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FBI Law Enforcement Bulletin

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Those Terrible First Few Minutes ***Revisiting Active-Shooter Protocols for Schools***

By MICHAEL E. BUERGER, Ph.D., and
GEOFFREY E. BUERGER, Ph.D.

The term *active shooter* entered the national lexicon in the wake of the fatal shootings at Columbine High School, a tragic capstone to similar devastation in other locales. The dynamics of Columbine redefined police response practices and spawned a constellation of in-school prevention initiatives.

The educational community has placed considerable focus on having a plan in place against a dire eventuality. The industry standard protocol is geared to targeted school violence by an aggrieved student, which has been the modal category of school shootings in recent years.¹

However, incidents meeting this definition represent only one of the potential active-shooter threats.

Although a tendency exists to argue that “you cannot plan for every conceivable situation,” the history of school invasions, in fact, has encompassed a wide range of contingencies. For example, a fire alarm pulled by an accomplice emptied classrooms into the playground, providing a clear field of fire for a shooter concealed in the woods. In another incident, a shooter targeted his tormentors during a voluntary prayer meeting just before the start of school. Several different cases have seen shooters focus on administrators or teachers. Still other schools have been invaded by adults armed with a variety of weapons.²

The authors assert that enough contingencies have occurred to justify developing flexible response plans that can account for and adjust to several broad categories of incidents. While even a limited plan is better than no plan at all, neither schools nor police should confine themselves to a “one size fits all” planning protocol. To this end, the authors address that time period between the first contact with an armed intruder on school grounds and the arrival of help. By examining this from the perspective of school personnel, they suggest that the police should be considered second responders. Unless a situation begins with the shooter confronting a school resource officer, the first reaction will come from individuals whose professional orientation

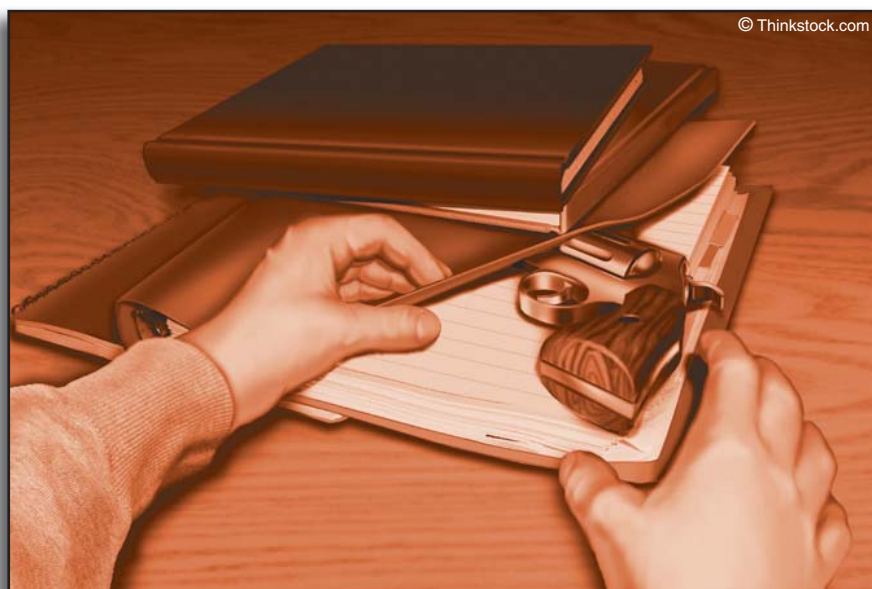
is far removed from armed conflict. The authors’ goal is to promote the development of better tactical and training options for the civilians whose reactions will define the incident until the police arrive.

THE PROTOCOLS

Most active-shooter protocols contain the same advice: implement lockdown procedures, minimize the target profile, and wait for the police to neutralize the situation. Teachers and students should hide quietly, lock or barricade doors, and turn off lights and electrical equipment that would attract the shooter’s attention. If possible, they should provide detailed information via 911 contact to guide authorities and, then, remain quiet until a recognized voice advises that it is safe to move.

The rationale for the existing active-shooter protocols is obvious. Once a school is in lockdown, “hide and hope” defensive actions minimize the chances of being a target and maximize police latitude in clearing the building. Concealment and cover reduce potential casualties. The chaos of moving, screaming bodies provides a target-rich environment, as well as camouflage, for a shooter.

Lockdown procedures encourage the shooter to search



for softer, more accessible targets within a large physical plant. That interval coincides with police response time, delays the perpetrator's engagement with any targets, and keeps the person in open space. When discovered, the shooter is isolated against the background, a single target for law enforcement officers. If intruders seek concealment from the police, they abandon the search for victims, increasing the overall safety of the school community.

Two tacit assumptions are inherent in the protocols. First of all, operationally, the concept of lockdown hinges upon a notification that occurs with students in standard classrooms. Second, school authorities will control the scene with police as the sole actors in the response. Embedded in both are presumptions of orderly, effective communication of the emergency and a methodical compliance with the school plan upon notification.

Nonstandard Circumstances

In primary and secondary schools, students are not always in classrooms. Recess and lunchtime take them out of their classrooms and often put them under the direction of adults who are not their regular teachers. School assemblies and other special events create similar conditions. In high schools, the

intervals between class periods have corridors full of students changing classrooms.

In an emergency during a transition period in a high school, administrators could direct students to report to their next class or to the nearest classroom. During their

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Unless a situation begins with the shooter confronting a school resource officer, the first reaction will come from individuals whose professional orientation is far removed from armed conflict.

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research, the authors discovered no protocols that addressed potential problems arising from overcrowded classrooms (e.g., those adjacent to cafeterias) or rooms in lockdown when students arrived from more distant locations. Because it is statistically probable that the shooter is a student, a person seeking entry to a classroom in lockdown could be the perpetrator. Procedures for handling contingency situations, such

as late-seeking refuge, must be developed and clearly communicated to all school staff.

Lunchtime creates a different dynamic, as do library periods, study halls, and similar nonclassroom times. The physical layouts of lunchrooms, libraries, and other common areas vary widely. Gym classes, locker rooms, and open bathroom facilities do not provide the same degree of cover that a locked classroom might. School-specific protocols need to cover these vulnerable, and predictable, times.

In addition, the protocols the authors reviewed seemed geared to college-age students in campus environments or to large high schools. But, reactions expected from a college population are quite different from those from a combined K-3 class. Young students are easily upset, and teachers cannot quell their crying by logical reminders why they should remain quiet. In the event of an evacuation, maintaining orderly flight and regrouping with younger or mixed-age school populations can prove much more difficult than directing older students.

In high schools and colleges, shutting off cell phones is desirable but probably impossible to implement. Cell phones provide a way to communicate information to the outside

world, but the ring of one alerts an intruder to the presence of people inside a room, elevating the danger. Parents hearing of a situation likely will call their child, increasing the probability that cell phones will be ringing throughout the school and defeating the “hide and hope” approach to lockdown.

Situational Considerations

Most school entrances have open space nearby, populated offices with transparent glass windows, and corridors. It is entirely possible that an invader’s first victims will be the administrators and staff charged with initiating the emergency procedures. In that case, the first notification that an emergency is underway may be the sound of gunshots and screams.

If administrative personnel are killed or driven to take cover, no one may be able to initiate a formal alert, thereby forcing teachers and other staff to make autonomous decisions for the protection of their charges. School policy and related police response protocols must be adaptable. Specific parameters when teachers have the freedom to initiate a lockdown of a classroom, even in the absence of formal notification from the office (i.e., when shots or shouts are heard), and under what conditions lockdown should be abandoned and

evacuation initiated should be developed at the local or district level.

Faced with a school-invasion situation, school staff will have to make a quick assessment of the threat and take multiple steps in response. They must disseminate appropriate information to the school and to outside authorities and initiate available defensive mechanisms.

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A number of dynamic elements exist at the point of first contact with a potential shooter. The intruder may be a member of the school population (including an adult staff member), a resident of the surrounding community, or a complete stranger. The shooter may be acting on impulse, under the influence of drugs, or mentally ill. The intruder may have a

specific target in mind or simply be intent on random violence.

Not all of these factors will be evident, nor will they necessarily be meaningful in terms of the reactions of staff in the first moments. Undoubtedly, overt visual and verbal cues will provide a rough “flash” image that determines the initial staff response. From a police tactical perspective, none of these issues are relevant once the shooting starts; safety precautions and search patterns presume the worst-case scenario. For school personnel, however, they may be critical.

Assuming that an attack does not ensue immediately, a person with only minimal training and an orientation far different from that of police officers will handle the first contact. This individual may be the principal, a teacher, a secretary or other staff member, a parent or other volunteer, a substitute teacher, or a student. The last three are most problematic because they are least likely to be aware of the protocol and less prepared to pick up on the nonverbal cues an intruder might display. Their initial reaction most likely will range from initial surprise and recovery to shock and outright panic.

The most important duty of the person making first contact is to communicate the potential

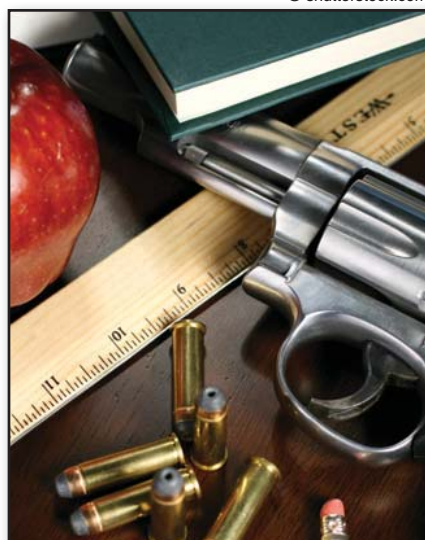
danger to others. That communication must be in a non-threatening manner that does not escalate the situation, but it must be clear and specific, even if the school protocol uses coded language. If that cannot be done and the intruder refuses to be engaged by conversation, the first notice of the event may be gunshots or screams.

If the invader is a student, either visibly armed or visibly disturbed, the likelihood that a teacher or administrator will engage them is fairly high. School personnel are familiar with each student's baseline behavior and would be sensitive to changes under most conditions. They also have a background relationship to help them. Even if the indicators suggest severe emotional upset, the teacher's approach is likely to be student focused, perhaps deflecting or distracting the individual and hopefully calming the student down. Confrontation runs the risk that the person who first approaches the intruder will become the first casualty.

Collateral risks include an untrained adult or a well-meaning student exacerbating a situation that might have been controlled by a different approach. As police know, the first contact with a visibly disturbed citizen always is risky. Determining the motivation and potential risk depends first

upon the intruder's willingness to engage in conversation and then upon the intervening individual's ability to interpret the responses and react in an appropriate manner.

Notification has two stages: internal notice to effect the lockdown procedures and communication of the emergency



to police authorities. School-intruder situations have no equivalent of the fire alarm, which initiates both notifications simultaneously. Instead, notice is volitional, with an expected hierarchy of action invested presumptively in a central administrative office. Because not all events begin with the office, however, planning needs to encompass circumstances in which notification is executed by other staff.

THE IMPLICATIONS

Neither police nor school officials should consider the national "best practices" protocols as either complete or sufficient. They are a place to begin, a platform from which to examine the exceptions that apply to each individual school. Planning, training, and contingency protocols should proceed from a variety of plausible scenarios that draw upon both historical events and knowledge of local situations.

Information Transmission

Incapacitation is not the only void in a hierarchy: principals may be out of the office, even off the school grounds for district meetings or other functions. Response plans cannot be strict chain-of-command protocols that gridlock in the absence of key hierarchical personnel. Authority and responsibility must be fluid and flexible. A large part of that flexibility requires mutual trust among school employees, from principal to custodian, and, as in all human institutions, that trust may not be pervasive.

Information transmission is critical to any protocol, but none, aside from "shots fired," may exist. The directive to seek quiet concealment can conflict with the need to develop and provide more information to responding authorities. Primary

Active Shooters in Isolated Rural Schools

Many rural schools are located in small, isolated towns served by only state police or sheriff's departments. The far-flung patrol responsibilities and limited staff levels of those agencies make a 20- to 30-minute response time an optimistic best-case scenario; in reality, it may take 45 minutes to an hour before authorities arrive.

A longer wait for police response extends the period of vulnerability. The smaller size of rural schools compresses both distance and time, making confrontations more intimate and dramatically altering the dynamics of refuge and escape. The advantage of lockdown quickly evaporates, tipping the advantage to the armed invader. At several schools known to the authors, the entire physical plant can be explored in less than 5 minutes. An armed intruder can check the doors of every office and classroom within 2 minutes and, if thwarted by locked or barricaded doors, could easily move outside to enter classrooms through a window or proceed around the perimeter, shooting into the interiors of classroom after classroom.

Special Vulnerabilities

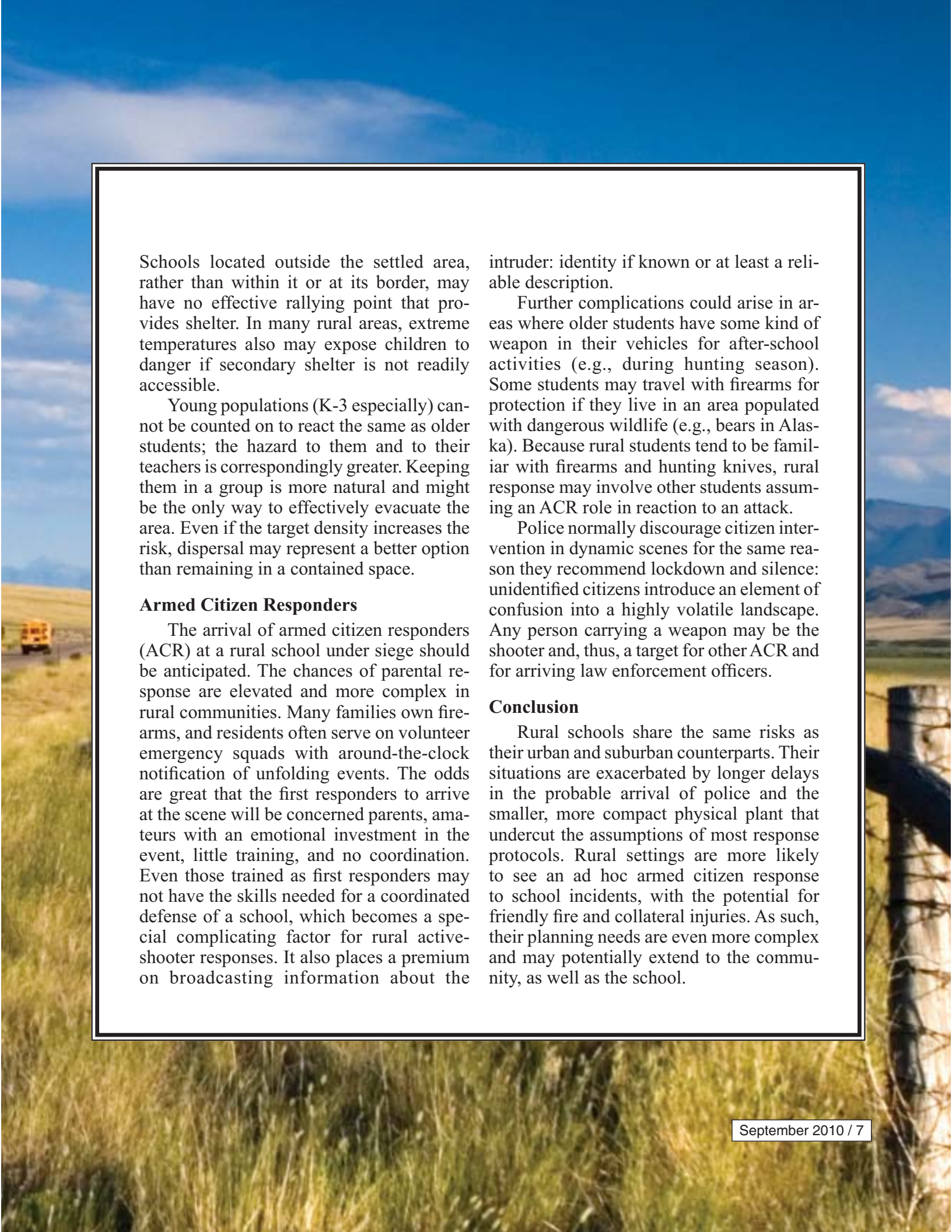
The potential for a shooter neutralizing the school's administrative staff can prove even more pronounced in rural schools.

Principals often have regular teaching duties or cover teacher absences out of necessity and may be away from the office at the critical moment. Teachers and other staff will be forced to make autonomous decisions for the protection of their charges.

The special vulnerabilities of isolated rural schools with a limited physical plant make flight a viable option under some conditions. When authority has devolved to the level of the individual classroom, teachers must decide whether shelter in place or flight gives their charges the greatest chance of surviving the incident. The intruder who has just rattled the locked classroom door may be a minute away from appearing at the windows with a clear view of the interior of the classroom and only a glass pane barring access.

The dispersal of students during an escape presents additional problems. The best chance for surviving an active-shooter situation may be to scatter but also may increase individual vulnerability to other hazards. It can increase the difficulties of accounting for students, elevating parents' anxieties and compounding the recovery stage. For example, some schools may have fences or be situated next to natural barriers, such as streams or rivers, that can prove dangerous to students.





Schools located outside the settled area, rather than within it or at its border, may have no effective rallying point that provides shelter. In many rural areas, extreme temperatures also may expose children to danger if secondary shelter is not readily accessible.

Young populations (K-3 especially) cannot be counted on to react the same as older students; the hazard to them and to their teachers is correspondingly greater. Keeping them in a group is more natural and might be the only way to effectively evacuate the area. Even if the target density increases the risk, dispersal may represent a better option than remaining in a contained space.

Armed Citizen Responders

The arrival of armed citizen responders (ACR) at a rural school under siege should be anticipated. The chances of parental response are elevated and more complex in rural communities. Many families own firearms, and residents often serve on volunteer emergency squads with around-the-clock notification of unfolding events. The odds are great that the first responders to arrive at the scene will be concerned parents, amateurs with an emotional investment in the event, little training, and no coordination. Even those trained as first responders may not have the skills needed for a coordinated defense of a school, which becomes a special complicating factor for rural active-shooter responses. It also places a premium on broadcasting information about the

intruder: identity if known or at least a reliable description.

Further complications could arise in areas where older students have some kind of weapon in their vehicles for after-school activities (e.g., during hunting season). Some students may travel with firearms for protection if they live in an area populated with dangerous wildlife (e.g., bears in Alaska). Because rural students tend to be familiar with firearms and hunting knives, rural response may involve other students assuming an ACR role in reaction to an attack.

Police normally discourage citizen intervention in dynamic scenes for the same reason they recommend lockdown and silence: unidentified citizens introduce an element of confusion into a highly volatile landscape. Any person carrying a weapon may be the shooter and, thus, a target for other ACR and for arriving law enforcement officers.

Conclusion

Rural schools share the same risks as their urban and suburban counterparts. Their situations are exacerbated by longer delays in the probable arrival of police and the smaller, more compact physical plant that undercut the assumptions of most response protocols. Rural settings are more likely to see an ad hoc armed citizen response to school incidents, with the potential for friendly fire and collateral injuries. As such, their planning needs are even more complex and may potentially extend to the community, as well as the school.

and secondary schools have an inherent in loco parentis responsibility for their minor charges not present in postsecondary institutions. By implication, expectations oblige school principals to develop as much on-scene information as possible, even at the risk of their own safety. Whether that devolves to secretaries or others in the absence of an administrator is less clear.

Information in the first few moments may be scant, fragmentary, and sometimes ambiguous. If lockdown is ordered swiftly and clearly in large schools, the associated protective factors take effect almost immediately. If such action is not an automatic response because of uncertainty, the intruder gains an advantage that expands risk to the school population.

A backup plan is needed for a more diverse reporting responsibility if the first contact is gunshots. Teachers tend to communicate with the central office for clarification, a momentary but understandable delay; in the absence of a response from the central office, autonomous lockdown should be the default protocol.

Secondary Protocols

While lockdown provides a solid foundation, it is not sufficient in itself. Police and emergency response personnel

must work with school officials to develop supplemental plans to address gaps.

The most glaring gap involves nonclassroom locations and activities. A robust active-shooter protocol must encompass outdoor recess, lunchtime groupings in the cafeteria, assemblies, and transition times. Other points of vulnerability include the unloading and loading of school buses. Students outside for recess or getting on or

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off school buses might be better served by flight and regrouping at a secondary location than by attempting to find or return to a classroom.

In addition, plans must address both age differences and the surrounding geography. The behavior expected of students has a powerful influence on the viability of elements of standard protocols. Older, compact school facilities in densely

populated urban settings pose different tactical challenges than newer, more spread out campuses in suburban and rural settings. Nearby environmental hazards—whether outdoor propane tanks, busy highways, or watercourses and other natural barriers—all create different dangers in the event of flight.

Finally, developing a local plan can run afoul of competing interests. One question that arises immediately is whether to evacuate a school if the fire alarm is pulled during lockdown. Fire officials are oriented to the perspective that premises always should be evacuated when a fire alarm is activated, but lockdowns are initiated only when danger is known to be present. Because the recent history of school shootings includes one incident where the alarm was pulled by an accomplice to generate targets,³ schools must conclude that without evidence of a fire, lockdown overrides the fire alarm. Other forms of resistance may come from the community or from within the school itself. “It can’t happen here” and “You cannot plan for every emergency” are standard rebuffs to attempts to create innovative responses. It may help to remind communities that all but a pair of high-profile school shootings took place in “it can’t happen here” locales.

Intervention Training

In-service training for educators cannot be expected to turn them into effective hostage negotiators. Nevertheless, some overview of danger signals, drawn from the library of post-shooting reports that has grown over the past two decades, might be considered.

The recent history of school shootings involves students in all but a handful of incidents, so knowledge of second-tier or contingency emergency protocols must be limited to staff. Some form of code phrase, or an alternative that conveys “a situation” has occurred to staff within earshot, could be developed.

Schools have a fluid population, however, including substitute teachers, aides, student teachers, and other guests. Their more limited connection to the student body makes it less likely they would recognize behavior changes and have the personal connection to engage a student, much less an adult, intruder. Whether, and how, to incorporate transient staff in an emergency protocol depends largely upon local circumstances.

For the police, the practical application of this is not a single presentation to school staff but a more robust and ongoing interactive process. Describing what the police are trained to do is merely the starting point

for discussing the realities perceived by the school staff. The process should craft a viable framework for multiple contingencies and help create a mind-set that facilitates adaptation. Moreover, the police must open their “first responder” mind-set during the preparation stage, recognizing that, in fact, they are the second responders. In school-invasion situations, the first responders are the school personnel who will manage the incident until the police arrive.

CONCLUSION

Three basic assumptions underlie existing active-shooter protocols for schools. First, police resources will arrive promptly and with overwhelming numbers to alter the

dynamics of the situation. Second, a tacit assumption, lockdown and concealment will protect students and staff, rather than endanger them. Third, also tacit but inherent in the structure of the protocols, the authorities will control the scene and be the sole actors in the response.

Given the astronomical odds against a shooting event happening in any one particular location, these considerations might seem academic. The list of school shootings continues to grow, however, and school administrators, law enforcement personnel, parents, and concerned citizens must consider all possibilities. An effective response requires school-specific planning and coordination grounded in local conditions.



To open a discussion on and promote the development of options for action during those first few minutes when hiding quietly and waiting for help may not be viable are paramount goals for all communities. ♦

Endnotes

¹ U.S. Department of Justice, Federal Bureau of Investigation, National Center for the Analysis of Violent Crime, Critical Incident Response Group, *The School Shooter: A Threat Assessment Perspective* (Quantico, VA, 2000); U. S. Department of Education, Office of Safe and Drug-Free

Schools, *A Guide to School Vulnerability Assessments: Key Principles for Safe Schools* (Washington, DC, 2008); and Bryan Vossekuil, Marisa Reddy, Robert Fein, Randy Borum, and William Modzeleski, U.S. Secret Service National Threat Assessment Center, *Safe Schools Initiative: An Interim Report on the Prevention of Targeted Violence on Schools* (Washington, DC, 2000).

² For additional details, see Stephen R. Band and Joseph A. Harpold, "School Violence: Lessons Learned," *FBI Law Enforcement Bulletin*, September 1999, 9-16.

³ Logic suggests that pulling the alarm is the quickest way for an intruder to neutralize lockdown, flooding the corridors with targets. This is a greater problem in a rampage shooting, with a generalized

target base, than it is for individually targeted shootings.

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Focus on Report Accuracy

Improved Memory Leads to More Accurate Use-of-Force Reports

By Todd Coleman



As you complete your midnight shift, you know that your department's policy states that you must finish your paperwork before securing from duty. As usual, it was a busy night, and, to top things off, you were involved in a foot pursuit that resulted in the use of force and an injury to the suspect. Fighting to stay awake, you fill out your agency's use-of-force report, turn it in, and head home for some well-deserved sleep.

Because of a great deal of scientific research on human memory, you should not be surprised to find that you have made errors in your use-of-force report. If you are lucky, these will be insignificant and easily corrected. Unfortunately, such errors could lead to accusations of untruthfulness,

internal investigations, and even potential civil or criminal prosecution.¹

Overconfidence in the accuracy of their own recollections leads most people to automatically assume that mistakes in another's recall of events stem from dishonesty, rather than memory errors. This belief, however, can have a devastating impact on the reputation of an officer who reported a use-of-force incident incorrectly due to faulty memory recall.

The best way to deal with this problem is to avoid it in the first place by taking advantage of the vast amount of research conducted in the area of human memory. The law enforcement community and the courts have accepted and implemented

many of these principles. While procedures, such as sequential lineups and the cognitive interview technique, have helped ensure the accuracy of the information provided by witnesses, law enforcement officers have received little training in methods to help them recall events as accurately as possible. Even more troubling, the procedures of many agencies often increase the likelihood of memory errors by officers.

Understand What Happens

First of all, use-of-force reports are unique because officers are describing an incident that is usually emotionally charged and one in which they actively participated. Second, the nature of a use-of-force incident can contribute to memory distortions. During deadly force situations, officers can suffer various memory distortions. Concepts, like tunnel vision and auditory exclusion, are familiar to most officers. However, memory distortions can occur in other use-of-force encounters as well.²

A recent report by the British Psychological Society defined a *traumatic event* as “a situation in which the individual experienced, witnessed, or was confronted with actual or threatened death, serious injury, or the threat to the physical integrity of self or others.”³ The report included physical assault as one example of a typical traumatic event that could negatively impact memory, stating that “it is common that other parts will be more vague, have some gaps, in jumbled order, and possibly contain inaccuracies.” By this definition, many, if not most, use-of-force incidents could be considered a traumatic event and carry the implications of possible memory distortions.

Additional research in this area also has shown that people’s memory can be affected by exposure to high levels of stress. One study reported that “evidence that eyewitness memory for persons encountered during the events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error.”⁴ Based on relevant research, it is clear that when reporting use-of-force incidents, officers need to be aware of circumstances that can lead to memory distortions.

Because officers are reporting an event where they may have some difficulty in completely and accurately recalling all details of the incident, they should enact procedures that help facilitate accurate memory. By following three basic procedures,

agencies can enhance officers’ memories resulting in more accurate and detailed use-of-force reports. This not only benefits officers by avoiding the trouble associated with an erroneous use-of-force report but it saves their agencies the time and money associated with conducting internal investigations.

Get Some Sleep

Many agencies require officers to complete all of their paperwork prior to securing at the end of their shift. While not always an issue, this policy can create significant problems in some circumstances. Research has found that people have a higher rate of false memories when suffering from sleep deprivation at the time of memory recall.⁵

While requiring sleep-deprived officers to complete and submit an alarm report or an accident report before the end of their shift may not have any serious repercussions, having them meet the

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Research has shown that humans have difficulty accurately recalling details involving spatial memory.

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same requirement on a use-of-force report constitutes another matter entirely. Use-of-force reports are routinely reviewed by a number of different personnel. An officer's immediate supervisor, higher-level commanders, internal affairs personnel, and even defense attorneys may have access to this document. Such scrutiny makes it imperative for officers to get it right the first time.

Few persuasive arguments exist as to why use-of-force reports cannot be done later. Obviously, if situations arise where officers will be away from work for a significant period of time, their departments must arrange to get the reports completed. However, this should be the exception, rather than the rule. Also, under these circumstances, it should not negatively reflect on the officers if any reasonable corrections are needed. By taking the simple step of allowing officers to complete their use-of-force reports at the beginning of their next shift, supervisors can increase the accuracy of the documents.

Do a Walk-Through

Most use-of-force incidents are dynamic and constantly evolving. They may cover a large geographical area, such as during vehicle pursuits, or they may involve an extended period of time in stand-off or barricade situations. They also may include both time and space in such cases as police K-9 searches. Regardless of the circumstances, a large number of important details will occur in the course of the encounter that officers may have difficulty recalling later.

Research has shown that humans have difficulty accurately recalling details involving spatial memory.⁶ Add to that the stress involved during the use of force and it becomes easy to understand why

officers may experience memory distortion when recalling the details of these encounters.

When possible, officers should return to the location of the incident. Such action often provides a number of memory triggers, enhancing the accuracy of their recollections. It also allows officers to get an exact picture of the physical environment under stress-free conditions. The actual distance that they were standing from a doorway or streetlight may not register as significant while they were chasing or fighting with a suspect. However, during a walk-through, they can pay attention to these types of details. During the initial encounter, breaking concentration to focus on specifics of this nature could have fatal consequences for officers.

Some may argue that doing a walk-through might alter an officer's true memories. Whether or not an officer's recall of an incident is affected by conducting a walk-through is not the issue. The point should be to obtain the most accurate use-of-force report. If conducting a walk-through allows an officer to accurately report the sequence and locations of events, then it is in

the best interest of both officers and their agencies to do so.

Tell Your Story

The cognitive interview technique or similar methods have become widely accepted by the law enforcement community. These encourage witnesses to tell their story in its entirety with little or no interruption. Interviewers then ask follow-up questions as needed. Without interruption, the witnesses can concentrate and possibly provide information that the interviewers otherwise may not have discovered. Such a process also avoids



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memory distortion due to leading questions or random searches of the witnesses' memories.

Unfortunately, many use-of-force reports violate this principle by requiring officers to check a box or select from a list of options regarding decisions made throughout an event. The forms often force them to mentally jump around from one part of the encounter to another. A typical use-of-force report may ask for the suspect's actions first and then the officers' responses. It may give a list of options to choose from and then a space to elaborate as needed. While these forms help with data collection, they leave much to be desired when it comes to getting a complete and accurate account of a use-of-force incident.

To enhance the accuracy of use-of-force reporting, agencies should follow the principles of the cognitive interview technique. Before starting the use-of-force report, officers should write out the entire story from beginning to end, including all of the information surrounding the event. Once they have completed the write-up, they can use it as a reference when filling out the use-of-force form. This will help negate the memory errors that can be caused by jumping around in the recounting of the incident.

Some may consider this duplication of effort a waste of time. Reporting a use of force is not the time to cut corners to save a few minutes. After all, an extra 10 or 20 minutes of effort ensuring accuracy in reporting officers' actions may save weeks or months of stress and headaches.

Conclusion

If law enforcement officers apply three basic recommendations—get some sleep, conduct a walk-through, and write out the complete

incident—they can minimize the effects of memory distortion when reporting their use-of-force actions. After all, their agencies spend a great deal of time and money on training with the goal of producing proficient and professional personnel. Another goal of this training is to avoid potential lawsuits. While a great deal of this training is time consuming and expensive, implementing these procedures costs nothing and can help achieve these goals. ♦

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**To enhance
the accuracy of
use-of-force reporting,
agencies should
follow the principles
of the cognitive
interview technique.**
”

Endnotes

¹ For an overview of use-of-force investigations, see Shannon Bohrer and Robert Chaney, “Police Investigations of the Use of Deadly Force Can Influence Perceptions and Outcomes,” *FBI Law Enforcement Bulletin*, January 2010, 1-7.

² For additional information, see Shannon Bohrer, “After Firing the Shots, What Happens?” *FBI Law Enforcement Bulletin*, September 2005, 8-13; and Alexis Artwohl, “Perceptual and

Memory Distortion During Officer-Involved Shootings,” *FBI Law Enforcement Bulletin*, October 2002, 18-24.

³ M.A. Conway and E.A. Holmes, “Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory,” The British Psychological Society, 2008, <http://www.policecouncil.ca/reports/BPS%20Guidelines%20on%20Memory.pdf> (accessed January 27, 2010).

⁴ C.A. Morgan III, G. Hazlett, A. Doran, S. Garrett, G. Hoyt, P. Thomas, et al., “Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress,” *International Journal of Law and Psychiatry* 27 (2004): 265-279.

⁵ S. Diekelmann, H.P. Landolt, O. Lahl, J. Born, and U. Wagner, “Sleep Loss Produces False Memories,” *PLoS ONE* 3, no. 10 (2008), <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=2567433> (accessed January 22, 2009).

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Officer Coleman serves with the Virginia Beach, Virginia, Police Department.



Effective Firearms Training

One Agency's Approach

By KEITH CAIN

Events across the nation continue to highlight the need for law enforcement officers to develop and sustain the firearms skills needed to survive a lethal force encounter. However, officer-involved shootings remain relatively rare in this country.

Consequently, assigning the right priority to firearms training never is easy, and many small and medium-sized agencies face the challenge of finding the resources necessary to implement more than a minimal periodic firearms requalification program. Further, the current

economic downturn has made the task harder as declining budgets have resulted in staffing shortages, overtime curtailments, and difficulty in purchasing training ammunition.

The Daviess County, Kentucky, Sheriff's Office continues to experience each of those

challenges. Yet, agency leaders felt obligated to officers and citizens to address those obstacles, rather than just defer firearms training until better times. This entailed gaining buy in among employees at all levels while developing creative solutions for the lack of resources—in short, crafting an effective program that the agency could execute within the available means. Leaders also decided that the training requirements would apply equally to all sworn personnel—supervisors, patrol officers, court security officers, criminal investigators, school resource officers, and special deputies—even though this presented additional challenges. Ultimately, the department implemented a program with two major components: a

limited-scale range firing every month and an annual 2-day event.

MONTHLY EXERCISES

Because the agency does not have its own firing range, it conducts the monthly event at the Owensboro Police Department's outdoor range over the course of 2 days. Every officer participates for 2 hours, while on duty if possible. The agency encourages all sworn personnel to attend monthly but requires them to participate at least bimonthly for record qualification. Scheduled exercises sustain basic firearms skills, periodically introduce new ones, and feature a mix of both dry and live fire. Although each exercise includes firing at least some rounds, the department

has found that certain tasks—for example, reloading with the weak hand only—can be taught effectively without requiring officers to fire.

ANNUAL EVENTS

The agency conducts the yearly event about 40 miles from department headquarters at the Kentucky National Guard (KYNG) training facility in Greenville, which features ranges and other facilities that rank among the finest in the country. While military training takes first priority, KYNG graciously shares its facilities when available; otherwise, this event would not take place. Further, one of the nation's premier firearms instructors, a full-time civilian contract employee of KYNG, provides most of the instruction.

In 2006, the training began with two 2-day iterations, each involving half of the participants. The coordination involved in allowing so many officers to train for 2 full days proved challenging and relied upon the generous assistance of both the Owensboro Police Department and the Kentucky State Police. Personnel provided overwhelmingly positive feedback about the training. Many officers said that this was the first time since graduating from the academy—in some instances, decades before—that they



Sheriff Cain heads the Daviess County, Kentucky, Sheriff's Office, is a board member of the Kentucky and National Sheriff's Associations, and chairs the Kentucky Law Enforcement Council.

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...while conducting this training takes a lot of work on the part of all concerned, officer feedback has shown its worth.

”

had in-depth, structured, formal firearms instruction, rather than just periodically demonstrating basic proficiency on a qualification range.

Beginning in 2008, a successful program took a significant leap forward when KYNG opened its newly constructed shoot house to the Daviess County Sheriff's Office. The shoot house is Kentucky's only three-dimensional, full live-fire training facility, and its use of service ammunition makes it both realistic and affordable. Its 11 rooms permit an almost limitless array of scenarios.

The agency chose an active-shooter scenario as the basic vehicle for instruction. This decision reflects a growing awareness among the law enforcement community that officers arriving at the scene of an ongoing shooting, an event usually over in minutes, cannot wait for the arrival of a SWAT or special response team. Department leaders decided that officers should receive some level of training to improve their prospects of succeeding in such encounters and reducing personal risk.

Rather than focusing on complex maneuvers that officers would find difficult to remember without constant practice or pairing with the same deputy while on duty, the agency decided to concentrate on a few very



basic tactical skills. Leaders especially wanted the training to benefit all sworn personnel, regardless of age, physical condition, or normal duty assignment, because nationwide experience suggests that any officer could respond first to an active-shooter scene. The department found it important to limit class sizes to 6 to 8 officers for each 2-day iteration as this not only facilitates scheduling but also allows instructors to devote more attention to each student and introduce skills more easily and safely than would be possible with a larger group.

Day 1

The first day focuses on individual officers placed into a situation involving a choice between waiting for backup while the active shooter

continues or entering the building alone to try to locate and stop the killer. Officers begin the day with a classroom presentation followed by a half day on the outdoor range to participate in a basic firearms skills refresher emphasizing speed and accuracy, ammunition management, malfunction clearance, and shooting on the move. When every participant has demonstrated an acceptable level of skill and, thus, fulfilled the prerequisite for the next phase, the class moves to the shoot house for the rest of the day for live-fire training.

The following segment begins with a walk-through discussion and demonstration of basic techniques, such as "slicing the pie," balancing security with speed, and engaging from the greatest practical distance.

Much of the time focuses on dealing with doorways and minimizing officer exposure. Next, every officer participates in one or more instances of dry fire under the close supervision of an instructor. When every officer is ready, the house is reconfigured for a series of individual live-fire exercises.

One of the shoot house's distinctive features provides the opportunity for officers to engage targets in any direction, something linear outdoor ranges do not normally offer. Many officers find the need to search for and encounter targets in a 360-degree setting new. To further complicate the process, the training involves targets held up by an internal balloon that shooters must break for the targets to fall; this requires multiple accurate hits to end the threat. And, to reinforce appropriate decision-making skills, the sessions normally employ more no-shoot targets than threats.

At the conclusion of each run, officers go through a reenactment with the instructors and discuss how they handled each situation. The training staff tries to ensure that participants feel comfortable speaking candidly.

Day 2

The second day simulates officers' arrival at the scene. On a standard outdoor range,

instructors begin introducing them to the concept of moving around each other safely with drawn weapons—a subject rarely covered in academy-like settings where the training emphasizes a straight firing line of officers facing similarly situated targets, a situation rarely encountered on the street. Next, more complex exercises involve coordinating ammunition management while moving and engaging targets so that two officers do not reload at the same time.

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This range portion concludes with a tightly coordinated “snake drill” in which participants experience another officer firing a weapon past them to engage a target in a nonlinear environment. They also must move around and past each other in close quarters with

weapons drawn. Officers can do this safely only if they have developed and maintained rigid muzzle awareness and control, as well as the discipline to keep their fingers off the trigger until they have their sights on the target. During this exercise, officers take turns standing forward of the firing line while another engages targets on each side of them. While this sounds—and potentially is—dangerous, instructors rigidly control it, and officers must master it in dry fire before progressing to live fire.

Officers with serious reservations do not have to take part in this exercise, but it is a prerequisite for anyone wanting to participate in a two-man live-fire entry into the shoot house. In addition to being a critically important safety gate, this activity also proves valuable because, as veteran law enforcement officers know, such situations are common on the street, but not often addressed in training.

When the instructors decide that all students have demonstrated their ability to safely move and engage targets with fellow officers in close proximity, the training moves back to the shoot house. This portion begins with a group walk-through that includes demonstrations and explanations of various entry and movement

techniques. Instructors emphasize the fundamentals: developing a quick plan, getting through doorways quickly and nearly simultaneously, going toward opposite corners to disrupt the shooter's decision-making loop, focusing by officers on their own area of responsibility so fellow officers can do the same, and effectively communicating with each other.

Next, two-officer dry-fire runs commence, the phase during which most of the learning occurs. Although a dry-fire exercise, most officers experience increased heart rates, respiration, and blood pressure.

As with the solo-officer entries the day before, when all students have successfully completed dry-fire training, the house is reconfigured for live fire. The crawl-walk-run approach helps manage risk, and two certified shoot house instructors who also must be currently certified range safety officers tailor the scenarios and target placement according to the demonstrated skill level of each officer. Instructors strive to challenge officers beyond their comfort zone, but task them within their capabilities.

During both of the dry-fire and live-fire exercises, one instructor accompanies the team, and another monitors the runs on a video system. Both instructors provide detailed performance reviews.

A veteran Daviess County Sheriff's deputy who completed the firearms training program approximately 90 days earlier responded to a suspicious person call in a residential neighborhood one morning and became involved in a shooting confrontation with an armed subject. Unknown to the officer, the individual recently had been released from prison, carried a handgun, and faced many years of backup time. The encounter took place at close range, and both parties fired multiple rounds. The subject sustained an incapacitating wound that terminated the encounter; the officer was uninjured.

This event demonstrates two things. One, the officer obviously went to work

that day with the skills necessary to survive and prevail; he stayed in the fight and ultimately took a violent criminal into custody. Further, he later went home safe. The officer credits the valuable training he received for saving his life that day. This incident serves as an example of why the Daviess County Sheriff's Office feels so strongly about the program.



© Daviess County Sheriff's Office

IMPLICATIONS

As of May 2009, everyone in the department authorized to carry a firearm completed this training. The agency views this not as a one-time event but an ongoing program and is beginning the second cycle, which will reinforce the previously learned skills while introducing new ones. For example, at some point, the entire course will take place at dark and require

flashlights. Other plans include configuring the training for patrol rifles and shotguns. And, already, the department has equipped a once largely empty building with furniture, which makes searching and clearing much more complex and dangerous and significantly increases the demand on officers.

Beyond introducing the skills and techniques needed to respond to an active shooter,



the department has learned that this training offers benefits that extend far beyond that specific scenario to other lethal-force encounters. Agency leaders realized that these basic skills may prove critical to survival in any situation, particularly one involving more than one officer in a weapons-drawn encounter.

First, the training requires an officer to move and engage a threat with one or more other officers in close proximity who also are moving and firing. As common—and potentially tragic—as this situation is, few departments can properly

train their officers on the skills required or even expose them to what is involved.

Second, and closely related, the emotional and physiological changes induced by the shoot-house scenarios come as close as possible in a training environment to exposing officers to stresses similar to those in an actual shooting situation. The difference between even the most challenging linear range setup and what officers must deal with in the shoot house is stark; while no one ever would argue that any training situation can duplicate a real life-or-death

confrontation, the department believes that the shoot house comes closer than a traditional police qualification range.

CONCLUSION

The Daviess County Sheriff's Office found that while conducting this training takes a lot of work on the part of all concerned, officer feedback has shown its worth. Somewhat surprisingly, several senior deputies—the ones who, according to tradition, may sometimes be less enthusiastic about new training concepts—have been among its biggest

supporters. Throughout, the agency strives to conduct a safe training event while equipping officers with potentially lifesaving skills. It tries to calibrate the training so that all officers gain newfound confidence in their ability to successfully handle very difficult situations.

The inherent challenges and risks in this kind of training caused the department to take

seriously the decision to provide it for officers. In the end, agency leaders based their choice on knowing that department personnel face certain hazards every day as part of the nature of their chosen profession. Because they chose to become police officers, the agency feels that it owes them to do everything possible to prepare them to do their jobs well and return

home safe at the end of each day. ♦

The author and the Daviess County Sheriff's Office thank members of the Kentucky National Guard for making this training possible, including Major General Ed Tonini, adjutant general; Command Sergeant Major Greg Armstrong; Jim Higginbotham, firearms instructor; and retired Major General D. Allen Youngman, former adjutant general.

Unusual Weapon

Walker Sword

Offenders may attempt to use this metal device that appears to be an ordinary walking cane. The expandable shaft can be removed from the handle portion to expose a knife blade, posing a serious threat to the safety of law enforcement officers. The blade also could be fitted into a walker or crutch.



Youth's Needs and Services

Youth's Needs and Services: Findings from the Survey of Youth in Residential Placement—a U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention bulletin—presents findings from the Survey of Youth in Residential Placement (SYRP) on how facilities have addressed youth needs, what services youth receive, and where these services could be improved. Specifically, the bulletin details youth reports regarding their—

- overall emotional and psychological problems and the counseling they receive in custody;
- substance abuse problems prior to entering custody and the substance abuse counseling they receive in their facility;
- medical needs and services; and
- educational background and the educational services the facility provides to them.

The findings are based on interviews with a nationally representative sample of 7,073 youth in custody during spring 2003, using audio computer-assisted self-interview methodology. Researchers analyzed the answers and assessed differences among subgroups of youth offenders in custody based on their age, gender, and placement program (detention, corrections, community-based, camp, or residential treatment facilities).

SYRP provides the first nationally representative findings on the needs of the population of youth who are in custody because they are charged with or adjudicated for offenses. These findings also are unique because they come from youth self-reports. The results reveal a broad range of needs in the custody population, show the extent to which existing services address these needs, and identify a number of areas in which improvements should be made. Readers interested in additional information may access the document (NCJ 227728) at the National Criminal Justice Reference Service's Web site, <http://www.ncjrs.gov>.



Juveniles in Residential Placement

Juveniles in Residential Placement, 1997-2008, an Office of Juvenile Justice and Delinquency Prevention (OJJDP) fact sheet, provides data derived from the Census of Juveniles in Residential Placement (CJRP) and the Juvenile Residential Facility Census (JRFC). As the fact sheet confirms, the number of juvenile offenders in residential placement in publicly and privately operated juvenile facilities has declined steadily since 2000. In 2008, fewer than 81,000 juvenile offenders were housed. This represents the lowest number of juvenile offenders counted in a national census of juvenile facilities since 1993 when the tally was slightly less than 79,000.

Facilities included in these data collections feature a wide range of types: secure and nonsecure; public (state or local), private, and tribal; and long-term and short-term holding. Juvenile facilities are known by many different names across the country: detention centers, juvenile halls, shelters, reception and diagnostic centers, group homes, wilderness camps, ranches, farms, youth development centers, residential treatment centers, training or reform schools, and juvenile correctional institutions. Some facilities resemble adult prisons or jails, some campuses, and others houses.

In 2008, 263 juvenile offenders were in placement for every 100,000 juveniles in the general population. CJRP reports state placement rates based on the state where the offense was committed. Youth held out of state are counted in the state that placed them. The residential placement rate is the number of juvenile offenders assigned a bed in a public or private facility on the census date per 100,000 youth ages 10 through the state's upper age of original juvenile court jurisdiction in the general population. From 1997 to 2007, 35 states experienced declines in their residential placement rates, 10 had increases, and 5 states and the District of Columbia saw virtually no change.

OJJDP's Statistical Briefing Book (<http://www.ojjdp.ncjrs.gov/ojstatbb>) provides access to CJRP data through two data analysis tools, the CJRP Databook and Easy Access to the CJRP. The Briefing Book also includes information on JRFC through bulletins that summarize each wave of data collection.

The *Juveniles in Residential Placement, 1997-2008* fact sheet (NCJ 229379) contains additional details and charts. It is available at the National Criminal Justice Reference Service's Web site, <http://www.ncjrs.gov>.

Bulletin Reports is an edited collection of criminal justice studies, reports, and project findings. Send your material for consideration to: *FBI Law Enforcement Bulletin*, FBI Academy, Quantico, VA 22135. (NOTE: The material in this section is intended to be strictly an information source and should not be considered an endorsement by the FBI for any product or service.)

Leadership Spotlight

Walk with Me

The test of leadership is not to put greatness into humanity but to elicit it, for the greatness is already there.

—James Buchanan

Certainly, leadership is about action. It is about making interventions and strong decisions. It is about influencing from the front, establishing a vision, and showing people the way. Yet, sometimes leadership is quiet. Sometimes it is simply just being there for our people: a subtle helping hand, a supportive shoulder, someone who will listen. An old proverb offers, “To listen well is as powerful a means of influence as to talk well and is as essential to all true conversation.”

In the spring of 1992, I learned a very important leadership lesson that I have turned to many times over the years in my various leadership roles. I was struggling with whether to stay in vice and narcotics or go through the promotional process for sergeant. Being a narcotics detective was the perfect job, but I was ambitious, too. I also had questions as to just how competitive I would be against so many great candidates. Did I really stand a chance? How strong would the support from my chain of command be? Was I really ready to be a sergeant?

I guess my lieutenant had a sixth sense (or very good leadership skills). One evening, he saw me in the parking lot at the station. He came over to my car and very casually said, “Walk with me.” I remember just a couple of minutes of small talk before he asked, “Jeff, where do you want to be in this department, and what can I do to get you there?” For nearly an hour, we walked. For the most part, I talked, and he listened. That was one of the best conversations I have ever had with a boss.

It was personal and sincere. The timing was impeccable. And, most important, besides his offering a little sage advice from time to time, that conversation showed that he valued me.

Each of us recognizes the need for active listening in our professional lives. We know how important it is for our people to provide their ideas and feedback about daily happenings at work. However, what we do not do quite as well is let our people talk about themselves. The law enforcement community has the daunting charge of preventing, mitigating, and responding to increasing demands and threats on a daily basis. In this high-stakes culture, our mission-driven ethos can overlook that how we lead is just as important as the results we achieve. In the long term, the latter cannot occur without effective leadership. Exceptional results are not sustainable in a climate where people feel undervalued and unappreciated. One of the simplest, most effective ways to show our people we value them is to offer one-on-one time where we ask a couple of good questions and then sit back and listen.

If you have a few minutes this week, consider asking one of your employees to go for a walk (figuratively or literally). The questions you ask will change from person to person, but the message will remain constant and clear: I value you as an employee; I value you as a person. ♦

Dr. Jeff Green, chief of the FBI Leadership Development Unit at the FBI Academy, prepared this Leadership Spotlight.

You Have to Speak Up to Remain Silent

The Supreme Court Revisits the Miranda Right to Silence

By JONATHAN L. RUDD, J.D.

Forty-four years ago, the U.S. Supreme Court handed down one of its most famous decisions—*Miranda v. Arizona*.¹ In *Miranda*, the Court addressed the application of the Fifth Amendment privilege against self-incrimination to in-custody interrogations and attempted “to give concrete constitutional guidelines for law enforcement agencies and courts to follow.”² Despite these guidelines and the fact that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part



of our national culture,”³ the practical application of *Miranda* continues to be debated and refined. This article focuses on the Supreme Court’s most recent decision in this area, *Berghuis v. Thompkins*, which was decided on June 1, 2010, and shines new light on issues surrounding both

the invocation and waiver of the *Miranda* right to remain silent.⁴

Setting the Stage

In *Miranda*, the Court held that “the prosecution may not use statements [...] stemming from custodial interrogation of the defendant unless it

demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”⁵ The procedural safeguards mandated by the Court are a specific set of warnings that must be given to individuals who are in custody and subject to interrogation.⁶ As one modern textbook explains, “The formula should be as easy as 1 + 1 = 2; that is, ‘custody’ + ‘interrogation’ = the requirement that *Miranda* warnings be given.”⁷

Once the warnings have been given, subjects must waive their rights before making any statements that can be used against them at trial, or, in the alternative, subjects may invoke the right to silence, the *Miranda* right to counsel, or both. Once either or both of these rights are invoked, all questioning of subjects must cease. “Although

the rule seems straightforward enough, a number of issues arise in cases regarding the application of *Miranda* that typically hinge on the meaning of [the] terms: custody, interrogation, warning, [invocation] and waiver.”⁸ *Berghuis* is one of these cases.

As we will see, the issue in *Berghuis* is not whether the subject was in custody or whether appropriate warnings were given. “The dispute centers on the response—or nonresponse—from the suspect” once the warnings were given. More specifically, in *Berghuis*, the Court refines the meaning and scope of an invocation and waiver of the *Miranda* right to silence.

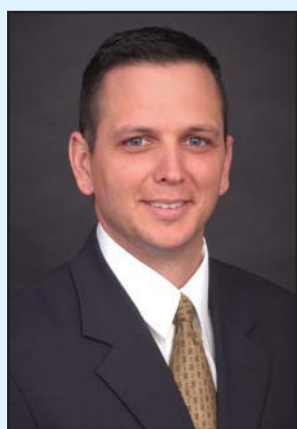
Berghuis v. Thompson

In *Berghuis*, Van Chester Thompson was arrested in

Ohio for a shooting that occurred approximately 1 year earlier in Southfield, Michigan. While in custody, Thompson was questioned by two detectives in a police interview room. At the beginning of the interrogation, the detectives presented Thompson with a general set of *Miranda* warnings.⁹

To make sure Thompson could understand English, one of the detectives asked Thompson to read a portion of the warnings out loud, which he did. Thereafter, the detective read the rest of the warnings to Thompson and asked him to sign the form, indicating that he understood his rights. Thompson refused to sign the form, and the officers began interrogating Thompson. “At no point during the interrogation did Thompson say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney.”¹⁰

With the exception of some minor verbal responses and limited eye contact, Thompson remained silent for most of the 3-hour interview. Approximately 2 hours and 45 minutes into the interrogation, one of the detectives asked Thompson if he believed in God. Thompson said that he did. The detective then followed up by asking Thompson if he prayed to God. Thompson said, “Yes.” The detective then asked, “Do you pray to God to forgive you for



Special Agent Rudd is a legal instructor at the FBI Academy.

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”

shooting that boy down?” To which, Thompkins answered, “Yes.” Thompkins refused to make a written statement, and the interrogation ended.¹¹

Court Proceedings

Thompkins filed a motion to suppress the statements he made during the interrogation and claimed that his Fifth Amendment right to remain silent had been violated. The trial court denied the motion, and Thompkins’ admission was used against him at trial. Thompkins was convicted of first-degree murder and sentenced to life in prison without parole.

Thompkins appealed.¹² The Michigan Court of Appeals rejected the *Miranda* claim, and the Michigan Supreme Court denied review. Thereafter, Thompkins filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Michigan that was likewise denied. The U.S. Court of Appeals for the Sixth Circuit reversed the district court ruling in favor of Thompkins.¹³ However, for the reasons set forth herein, the Supreme Court reversed the judgment of the Sixth Circuit Court of Appeals and found no *Miranda* violations.

Right to Remain Silent—Invocation

In filing his motion to suppress the statements he



made during the interrogation, Thompkins first argued that he had invoked his right to remain silent by not saying anything for the first 2 hours and 45 minutes of the interrogation. If, in fact, he had invoked his right to remain silent, it is undisputed that the officers would have been obligated to stop questioning.¹⁴

However, Justice Kennedy, in writing the majority opinion, explained that Thompkins’ mere

silence in the face of questioning was not a clear and unambiguous invocation of his right to remain silent.¹⁵ The Court noted that, unlike its earlier ruling in *Davis v. United States* regarding the invocation of the *Miranda* right to counsel, it never had defined whether an invocation of the right to remain silent must be unambiguous. In *Davis*, the defendant initially waived his *Miranda* rights and

was interrogated for 90 minutes before saying, “Maybe I should talk to a lawyer.” The Court held that if a subject is unclear, ambiguous, or equivocal in requesting a lawyer, officers can ignore the reference and proceed with the interrogation.¹⁶

In *Berghuis*, the Court acknowledged that “there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*. [...] Both protect the privilege against compulsory self-incrimination [...] by requiring an interrogation to cease when either right is invoked.” Moreover, the Court explained that there are practical reasons for requiring that an invocation of the right to

silence be clear and unambiguous. Namely, “an unambiguous invocation of *Miranda* rights results in an objective inquiry that ‘avoid[s] difficulties of proof and...provide[s] guidance to officers’ on how to proceed in the face of ambiguity.”¹⁷ Accordingly, *Berghuis* does for the invocation of the right to silence what *Davis* did for the invocation of the right to counsel—it mandates that an invocation of either *Miranda* right must be clear and unambiguous to be effective.

Right to Remain Silent—Waiver

Thompkins next argued that absent an invocation of his right to silence, his statements still should be suppressed because he never adequately waived his

right to silence. Two portions of the original *Miranda* decision seem to tilt the scale in Thompsons’ favor on this issue. First, the *Miranda* Court said, “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.”¹⁸ Additionally, “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination....”¹⁹

However, the Supreme Court has clarified its position with respect to the waiver since the *Miranda* decision. The impact has been to keep *Miranda* focused on the right to refrain from speaking and to consult with an attorney. As the Court in *Berghuis* noted, “The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel....”²⁰ Thus, “if anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”²¹

Two cases clarify the Supreme Court’s position with respect to waiver—*Colorado v. Connelly*²² and *North Carolina*



v. *Butler*.²³ In *Colorado*, the Court explained that the “heavy burden” in *Miranda* requires that the prosecution prove waiver by a mere “preponderance of the evidence” standard.²⁴

With regard to the *Butler* opinion, Justice Kennedy noted in *Berghuis* that “the Court in *Butler* therefore ‘retreated’ from the ‘language and tenor of the *Miranda* opinion,’ which ‘suggested that the Court would require that a waiver...be ‘specifically made.’” In *Butler*, the defendant was arrested for armed robbery, kidnapping, and assault. FBI agents then provided him with *Miranda* warnings. Once the agents were satisfied that the subject understood his rights, he was told that he did not need to speak with the agents nor did he need to sign the *Miranda* form. The defendant declared, “I will talk to you but I am not signing any form.” He then made several incriminating statements. The Court, in *Butler*, allowed for the use of these statements against the defendant at trial. In *Berghuis*, the Court stated, “*Butler* made clear that a waiver of *Miranda* rights may be implied through ‘the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.’”²⁵

In *Berghuis*, the Court held, “Where the prosecution shows that a *Miranda* warning was

given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.” Moreover, the Court noted that “the record in this case shows that Thompkins waived his right to remain silent.”²⁶

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...if a subject is unclear, ambiguous, or equivocal in requesting a lawyer, officers can ignore the reference and proceed with the interrogation.
”

Initiation of Interrogations Without a Waiver

Finally, Thompkins argued that even if his answer to police questioning constituted a waiver of his right to remain silent, “the police were not allowed to question him until they obtained a waiver first.” The majority disagreed and noted a direct conflict between Thompkins’ argument and the Court’s earlier ruling in *Butler*, which allows courts to infer a waiver from a subject’s actions: “This principle would be inconsistent with

a rule that requires a waiver at the outset.”²⁷

The Court further noted practical reasons why a waiver should not be required for an interrogation to begin. “Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate.”²⁸

In the end, the Court explained that “the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves.”²⁹ “The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.”³⁰ Accordingly, “after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights.”³¹

“In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins

did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police. The police, moreover, were not required to obtain a waiver of Thompson's right to remain silent before interrogating him."

Conclusion

Berghuis is the latest in a line of Supreme Court cases that attempt to clarify the parameters and provide practical guidance to law enforcement officers and the courts regarding the procedural safeguards first promulgated in *Miranda*. In summary, the *Berghuis* Court held that 1) a custodial subject's invocation of the *Miranda* right to silence must be unambiguous. Mere silence, even for an extended period of time, does not constitute an invocation of the right to silence. 2) A custodial subject's waiver of the right to silence may be implied—once a subject has been sufficiently "*Mirandized*," merely responding to an interrogator's questions could be considered a waiver of the right to silence.³² And, 3) police officers are not required to obtain a waiver of a defendant's right to remain silent before beginning an interrogation. Under this new ruling, it is clear that subjects will have

to speak up if they truly want to remain silent. ♦

Endnotes

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² *Id.*, at 442, 443.

³ *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326 (2000) at 2336.

⁴ *Berghuis v. Thompson*, 560 U.S. ____ (2010).

⁵ *Id.*, at 445.

“

...police officers are not required to obtain a waiver of a defendant's right to remain silent before beginning an interrogation.

”

⁶ In *Miranda*, the Court held that a suspect in custody “must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” at 479.

⁷ Larry Holtz, CONTEMPORARY CRIMINAL PROCEDURE, LexisNexis, Tenth Edition, 2008, 702.

⁸ John N. Ferdico, Henry F. Fradella, Christopher D. Totten, CRIMINAL PROCEDURE FOR THE CRIMINAL JUSTICE PROFESSIONAL, Tenth Edition, 2009, 688.

⁹ *Id.* “Notification of Constitutional Rights and Statement

- 1) You have the right to remain silent.
- 2) Anything you say can and will be used against you in a court of law.
- 3) You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.
- 4) If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
- 5) You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.”

¹⁰ *Id.*

¹¹ *Id.*

¹² Thompson also filed a motion for a new trial claiming ineffective assistance of counsel. This motion was likewise denied and followed the appeal regarding alleged *Miranda* violations to the Supreme Court.

¹³ The Sixth Circuit also ruled in favor of Thompson on the ineffective-assistance-of-counsel claims.

¹⁴ *Miranda*, at 446. In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court explained that when a subject invokes his right to silence, all questioning must cease. However, the Court further held that the invocation of the right to remain silent does not mean that police never may resume questioning. Indeed, in *Mosley*, the Court held that the police had scrupulously honored the suspect's Fifth Amendment rights when a different officer questioned the subject in a different location about a different crime after 2 hours had elapsed since the subject invoked his right to silence. (Note, this differs from an invocation of the right to counsel, wherein officers would not be allowed to reinitiate contact after merely the passage of time. See *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Maryland v. Shatzer*, 559 U.S. ____ (2010).)

¹⁵ Justice Kennedy delivered the 5-4 opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas,

and Alito joined. Justice Sotomayor filed a dissenting opinion, in which Justices Stevens, Ginsburg, and Breyer joined.

¹⁶ *Davis v. United States*, 512 U.S. 452 (1994).

¹⁷ *Berghuis*.

¹⁸ *Miranda*, at 475.

¹⁹ *Id.*

²⁰ *Davis*, at 460; *Moran v. Burbine*, 475 U.S. 412, at 427 (1986).

²¹ *Dickerson*, at 443-444.

²² *Colorado v. Connelly*, 479 U.S. 157 (1986).

²³ *North Carolina v. Butler*, 441 U.S. 369 (1979).

²⁴ State courts, however, may require a higher standard. In New Jersey, for example, the prosecution must prove waiver "beyond a reasonable doubt." See *State v. Galloway*, 133 N.J. 631, 654 (1993).

²⁵ *Berghuis*.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*, quoting *Davis*, at 460.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Of course, the government still is under an obligation to show that the waiver was knowing, intelligent, and voluntary.

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

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Length: Feature articles should contain 2,000 to 3,500 words (8 to 14 pages, double-spaced). Submissions for specialized departments, such as Police Practice and Case Study, should contain 1,200 to 2,000 words (5 to 8 pages, double-spaced).

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The Bulletin Notes

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



Sergeant Shaffery



Officer Salerno

While on a routine prisoner transport, Sergeant Daniel Shaffery and Officer Frank Salerno of the Little Silver, New Jersey, Police Department observed a vehicle with a large tree limb piercing its windshield traveling in the opposite direction. The driver was waving his arms frantically in an attempt to get the officers' attention. Officer Salerno turned the patrol car around and reported the incident to the dispatch center. After the driver's vehicle came to a stop, Sergeant Shaffery and Officer Salerno approached it and determined that the limb had fallen from above, penetrated the windshield,

and impaled the front passenger through the chest and pinned her to the seat. She was unresponsive and bleeding profusely. Officer Salerno began to render first aid, and Sergeant Shaffery returned to the patrol vehicle to update the report and to request emergency response. Sergeant Shaffery then brought a first-aid kit to the vehicle. At this time, Officer Salerno had established an airway for the victim. She began breathing, albeit labored. Officer Salerno continued to hold the victim's neck steady, thus keeping her airway open and stabilizing her spine and neck, and stayed with her until her safe removal from the vehicle. Sergeant Shaffery maintained scene safety and directed emergency responders as they arrived. Other officers arrived to complete the transport of the prisoner, and Sergeant Shaffery and Officer Salerno took the driver home so he could meet with his daughter and travel with her to the hospital.



Deputy Koehler

One day, a man became entrapped in a hole at his farm. Deputy Kenneth Koehler of the Scott County, Iowa, Sheriff's Office responded to the emergency call. Upon his arrival, Deputy Koehler saw that water from the heavy rainfall was quickly filling the hole and was up to the man's neck. The elderly victim had become injured and hypothermic after being trapped for nearly 4 hours. Quickly, Deputy Koehler lifted the man out of the hole and held him until the arrival of emergency responders.

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

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Patch Call



The patch of the Ridgetop, Tennessee, Police Department features a train emerging from a railroad tunnel, constructed in 1905 and one of the longest self-supporting tunnels in the world. When completed, it opened a direct line between Louisville, Kentucky, and Nashville and brought expansion, both in population and economy.



Jefferson County, Washington, is located in the northwest corner of the state, as well as the continental U.S. The patch of its police department features the Olympic Mountain Range, along with 7,800-foot Mt. Olympus, a majestic old tree, and a river representing any one of the dozens on the Olympic Peninsula.