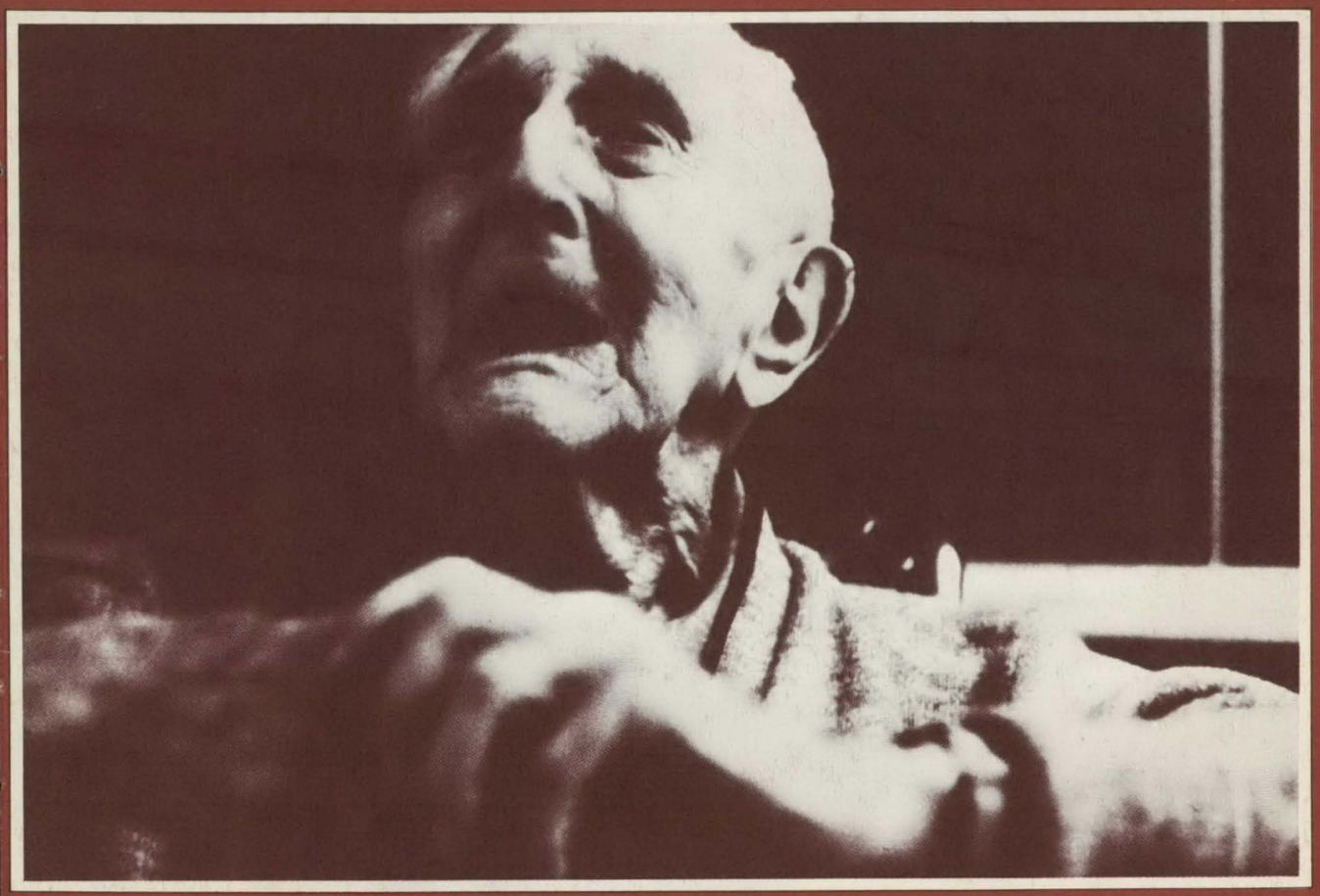
FBI LAW ENFORCEMENT BULLETIN

SEPTEMBER 1983



The Police and the Elderly

FBI LAW ENFORCEMENT BULLETIN

SEPTEMBER 1983, VOLUME 52, NUMBER 9

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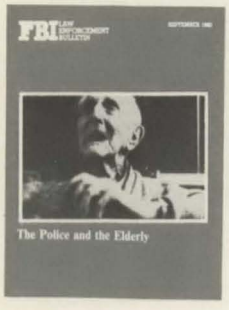

The Cover: With the dramatic increase in the number of elderly in the United States, police personnel play a vital role in assisting these individuals. See story p. 1.

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The Police and the Elderly (Part II)

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The Rights of the Elderly—Evolution of Legislation

The passage of the Social Security Act in 1935 signaled the beginning of major national legislative action concerning the health, safety, and welfare of older citizens. Basically, Social Security provides a minimum income for eligible workers and their families when the worker retires, becomes severely disabled, or dies. The act did not provide direct assistance for medical expenses until 1950, when amendments were incorporated which provided for Federal matching funds to States that offered public assistance, including medical payments to hospitals, physicians, and other providers of medical care. Disability insurance (DI) was added to the program in 1956, Medicare in 1965, and early retirement with actuarially reduced benefits in 1956 for women and in 1961 for men. In 1974, the Supplemental Security Income (SSI) program was enacted to provide a nationally uniform minimum income to aged, blind, and disabled persons who were not covered by Social Security as wage earners or dependents of wage earners or whose income from Social Security and other sources was not sufficient to provide basic maintenance needs. Medicaid was instituted in 1965 for older persons with very low incomes and pays the amounts the Medicare program does not, if various requirements are met. Congress has enacted, in a largely piecemeal fashion, over 40 additional programs to help the elderly. In 1965, Congress passed the Older Americans Act as the centerpiece of its legislative activities. In 1982, Congress extended the Older Americans Act for another 3 years and set funding levels for a separate Administration on Aging through September 30, 1984.

Dr. Greenberg

Dr. Wertlieb

Hundreds of preparatory meetings all over the country were conducted as a prelude to the 1981 White House Conference on Aging, which had as its theme "The Aging Society: Challenge and Opportunity." Approximately 2,200 delegates, 1,200 observers, and 2,000 volunteers attended. Two major issues found unanimity among the delegates: The necessity of preserving the Social Security system for both current and future recipients and the elimination of mandatory retirement. The conference also recommended that older persons should be encouraged to play an active role in crime prevention and should be made aware of the steps they can take to minimize the risk of being victimized.[31]

Legal Issues

The growing emphasis on legislative programs to assist the aged should strengthen the resolve of local law enforcement agencies to adjust their operations in order to assist the elderly.[32] As already indicated, the passage of the Older Americans Act of 1965 and its subsequent amendments spawned a new era in services available for the elderly. However, the benefits and services which these statutes have established may represent a bewildering bureaucratic maze for many older people. Added to these laws are innumerable others which deal with Social Security, Supplemental Security Income, Medicare, Medicaid, public and private pensions, taxes, wills and probate, patients' rights, consumer affairs, age discrimination, energy, food stamps, housing, guardianship, adult protective services, rights of victims and witnesses, and the rights of offenders.

The scope of this article does not permit a complete description of the many laws pertaining to the elderly. In fact, any definitive analysis of such laws would probably require the preparation of a many-volumed legal encyclopedia. However, we shall attempt to summarize some of the more useful statutes and rules which police personnel should be acquainted with in order to make appropriate referrals and to take specific action in order to protect the safety and welfare of the disabled elderly.

The police have a duty to insure that nursing home regulations are enforced and that the civil rights guaranteed by the Constitution and by State and Federal statutes to all citizens are not denied nursing home residents. Nursing home facilities and operators are regulated by State health and welfare departments. In addition, they must comply with Federal fire, health, and safety standards if they receive Federal Medicare and Medicaid payments. Periodic inspections are conducted and the summaries of the inspection reports are available to the public. Generally, few individuals review this information before selecting a home and the sanctions imposed for violations have been unsatisfactory. Some States have begun to reform their regulatory system and have developed a nursing home patients' bill of rights, but the process has been slow.[33]

The elderly may suffer psychological abuse, physical neglect, and the loss of property or money because of the deceit or threats of their caretakers. On such occasions, outside help may be the only means for ending the abuse. The main feature of many new elderly abuse laws is the establishment of a free hotline number which any abused victim or concerned person may call to report an abusive incident. Protective services will be offered if an incident of abuse is validated by an authorized investigator.

There exist wide variations with respect to the new laws protecting the elderly in many States. Generally, laws under the title "Adult Protective Services" provide for voluntary and involuntary (with court authorization) transfer of adults to institutions other than mental health hospitals (e.g., nursing or foster care homes). The criteria used for transfer involve a decision about whether adults are able to manage their own affairs or to protect themselves from exploitation, abuse, neglect, or physical danger. In States with no law specifically protecting the abused elderly, the police may generally not enter a private home unless consent has been obtained or a court order has been signed. On the other hand, some State laws may allow for entry without consent and even force may be used, if necessary.

Many adult protective services statutes include the provision of social casework, psychiatric and health evaluation, home care, and day care. The costs for these services are paid by the provider, unless the elderly person agrees to pay or a court authorizes reimbursement from the assets of the client.[34] However, while these statutes appear at face value to be directed at salutary goals, some States have failed to review their procedures for involuntary guardianship, "thereby threatening the civil liberties of the very persons the programs are intended to protect." [35]

All States have laws concerning the granting of a "power of attorney," as well as procedures for the establishment of guardianship over an individual's estate and/or person. An ill-

Who Are The Elderly?

Benefits provided by:

Age Discrimination and Employment Act — **40**

Comprehensive Employment Training Act — **55**

Social Security — **60**

Older Americans Act — **62**

Medicare — **65**

Gerontologists define older as:

55 - 65	**young-old**
65 - 75	**middle-old**
75 & over	**old-old**

". . . the police are in a unique position to help insure that State laws and the constitutional requirements of due process and equal protection [for the elderly] are maintained."

ness or other misfortune may require that another person act for the one who has become incapacitated. Civil commitment proceedings always lead to a similar loss of control regarding the management of one's affairs. The commitment process is initiated with the filing of a petition in probate court or its equivalent by an interested party. The petition usually states that the prospective ward is unable to take proper care of his or her person or property due to one of several conditions (e.g., mental illness, retardation, physical disability, senility, and old age). Most States require some form of notification to the alleged incompetent that such a petition has been filed. Although many States explicitly provide for jury trials in incompetency proceedings, these trials are rarely held in practice. Moreover, appeals of incompetency determinations are rare, though there are a large number of guardianships imposed yearly.

Police personnel may be called to the scene of a domestic dispute and/or be asked to state the law with respect to guardianship at any time. In all such cases, the police are in a unique position to help insure that State laws and the constitutional requirements of due process and equal protection are maintained. The new protective service laws in most States do not modify or replace the existing procedures concerning guardianship and civil commitment, but rather provide legal authority to intervene in situations requiring less drastic interference with a person's civil rights.

Police departments can also assist the aged population by keeping current on the Age Discrimination in Employment Act Amendments of 1978 that prohibits mandatory retirement below age 70 for roughly one-half of the Nation's employees and the U.S. Department of Justice rules applying section 504 of the Rehabilitation Act of 1973. The regulations to section 504 adopted by the Justice Department provide specific requirements that police, courts, and correctional agencies must follow to ensure effective communication for hearing-impaired people. Law enforcement agencies should ensure the availability of qualified interpreters by contacting the local or State chapter of the Registry of Interpreters for the Deaf (RID) or State associations of deaf people for a list of certified interpreters. Some police departments video tape all communications with hearing-impaired defendants in order to substantiate the effectiveness of the communication and the quality of the interpretation. In addition, the installation of telecommunication devices

(TDD's or TTY's) would be of tremendous value for the hearing-impaired.

Another often overlooked subject in most police training classes concerns the civil and criminal liabilities for withholding or withdrawing extraordinary or heroic care from patients. Hospitals commonly refer to this decision as "Orders Not to Resuscitate" or "ONTR." [36] The term "resuscitate" in this context usually refers to the following techniques: Intubation/ventillation, closed chest cardiac massage, and defibrillation. It does not mean or refer to ordinary or reasonable methods used to maintain life or health.

The applicable legal principle in cases involving ONTR is that a physician must obtain the consent of his patient or his patient's representative. Caution needs to be exercised so that patients do not unwittingly consent to an ONTR as a result of any temporary distortion in their ability to choose among alternatives. Such distortions could result from the experience of pain and the digestion of medication.[37] It should be emphasized that what may constitute "extraordinary" care today may at some future date be termed "ordinary." Inasmuch as police are often involved in cases leading to the emergency room, they are in a strategic position to safeguard the rights of patients in such settings.

It has been a longstanding American tradition that the primary responsibility for the care of the needy rests first with an individual's own family. When the family has been unavailable or incapable of meeting the problem adequately, it is appropriate to turn to community agencies or to the government for help. Today, any disabled elderly person may seek benefits from a number of public programs.

Each month 35.2 million persons in the United States receive a Social Security check.[38] Current eligibility for Social Security benefits depends on how long an individual has paid into the system as a worker—10 years minimum in order to fully qualify for benefits for life. However, a lesser number of years may also be enough for full coverage if the worker has achieved a certain amount of "work credit." The exact amount of work credit required depends on whether a person is applying for retirement benefits or whether a worker's spouse and dependents are applying for survivor's benefits after the worker's death. Eligibility for disability benefits depends on the seriousness and type of impairment, recent employment, and a person's accumulation of prior work credit.[39]

The Social Security Administration also administers a Supplemental Security Income (SSI) program. This

"The growing emphasis on legislative programs to assist the aged should strengthen the resolve of local law enforcement agencies to adjust their operations in order to assist the elderly."

program provides a basic monthly income to the blind, the disabled, and senior citizens (age 65 or older) who are in special need of financial help. The SSI law defines a person as disabled if he/she is unable to engage in any gainful employment due to a physical or mental impairment which has lasted or is expected to last for at least 12 months or is expected to result in death. Unlike FICA, a person can obtain assistance even if he/she has never worked.[40]

Persons who receive SSI are automatically eligible for Medicaid. Medicaid is a joint Federal-State program which helps pay for health care for low-income persons who are either over 65, disabled, or have dependent children. Benefits vary from State to State. In 1977, Congress reacted to estimates of Medicaid fraud ($2.5 to $6.2 billion) by authorizing 90 percent Federal funding for the States to establish Medicaid fraud units within the offices of the State attorney general. Only 30 States have applied for Federal financing to establish such fraud units.[41]

Medicare is an entirely separate Federal health insurance program which is administered by the Social Security Administration. Medicaid and Medicare are in no way related, and a person over 65 may receive both. Medicare, which can be considered a type of insurance, is available to any individual who falls within its designated categories, regardless of that person's income or resources. All persons 65 or older, including veterans,

who are entitled to or receive Social Security benefits, SSI, or railroad retirement are eligible for Medicare protection. Certain disabled persons under 65 are eligible for Medicare health care coverage and persons over 65 who are not receiving or entitled to Social Security benefits can purchase Medicare protection if they meet certain requirements. There are two separate parts to Medicare health insurance—hospital and medical. Regardless of the type of coverage, Medicare will never pay for medical expenses that are not reasonable or necessary or custodial care. Persons who are automatically eligible for Medicare because they are entitled to Social Security pay nothing for hospital insurance under Medicare. However, everyone must pay premiums for medical insurance under Medicare.[42]

The Federal Government funds a rental subsidy program known as the "Section 8 Rental Assistance Program." The program is administered through local area agencies on aging. A low-income person may qualify if handicapped, disabled, or over 62 years of age. Under the program, the tenant pays no more than 25 percent of the gross family income for rent. Moreover, in these days of ever-increasing food prices, low-income elderly may apply for benefits under the Federal Food Stamp Program. The Government provides coupons under this program which can be used like money at the grocery store and an individual need not be receiving other assistance payments to qualify. Other benefits under title XX of the Social Security Act (e.g., adult day care, adult foster care, homemaker services, etc.) and under title III of the Older Americans Act (e.g., transportation, senior center activities, information and referral, etc.) are also availa-

"Police personnel can play a vital role in assisting the disabled elderly. . . ."

"Law enforcement agencies should . . . develop appropriate policies in order to insure that the civil rights of the disabled elderly are maximized."

ble to qualified older persons. Local area agencies on aging and local departments of social services can provide detailed information about each of these programs.

Summary

The foregoing represents only a small sample of the various laws applicable to the disabled elderly and certainly points to this population's overwhelming need to have access to qualified legal help. However, older persons may be reluctant to seek legal assistance because they fear retribution from agencies or persons on whom they totally depend or because they do not want to receive a "handout" or benefit that is reserved for the poor. In some cases, the elderly may be ashamed to report that they have been the victims of consumer fraud or exploitation. Some elderly may just be unaware that their problems require the services of a lawyer due to their isolated living habits. Police personnel can play a vital role in assisting the disabled elderly by ascertaining which law firms, local bar associations, and law schools are providing low cost or *pro bono* (free) legal services.

The Legal Services Corporation was created by Congress in 1974 to provide legal services to the poor or to those who cannot obtain the services of a private attorney because their case will not support a fee. The corporation administers a network of civil law office projects throughout the United States. Legal aid societies also render assistance to low-income clients. They are nonprofit and predate the Legal Services Corporation.[43]

Legal aid programs have generally been available to needy offenders, but they have consistently not been available to assist victims. Recent amendments to the Older Americans Act attempt to address this problem, but much remains to be done to protect the rights of victims. Police are usually the first societal agents to come to the aid of the elderly crime victim. They should also be the first to provide appropriate guidance with respect to the availability of legal services.

Many additional legal issues concerning the aged and the role of the police exist. Law enforcement agencies should survey their community's needs and then develop appropriate policies in order to insure that the civil rights of the disabled elderly are maximized. **FBI**

(Continued next month)

(Photographs courtesy of the American Association of Retired Persons)

Footnotes

[31] White House Conference on Aging, *Final Report Vol. 1: A National Policy on Aging* (Washington, D.C.: Department of Health and Human Services, 1981), p. 105.

[32] For an excellent overview of the critical issues involving the law and the elderly, see "Law and the Aged: A Symposium," *Arizona Law Review,* vol. 17, 1975, pp. 267–545.

[33] R. N. Brown, "Aging in America: A Bill of Rights for Nursing Home Patients," *Trial,* vol. 13, May 1977, pp. 22–28.

[34] Senate Special Committee on Aging and the House Select Committee on Aging, *Joint Hearing on Elder Abuse, Washington, D.C. June 11, 1980* (Washington, D.C.: U.S. Government Printing Office, 1980), p. 153.

[35] J. Regan, "Intervention Through Adult Protective Services Programs," *The Gerontologist,* vol. 18, 1978, p. 250.

[36] Northwestern Memorial Hospital, "Patient Care Administration: Do Not Resuscitate Orders," *Critical Issues in Health Law* (New York: Law Journal Seminars Press, Inc., 1978), p. 144.

[37] M. Rabkin, G. Gillerman, and N. Rice, "Order Not to Resuscitate," *Critical Issues in Health Law* (New York: Law Journal Seminars Press, Inc., 1978), p. 136.

[38] J. Montgomery, "The Economics of Supportive Services for Families with Disabled and Aging Members," *Family Relations,* vol. 31, 1982, p. 22.

[39] Arkansas Bar Association, The Young Lawyers Section, *Arkansas Senior Citizens' Handbook* (Little Rock, Ark.: Arkansas Bar Association, 1981), p. 1.

[40] Ibid. p. 2.

[41] "Medicaid Fraud Continues." *Journal of Gerontological Nursing,* vol. 8, 1982, p. 353.

[42] W. Wishard, *Rights of the Elderly and Retired: A People's Handbook* (San Francisco: Cragmont Publications, 1978), p. 6/5.

[43] M. Bigel, *Program Development Handbook for State and Area Agencies on Legal Services for the Elderly* (Washington, D.C.: Administration on Aging, Department of Health, Education and Welfare, 1977), p. II–7.

The Behavior-oriented Interview of Rape Victims: The Key to Profiling

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"What is to be expected . . . is an understanding not merely of the deeds, but also the doers." [1]

In October 1981, a police department submitted an investigative report of a rape, requesting that a criminal personality profile of the unidentified offender be prepared. A synopsis of that report follows:

On October 5, 1981, Alicia, a 21-year-old Caucasian who resided alone, was asleep in her apartment. At approximately 2:30 a.m. she was awakened by a male, who placed his hand over her mouth and held a knife to her throat. The intruder warned her not to scream or resist and advised her that if she complied with his demands, she would not be harmed. He then forced her to remove her nightgown, kissed and fondled her, then raped her. After warning the victim not to call the police, he left. Ignoring the rapist's warning, she notified the police. The victim advised nothing had been stolen and that she could not provide a description of her assailant because he had placed a pillowcase over her head. The rapist was with the victim approximately 1 hour.

Needing additional information in order to complete a profile, the requesting agency was sent a set of questions specifically designed to elicit information from the victim concerning the rapist's behavior during the assault. The victim was reinterviewed, using the questions as a guide. As a result, a 9-page typewritten statement was obtained. Based on the new statement, a profile was prepared with opinion as to the offender's age, race, marital status, occupational level, arrest history, socioeconomic background, type and proximity of residence to victim, military history, approximate age and style of automobile, as well as certain personality characteristics. The rapist was subsequently arrested and confessed to a series of rapes. When the profile was compared to the offender, only the marital status was found to be incorrect.

MOTIVATION

Since 1978, the FBI Academy's Behavioral Science Unit (BSU) has been assisting city, county, and State law enforcement agencies in their investigations of violent crimes by analyzing crime or crime scene data for offender behavior exhibited during the commission of those crimes. Previous publications by the BSU have addressed the development and use of profiling and related topics.[2] Hundreds of rape victims' statements submitted by police agencies seeking a criminal personality profile have been reviewed. While the essentials of the crime were given, as well as a great deal of information concerning the offender's physical characteristics, there was a marked absence of information that would provide clues as to why the person was raping—that is, clues as to the offender's motivation (through his behavior) in carrying out the assault. As one study of convicted rapists and victims points out, rape is behavior which is primarily serving nonsexual needs.[3]

In an attempt to test this hypothesis, a set of questions was designed to elicit from the victim the behavioral aspects of the rapist. There is a definite need for the offender's physical description, but in addition, more attention should be devoted to the offender's behavior. In so doing, the purpose of the assault may become much clearer, thereby allowing the investigator better insight into the psychological and social aspects of the type of person he is seeking.

This article will deal with questioning the rape victim specifically for the purpose of determining the offender's motivational intent in the commission of the assault. Knowledge of why the rapist is committing the act provides clues to profiling the rapist.

PROFILING THE RAPIST

In preparing a rapist profile, three basic steps are essential:

1) Careful interview of the victim regarding the rapist's behavior;
2) Analysis of that behavior in an attempt to ascertain the motivation underlying the assault; and

Special Agent Hazelwood

3) Compilation of a profile of the individual likely to have committed the crime in the manner reported and having the assumed motivation.

Interviewing the victim is the most crucial step in the process and is one that investigators can complete. The remaining steps are handled by profilers.

The Interview Atmosphere

Only the victim can provide the information necessary to complete an analysis of the crime. Therefore, it becomes essential for the investigator to establish a rapport with the victim through a professional and emphatic approach in order to help the victim overcome feelings generated by the rape, such as fear, anger, and guilt.

The interviewer must not allow his emotions to interfere with objectivity. During the interview, three personalities are present: The victim's, the criminal's, and the interviewer's. The investigator should view the crime through the eyes of both the rapist and the victim. Personal feelings about the offense, the victim, and the criminal will cloud the picture of the crime. By remaining objective, the investigator may be surprised as to what an analysis of the crime reveals about the responsible individual. An excellent example of why this is necessary is illustrated in the following incident:

In a large metropolitan area, a series of rapes had plagued the police over a period of months. In each instance, the rapist had controlled his victim through threats and intimidation. One evening, a hospital orderly went off duty at midnight and happened upon a male beating a nurse in an attempt to rape her. The orderly went to her rescue and subdued the attacker until the police arrived. Predictably, he received much attention from the media and received a citation for bravery from the city. Shortly thereafter, the orderly was arrested for the series of rapes mentioned earlier. During interrogation, he was asked why he had rescued the nurse when he was guilty of similar offenses. He became indignant and advised the officers that they were wrong. He would never "hurt" a woman.

This offender equated "hurt" with physical trauma. He either failed to consider, or completely ignored, emotional trauma. Intent becomes clear only when the crime is viewed from the motivational standpoint of the criminal. Once a reasonably safe assumption is made as to why the rape occurred, it is probable that the person who has exhibited this need through rape can be profiled. The basis for this hypothesis lies in the axiom that behavior reflects personality. The manner in which an individual behaves within his environment portrays the type of person he is. A person's self-esteem, educational level, social interaction, and life goals are revealed by that person's behavior. In rape cases, descriptions of offender behavior enables the investigator to form an opinion as to the type of person responsible.

". . . it [is] essential for the investigator to establish a rapport with the victim through a professional and empathetic approach. . . ."

It is not uncommon to encounter two rape cases from different investigative jurisdictions in the same day, with strikingly similar offender behavior. Obviously, the crimes were committed by different individuals, yet the assaults are almost identical. Why? As Groth, Burgess, and Holmstrom point out, ". . . rape is in fact serving primarily non-sexual needs." [4] Therefore, if a similar need exists, it is probable that a similar assault will occur. In other words, each of the two rapists was satisfying a similar need. It should not be surprising that a comparison of the rapists after arrest many times reveals that they are as similar as their assaultive behavior.

QUESTIONING FOR BEHAVIOR

Three forms of behavior are exhibited by most rapists: Physical (force), verbal, and sexual. Categorizing the offender's behavior into these three areas presents a much clearer and less biased view of the offender. The interview must be conducted in a tactful, professional, probative manner. The investigator must impress upon the victim that he is concerned not only with the arrest and conviction of the offender but also with the victim's welfare. She has been involved in a life-threatening situation, and the importance of recognizing this cannot be overemphasized. The investigator should inform the victim that by his obtaining detailed and personal information, the identification of the offender may be expedited through a criminal personality profile.

Method of Approach Used by Offender

A rapist, in choosing a method of approaching and subduing his intended victim, chooses a method he believes to be most successful. Three categories of approaches were identified: "Con," "blitz," and "surprise."

In the "con" approach, the offender approaches the victim openly with a subterfuge or ploy. Frequently, he will offer some sort of assistance or will request directions. He is initially pleasant, friendly, and may even be charming. His goal is to gain the victim's confidence until he is in a position to overcome any resistance she might offer. Quite often, for different reasons, he exhibits a sudden change in attitude toward the victim once she is within his control. In some instances, the motivation for the attitudinal change is the necessity to convince the victim he is serious about the rape. Other times, it is merely a reflection of inner hostility toward the female gender. This style of approach suggests an individual who has confidence in his ability to interact with women.

A person employing the "blitz" approach uses direct and immediate physical assault in subduing his victim. He allows her no opportunity to cope physically or verbally and will frequently gag, blindfold, or bind his victim. His attack may occur frontally or from the rear, and he may use disabling gasses or chemicals. The use of such an approach suggests hostility toward women. This attitude may also be reflected in his other relationships with females. The offender's interaction with women in nonrape relationships is likely to be selfish and one-sided, resulting in numerous, relatively short involvements with women.

In the "surprise" approach, the rapist either waits for the victim in the back seat of a car, steps out from behind a wall or the woods, etc., or he may wait until she is sleeping. Typically, this individual uses threats and/or a weapon to subdue her. This style suggests two possibilities: (1) The victim may have been targeted or selected, or (2) the offender does not feel sufficiently confident to approach the victim either physically or through subterfuge tactics.

Offender's Control of the Victim

Once the offender has physical control over his victim, his next task is to maintain that control. The manner used depends on the passiveness of his victim, his motivation in committing the assault, or a combination of the two factors. Four control methods have been observed: Mere presence, verbal threats, display of a weapon, and use of physical force.

Depending upon the emotional response and fear of the victim, it is very possible that the offender's mere presence will control the victim. This response may be difficult for a person removed from the actual situation to understand. Quite often we judge a victim's reaction on the basis of what we believe we would do, rather than taking into account the victim's personality, the circumstances surrounding the assault, and the victim's fear.

Many victims are intimidated by orders and threatening remarks promising physical violence if compliance is not forthcoming. Obtaining the context of these verbal threats (verbatim, if possible) and determining whether the threats were carried out are important in ascertaining the motivational factors behind the assault.

If a rapist displays a weapon, it is important to determine at what point he either displayed it or indicated that he had one? Did the victim see it? Was it a weapon of choice, such as a gun or switchblade, or of opportunity, such as a kitchen knife, screwdriver, etc.? Did he relinquish control of it—give it to the victim, put it down, or put it away—and did he inflict any physical injury with the weapon?

The use and amount of physical force in a rape attack is a key determinant of offender motivation. The interviewer should determine the amount of physical force, when it was employed, and the rapists' attitude prior to, during, and after its employment.

Because the amount of force used by a rapist provides valuable insight into the motivational needs of the individual, the interviewer should elicit from the victim a precise description of the physical force involved. Frequently, the victim will exaggerate when responding to this question, either because she wants to be believed or because she has never been struck or physically attacked before. An example would be the victim who, having never been slapped or spanked as a child or an adult, is slapped twice during a rape and reports that the attacker was brutal. Another victim may not distinguish between the sexual assault and the physical assault. For these reasons, four levels of physical assault have been developed to assist in arriving at an opinion as to the amount of force used.

At the first level—minimal force—there is little or no physical force used. While mild slapping may occur, the force is employed more to intimidate than to punish. At this level, the rapist is typically not profane.

When the rapist employs moderate force, he will repeatedly slap or hit the victim in a painful manner, even in the absence of resistance. He typically uses profanity throughout the attack and is very abusive.

When excessive force is used, the victim is beaten, possibly on all parts of her body. She will have bruises and lacerations and may require hospitalization. Again, the rapist is very profane and directs personal and derogatory remarks toward the victim.

At the fourth level of physical assault—brutal force—the victim is subjected to sadistic torture, with instruments or other devices often being employed. Intentional infliction of physical and emotional pain is the primary aim of the offender; he is extremely profane, abusive, and aggressive. Frequently, the victim dies or requires extensive hospitalization.

The victim, when ordered to act, has two available options—comply or resist. Three methods of resistance have been identified: Passive, verbal, and physical. While most interviewers are alert to physical or verbal resistance by victims, they often tend to overlook or disregard passive resistance. Passive resistance is evidenced when the victim does not resist physically or verbally but also does not comply with the rapist's demands. An example would be a victim who is ordered to disrobe, but without verbal or physical accompaniment, simply does nothing. Verbal resistance is offered by the victim screaming, pleading, refusing, or attempting to reason or negotiate with her attacker. While crying is a verbal act, it is not considered to be resistance in this context. Any physical act taken by the victim to preclude, delay, or reduce the attack is considered resistance. Hitting, kicking, scratching, gouging, or running are examples of this form of resistance.

Offender's Reaction to Resistance

People react to stressful situations in various ways. While rape is certainly stressful to the victim, it also creates stressors for the attacker, who fears being identified or arrested, being injured or ridiculed, or being successfully rebuffed. Therefore, it becomes crucial for the investigator to learn how the rapist reacted to any resistance offered by the victim.

Cases submitted for profiling indicate five rapist reactions: Ceasing the demand, compromising, fleeing, use of threats, and use of force. In some instances, a rapist who encounters resistance will not insist or attempt to force compliance. Instead, he will cease his current demand and move to another demand or phase of the attack. In other cases, the subject will compromise or negotiate by suggesting, or allowing the victim to suggest, alternatives. For instance, the rapist may demand or attempt anal sex, but upon encountering resistance, he will

"A rapist reveals a great deal about himself and the motivation behind the assault through verbal activity with the victim."

alter his demand to vaginal sex with no further attempt at anal sex. The rapist sometimes leaves the scene of the assault after being resisted. This fleeing reaction is interesting in that it suggests the offender either had no desire to "force" the victim or was unprepared for the victim's reaction and/or the attention it might bring.

The offender may resort to threats, either verbal or physical, in an attempt to gain compliance. If the victim continues to resist, it is important to learn whether the offender followed through with his threatened action. Certain rapists resort to force only if they experience victim resistance. In these cases, the interviewer should determine the degree of force used and its duration.

SEXUAL DYSFUNCTIONS

Coleman defines the term "sexual dysfunction" as an "impairment either in the desire for sexual gratification or in the ability to achieve it." [5] In a study of 170 rapists, Groth and Burgess determined that 34 percent of the offender population suffered a sexual dysfunction during the assault.[6] Many times, the victim is either not asked if a dysfunction occurred or the fact is simply noted without further inquiry.

The occurrence of offender sexual dysfunction, coupled with an investigative understanding of the dysfunction, may provide valuable information about the unidentified rapist. When interviewing a rape victim, the investigator should be alert to the possibility that she may not volunteer such information because she does not consider it significant, she is embarrassed by the acts demanded to correct the dysfunction, or she is ignorant of such facts and did not recognize it as a dysfunction. For this reason, it behooves the investigator to explain the various sexual dysfunctions affecting males and their meaningfulness and inquire as to the occurrence of each type.

Erectile Insufficiency

Formally classified as impotence, this type of dysfunction affects the males' ability to obtain or maintain an erection sufficient for sexual intercourse. Masters and Johnson describe two types of erectile insufficiency as *primary* and *secondary.*[7] Males suffering from primary insufficiency have never been able to maintain an erection sufficient for intravaginal ejaculation. While this type is relatively rare and not generally of concern to the investigator, it is discussed in the interest of completeness. In secondary insufficiency, the male is currently unable to obtain or maintain an erection.

Groth and Burgess identified a third form of insufficiency termed *conditional.* In such cases, the rapist is unable to become erect until there is forced oral and manual stimulation by the victim. BSU data suggest that the methods of resolvement may not be limited to the ones aforementioned but may include any condition demanded by the offender. The required condition may be sexual acts, such as anal sex, analingus, etc., or haveing the victim say certain words or phrases or dress in certain clothing.

Groth and Burgess compared erectile insufficiency among a group of rapists with a group of 448 nonrapist patients studied by Masters and Johnson. They found that in both instances, it was the most commonly experienced dysfunction.[8]

Premature Ejaculation

"Ejaculation which occurs immediately before or immediately after penetration is termed premature ejaculation." [9] In their study, Groth and Burgess found that this dysfunction affected 3 percent of the rapists.

Retarded Ejaculation

With retarded ejaculation, the rapist experiences difficulty in ejaculating or fails to ejaculate. Contrary to popular belief, the individual experiencing retarded dysfunction is not controlling seminal discharge and prolonging enjoyment, but is denied sexual gratification by his inability to ejaculate.

Groth and Burgess reported that 15 percent of the rapist population suffered retarded ejaculation.[10] Masters and Johnson found it to be so rare among their patients that they did not rank it with a percentage.[11] Failure to consider the possibility of retarded ejaculation may prejudice the victim's version of multiple and extended assaults.[12]

Conditioned Ejaculation

The final type of dysfunction observed in cases submitted for profile is one on which there has been no research conducted. The rapist experiencing conditioned ejaculation has no

difficulty in obtaining or maintaining an erection and can ejaculate only after certain conditions have been met. Most often, the conditions involve particular sexual acts.

TYPE AND SEQUENCE OF SEXUAL ACTS OCCURRING DURING AN ASSAULT

Holmstrom and Burgess suggest that documenting the kinds of sex acts that occur during rape helps us understand rape.[13] In determining the motivation behind a rape assault, it is imperative to ascertain the type and sequence of sexual assault. This may be difficult because of the emotional trauma experienced by the victim and her reluctance to discuss certain aspects of the crime because of fear, shame, or humiliation. Quite often, however, the investigator can overcome the victim's reluctance through a professional and empathetic approach. While it is common for interviewers to ask about vaginal, oral, and anal acts, they do not often ask questions pertaining to kissing, fondling, use of foreign objects, digital manipulation of the vagina or anus, fetishism, voyeurism, or exhibitionism on the part of the offender. In a sample of 115 adult, teenage, and child rape victims, Holmstrom and Burgess reported vaginal sex as the most frequent act but they also reported 18 other sexual acts.[14] Repetition and sequence of acts are infrequently reported. More commonly, the report is likely to state "the victim was raped, vaginally assaulted, or raped repeatedly."

Forced sexual acts may have various sociopsychological meanings.[15] By analyzing the sequence of the assault, it may be possible to determine whether the offender was acting out a fantasy, experimenting, or committing the sexual acts to punish or degrade the victim. For example, the acts of oral and anal sex are forced on a victim. If anal sex were followed by fellatio, the motivation to punish and degrade would be strongly suggested. In acting out a fantasy, the offender normally engages in kissing, fondling, and/or cunnilingus. If fellatio occurs, it generally precedes anal sex. With sexual experimentation, the offender is moderately forceful in his physical contact with the victim and is verbally profane and derogatory toward her. In this instance, fellatio may either precede or follow anal sex.

VERBAL ACTIVITY OF THE RAPIST

A common stereotype of the male rapist's attack is that he uses physical force to attain power and control over victims. Not only do rapists use physically based strategies, but they also use a second set of strategies based on language.[16]

A rapist reveals a great deal about himself and the motivation behind the assault through verbal activity with the victim. For this reason, it becomes extremely important to elicit from the victim everything the rapist said and the manner—tone and attitude—in which it was said.

In a study of 115 rape victims, Holmstrom and Burgess reported 11 major themes in rapists' conversations, including "threats, orders, confidence lines, personal inquiries of the victim, personal revelations by the rapist, obscene names and racial epitaphs, inquiries about the victim's sexual 'enjoyment,' soft-sell departures, sexual put-downs, possession of women, and taking property from another male." [17]

Preciseness is important. For example, a rapist who states, "I'm going to hurt you if you don't do what I say," has, in effect, threatened the victim, whereas the rapist who says, "Do what I say and I won't hurt you," may be reassuring the victim in an attempt to alleviate her fear of physical injury and gain her compliance without force. An offender who states, "I want to make love to you," has used a passive and affectionate phrase which is indicative of one who does not want to harm the victim physically. Conversely, a statement such as, "I'm going to f--- you," is much more aggressive verbage with no affection intended and suggests hostility and anger toward women.

Compliments directed toward the victim, politeness, expressions of concern, apologies, and discussions of the offender's personal life, whether fact or fiction, indicates low self-esteem on the part of the offender. On the other hand, derogatory, profane, threatening, and/or abusive verbage is suggestive of anger and the use of sex to punish or degrade the victim.

When analyzing a rape victim's statement, the interviewer is advised to write down an adjective that accurately describes each of the offender's statements, for example, "You're a beautiful person" (complimentary); "Shut up b----" (hostility); "Am I hurting you?" (concern). This assists the interviewer in gaining a better insight into the offender's motivation and personality.

"In attempting to determine the experience level of the rapist, the investigator should determine what actions the offender took to protect his identity, remove physical or trace evidence, and/or facilitate his escape."

VERBAL ACTIVITY OF VICTIM

What a person says to his sexual partner during consenting intercourse can be either gratifying or harmful to a relationship. In a nonconsenting situation such as rape, the rapist may demand from the victim certain words or phrases that enhance the act for him. By determining what, if anything, the victim was forced to say, the interviewer is made aware of what gratifies the rapist and gains insights into the needs (motivation) of the offender. For example, a rapist who demands such phrases as "I love you," "Make love to me," or "You're better than my husband" suggests a need for affection or ego-building. One who demands that the victim plead or forces her to scream suggests a sexual sadist—one who enjoys the total and absolute control and domination involved. If the victim is forced to speak in a self-demeaning or derogatory manner, the offender may be motivated by anger and hostility.

SUDDEN CHANGE IN THE OFFENDER'S ATTITUDE DURING ATTACK

The victim should be specifically asked whether she observed any change in the attitude of the rapist during the time he was with her. Did he become angry, contrite, physically abusive, or apologetic, and was this a departure from his previous attitude? If the victim reports an attitudinal change, she should be asked to recall what immediately preceded the change. A sudden and unexpected behavioral change may be reflective of a weakness or fear on the part of the offender, and it becomes important to determine what precipitated that change.

Factors which may cause such sudden behavioral changes include offender sexual dysfunction, external disruptions (a phone ringing, noise, or a knock on the door), victim resistance, a lack of fear on the part of the victim, ridicule or scorn, or even completion of the rape.

An attitudinal change may occur verbally, physically, or sexually. As previously mentioned, the rape is stressful not only for the victim but also for the offender. How he behaviorally reacts to stress may become important in future interrogations, and knowledge of the precipitating factor that caused the change is a valuable psychological tool to the investigator.

In attempting to determine the experience level of the rapist, the investigator should determine from the victim what actions the offender took to protect his identity, remove physical or trace evidence, and/or facilitate his escape. It may be possible to conclude from the offender's actions whether he is a novice or an experienced offender who may have previously been arrested for rape or similar offenses.

While most rapists take at least some action, such as wearing a mask or telling the victim not to look at them, to protect their identity, some go to great lengths to protect themselves from future prosecution. As in any criminal act, the more rapes a person commits, the more proficient he becomes in eluding detection. If a person is arrested because of a mistake and later repeats the crime, it is not likely that he will repeat the same costly error.

The offender's experience level can sometimes be determined from the protective actions he takes. The novice rapist is a person who is not familiar with modern medical or police technology and who takes minimal or obvious actions to protect his identity. For example, he may wear a ski mask and gloves, change his voice tone, affect an accent, order the victim not to look at him, or blindfold and bind the victim. These are common precautions a person not knowledgeable of phosphotate tests or hair and fiber evidence would be expected to take.

When an experienced rapist is involved, the investigator may note factors in the offender's modus operandi which are indicative of one who has more than common knowledge of police and medical developments. The rapist may walk through the residence or prepare an escape route prior to the sexual assault, disable the victim's telephone prior to entry or departure, order the victim to shower or douche, bring bindings or gags rather than using those available at the scene, wear surgical gloves during the assault, or take or force the victim to wash items the rapist touched or ejaculated on, such as bedding and the victim's clothing.

As in all such subjective analysis, the projected experience level of the rapist is approximated, based on the offender's actions and the investigator's interpretation of those actions.

MISSING ITEMS

Almost without exception, police record the theft of items from rape victims. All too often, however, investigators fail to probe the matter further unless it involves articles of value. The profiler is not only interested in *if* something was taken but *why* it was taken. The item stolen may provide in-

formation valuable in determining a characteristic about the criminal, providing an aid in the investigative process. In some cases, the victim initially may not realize something was taken, i.e., one photograph from a group or one pair of panties from a drawer. For this reason, the victim should be asked to inventory such items.

Missing items fall into one of three categories: Evidentiary, valuables, and personal. As previously mentioned, the rapist who takes evidentiary items—those he has touched or on which he has ejaculated—suggests prior rape experience and/or an arrest history for similar offenses. One who takes items of value may be experiencing financial difficulties, such as unemployment or employment in a job providing little income. The type of missing items may also provide a clue as to the age of the rapist. Younger rapists have been noted to steal items such as stereos, televisions, etc., while older rapists tend to take jewelry or items more easily concealed and transported. Personal items taken sometimes include photographs of the victim, lingerie, driver's license, etc. These types of items have no intrinsic value, but instead serve to remind the offender of the occurrence and the victim.

A final factor to consider is whether the offender later returns the item to the victim, and if so, why. Some do so to maintain power over the victim by intimidation, while others wish to convince the victim they meant no harm to her life and wish to convince themselves that they are not bad persons.

Rapists quite often target or select their victims prior to committing the crime. A series of rapes involving victims who were either alone or in the company of small children is a very strong indication that the offender was well aware of his victim's vulnerability, either through peeping or surveillance activities. He may also have entered the residence or communicated with the victim prior to the offense. For this reason, the investigator should determine whether the victim or her neighbors have experienced any of the following prior to the rape:

1) Calls or notes from unidentified persons;
2) Residential or automobile break-in;
3) Prowlers or peeping toms; or
4) A feeling that she was being watched or followed.

Frequently, rapists who do target or select their victims have prior arrests for breaking and entering, prowling, peeping tom activities, and/or theft of feminine clothing.

CONCLUSION

Rape is a deviant sexual activity serving nonsexual needs. Through an analysis of the offender's verbal, sexual, and physical behavior, it may be possible to determine what needs were being served and to project personality characteristics of the individual having such needs. It must be remembered that the only available source of information about such behavior is the victim; therefore, it is necessary to establish a rapport with the victim through empathy and professionalism. One must isolate personal feelings about the crime and the criminal and view the crime through the eyes of the rapist.

If, in fact, behavior reflects personality, it would seem obvious that a set of questions designed specifically to elicit behavioral information would be the first step in the analysis of a rape. The questions set forth in this article were developed and refined over a period of 4 years and have been found to be of inestimable value in understanding the personality involved in the crime of rape.

FBI

Footnotes

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[15] Ibid., p. 427.

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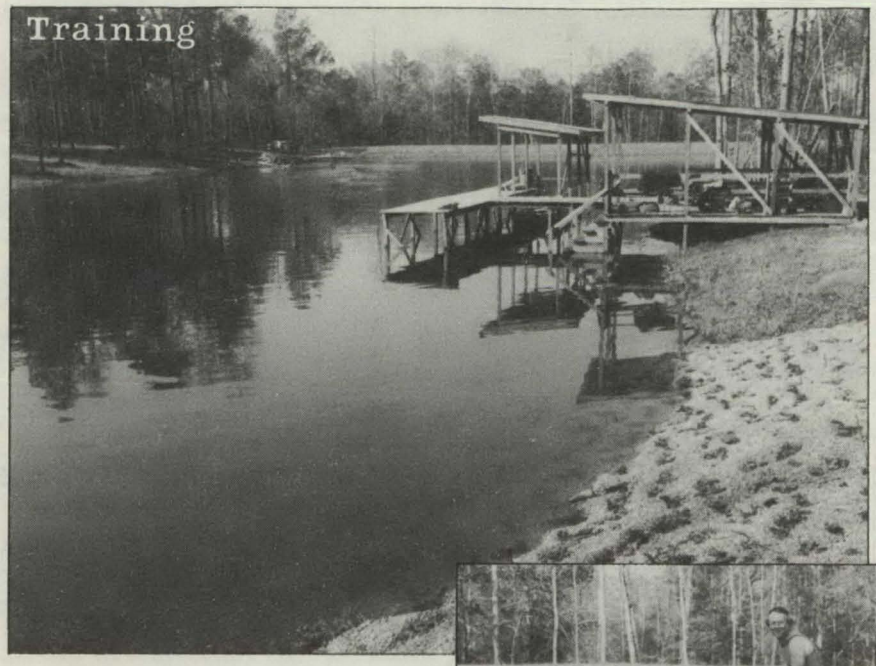
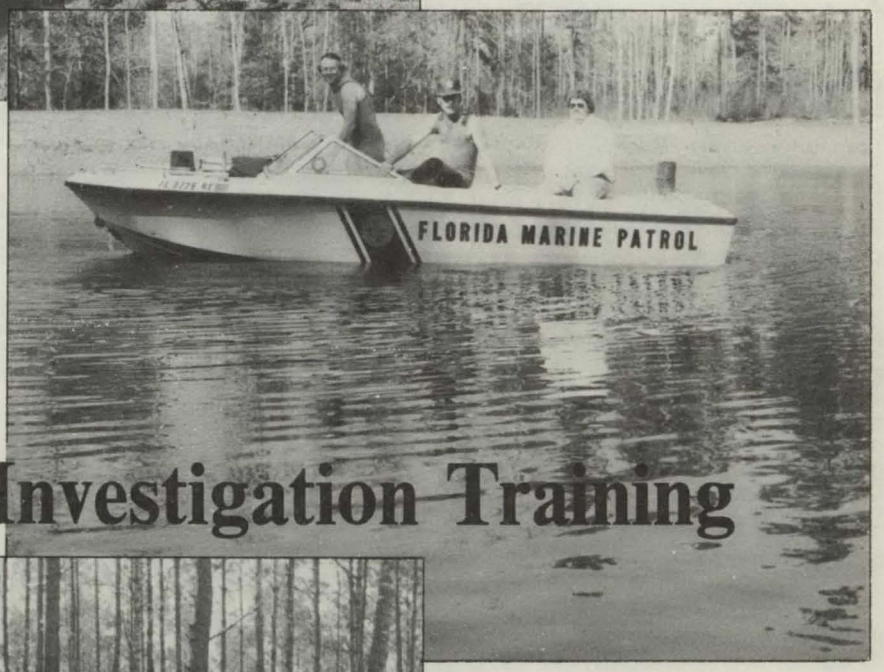


"This program has been e techniques of handling un all techniques of search a

A dock with a diving platform and boat ramp permits students to receive instruction in basic diving and boat handling procedures.

Students practice approach, maneuvering, boarding, inspection, and boat handling on patrol boats.



Underwater Investigation Training

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Training personnel prepare to sink a car to be used for teaching deep vehicle search and recovery techniques.

tly designed to prepare the law enforcement officer in the ater investigation, the collection and preservation of evidence, and covery of water-related accident victims, vehicles, boats, and planes."

*Hundreds of human bodies were found in Florida's fresh water lakes, ponds, and streams in 1982.[1]

*Eighty-six victims of reported water-related accidents were found along Florida's coastline in 1981.[2]

The magnitude and complexity of investigating these and other water-related crimes, accidents, and incidents can best be understood when one realizes that Florida has over 11,000 named lakes—the greatest number in the Nation—covering 4,470 square miles of water and 10,000 miles of inland freshwater shorelines. This does not include the uncounted/unnamed ponds, sinkholes, and swamps. Florida also has the longest coastline of any State, totaling 8,426 miles as measured around bays, inlets, and tidal estuaries.[3]

These statistics give a clear indication of the importance of proficient underwater tactical dive teams. The effectiveness of such units depends entirely on training. Tactical dive teams are not simply law enforcement officers who know how to dive—very definite techniques that require unique talents and specialized training are involved.

In law enforcement, dive officer training is largely a matter of individual departmental policy. Several of the larger agencies across the country do have their own inhouse training which uses existing natural water areas. Prior to 1982, however, no State was known to have had a central law enforcement training facility to meet this need.

The Lively Criminal Justice Training Academy in Gadsden County, Fla., now has the first formal, centralized dive officer training program in operation in the country. This program has been explicitly designed to prepare the law enforcement officer in the techniques of handling underwater investigation, the collection and preservation of evidence, and all techniques of search and recovery of water-related accident victims, vehicles, boats, and planes.

One of the most important aspects of this program is that it has been developed specifically to use facilities built for just this purpose. The diving program has been designed by law enforcement personnel who have had a vast amount of experience in search and recovery operations. At this time, the program is offered only to criminal justice agencies and fire rescue departments.

On the grounds, a 3½-acre lake has been constructed with an average depth of 14 feet. Before the spring-fed lake was allowed to fill with water, a 1,000-foot obstacle course was laid out on the lake bottom. The course familiarizes the diver with the extreme conditions found underwater, where visibility is often zero and objects that would go unnoticed on land can become life-threatening perils. Instilling psychological confidence in the officer in these surroundings is an absolute must.

The obstacle course also teaches the practicalities of staying on track in following underwater search lines, how to successfully maneuver underwater obstacles, and the development of safe diving habits.

The diver must follow the obstacle course by maintaining contact at all times with the nylon rope that marks the path. It begins at the northeast end of the lake and zigzags through a winding pattern around, under, over, and through natural as well as manmade obstacles, including 10 4-foot sections of culvert that have a diameter of 48 inches.

An area on the southeast corner of the lake was dug out to a depth of 32 feet, where a 35-foot boat with a 16-foot cabin superstructure lies at the bottom for use in teaching the dive officers how to search sunken boats for victims, suspects, contraband, and evidence. A car has also been placed on the southern edge of this hole to give the divers practical experience in deep vehicle search and recovery techniques. They are taught how to locate and search the sunken vehicle and the procedures for bringing the vehicle to the surface.

At the southwest end of the lake, an airplane was sunk in such a way as to simulate a crash. Pieces of the "wrecked" plane are strewn along a 200-foot debris line from the edge of the lake to the main section of the plane. Here again, divers are taught search and recovery techniques for victims, accident investigation, and collection and preservation of evidence.

Divers do not have to leave the lake to enter the classroom. A dock has been built with a submerged platform for diver access, and divers can remove their gear while standing in the 36 inches of water covering the platform. Steps lead directly to the outside classroom, which is roofed and equipped with benches and blackboards. Divers can receive technique corrections and instructions and immediately return to the water.

Mr. Steverson

Mr. Lamarche

Peter Durland
Coordinator

Most of Florida's State law enforcement and regulatory agencies conduct recruit, inservice, and specialized law enforcement training programs at the academy. With this in mind, facilities at the lake were not limited to those used for underwater investigation training. The permanent assignment of patrol boats to the lake allows officers from the Florida Game and Fresh Water Fish Commission and the Florida Marine Patrol to receive firsthand instruction in approach, maneuvering, boarding, inspection, and basic boat handling. There is also a paved drive and concrete boat ramp which allows recruits of these two agencies to learn basic boat launching and trailering. Officers from both agencies must be proficient swimmers, so the lake is used by them for conditioning, practicing lifesaving techniques, and water safety training.

Water-related law enforcement techniques center around the proper approach and investigation of game or fishing violations, the checking of permits and licenses, and safety equipment checks. A permanent duck blind has been constructed at the southeast end of the lake for wildlife officer field exercises in the proper approach and handling of hunters within a blind. Techniques of investigation of illegal fish and game violations are taught to recruits, as well as drag and recovery training for trawls, nets, fish traps, and other illegal devices.

The academy was chosen as the site for the underwater investigation training program for several reasons. Located on 375 wooded acres in Gadsden County, the academy has some of the most modern training facilities in the country. In addition to providing training for State agencies, it also serves the law enforcement and corrections training needs for all local agencies within six counties. Since its opening in January 1977, over 25,000 law enforcement officers, recruits, corrections officers, and military personnel have been trained at the academy.

Plans for the underwater investigation training lake were begun in the spring of 1982 when timber was harvested from a 4-acre natural ravine located 200 yards southwest of the main training building complex. Designs had previously been drawn, environmental impact studies completed, and permits issued. The lake was near the designed capacity level when the first classes began in the fall of 1982.

Further construction and expansion is planned, including equipment storage buildings, student locker rooms, and facilities for an air compressor. These facilities are projected to be fully operational by July 1983.

Law enforcement officers completing this intensive course will be fully trained and ready to meet the unique challenges of water-related and underwater investigations.

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Footnotes

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Law Enforcement Accreditation: A Big Step Toward Professionalism

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In 1979, four law enforcement associations came together to design an accreditation program for law enforcement agencies. Their main goal was to develop standards for law enforcement administration and operations and to make those standards available to the law enforcement community through a voluntary accreditation program.

These four associations—the International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriffs' Association (NSA), and Police Executive Research Forum (PERF)—took the work of earlier standards development efforts and refined the recommendations, updated the requirements, and added an accreditation process.

Three and a half years later, the major objectives of this program have been reached. Nearly 1,000 standards have been researched, approved, tested, and are now being offered for adoption by law enforcement agencies. The commission plans to accept the first applications for accreditation in the fall of this year, following pilot testing and examination of the entire process.

What is accreditation?

The simplest definition of accreditation is measuring up to a body of standards related to a specific discipline—in this instance, law enforcement.

Accreditation is a *process* by which agencies bring themselves into compliance with a body of established standards; it is also a *status* awarded to agencies that meet or exceed all requirements of the standards.

Why was the commission created?

The commission was formed to develop a set of law enforcement standards and establish and administer an accreditation process by which law enforcement agencies at the State and local levels can demonstrate *voluntarily* that they meet professional criteria. The overall goal of the accreditation program is to improve the delivery of law enforcement services.

Who serves on the commission, and how are they appointed?

The 21-member commission is composed of 11 law enforcement professionals and 10 representatives from the public and private sectors. It includes a State supreme court justice, State senator, county administrator, mayor, city council members, and a professor, among others.

Commission members are appointed for 3-year terms by the unanimous consent of the president and executive director of each of the four law enforcement associations.

How is the commission organized?

The commission, a nonprofit, tax-exempt corporation, appointed an executive director to head its staff and implement its policies. Major staff activities include developing, refining, evaluating, and updating standards and related procedures and publications; maintaining a public information

Mr. Cotter

and communications program; and administering the accreditation process, including the selection, training, and evaluation of assessors who are responsible for verifying compliance with standards by agencies seeking accreditation.

What authority does the commission have to develop standards and accredit law enforcement agencies?

The commission's general standard-setting authority is derived from the four major law enforcement membership associations noted earlier. Those agencies that *voluntarily* participate in the accreditation program constitute the source of the commission's accreditation authority.

Does the Government control or influence the operation or policies of the commission in any respect?

No. The commission was founded by, exists for the benefit of, and derives its authority from the law enforcement community. It is not obligated to any governmental unit—local, State, or Federal. (Initial Federal seed money was granted on a no-strings-attached basis.)

How is the commission funded?

Grants are sought from foundations and the private sector. In addition, fees are collected from law enforcement agencies seeking accreditation. This income defrays the two major costs of accreditation—onsite assessment costs (payments to assessors for their time, travel, etc.) and offsite costs (staff salaries and travel, various commission expenses, assessor training, publication costs, etc.).

What is the ongoing relationship to the commission of the four law enforcement associations that founded it, now that their standards development work is finished?

The commission's bylaws specify that the associations are to appoint the members of the commission, by unanimous endorsement. The executive directors of the four associations serve as "advisors" to the commission. On an informal basis, the suggestions and observations of the four associations are always welcome, including recommendations to the commission regarding new or revised standards and changes in the accreditation process.

What are the standards designed to accomplish?

The standards were developed to help law enforcement agencies achieve the following:

1) Increase agency capabilities to prevent and control crime;
2) Enhance agency effectiveness and efficiency in the delivery of law enforcement services;
3) Improve cooperation and coordination with other law enforcement agencies and with other components of the criminal justice system; and
4) Increase citizen and employee confidence in the goals, objectives, policies, and practices of the agency.

What areas do the standards cover?

The standards pertain to six major areas: (1) Law enforcement role, responsibilities, and relationships with other agencies; (2) organization, management, and administration; (3) personnel administration; (4) law enforcement operations; (5) prisoner and

court-related services; and (6) auxiliary and technical services. Within those general categories, the standards address 48 topics. Though designed to reflect the best professional practices in each of the six areas, the standards deal with the "what to," leaving the decision of "how to" up to the agency.

How were the standards developed and by whom?

Initially, the standards were drafted by the four law enforcement associations. Each assumed responsibility for developing a portion of the standards which were then reviewed at group meetings attended by representatives from all the associations. Proposed standards were amended, if necessary, and sent to the commission for approval.

The commission-approved standards were then submitted to law enforcement agencies and individuals for examination and comments. Standards were also subjected to a structured field review by over 300 law enforcement agencies of various types and sizes in all 50 States. Field test results were reviewed by the four participating associations. If indicated, changes to standards were made and sent to the commission for approval. These standards are evaluated continually and are subject to revision. New or revised standards will occasionally be developed by the commission with the advice and counsel of agencies already accredited and the four participating law enforcement associations.

Are law enforcement agencies required to comply with all the standards?

No. First, the accreditation program is voluntary so an agency may choose not to apply for accreditation.

Second, those agencies that do seek accreditation are only required to comply with standards specifically applicable to their agency, based on agency size and the functions it performs. For example, the commission designated a number of standards as not applicable to smaller agencies that cannot be expected to employ the range of specialists or perform the number of functions that large agencies could reasonably be expected to employ and perform.

Third, applicable standards fall into two categories: Mandatory or nonmandatory. Agencies must comply with all applicable mandatory standards. However, an agency initially need not comply with more than 80 percent of the applicable nonmandatory standards, although it is encouraged to comply with as many of these as possible. The agency selects the 80 percent with which to comply.

How difficult is it to gain compliance with the standards?

The standards are designed so that compliance is attainable, although it may not be an easy matter for some agencies. The standards are not considered to be an unreasonable burden on any well-managed law enforcement agency.

How do these standards differ from those of previous commissions?

Many of the standards developed by previous commissions are out of date, and few were field tested. This program's standards build on past efforts; they were reviewed and tested in the field. There is a mechanism—the commission—to evaluate the standards and keep them up to date.

Is the accreditation program voluntary?

Yes. Agencies are in no way obligated to seek accreditation. More importantly, the commission neither encourages nor endorses efforts by any governmental authority to mandate accreditation. Inasmuch as accreditation is voluntary, an agency may withdraw at any point or suspend accreditation activities for a specific period of time after commission acceptance of the agency's application and approval of eligibility.

What law enforcement agencies are eligible for accreditation?

Eligible law enforcement agencies include legally mandated agencies and other law enforcement agencies whose eligibility has been verified by the commission.

Who submits the application for agency accreditation?

The commission will only accept an application for accreditation from the law enforcement agency's chief executive officer, countersigned, if necessary, by the chief executive officer of the agency's governmental entity. This assures the commission that the agency and its governmental unit understand all elements of the program and that they are willing to commit the necessary resources.

How long does it take to become accredited?

Agencies are generally expected to comply with all applicable standards within 1 year after they enter the accreditation process. If the agency does not comply within this period, its accreditation application may be suspended until the commission is notified that the agency has completed the self-assessment process.

For what period is an agency accredited, and what is expected of an accredited agency?

Accreditation is for a 5-year period. Once accredited, agencies are expected to retain those standards under which accreditation was awarded. Accredited agencies are required to file an annual report testifying to continuing compliance. At the end of the fourth year, an agency should initate the process of reaccreditation.

Is accreditation merely a paper exercise?

Although accreditation does require paperwork, much more than that is involved. For example, each agency must show proof of its compliance with applicable standards. Commission assessors visit the agency to examine the proofs and determine whether written policies and procedures are actually followed by the agency's personnel.

What are the major steps in the accreditation process?

When the commission determines that an agency is eligible for accreditation, the agency is asked to complete a questionnaire that is designed to elicit information about the agency's size, responsibilities, functions performed, organization, and management. This information reconfirms the agency's eligibility and determines which standards are applicable to the agency.

Using forms and instructions from the commission, the agency conducts its own assessment of compliance with standards and assembles the necessary proofs of compliance. Ordinarily, the period allowed for this self-assessment is 6 months. If the agency cannot comply with all applicable standards within that period, the commission may grant the agency an additional 6 months to comply. If the agency cannot indicate that full compliance has been achieved with all applicable standards within that second 6-month period, the agency's application is suspended until the agency advises that it is in compliance.

If the commission finds the agency's self-assessment report acceptable, it sends a team of assessors to the agency to verify the proof of compliance. The assessors also coordinate a public information session during which agency employees and the general public are offered an opportunity to comment on the agency's compliance with applicable standards.

After the commission's staff reviews the assessment team's report, it is forwarded—along with their recommendations—to the commission, which either awards or defers accreditation. If deferred, the agency is sent an outline of the steps required to gain full compliance with the standards.

At any point in the accreditation process, decisions by the commission, staff, and assessors may be appealed by the agency.

Who conducts the onsite assessment?

Experienced law enforcement practitioners and persons with demonstrated law enforcement knowledge and experience are being recruited and trained by the commission to conduct the onsite assessments. If possible, assessors are assigned to assess agencies of similar sizes and types as those agencies in which they have served. Assessors are never assigned agencies within their own State.

Will the agency have an opportunity to review the names and qualifications of the assessors?

Agencies will be notified in advance of the identities and backgrounds of potential assessors, and the commission will accept comments from the agency concerning potential conflicts of interest or other reasons why it may be advisable not to assign a specific assessor to that assignment.

How much is the fee that must accompany an agency's request for an accreditation application?

The fee is $100, nonrefundable. However, if the agency decides to seek accreditation after receiving the application and the accompanying materials, the $100 is credited toward the total accreditation fee. The $100 covers staff time, publications, and the other items accompanying the application form.

When must an agency pay the full accreditation fee?

When it submits the completed accreditation application form, the agency remits a check for 50 percent of the total accreditation fee, refundable if the commission rules that the agency is ineligible for accreditation. The balance of the accreditation fee is payable after the commission's staff reviews and accepts the agency's self-assessment documentation, prior to the onsite assessment by commission assessors.

How much is the total accreditation fee?

The commission will keep accreditation fees to a minimum. The largest single cost of accreditation is the onsite assessment—payments to assessors, their subsistence and travel costs, and their reporting responsibilities. The remaining money is used for headquarters operations. The commission is currently conducting "pilot tests" of the standards and accreditation process in selected agencies. One objective of the pilot test is to determine onsite assessment costs, as well as other costs. As an interim measure, the commission approved the following estimated fees:

1) Agencies with fewer than 24 members, less than $5,000;
2) Agencies with fewer than 200 members, less than $10,000;
3) Agencies with fewer than 1,000 members, less than $20,000; and
4) Agencies with more than 1,000 members, $25,000.

How many agency personnel are involved in the accreditation effort and for how long?

The individual most involved during the accreditation period is the person designated as the agency's accreditation manager. This individual, who may require secretarial and other assistance, manages the accreditation process for the agency and provides orientation and training for other agency personnel who will occasionally participate in the process. These others may include personnel assigned to gather various types of compliance documentation. Some will conduct the self-assessment and assist the commission's onsite assessment team.

What are the major benefits of accreditation?

Some major benefits resulting from compliance with the standards are:

1) Accreditation provides a norm for agencies to monitor and measure performance and to correct deficiencies;
2) Standards represent independent guidelines for upgrading services as well as a means for independent evaluation of agency operations;
3) Adherence to standards increases agency efficiency, as well as accountability for agency operations;
4) Accreditation provides access to information about innovative programs in other agencies;
5) Accreditation commits policies and procedures to writing; and
6) There is great benefit in the exchange of information among participating accredited agencies concerning the best methods and procedures identified by commission assessors during onsite assessment. Distribution of this information is made regularly and may eventually lead to new and better standards.

How might I get more information on the accreditation program?

The commission publishes a newsletter, "Commission Update," free of charge every month. The commission also has available, upon request, an information kit that contains more detailed information on the topics covered in this article.

If you would like a copy of the information kit, or would like to receive the commission's newsletter, please call or write:

Information Office
Commission on Accreditation for Law Enforcement Agencies, Inc.
1730 Pennsylvania Avenue, N.W.
#460
Washington, D.C. 20006
(202) 783-5247

When and how may an agency apply for accreditation?

Applications for accreditation will be accepted in October 1983. Prior to that time, please direct a letter indicating an interest in applying for accreditation to:

James V. Cotter, Executive Director
Commission on Accreditation for Law Enforcement Agencies, Inc.
8803 Sudley Road, Suite 205
Manassas, Va. 22110
(703) 361-1711 **FBI**

CONFESSIONS AND THE SIXTH AMENDMENT RIGHT TO COUNSEL (Conclusion)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

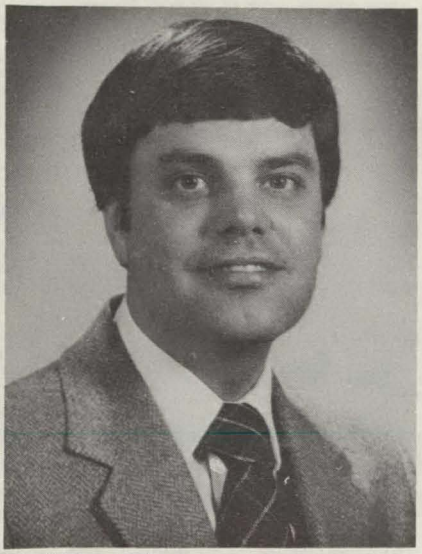
VIOLATION OF THE RIGHT TO COUNSEL

The point at which a defendant's right to counsel attaches in a criminal case is a crucial factor in any sixth amendment analysis; however, attachment of the right is meaningless unless the right is violated. In *Massiah,* there would have been no violation had the Government not—through Colson—deliberately elicited the incriminating statements from Massiah in the absence of his counsel. Two questions immediately come to mind. First, would Massiah's right to counsel, which clearly had attached as the result of his indictment, have been violated if Colson had deliberately elicited the statements from Massiah on his own initiative and then contacted Murphy and agreed to testify to the admissions in court? Second, assuming that Colson was acting as an agent of the Government, and there is no doubt that he was, would there have been a violation if Colson had obtained the incriminating statements from Massiah without deliberate elicitation?

The Requirement of Government Involvement

It is a fundamental principle of constitutional criminal procedure that the exclusionary rule only operates to exclude evidence that has been obtained as the result of unconstitutional conduct on the part of Federal or State officials and their agents.[31] As a result of this principle, incriminating statements deliberately elicited by private persons—persons who are not acting pursuant to Government direction—should not be subject to exclusion even though the defendant's sixth amendment right to counsel had attached at the time the statements were obtained. While this rule appears to have been generally accepted by the courts, there has been some controversy over what type of relationship must exist between a private citizen and the Government before the private citizens' actions will be viewed as those of the Government.

In *United States* v. *Van Scoy,*[32] one Casebeer, who in the past had acted as a Government informant, deliberately elicited incriminating statements in the form of notes passed from cell to cell from the defendant Van Scoy while they were incarcerated at the Lewisburg Penitentiary. These notes detailed Van Scoy's involvement in the murder of another prisoner, a crime for which Van Scoy had been charged at the time the notes were elicited. Casebeer turned these notes over to the FBI, and over objection, they were admitted in evidence against Van Scoy at his murder trial. Van Scoy appealed his conviction on grounds that Casebeer was acting as a Government agent at the time he deliberately elicited the notes, and therefore, his (Van Scoy's) sixth amendment right to counsel had been



Special Agent Riley

violated. The appellate court reviewed the transcript of the suppression hearing conducted in the case and agreed with the trial court that although Casebeer had served as an informant for the FBI in the past, there was nothing to suggest that he had been paid or had been given any favorable treatment as the result of his cooperation. Furthermore, the court found there was no evidence which suggested that the Government instructed Casebeer to secure information with regard to the murder or that Casebeer was in any way paid to discover such information. The court adopted the following findings as set forth by the trial court:

> "At best, it can be said that Casebeer was willing to furnish certain information without any instructions from the government. Although it is true that Casebeer undoubtedly knew that the information he secured would be useful and accepted by the government, it is the Court's view that this does not convert him into a government agent . . . and the Court cannot say that the mere acceptance of such inculpatory information converts an informant acting without direction from the government into a government agent." [33]

Although Casebeer was not found to be a Government agent, the opinion certainly suggests that the court might have ruled differently if Casebeer had been paid or otherwise compensated for his past activities. This is interesting because it suggests that an informant's deliberate elicitation can result in a sixth amendment violation requiring suppression, even though the Government has not solicited the informant's help or in any way targeted the informant against the defendant.

In *United States* v. *Sampol,*[34] the court addressed the question left open in *Van Scoy,* i.e., whether a jailhouse informant's deliberate elicitation of incriminating statements from an indicted defendant and his subsequent testimony concerning these statements violates the defendant's sixth amendment right to counsel where the Government has not directed or targeted the informant against the defendant.

In *Sampol,* one Sherman Kaminsky had been indicted for extortion and interstate racketeering in the Southern District of New York, in the District of New Jersey, and in the Northern District of Illinois. After pleading guilty to each indictment, he became a fugitive and remained in that status until his arrest in the State of Washington in January 1978. Kaminsky was returned to New York and incarcerated at the Metropolitan Correctional Center in New York City to await sentencing. Upon his arrival at the center, Kaminsky began to develop information from fellow inmates, information that his attorney passed on to the FBI. On June 14, 1978, Kaminsky was taken before a Federal judge for sentencing, and the judge was told of Kaminsky's cooperation.

" . . . deliberate elicitation of . . . incriminating statements [is] a necessary ingredient in the sixth amendment right to counsel violation. . . ."

The judge sentenced Kaminsky on the New York charges and then continued the sentencing in the New Jersey case for 6 months, with the understanding that continued cooperation with the Government would be taken into consideration at that time. In referring to the level of cooperation that was expected from Kaminsky, the judge stated: "If you don't make good, I will throw you in the can if it's the last act I do before I pass on. . . ." [35]

Kaminsky was returned to the center following his sentencing and proceeded to develop information from inmates concerning a variety of crimes—some for which the inmates involved had already been formally charged and others that had gone undetected by the police up to that time or were still in the planning stage. This information was dutifully reported by Kaminsky either directly to Government agents or indirectly through his attorney. One inmate who was unlucky enough to befriend Kaminsky during this time was Alvin Ross, who was awaiting trial on numerous Federal charges resulting from the 1976 murder of Chilean Ambassador Orlando Letelier in Washington, D.C. While Kaminsky was not directed by the Government to elicit information from Ross, at least no more so than any other inmate, Ross and Kaminsky were confined in the same unit, and some time after June 14, 1978, they "began to talk to each other." Ross made incriminating statements to Kaminsky concerning the murder of Letelier, and this information was reported to the assistant U.S. attorney who was handling Kaminsky's case.

On October 31, 1978, Kaminsky and his attorney met for the first time with the Federal prosecutor in the Letelier case. The prosecutor advised Kaminsky that he should continue his association with Ross; however, he admonished Kaminsky not to initiate any conversations with Ross or report any information to the Government he might overhear concerning Ross' legal defense. Kaminsky continued to obtain information from Ross after this meeting, and this information was transmitted to the prosecutor.

At Ross' trial, Kaminsky took the stand but was only allowed to testify about conversations he had with Ross prior to his October 31, 1978, meeting with the prosecutor. This limitation was placed on Kaminsky's testimony as the result of the trial court's determination that after the October 31 meeting, Kaminsky was a Government agent who had been specifically targeted at Ross, and therefore, the statements obtained after that date were obtained in violation of Ross' sixth amendment right to counsel.

Following his conviction, Ross appealed, alleging that Kaminsky was a Government agent as of his June 14, 1978, sentencing hearing, and therefore, the trial court erred in not excluding all of Kaminsky's testimony as being obtained in violation of Ross' sixth amendment right to counsel. The appeals court agreed with Ross, and in reversing his conviction, found that Kaminsky's relationship with the Government, a relationship that was enhanced by the possibility that the sentencing judge in his own case would impose a shorter sentence (a possibility that in fact materialized), was sufficient as of June 14, 1978, for the court to find that statements elicited from Ross after that date were deliberately elicited by the Government in violation of Ross' right to counsel.[36]

In both *Van Scoy* and *Sampol,* the courts placed heavy emphasis on whether the informants reasonably could expect to gain or benefit from the Government in return for their services. In *Sampol,* this factor was paramount; the court ruling that the potential gain or benefit to Kaminsky was such that it justified exclusion of all of Ross' statements despite the fact that some of the statements were obtained by Kaminsky before the Government had even indicated an interest in Ross. As a result of these cases, future defendants can be expected to argue that once it is shown that the informant reasonably can expect to benefit from the Government as a result of his activities, he becomes a Government agent at that point, regardless of whether there is a specific agreement between the Government and the informant concerning the role the informant is to play.

Ironically, the *Sampol* court's reliance on gain or benefit to the informant in resolving this issue has prompted at least one other court to conclude that absent a promise of pecuniary gain or freedom in return for furnishing information, an informant is not a Government agent even though there was a conversation between a law enforcement officer and the informant prior to the time that some of the statements were elicited and this conversation included an instruction to the informant to try to get what he could.[37]

The Requirement of Deliberate Elicitation

It is clear from the *Massiah* decision that the Supreme Court viewed Colson's deliberate elicitation of Massiah's incriminating statements as a necessary ingredient in the sixth amendment right to counsel violation it found in that case. It has remained a necessary ingredient over the years; however, what constitutes deliberate elicitation, and what does not, has been the subject of some controversy.

In *United States* v. *Hearst,*[38] the defendant, while incarcerated at the San Mateo County Jail awaiting trial on bank robbery charges for which she had been indicted, was allowed to receive and speak with visitors. One visitor was a childhood friend, and the conversation that took place in the visiting room was monitored and recorded by jail authorities pursuant to established jail policy. The resulting tape contained incriminating statements, and it was delivered to the FBI by jail authorities for use at the defendant's trial. Defense counsel objected to the introduction of the tape on grounds, *inter alia,* that the Government violated the defendant's sixth amendment right to counsel by "surreptitiously making itself a party to [her] conversations and thereby deliberately elicited incriminating statements made in the absence of counsel." [39]

In rejecting this argument, the court found that there was no evidence to suggest that the defendant's childhood friend had initiated the conversation at Government direction and stated: "The obvious problem with applying *Massiah* to the facts surrounding the making of the . . . tape is the absence of any governmental effort to elicit incriminating statements from appellant." [40]

The *Hearst* opinion stresses that Government presence at the time incriminating statements were made is not sufficient to establish a sixth amendment violation. Presence must be accompanied by some act or words on the part of the Government that can be characterized as a deliberate effort to obtain or elicit an incriminating response. However, exactly what words or actions a defendant must show in order to prove deliberate elicitation was not addressed in this case.

In *United States* v. *Henry,*[41] the Supreme Court was presented a case where the defendant, Billy Gale Henry, had been indicted for armed robbery and was incarcerated in the Norfolk city jail pending trial. Shortly after Henry's incarceration, an FBI Agent contacted one Nichols, who was a paid FBI informant serving a sentence in the jail for forgery. Nichols told the FBI Agent that he was housed in the same cell block with several Federal prisoners awaiting trial, including Henry. The Agent instructed Nichols to be alert for any incriminating statements made by these Federal prisoners; however, he specifically told Nichols not to initiate any conversations with Henry or to question him regarding the bank robbery. Nichols was recontacted by the FBI shortly after he was released from jail, at which time he stated that he had engaged in conversations with Henry and Henry had admitted his participation in the bank robbery for which he was charged. Nichols was paid for this information, and ultimately, he testified at Henry's trial concerning the incriminating statements. Henry was convicted and sentenced to 25 years in prison.

Following a series of appeals, the substance of which it is not necessary to deal with here, Henry's case came before the Supreme Court with a single issue to be decided: Did the Government agent, Nichols, deliberately elicit incriminating statements from Henry within the meaning of *Massiah*? The Court answered this question in the affirmative and stated: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." [42]

In reaching the conclusion that the Government had intentionally created a situation likely to induce Henry to make incriminating statements, the Court relied on three factors. First, Nichols was acting under instructions as a paid informant for the Government. Although this included instructions not to initiate any conversations with Henry or to question him regarding the bank robbery, the Court determined that these instructions were not controlling, not when Nichols would only be paid if he produced information, and Nichols himself testified that he had "some conversations with Mr. Henry." Second, the Court noted that

". . . Government presence. . . is not sufficient to establish a sixth amendment violation. Presence must be accompanied by some act or words . . . that can be characterized as a deliberate effort to obtain or elicit an incriminating response."

when an accused is in the company of a fellow inmate who is acting as a Government agent, conversations stimulated in these circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents. Third, the Court pointed out that Henry was incarcerated at the time the statements were made, and that while custody is not required for a sixth amendment right to counsel violation, it does impose pressures on the accused and could bring into play "subtle influences that will make him particularly susceptible to the ploys of undercover government agents." [43]

Since the second and third factors discussed by the Court are present in every case where a Government informant obtains incriminating statements from an incarcerated defendant, it is possible that the *Henry* decision has, in effect, totally outlawed the investigative technique used in that case. The possibility of this result is enhanced by the fact that even though the first factor can be controlled somewhat by the Government, the Court made it very clear that factual issues concerning such matters as whether the informant stood to gain from his assistance, or who initiated the conversation, should be decided in favor of the defendant absent convincing proof to the contrary.

Finally, while the third factor discussed by the Court (custody) is not applicable where the defendant is not incarcerated at the time he makes incriminating statements to a Government agent, the other two factors would still apply. Hence, the *Henry* decision is expected to impact negatively on the use of this investigative technique in a noncustody situation, as well as where the defendant makes the statements while in jail.

WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

As early as 1938, in *Johnson* v. *Zerbst,*[44] the Supreme Court held that the sixth amendment right to counsel can be waived by a defendant as long as the Government proves that the defendant understood what his right was and evidenced his intention to waive it. Based on these requirements for a valid waiver, it is not surprising that the Government did not argue waiver in *Massiah,* nor is it likely that a waiver argument can be made in any case where a Government agent surreptitiously attempts to obtain incriminating statements from a charged defendant.

However, the *Massiah* rule applies equally to situations where a known Government agent attempts to directly and deliberately elicit incriminating statements from a defendant who has been formally charged, and in these cases, the waiver issue can and does come into play. For example, suppose that upon entering Colson's automobile, Massiah had been greeted by Murphy who immediately identified himself as a customs agent and then began to ask Massiah questions concerning his role in the drug operation that resulted in his indictment on Federal drug charges. This fact situation would clearly fall under *Massiah* because Murphy's questions would be an attempt by the Government to deliberately elicit incriminating statements from an indicted defendant in the absence of counsel. However, in this scenario, the question that remains is whether Murphy could attempt to obtain, and Massiah agree to provide, a waiver of his sixth amendment right to the assistance of counsel that would meet the requirements of *Johnson* v. *Zerbst,*[45] thereby rendering any incriminating statements obtained after that point admissible.

One of the most publicized cases dealing with waiver of the sixth amendment right to counsel is the Supreme Court's 1977 decision in *Brewer* v. *Williams.*[46] In this case, the defendant Robert Williams, an escaped mental patient, voluntarily turned himself in to the Davenport, Iowa, Police Department when he found out that the Des Moines, Iowa, Police Department had obtained a warrant for his arrest charging him with the abduction of 10-year-old Pamela Powers in Des Moines 2 days earlier. The Davenport police booked Williams and advised him of his rights. Additionally, Williams spoke with his lawyer in Des Moines on the telephone, and his lawyer advised him that the Des Moines police would be coming to Davenport to bring him back and that they had agreed not to interrogate him on the return trip. Williams was also instructed not to volunteer any information to the Des Moines police concerning Pamela Powers.

Prior to the arrival of the Des Moines police in Davenport, Williams was arraigned before a judge in Davenport on the abduction warrant, again advised of his rights, and committed to jail to await transfer back to Des Moines. A Davenport lawyer named Kelly also spoke with Williams and told him not to speak with the police until after he had met with his lawyer in Des Moines. When the Des Moines police arrived, attorney Kelly advised one of the transporting officers, Detective Leaming, that Williams should not be questioned during the return trip. Attorney Kelly also sought permission to ride in the car with Williams back to Des Moines, but his request was denied.

On the return trip Detective Leaming, who knew that Williams was a former mental patient and was deeply religious, delivered what has become commonly known as the "Christian Burial Speech." The substance of Detective Leaming's spiel was that if it snowed, it would be difficult to locate Pamela Powers' body and she deserved a Christian burial. The result of Detective Leaming's statements was that Williams made several incriminating statements and then led the officers to Powers' body. Williams was subsequently tried and convicted of first degree murder.

Williams appealed his conviction within the Iowa State Court System alleging, *inter alia,* that his sixth amendment right to counsel had been violated as the result of Detective Leaming's deliberate elicitation of his incriminating statement in the absence of counsel after he had been formally charged. These direct appeals failed as the Iowa courts ruled that while the incriminating statements had been deliberately elicited after he was formally charged, Williams had validly waived his sixth amendment right to the assistance of counsel before the statements were made, and therefore, no *Massiah* violation occurred.

Williams then petitioned the U.S. district court for a writ of *habeas corpus*, again alleging that his sixth amendment right to counsel had been violated. The district court granted the writ ruling that Williams had not waived his right to counsel. The Federal Court of Appeals for the Eighth Circuit subsequently upheld the district court's decision.

The State of Iowa then appealed to the Supreme Court, arguing that the lower Federal courts had erred in concluding that Williams had not validly waived his sixth amendment right to counsel. In affirming the decision of the eighth circuit, the Supreme Court ruled that Williams had not waived his sixth amendment right to counsel. In reaching its decision, the Court found that while Williams understood what his rights were, the State failed to meet the heavy burden of proving that Williams intentionally relinquished or abandoned this right as required by *Johnson* v. *Zerbst.*[47] In support of this conclusion, the Court noted that Williams had clearly evidenced his intention to deal with the police through his lawyers, attorney Kelly in Davenport and attorney McKnight in Des Moines, and there were no facts that evidenced his intention to forgo this decision. In fact, the Court found that Williams' statements to Detective Leaming that he would talk to him after he saw his lawyer in Des Moines, and his reliance on his attorney's statements that the police had agreed not to question him on the return trip, evidenced just the contrary.

Although a valid waiver was not found in *Brewer,* the Court did point out the following:

> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." [48] (emphasis in original) (footnote omitted)

The above statement from the Court's opinion, coupled with Justice Powell's concurring opinion and the opinions of the four dissenters in the case, clearly implies that after the right to counsel attaches and counsel has been appointed, the defendant can still validly waive this right, in the absence of counsel, as long as the waiver meets the requirements of *Johnson* v. *Zerbst.*[49]

The most common method of obtaining a waiver of a defendant's sixth amendment right to counsel is by use of the standard warning and waiver form developed by all police departments as the result of the *Miranda* decision. Although this form was created in order to assist police officers in ob-

"The most common method of obtaining a waiver of a defendant's sixth amendment right to counsel is by use of the standard warning and waiver form developed . . . as the result of the *Miranda* decision."

taining a valid waiver of a defendant's *Miranda* rights which are based on the fifth amendment right against compelled self-incrimination, a knowing, intelligent, and voluntary waiver of these rights is generally found to also waive the defendant's sixth amendment right to the assistance of counsel. Of course, the use of this method to obtain a waiver of sixth amendment rights requires police officers who are going to question a charged defendant to advise the defendant of his *Miranda* rights and obtain a waiver, even where the charged defendant is not in custody.

Although use of the *Miranda* warnings and waiver has generally been found to be sufficient to waive a defendant's sixth amendment right to counsel, one Federal appellate court has rejected this approach, at least where the defendant has been formally charged by indictment. In *United States* v. *Mohabir,*[50] the Court of Appeals for the Second Circuit was presented with a case where the defendant, following his indictment on Federal charges, turned himself in to Federal authorities and was booked. A little later in the day, before the defendant had been arraigned, he was interviewed by an assistant U.S. attorney who advised him that he had been indicted and gave him a copy of the indictment to read. Additionally, the assistant read the defendant his *Miranda* rights, and the defendant agreed to answer questions. In the resulting interview, the defendant made incriminating statements which were used against him at his trial. Following his conviction, the defendant appealed, arguing that he had not validly waived his sixth amendment rights, and therefore, the incriminating statements deliberately elicited from him by the Government in the absence of counsel should have been excluded. The appeals court agreed with the defendant, noting that "waivers of Sixth Amendment rights must be measured by a 'higher standard' than are waivers of Fifth Amendment rights." [51] Additionally, the court found that this higher standard requires that a defendant who has been indicted understand the significance of this event before the right can be waived. In this case, the court ruled that while the defendant was told that he had been indicted and a copy of the indictment was given him to read, the record suggested that the defendant did not understand the gravity of his position when he agreed to answer the assistant's questions.

The court then reversed the defendant's conviction. The court also ruled, in the exercise of its supervisory power, that a waiver of the sixth amendment right to have counsel present during postindictment interrogation must be preceded by a Federal judicial officer's explanation of the content and significance of this right.[52]

CONCLUSION

In 1964, the Supreme Court created a new constitutional standard for the admissibility of a defendant's confession in a criminal case. In short, the Court ruled that the sixth amendment right to the assistance of counsel is violated where the Government deliberately elicits incriminating statements from an indicted defendant in the absence of counsel and then uses these statements as evidence at the defendant's trial.

The *Massiah* rule has been expanded substantially since it was first announced by the Court. For example, in 1972, the Supreme Court made it clear that a defendant no longer had to show that he was indicted at the time his statements were deliberately elicited in order to make a sixth amendment argument. Instead, he need show only that at the time the statements were obtained by the Government in the absence of counsel, there had been an arraignment or a preliminary hearing, an information had been filed, or he had been otherwise formally charged. Furthermore, some courts have ruled that the filing of a complaint and the issuance of an arrest warrant is a formal charge that triggers a defendant's sixth amendment right to counsel.

Attachment of the sixth amendment right to counsel does not prevent the Government from continuing its investigation of the defendant or from deliberately eliciting statements concerning separate and distinct crimes for which the defendant had not been charged. However, some courts have held that the right attaches to other related, uncharged crimes, especially where it is shown that the motive behind the Government's deliberate elicitation was to

obtain statements relating to the original charge.

Incriminating statements deliberately elicited by private persons—persons not acting pursuant to Government direction—are not subject to exclusion under the *Massiah* rule. However, some persons have been found to be Government agents even though they were not specifically directed to obtain information from a particular defendant. These cases usually involve jailhouse informants who reasonably expect to gain a benefit from the Government in return for their services.

Deliberate elicitation is a necessary ingredient in a *Massiah* violation. Mere presence by the Government at the time an incriminating statement is made is not sufficient to establish deliberate elicitation. Presence must be accompanied by some act or words on the part of the Government that can be characterized as a deliberate effort to obtain or elicit an incriminating response. Arguments that incriminating statements were not deliberately elicited from an incarcerated defendant are closely scrutinized by the courts, and factual issues concerning how the statements came about are decided in favor of the defendant absent convincing proof to the contrary.

Waiver of the sixth amendment right to counsel is not an issue in cases, like *Massiah,* where the Government surreptitiously obtains incriminating statements from a charged defendant. However, the *Massiah* rule applies equally to situations where a known Government agent attempts to directly and deliberately elicit incriminating statements from a defendant who has been formally charged, and in these cases, the waiver issue does come into play. A defendant can waive his sixth amendment right to counsel, in the absence of counsel, as long as the Government proves that the defendant understood his right and evidenced his intention to waive it. The most common method of obtaining a waiver of a defendant's sixth amendment right to counsel is to advise the defendant of his *Miranda* rights and then obtain a knowing, intelligent, and voluntary waiver of those rights. However, one Federal circuit court of appeals has ruled that where a defendant has been charged by indictment, a waiver of *Miranda* rights is not sufficient to waive the sixth amendment right to counsel.

FBI

Footnotes

[31] *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971).
[32] 654 F.2d 257 (3d Cir.), *cert. denied,* 102 S.Ct. 977 (1981).
[33] *Id.* at 260.
[34] 636 F.2d 621 (D.C. Cir. 1980) (per curiam).
[35] *Id.* at 634.
[36] *Id.* at 638.
[37] *State* v. *Krause,* 644 P.2d 964 (Hawaii 1982).
[38] 563 F.2d 1331 (9th Cir. 1977).
[39] *Id.* at 1344.
[40] *Id.* at 1347.
[41] 447 U.S. 264 (1980).
[42] *Id.* at 274.
[43] *Id.*
[44] 304 U.S. 458 (1938).
[45] *Id.*
[46] 430 U.S. 387 (1977).
[47] 304 U.S. 458 (1938).
[48] 430 U.S. 387, 405 (1977).
[49] 304 U.S. 458 (1938).
[50] 624 F.2d 1140 (2d Cir. 1980).
[51] *Id.* at 1146.
[52] *Id.* at 1153. *See also, United States* v. *Payton,* 615 F.2d 922 (1st Cir. 1980); *United States* v. *Durham,* 475 F.2d 208 (7th Cir. 1973).

WANTED BY THE FBI

Photographs taken 1978 *Photograph taken 1976*

Hector Brito

Hector Brito, also known as Hector Victor Brito, Hector Maurice Brito, Hector Briton, Arcadio Checo, Hector Maurice Lopez, Hector Maurice Brito Lopez, Marice Lopez, Maurice Lopez, Julio Martines, Juan Ortiz, Rolando Ruiz, "Cutchy," and "Kutchy"

Wanted for:

Interstate Flight—Murder, Aggravated Robbery, Attempted Aggravated Burglary

The Crime

Brito is being sought in connection with the brutal murder of a paraplegic on January 5, 1979, in Salt Lake City, Utah. While attempting to burglarize the victim's home, Brito allegedly shot the man in the face with a .45 Colt revolver.

A Federal warrant was issued on January 12, 1979, in Salt Lake City, Utah.

Description

Age	24, born January 2, 1959, Santo Domingo, Dominican Republic (not supported by birth records).
Height	5'9" to 5'10".
Weight	145 to 150 pounds.
Build	Medium.
Hair	Black.
Eyes	Brown.
Complexion	Dark.
Race	White.
Nationality	Dominican.
Occupations	Clerk, contractor, dishwasher, laborer, roofer.
Scars and Marks	Scar above left eye; pierced left ear; tattoo: "KUTCHY" on left forearm.
Social Security Nos. Used	058-53-4703; 072-30-3977; 076-52-3977.
FBI No.	826 988 P2.

Caution

Brito is known to wear body armor and has carried a 9-millimeter pistol in the past. He should be considered armed and extremely dangerous.

Notify the FBI

Any person having information which might assist in locating this fugitive is requested to notify immediately the Director of the Federal Bureau of Investigation, U.S. Department of Justice, Washington, D.C. 20535, or the Special Agent in Charge of the nearest FBI field office, the telephone number of which appears on the first page of most local directories.

Classification Data:

NCIC Classification:

2108161713180912PI13

Fingerprint Classification:

21 M 1 U IOO 13

L 2 U IOI

I.O. 4906

Right index fingerprint

Change of Address

Not an order form

FBI LAW ENFORCEMENT BULLETIN

Complete this form and return to:

Director
Federal Bureau of
Investigation
Washington, D.C. 20535

Name

Title

Address

City State Zip

Interesting Pattern

Although the classification of this pattern is not questionable, the position of the two loop formations are unusual and interesting. This impression is classified as a double loop whorl with an inner tracing.

U.S. Department of Justice
Federal Bureau of Investigation

Official Business
Penalty for Private Use $300
Address Correction Requested

Postage and Fees Paid
Federal Bureau of Investigation
JUS–432

Second Class

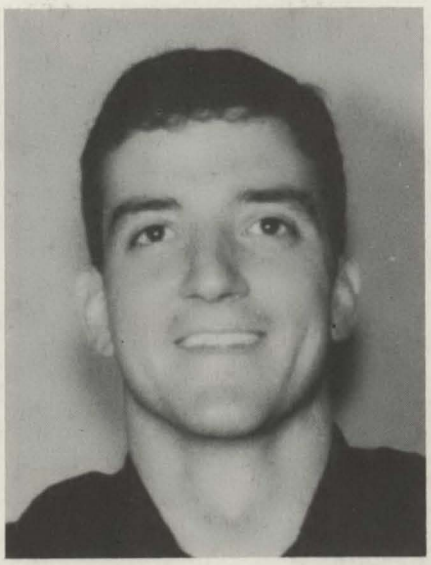
Washington, D.C. 20535

The Bulletin Notes

that Phoenix, Ariz., Police Officers Randall D. Force, James J. Kulesa, and Larry Jacobs rescued a 9-month-old baby girl from a fire in her home at 1:45 a.m. on January 25, 1983.

These officers, while checking a suspicious vehicle, heard a woman screaming and saw she was holding her infant out of a nearby second-story window. Heat from the fire, at first, prevented the officers from reaching the woman and her baby, but their second attempt saved the mother and daughter. The Bulletin joins the chief of police in Phoenix in congratulating Officers Force, Kulesa, and Jacobs.

Officer Force



Officer Kulesa

Officer Jacobs