup>21</sup> *State v. Powell*, 998 So.2d 531 (2008).

<sup>22</sup> See *California v. Prysock*, 453 U.S. 355 (1981); *Duckworth v. Eagan*, 492 U.S. 195 (1989).

<sup>23</sup> *Powell* at 1205.

<sup>24</sup> *Michigan v. Fisher*, 130 S. Ct. 546 (2009).

<sup>25</sup> *Fisher* at 548, quoting Docket No. 276439, 2008 WL 786515 at 2 (Mich.App. 2008).

<sup>26</sup> *Id.* at 549.

<sup>27</sup> 547 U.S. 398, 126 S. Ct. 1943 (2006).

<sup>28</sup> 130 S.Ct. at 548, quoting *Brigham City v. Stuart*, 547 U.S. 398 at 403 (2006).

<sup>29</sup> *Id.*, quoting *Brigham City* at 406. See also *Mincey v. Arizona*, 437 U.S. 385 (1978).

<sup>30</sup> *Id.* at 549 (internal quotation marks omitted).

<sup>31</sup> *Id.* at 549, quoting *Brigham City* at 406.

<sup>32</sup> *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008).

<sup>33</sup> See *City of Ontario v. Quon*, 130 S. Ct. 2619, 2625 (2010).

<sup>34</sup> *Id.* at 2627. For example, during the month of August 2002, the officer sent or received 456 messages during work hours, of which 57 were work related.

<sup>35</sup> *Id.* at 2629.

<sup>36</sup> 480 U.S. 709, 107 S. Ct. 1492 (1987).

<sup>37</sup> *Id.* at 2631, rejecting the Ninth Circuit Court of Appeal’s holding that the department had to choose the least intrusive method to conduct this review to satisfy reasonableness, stating, “Even assuming there were ways that [the department] could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable.” *Id.* at 2632.

<sup>38</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109-248, 120 Stat. 587 (2006).

<sup>39</sup> 130 S. Ct. 1949, 1955 (2010).

<sup>40</sup> *United States v. Comstock*, 507 F.Supp.2d 522 (E.D.NC. 2007).

<sup>41</sup> *United States v. Comstock*, 551 F.3d 274 (2009).

<sup>42</sup> Subsequently, two other federal circuits considered the legislative authority issue, resolving the issue in favor of the government, thus creating a split of opinion on the issue. See *United States v. Volungus*, 595 F.3d 1 (1st Cir. 2010); *United States v. Tom*, 565 F.3d 497 (8th Cir. 2009).

<sup>43</sup> In rejecting the Commerce Clause challenge, the Supreme Court drew upon

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a long line of judicial interpretation of the powers vested in Congress, stating:

Nearly 200 years ago, this Court stated that the Federal "Government is acknowledged by all to be one of enumerated powers," which means "[e]very law enacted by Congress must be based on one or more of" those powers. But, at the same time, "a government, entrusted with such" powers "must also be entrusted with ample means for their execution.... Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional."

*United States v. Comstock*, 130 S. Ct. 1949, 1956, quoting *McCulloch v. Maryland*, 4 Wheat., 316, 405-408, 421 (1819).

<sup>44</sup> *Comstock* at 1956.

<sup>45</sup> *Id.* at 1958-1961.

<sup>46</sup> 130 S. Ct. 1962. The Supreme Court explicitly declined to address any other

constitutional challenges to the statute, instead remanding the case to the lower courts where the challengers may pursue these claims. The Supreme Court previously addressed the constitutionality of a state statute addressing sexual predators and creating a civil-commitment scheme in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997). In this case, the Court rejected constitutional challenges to the civil-commitment provision, holding that it did not create criminal proceedings and that involuntary commitment as provided for in the statute was not punitive, thus allowing for a less-than-reasonable-doubt legal standard. Whether the civil-commitment scheme established by section 4248, largely modeled after the provision challenged in the *Hendricks* case, survives further judicial scrutiny remains to be seen.

<sup>47</sup> 554 U.S. \_\_\_, 128 S. Ct. 2783 (2008).

<sup>48</sup> 130 S. Ct. 3036.

<sup>49</sup> *Id.* at 3047. Describing appropriate areas of regulation, the Court in *Heller* recognized, "prohibitions on the possession of firearms by felons and the mentally ill,...

laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, at 2816-2817.

<sup>50</sup> 489 U.S. 658 (1978).

<sup>51</sup> 520 U.S. 397, 117 S. Ct. 1382 (1997).

<sup>52</sup> 541 U.S. 36, 124 S. Ct. 1354 (2004).

<sup>53</sup> 547 U.S. 813, 126 S. Ct. 2266 (2006).

<sup>54</sup> See *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S. Ct. 846 (2009); *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006).

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

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## Wanted: Notable Speeches

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

As with article submissions, the *Bulletin* staff will edit the speech for length and clarity, but, realizing that the information was presented orally, maintain as much of the original flavor as possible. Presenters should submit their transcripts typed and double-spaced on 8 1/2- by 11-inch white paper with all pages numbered, along with an electronic version of the transcript saved on computer disk, or e-mail them. Send the material to: Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Outreach and Communications Unit, Quantico, VA 22135, or to [leb@fbiacademy.edu](mailto:leb@fbiacademy.edu).

## Gang Survey

*Highlights of the 2006 National Youth Gang Survey* is an Office of Juvenile Justice and Delinquency Prevention (OJJDP) Fact Sheet that reports findings from the research. Since 1995, the National Youth Gang Center (NYGC) has conducted this annual survey of law enforcement agencies across the United States regarding the presence and characteristics of local gang problems. Selected in 2002, the current nationally representative sample includes all police organizations that serve cities with populations of 50,000 or more and all suburban county police and sheriff's departments, along with a randomly selected sample of police agencies in smaller cities (between 2,500 and 49,999 population) and rural county police and sheriff's departments. For the 2006 survey, 86 percent (2,199) of the 2,551 survey recipients responded. NYGC asked participants to report information solely for youth gangs, defined as "a group of youths or young adults in your jurisdiction that you or other responsible persons in your agency or community are willing to identify as a 'gang.'"

Survey results indicated that approximately 785,000 gang members and 26,500 gangs were active in this country in 2006. The survey asked respondents to indicate factors influencing gang-related violence. Over half of the agencies reported conflict between gangs and drug-related issues as directly affecting levels of gang-related violence. Respondents advised of gang-member migration across U.S. jurisdiction, emergence of new gangs, and the return of gang members from secure confinement as somewhat impacting this type of violence and conflict within a gang and gang-member migration from outside the country as infrequently influencing such criminal behavior. The OJJDP Fact Sheet (FS 200805) is available at the National Criminal Justice Reference Service's Web site at <http://www.ncjrs.org>.



## 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.



Deputy Sturgill



Deputy Vieth

Deputies Travis Sturgill and Marc Vieth of the Hall County, Nebraska, Sheriff's Office were transporting a prisoner and observed a van ahead of them go into the median and spin to a halt. Deputies Sturgill and Vieth stopped to render assistance. While Deputy Vieth remained with the prisoner, Deputy Sturgill approached the van and observed two men fighting in the front. Upon opening the right-side door, he discovered that the passenger was a prisoner who had taken the transporting officer's handgun. While the officer was struggling to regain control of the firearm, the prisoner

had it pointed at his own head. Immediately, Deputy Sturgill entered the vehicle, secured the handgun, and assisted the officer in regaining control of the prisoner, who was transported to a hospital on an emergency mental health hold.



Officer Daniel



Officer Moss

Senior Police Officers Harrison Daniel and James Moss of the Athens-Clarke County, Georgia, Department of Police Services responded to an accident in which a vehicle struck a tree and caught fire with two occupants trapped inside. The passenger did not survive. Quickly, the officers began working to free the driver, who was trapped with his legs on fire. As Officers Daniel and Moss worked furiously to free him, the driver said, "It's my time to go." However, the officers insisted that they would not give up. They calmed the victim as they continued to fight the fire and stop it

from spreading, sustaining injuries in the process, even as it showed signs of exploding. Eventually, the fire department arrived and helped extinguish the fire and release the driver.

Nominations for the *Bulletin Notes* should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions can be mailed to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Outreach and Communications Unit, Quantico, VA 22135 or e-mailed to [leb@fbiacademy.edu](mailto:leb@fbiacademy.edu).

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## Patch Call



The Payson, Arizona, Police Department's patch depicts an elk against the pine tree-covered skyline of the Mogollon Rim, a stunning geographical wonder that stretches for 200 miles across central Arizona. A place of abundant wildlife and a plethora of outdoor activities, Payson sits in the heart of the Rim, which attracts visitors from all over the world to see its panoramic views.



Sectioned into four unique squares, the patch of the Toccoa, Georgia, Police Department patch represents the city, state, and nation that the agency protects. The green and white "T" graphic displays the city logo; its shape mimics the picturesque Toccoa Falls illustrated in the bottom left section of the patch. The bottom right depicts another Georgian geographical wonder, the Currahee Mountain, named for the Cherokee word for "stand alone."