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Investing in the Future

Protecting the Elderly from Financial Abuse

By JOHNNY COKER M.S. and BOBBY LITTLE, Ph.D.



Human Services receive approximately 400 new reports of adult abuse each month. The agency pursues about 3,200 cases per month. Thirty-five percent of the cases involve victims over the age of 80.²

These statistics relate to elder abuse in general. The precise number of elder abuse cases involving financial exploitation is unknown because cases often are not reported to either social service or law enforcement agencies. Victims seem more likely to report physical abuse than financial abuse, which may be due to the perception that bodily assaults are more threatening than property losses, as well as the embarrassment that individuals feel when they fall victim to fraud, or finally, because they simply are unaware that something is amiss. Furthermore, no national reporting center or database exists to compile and analyze reported cases. Consequently, no one can accurately estimate the number of cases of financial forms of elder abuse, even if they do get reported.

However, academic research confirms the existence of significant amounts of financial elder abuse. For example, a relatively recent study of various forms of elder abuse that occurred in Forsyth County, North Carolina, found financial abuse to be the most prevalent form, accounting for 46 percent of the total abuse cases.³

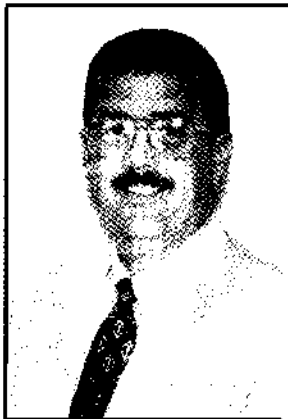
Unlike the bruises that often accompany physical abuse, the signs of financial abuse may not be so

Over the years, a shift in law enforcement priorities, as well as an increase in general awareness, has made most officers familiar with the concepts of spousal abuse and child abuse. Still, the term elder abuse raises questions among even the most seasoned law enforcement officers. From physical, emotional, or sexual abuse to financial exploitation, approximately 8 18,000 elderly individuals are victimized annually. Furthermore, experts estimate that

only 1 in 10 cases of elder abuse gets reported.¹

Many elderly citizens must contend with a variety of health problems that limit their physical or mental functioning. Some become bedridden and cut off from normal contact with the rest of the world. At the same time, mental limitations leave many older citizens highly vulnerable to various forms of abuse.

In Tennessee, caseworkers with the Tennessee Department of



Sergeant Coker serves with the Decatur, Alabama, Police Department.



Dr. Little is a professor in the department of sociology and criminal justice at the University of North Alabama in Florence.

obvious. Nonetheless, financial victimization can create serious problems for the aged. Elder citizens who can no longer work may not be able to recoup their economic losses. Many victims become dependent upon family members, creating additional stress within families already economically strained. Families often are overcome by the financial and other burdens associated with providing care for a needy elderly relative. Consequently, many destitute elderly citizens depend on social welfare agencies for survival, and their quality of life suffers tremendously.

Unfortunately, because financial abuse is the type of exploitation least likely to be recognized or understood by police officers, financial abusers are least likely to be detected and apprehended. By understanding the nature of financial abuse, law enforcement officers can give seniors the security they deserve.

Definitional Issues

A lack of federal statutes regulating elder abuse has placed the responsibility on states to define this type of crime, and the states' definitions for elder abuse, financial abuse, and even the elderly vary. Most states define the elderly as anyone over age 65; 6 states apply the term to individuals over 60, one state, X⁴ Some states do not differentiate between elderly and adult crime victims; anyone over age 18 (or the state's age of majority) is simply an adult victim. However, if adult victims meet such specific state criteria as "adults in need of protective services," then certain elder abuse statutes may apply.

The definitions of financial elder abuse vary, as well. Some definitions include the use of force, misrepresentation, or other illegal means to take advantage of a person's partial or complete incompetence;⁵ the illegal use of an elder's resources or property;^h the

misuse or theft of money and property; the use of funds without the owner's permission; the persuasion of the elder to relinquish control of resources; or the distribution of resources without the elder's consent.⁷ Many states define financial elder abuse within general elder abuse or financial abuse statutes⁸ In short, the various ways elder abuse is defined often causes confusion and a lack of understanding of the forms it can take.

Forms of Financial Abuse

Ironically, the elderly often are financially abused by their own legally appointed conservators or guardians. Conservatorship, a court-appointed position, involves involuntary removal of the elders' civil rights, including the legal ability to handle their own finances. Conservatorship usually is limited to financial decisions, as opposed to guardianship, which gives the guardian control of every aspect of the elder's personal life.⁹ Conservators and guardians may abuse their victims by converting the victim's financial assets to personal use.

A survey of various financial institutions with elderly clients revealed that 83 percent suspected that some of their elderly clients were victims of financial abuse. Forms of suspected abuse included exploitation of the elders' finances by substance-abusing relatives, roommates, or boarders; misappropriation of cash or belongings; and abuse of power of attorney.¹⁰

A power of attorney authorizes a person to act on an elder's behalf in legal or financial matters for a specific period of time." The power

of attorney becomes void should the elder be ruled mentally incapacitated. A related legal construct, the durable power of attorney, remains in effect even if the person becomes mentally incapacitated. Both types are often abused. In fact, a 1994 survey of attorneys and service providers for the elderly revealed that two-thirds of the 410 respondents reported cases of abuse of the durable power of attorney. Thirty-eight percent had knowledge of five or more cases.¹²

A survey of a small number of banks in the New York City area is particularly revealing. Banks reported that the most common forms of financial exploitation their elderly customers encountered were forgery, misappropriation of funds, abuse of joint accounts, and abuse of power of attorney. The respondents listed the most common abuser as a relative of the victim. Unfortunately, only 43 percent of the banks said they always reported the abuse to Adult Protective Services. In fact, 43 percent never reported the abuse, and 14 percent only reported sometimes.³ Yet, bank employees may stand the best chance of recognizing the signs of financial abuse.

Clues to Financial Elder Abuse

Law enforcement officers investigating suspected financial abuse can look for certain indicators of criminal activity. These include:

- Unusual activity in a bank account, including activity inconsistent with the victim's ability, such as the use of an automatic teller machine on an account of a bedridden elder

- New acquaintances of the elder expressing a desire to reside with the elder
- Loss of amenities, such as the disconnection of utilities, when the elder is known to afford such amenities
- New signees or unusual activity on credit cards
- Suspicious signatures on documents, particularly if the elder is capable of writing."

Cases can come to an investigator's attention from a variety of sources, including social service

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agencies, medical personnel (such as home health-care nurses or emergency medical technicians), neighbors, acquaintances and relatives of current victims, as well as from victims themselves. Unfortunately, many of these sources also can be possible offenders.

The scant amount of research on traits of offenders and victims, including the authors' analysis of cases from their jurisdiction, suggests a certain profile for each. A slight majority of

victims (over 60 percent) are likely to be elderly white females over age 70. Offenders are often relatives, many of whom depend on the elderly victim for housing or other forms of assistance.¹⁵ Many offenders have substance abuse problems that factor into their crimes. Perpetrators are represented almost equally from both sexes and are often the children or grandchildren of the victim.

Combating Elder Abuse

Elder abuse can be hard to detect and difficult to prosecute. Some elderly victims may be reluctant to prosecute their offenders; some make poor witnesses in court; others seem to tolerate their abuse knowingly. As tough as these cases may be, this type of crime warrants serious attention by law enforcement.

The Triad program probably is the most recognized effort by law enforcement to address the needs of the elderly.¹⁶ Triads consist of the county sheriff, local police departments, and senior citizen groups working together to solve problems inherent to the elderly. With the Triad in place, the partners form an advisory council known as Seniors and Law Enforcement Together (SALT) to identify the particular needs of the elderly within that jurisdiction. The council provides seniors with a vehicle to express their needs and a way to participate actively in matters that directly affect them. Triads provide training to help law enforcement address the needs of the elderly. They also arrange seminars for senior citizens designed to lessen their chances of

becoming victims of financial abuse. To date, 472 active Triad programs exist throughout the United States.¹⁷

The Adopt-a-Senior program of the St. Martin Parish, Louisiana, Sheriffs Department provides another example of law enforcement working directly with the senior citizen population. Deputies are encouraged to "adopt" two or three seniors in their jurisdictions and visit them regularly to check on their well-being. The deputies inquire as to any unusual mail, telephone calls, visits, or solicitations the seniors may have received. This program is well-suited to the community-oriented policing philosophies adopted by many law enforcement agencies.

Despite these success stories, much more needs to be done to combat elder abuse. Several strategies, if implemented, can serve as a springboard for successful crime prevention programs.

First, police need additional training in the recognition and apprehension of elder abusers. While most officers eventually make cases of physical or sexual assault on criminals who victimize the elderly, fewer officers make cases of financial abuse because they have not been trained in the abuse of conservatorship, guardianship, power of attorney, durable power of attorney, and other methods offenders use to prey upon vulnerable old people. In-service training or investigators and patrol officers would lead to more cases made against offenders, and police training academies should consider

incorporating this training into their curricula.

Second, forming investigative coalitions and sharing information among social service, law enforcement, and financial institutions can increase the number of successful cases brought for prosecution.* For example, a free seminar provided by police for the employees of local banks on recognizing financial elder abuse and reporting suspected cases to law enforcement would

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increase the number of cases reported. Furthermore, improved interaction between local police and social service personnel likely would lead to more criminal cases of financial abuse, as many social service agencies simply do not criminally pursue their known cases.

Third, creating laws that require people who suspect abuse to report their suspicions to authorities can combat elder abuse. Forty-three states have laws that mandate over 50 different agencies and job titles to report elder abuse. Most

mandatory elder abuse reports to police are made by health-care providers, especially home health-care providers.¹⁹ Some states have combined mandatory reporting laws with legislation that allows elderly victims to sue their perpetrators for reimbursement of attorneys' fees and court costs in exploitation cases.

Interestingly, employees of financial institutions do not have to report suspected financial abuse, even though they may be in the best position to uncover it. Adding financial firms to the list of mandatory reporters could prove a valuable weapon against abuse.

A fourth anti-abuse strategy concerns educating the elderly to recognize financial victimization. How would the police accomplish this? The same way crime prevention officers educate other citizen groups on community watch programs, business security, and other topics. Crime prevention officers can schedule financial victimization prevention lectures with local senior citizen groups, American Association of Retired Persons chapters, Veterans of Foreign Wars groups, and other similar organizations. Such seminars provided by crime prevention officers could be combined with financial planning seminars given by estate planners or financial counselors. The latter type of seminar would explain strategies of financial management for maximizing income and protecting against asset loss and exploitation.

A final strategy for fighting elder abuse involves programs for

offenders. To keep offenders from repeating their crimes, judges could make convicted offenders participate in mental health counseling designed to combat the psychological roots of offenders' exploitative behavior. Counseling may serve a behavioral corrective function and prevent serial offending.

Conclusion

Financial elder abuse is widespread but often escapes police attention. To prevent further proliferation of this abuse, law enforcement officers need a better understanding of the various forms financial abuse takes and what can be done about it. In-service training, investigative coalitions, effective legislation, innovative crime prevention seminars for the aged, and proper treatment of offenders can protect elderly victims from the crimes that threaten their quality of life.

Police agencies can expect to see elder abuse become more of an enforcement priority as the graying of our nation's population continues and greater numbers of the aged are preyed upon by others. Elderly victims need police protection to help them savor the golden years that they so richly deserve.+

Endnotes

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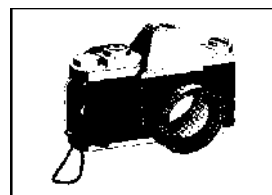
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¹⁹ Supra note 4.

Wanted: Photographs



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

We can use either black-and-white glossy or color prints or slides, although we prefer prints (5x7 or 8x10). Appropriate credit will be given to contributing photographers when their work appears in the magazine. We suggest that you send duplicate, not original, prints as we do not accept responsibility for prints that may be damaged or lost. Send your photographs to:

Brian Parnell, Art Director, *FBI Law Enforcement Bulletin*, Law Enforcement Communication Unit, FBI Academy, Quantico, VA 22135.

Focus on Youth

The Chief Operator Teen Driver Program

By Larry Murdo

Every day, the media report on violent acts perpetrated by teenagers. These accounts make it easy to perceive that violence is the singular cause of death and serious bodily injury among teenagers. Yet, statistics reveal that in nine counties surrounding the San Francisco Bay Area, traffic-related incidents were the most significant contributor to death and serious bodily injury of 15 to 19-year-olds.¹ Moreover,

- . Teen drivers age 15 to 19, who represent 4 to 5 percent of licensed drivers, became involved in 10 percent of all fatal and/or serious bodily injury crashes, a rate approaching 2.5 times their licensed driving population
- . Only 16.3 percent of all teenagers killed in motor vehicle crashes wore seat belts
- . One in 4,000 teens involved in fatal accidents as drivers or occupants used alcohol, the highest among any driving population
- . Nearly half of teens killed in vehicle crashes were in the company of other teens, suggesting that peer pressure may have played a role.*

More than likely, these statistics reflect a national trend. Can teens' behavior be changed? A Philadelphia-based research group found that when a teenage audience perceives a safety message as emanating from mainstream culture, even when presented by their favorite sports icon, they summarily discount its content. On the other hand, if the teens themselves craft and deliver safety messages, without fear of ostracism by their peers, lasting behavior modification can result.³ This research suggests that a primary goal of law enforcement may be to create programs that enhance teens' ability to promote their own safety messages in the style of their choice. The Albany, California, Police Department's Chief Operator Teen Driver Program represents one such program.

Elvis and The Lawman

With funding from a 3-year grant from the California Office of Traffic Safety, the Albany Police Department took a new approach to teen mentoring programs. The department counted on the universal appeal of music to create a successful program. "Elvis," a lieutenant, transforms into the "King of Traffic Safety" to communicate with the teens. "The Lawman," a sergeant, plays guitar and writes and produces all original songs. The chief, who plays bass guitar, completes the trio.

The Chief Operator Teen Driver Program stresses that teens should not consume alcoholic beverages. Still, acknowledging that many teens do drink, the program encourages them not to drink and drive, much like the adult-oriented Designated Driver campaign. In short, students who become Chief Operators pledge to:

- . ensure that all teens buckle up
- . safely drive a carload of teens
- . obey all traffic laws
- . never drink and drive.

Students take the pledge during a Chief Operator assembly at their local high school. To energize the students, Elvis and The Lawman perform an original traffic safety song. Then, a uniformed police officer from the host jurisdiction poses a series of traffic safety questions to randomly selected members of the audience. But the highlight of each assembly is when students perform original traffic safety songs and skits. Encouraging students to participate begins several weeks prior to the assembly and includes a number of incentives.

Program Incentives

Tangible incentives ensure participation in both presenting individual safety messages and responding to safety questions during the assembly. Students who create a song or skit for the assembly are entered automatically in the Chief Operator program contest. The first judging panel included an executive from the Music Television Network (MTV), giving the teens an extra incentive to perform. The winning video is produced professionally. Three song winners

record their work at a professional studio, and the final album is distributed to high school students locally and nationally.⁴ The winners also receive cash awards and their own personalized trading cards.

Local merchants make it easy to get students to participate during the assembly. Students who correctly answer traffic safety questions receive such prizes as coupons for free food at a local restaurant, tickets to professional baseball games, and movie passes. Additional prizes-such as T-shirts, baseball caps, key chains, footballs, audio tapes, and videotapes-feature the Chief Operator logo. Every student who attends the assembly receives a buy-one-get-one-free coupon for a local fast-food restaurant.

Program Success

At the end of the 3-year grant period, the California Office of Traffic Safety determined that the Chief Operator program had met its objectives and declared it a success. Traffic statistics from the California Highway Patrol for fatal and injury-resulting collisions involving alcohol-impaired teenage drivers in the nine-county target area suggest progress. In 1992, when the Chief Operator program began, 385 separate incidents occurred. In 1995, at the conclusion of the grant period, 312 incidents were reported, an 18.9 percent reduction?

In addition, teenagers in several states and even some foreign countries have embraced the program. Elvis and The Lawman have hit the road to perform in many other states and represented California law enforcement at the annual Canadian Students Against Drunk Driving conference in March 1996. Other departments have adopted the program, including the



San Jose, California, Police Department, whose El Guardian program uses material printed in Spanish to allow Spanish-speaking students to participate. The record albums remain popular, and in 1996, the Recording Industry Association of America honored the Chief Operator program with a Gold Record award for reaching so many teens.

Conclusion

Teens tend to think of themselves as invincible. They often fail to see the dangers associated with drinking and driving. Yet, traditional methods aimed at getting teens to see the light usually miss the mark.

What better way to get through to hard-to-reach teens than with a program and contest that feature professionally produced recordings and videos? The Albany, California's Chief Operator Teen Driver Program drives the point home for teens who would rather sing at a school assembly than attend their best friend's funeral. +

Endnotes

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⁵ California Statewide Integrated Traffic Records System.

Chief Murdo commands the Albany, California, Police Department



Community-Oriented Policing Success Insurance Strategies

By RANDALL ARAGON, M.A. and RICHARD E. ADAMS, Ph.D.

Law enforcement agencies across the country are implementing community-oriented policing (COP) philosophies. When they do, everyone from politicians to the press sings their praises, emphasizing the remarkable results COP programs often obtain. These well-meaning cheerleaders often downplay or fail to mention the obstacles that invariably surface when organizational change takes place in one of the most resistant-to-change establishments in existence: the law enforcement agency. Law enforcement

agencies making the transition to community-oriented policing need tried-and-true methods for overcoming such hurdles before they weaken their esprit de corps and simultaneously undercut the chief executive officer's (CEO) managerial effectiveness. The country is littered with CEOs and failed attempts to transform law enforcement agencies from traditional to community policing.

With proper planning, however, law enforcement agencies and the communities they serve can enjoy the fruits of COP without

becoming embroiled in problems. The Whiteville, North Carolina, Police Department's (WPD) move to COP encountered only mild opposition. The key to the department's successful adoption of COP rested in the chief's implementation of Total Quality Management (TQM) and other techniques. The resulting positive organizational culture provided the fertile ground necessary for COP to take root and blossom.

After successfully implementing community policing throughout the department, WPD's command-level officers adapted the lessons

they learned into "COP Success Insurance Strategies." Interspersed throughout this article, these strategies can serve as a primer for other departments instituting COP.

BACKGROUND

Whiteville is a small southern city located in Columbus County in the southeastern section of the state. Its 5,600 residents are 65.5 percent white, 33.1 percent African American, 1.1 percent Native American, and .5 percent Hispanic. The city depends on agriculture, mainly tobacco, for its major source of income. Personal incomes vary widely, and approximately 26.5 percent of the population lives in poverty. Several federally subsidized projects provide housing for economically disadvantaged residents and low-income senior citizens.

As the county seat and because of other, more metropolitan cities are some distance away, Whiteville hosts nearly 10,000 to 20,000 people per day, who come to shop or to obtain services. Indeed, the city is an extremely busy municipality.

The Whiteville Police Department consists of 26 sworn officers, 10 auxiliary officers, and 4 civilians. The department is composed of the patrol services, investigative services, narcotics, and accreditation divisions. Patrol services comprises teams devoted to animal control, community services, and community policing.

The impetus for the move to community policing came from both inside and outside the department. Whiteville's current chief took the helm of a department that



Chief Aragon commands the Whiteville, North Carolina, Police Department.



Dr. Adam S is an assistant professor at the School of Social Welfare at the State University of New York-Stony Brook.

was rife with dissention and animosity. Teamwork and morale had reached record lows. The chief saw COP as a long-term strategy for solving some of these internal problems. In addition, several officers who had worked for other departments pushed for a change in the department's traditional policing practices. Other officers had heard about COP from peers in departments that already had implemented the philosophy.

Outside the department, members of the community encouraged the WPD to move toward any type of effort that would form a partnership between the police and the community. Although residents did not know the term "community-oriented policing," they wanted a more visible police presence in their neighborhoods and a better relationship between citizens and the police. Thus, the chief viewed COP not only as a means of solving internal problems but also as a way to address the needs of the city's residents.

THE FOUNDATION

Several key elements contributed to WPD's successful COP implementation. The most prominent factor was creating the appropriate organizational culture—i.e., values, beliefs, and behaviors—to empower employees and help them understand the importance of customer satisfaction and, in turn, deliver quality services.

Positive Organizational Culture

To avoid the havoc and diminished morale that COP sometimes creates in agencies, the chief introduced officers to COP slowly. During the first year, the chief did not introduce any COP practices. Instead, he placed primary emphasis on building a healthy foundation from which to institute COP principles. Officers wrote their own personal mission statements and developed personal goals. The chief also instituted TQM principles, which played an equally important role in establishing a positive culture throughout the agency.

The TQM philosophy has three basic elements: teamwork, participative management, and continuous improvement in quality and productivity. Initially, officers need to accept the values, beliefs, and behaviors that lead to customer satisfaction and quality improvement. Once this is achieved, the goal of delivering law enforcement services in a manner that satisfies the needs and priorities of customers is much more likely to become a reality. Such a victory comes from empowerment, a force that energizes employees to take personal interest and responsibility in achieving the agency's goals because they realize that they genuinely have a say in how things get accomplished.

Though an experienced TQM and COP instructor, the chief purposely did not train any employees. Doing so might have short-circuited the implementation process and caused employees to believe that they would be labeled troublemakers if they questioned any of the program's tenets or processes. Instead, the chief worked with experienced TQM instructors from the local community college to develop a comprehensive training program tailored to the unique needs of the department.

Mission Statement

Applying the TQM team approach, the chief appointed a mission statement team. Within a month, the team had drafted a mission statement that all department employees reviewed and voted to accept. It then became the guiding philosophy of the

department. Because everyone had a hand in developing the mission statement, it took on an aura of a constitution by which all members of the department loyally and wholeheartedly abide. Today, it sits proudly and conspicuously in the lobby of the department and the squad room. It also is printed in every employee manual.

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***With proper
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”

Transition Team

With the TQM training and mission statement completed, the department developed a transition team, consisting of the chief and five other officers. The officers, who were selected by the chief, had expressed interest in COP. This team represented the think tank, the guiding light that looked at the overall picture and formulated the agency's approach to instituting community-oriented policing.

To ensure that the team carried out this endeavor effectively, each member received training in the evolution of COP, its benefits (e.g., lower crime rates, reduced fear of crime, and, ultimately, an enhanced quality of life in neighborhoods),

and implementation strategies. After acquiring this training, members of the transition team worked to develop approaches to initiate community policing in Whiteville.

Because the team consisted of representatives with diverse experience and training, a synergistic effect occurred, and the department's COP effort began to blossom. The team made numerous judicious recommendations for tailoring COP to the unique needs of Whiteville. Today, the team continues to provide an invaluable resource by fine-tuning the department's current methods and determining the most appropriate means of infusing additional programs into the COP network.

CEO Support

CEOs need to commit themselves to COP over the long term. Despite an outpouring of federal and state money to support community policing programs, CEOs should not view COP as a short-term strategy to increase funding. In addition, setbacks, whether intentional or inadvertent, may hamper the COP effort. When setbacks occur, the CEO must personally and immediately develop the appropriate courses of action to ensure that COP remains on target.

- . *COP Success Insurance Strategy #1*: CEOs should do first things first. They should develop a positive organizational culture before implementing COP.
- . *COP Success Insurance Strategy #2*: CEOs should resist the inclination to have

in-house personnel conduct the TQM training. Instead, they should enlist the assistance of instructors from the local community college or other local educators proficient in TQM.

COP Success Insurance Strategy #3: CEOs should appoint a team to develop a mission statement, allowing all employees to 1) review the proposals, 2) provide input, and 3) vote for their choice.

COP Success Insurance Strategy #4: CEOs must commit completely to the COP endeavor. They should not consider COP a short-term solution to budget woes. Additionally, especially in the early stages of COP, the CEO must remain alert for setbacks in the effort and take immediate corrective action.

THE FRAMEWORK

COP officially began in Whiteville in July 1994 as a target-specific approach, with the establishment of the West-Side COP Team and the opening of Substation-west in a federally subsidized low-income housing complex in an area of the city designated West-Beat. Initially, the chief assigned a team of two officers to this area known for its high crime rate and frequent service calls.

WPD originally planned to use its experience from West-Beat operations to expand COP into the east-side 2 years. However, the West-Side COP Team caused a massive displacement of crime to

the east side of the city. Additionally, numerous upper-class subdivisions (with low crime rates) on the east side soon became jealous. They, too, wanted to receive the special attention from the community policing officers. By the end of the year, only 5 months after establishing the West-Side COP Team, the transition team accelerated the conversion to COP on the east side.

East-Beat emerged as a second target-specific area. Another federally subsidized apartment complex housed the newly formed Substation-East. The city then had two target-specific areas with one community policing officer assigned to each substation. A community policing sergeant supervised these officers.

Photo © Don Ennis



Soon, downtown merchants became aware of the program. They envied the attention and additional police activity on the east and west sides of town. To satisfy business owners, the community policing sergeant also covered the business district, becoming its personal community policing officer. The sergeant solved problems and

developed partnerships in the business district. He worked closely with the chamber of commerce, and when the WPD established a downtown substation in December 1996, it was located within the chamber of commerce office.

Although COP began with a targeted approach, in January 1996, it evolved into a departmentwide, citywide effort. All patrol officers were assigned designated neighborhoods with the responsibility to conduct the full range of COP activities. Consequently, all patrol officers and sergeants now are considered community policing officers.

- *COP Success Insurance Strategy #5:* Upon introducing COP to any target-specific area, CEOs should prepare to have crime displaced to other sections of the community.
- *COP Success Insurance Strategy #6:* CEOs eventually should target even those areas experiencing little crime, whose residents want the extra attention community policing delivers. Depending on the pressure exerted by residents in other sections of the city, implementation may need to be expedited.
- *COP Success Insurance Strategy #7:* CEOs should not neglect neighborhood business districts. Though they need to be modified somewhat, COP principles work there, as well.

Community Involvement

The department introduced COP to citizens in several ways. First, and most important, officers

began working with residents to organize community watch programs. Because they provide a link between officers and residents, community watch groups became a part of the department's hierarchy. These groups also work with WPD in prioritizing and seeking solutions to problems identified by residents.

Organizing community watch programs is not difficult. Once citizens hear about the programs and learn they will have a hand in setting police priorities and allocating police services, they usually respond enthusiastically.

While most citizens embrace community watch groups, officers should not be surprised when attendance at meetings drops once problems diminish in that neighborhood. Experience suggests that people initially may meet monthly, but quickly go to quarterly meetings. The drop in attendance and the reduced meeting schedule does not mean that COP has failed. Rather, it reflects successful problem solving and satisfaction with police services.

Because the WPD considers community watch one of the most important factors for ensuring the success of COP, the chief designed a form to help officers successfully kick off community watch programs. As a checklist, the form prompts officers to take the necessary steps before and during the first, most important meeting. The form proved so valuable that the department uses it as a teaching tool at area COP conferences.

The department also used a survey to introduce COP to residents. Rather than adopting a long, complicated survey, which might have

confused or unreasonably consumed citizens' time, the West-Side COP Team asked residents only three questions:

- 1) What crime-related problems have you experienced in your neighborhood?
- 2) As police officers, how can we improve conditions in your neighborhood?
- 3) Of the problems you mentioned in Question 1, please place them in order of priority-with the most serious at the top of the list.

As other research shows, residents tended to list quality-of-life issues-such as speeding, loitering, littering, creating disturbances, and using and selling drugs-rather than criminal activity such as burglaries or muggings.

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Community watch groups represent a key component to a successful COP effort.

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Spreading the word to community residents can be vital to the successful introduction of COP. The local newspapers and radio and television stations eagerly covered the department's COP-related activities.

Finally, leadership councils can help build community support and avenues of funding for COP. Comprised of citizens, business owners, elected officials, representatives

from public service and other key agencies, the media, and the police, the council sets priorities and goals for the police department. Whiteville's leadership council meets quarterly and has proven effective in developing the necessary community partnerships and providing invaluable feedback to the department.

- *COP Success Insurance Strategy #8:* CEOs should implement COP incrementally and slowly.
- *COP Success Insurance Strategy #9:* Community watch groups represent a key component to a successful COP effort. CEOs should ensure that all community policing officers know how to initiate a community watch program. A checklist will aid the process.
- *COP Success Insurance Strategy #10:* Community policing officers must survey their assigned neighborhoods to determine their customers' needs and priorities. They should use the KISS principle for survey questions: keep it short and simple.
- *COP Success Insurance Strategy #11:* CEOs should establish a leadership council that includes citizens, elected officials, and other key members of the community. The council should meet regularly to set priorities and provide feedback.

Beat Assignment System

When WPD implemented community policing departmentwide

and citywide in January 1996, all officers received assignments to a particular sector of the city using a beat assignment system. Their sector became *their* neighborhood. The CEO advised community policing officers that unless reassigned for promotion or lateral transfer to another division, they could expect to remain assigned to their neighborhoods for a minimum of 2 years. This assignment of specific areas of responsibility represented another hurdle of paramount importance to the successful initiation of COP.

Officers received frequent reminders that 1) they had received the necessary training to implement COP; 2) they would be provided with time away from their patrol vehicles; 3) they would receive support from their immediate leader, up through the chain of command to the chief; and 4) they should expend about one-third of their time on crime prevention and COP activities, such as introducing themselves to residents, organizing and attending community watch meetings, and working with residents to identify and solve problems.

WPD officers had two key concerns with the beat assignment system: 1) what consequences would they face if they strayed from their assigned beats and 2) how would they patrol their neighborhoods and still find the time to meet with residents and complete the other problem-solving activities required by COP? Such questions have merit and create such upheavals that many agencies eventually abandon community policing, the CEO, or both.

The first concern reminded the chief of his early days as a deputy



sheriff, when he had to obtain permission from the dispatcher to drive even a few blocks outside of his assigned zone. Rather than empowering him and his fellow officers, this policy conveyed the message that the department did not trust them to do their jobs in the manner they thought best. Thus, the chief adopted a more prudent approach with his own officers, allowing them latitude to leave their assigned areas, but with one caveat: at evaluation time, officers would have to demonstrate positive results. Officers who perennially meandered into more "interesting" zones of the jurisdiction might pay the price if they showed unacceptable results, for example, a lack of community watch organizations, minimal visitations, and other precoordinated indicators, all of which reveal that the officer did not focus enough energy or time to the assigned neighborhood.

The second concern-finding the time to conduct COP activities-troubled both line officers

and their supervisors. Yet, all officers experience uncommitted time during their shifts, when calls for service ebb. Face-to-face visits should take place at reasonable hours during such uncommitted times. Attending community watch meetings and the like requires special coordination between officers and their supervisors; nevertheless, attendance at such meetings usually can be preplanned and service calls covered by another team member. Officers also should schedule visits that are convenient for residents. Few people would welcome an officer knocking on their door early on a Saturday or Sunday morning.

Police agencies should attempt to allocate their resources using the "one-third workload principle:"² one-third devoted to calls for service, one-third for administrative work (writing reports, servicing patrol vehicles, etc.), and the final, most important third devoted to crime prevention, including COP activities. Agencies whose officers spend half of their time consumed

with service calls already have started out on the wrong note; COP will not be instituted effectively in these organizations without a reappraisal of the organizational structure. Most likely, the agency suffers from a lack of people power and needs more officers on the street. In such cases, the CEO's only option may be to approach the city manager and the legislators who control the department's purse strings. Without an up-front commitment, such an agency will never foster an effective COP effort.

• *COP Success Insurance Strategy #12:* Beat assignments are important to community policing success. Still, CEOs should give their community policing officers reasonable leeway regarding straying from their assigned neighborhoods. However, officers who take advantage of this wide latitude of personal responsibility should receive an objective evaluation that matches the level of their contribution to the COP effort.

• *COP Success Insurance Strategy #13:* COP is labor-intensive. If officers do not have any uncommitted time to conduct COP operations, the department should defer implementing COP until officers can sustain the one-third workload principle.

ADDITIONAL CONCERNS

CEOs planning to introduce COP into their departments should be aware of several additional concerns. They revolve around two resources most often in short supply

in law enforcement agencies: money and people.

Financial Support for COP

Initially, 75 percent of the funding to cover the costs of Whiteville's two community policing officers came from a North Carolina Crime Control and Public Safety grant. Although the state grant expired in June 1996, the city assumed full funding of the two positions.

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COP should evolve into a departmentwide and citywide approach....

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The CEO must understand, up front, that grants eventually expire, leaving the department with two alternatives: 1) continue COP by having the jurisdiction absorb the entire expenditure; 2) terminate the COP effort—at least with the human resources funded by the grant. While the first option may be the most desirable, in some jurisdictions, CEOs who launch their COP efforts with grants believe that only personnel funded by the grant should take part in the overall COP effort. Thus, COP ends when the grant money runs out—even when the undertaking proved successful. Unfortunately, this scenario occurs all too frequently.

Yet, while COP may start with a target-specific approach using only one or two officers, the true

essence of community-oriented policing is a departmentwide philosophy, where all officers conduct the full spectrum of COP activities. The CEO must commit to this goal if organizational and funding difficulties are to be overcome.

- *COP Success Insurance Strategy #14:* Funding generally emerges as seed money to help an agency develop a foundation for a wide-ranging, comprehensive purpose. Using funding to implement COP in a specific area as a supplement to traditional policing efforts is prudent; however, COP should evolve into a departmentwide and citywide approach, where *all* officers perform as team players guided by the precepts of the COP philosophy.

Recruitment and Selection of Community Policing Officers

Whiteville's first community policing officers volunteered for the positions; they had expressed interest in participating in this new form of policing. As strong supporters of COP, they seemed to be the best candidates for the job. Volunteers, however, do not necessarily make the best community policing officers. In fact, both of WPD's original COP officers left before serving 1 year in their assignments. One officer left for a position with another department. The other officer asked to return to traditional patrol duty after only 2 months. He eventually left the department to work for another agency.

Each loss of these COP "pioneers" represented a setback. Not only did the department lose key

COP advocates, but high turnover made it difficult for officers to establish rapport with residents. In addition, the need to order new bicycle uniforms and other sized-to-fit equipment for the officers' replacements placed a financial strain on the department.

To overcome these obstacles, the department revamped its recruiting procedures. Recruiting for community policing officers must contain several key components. First, officers must have the social interaction and problem-solving skills to identify neighborhood problems effectively and work with residents to solve those problems. To this end, the department thoroughly interviews applicants using the COP philosophy as a central theme. Specifically, candidates are asked how they would solve certain community problems, such as burglaries or drug dealing.

Applicants who offer only traditional policing responses, e.g., more arrests or sweeps through the area, are less likely to be hired. Potential community policing officers must search for more fundamental causes of neighborhood problems and develop proactive, creative approaches to solve them.

Second, effective recruitment weeds out unsuitable COP officers. Research into COP indicates that community policing officers should have 2-3 years' experience as line officers because experienced officers usually have worked any Rambo-like tendencies out of their systems. In contrast, new recruits often select policing as a career because they like the idea of arresting the bad guys.

However, due to a limited labor market and attractive salaries in neighboring jurisdictions, WPD was extremely young in terms of overall years of experience. Thus, the textbook solution of 2-3 years' experience, though solid advice, must give way to the real world of what Whiteville and other similar departments face.

Therefore, if experienced personnel are not available to assume COP officer positions, the CEO must choose from the pool of recruits entering the department. In this case, a thorough screening process will separate those who can communicate clearly, solve problems, and interact well with people from those who enter police work



for the *exclusive* purposes of "putting people in jail," "purging the world of violence," and other such narrow-minded views held by some police officer candidates.

Third, the CEO appraises all recruits that the department was built on a COP foundation, and all officers are expected to adhere to its

philosophy. After completing the department's Basic COP Proficiency Training and field training with an assigned field training officer, the recruit is assigned a COP beat.

COP Success Insurance

Strategy #1.5: CEOs must recruit those candidates with the right qualities to work COP. Granted, candidates need to be physically and mentally fit, but they also should be able to solve problems, communicate with people, and seek out resources in the absence of close supervision. Above all, applicants and newly hired officers must understand the department's allegiance to COP.

COP Training

WPD provides two levels of COP proficiency training: basic and advanced. The basic level consists of a classroom presentation, 4-6 hours of on-the-job training with a COP officer, 1 hour of bicycle training, a written test, and an interview with the COP team leader. Officers who complete the basic course know how to make introductory visits, network with community members, and solve problems using the SARA model.²

After achieving basic proficiency, nonsupervisory personnel move to the advanced level. This training consists of two North Carolina Justice Academy (NCJA) courses: Introduction to COP and Problem Solving for Community Officers (2 days each). Supervisory personnel obtain advanced training from NCJA's 2-day COP Course

for Leadership Personnel, which focuses on leadership styles, TQM, and COP support.

Officers who complete all of the training requirements receive a green tab for the basic level and a green tab with gold trim for the advanced level. Officers wear the tabs proudly on their uniforms to show that they have successfully completed COP training.

Initially, Whiteville's community policing officers each attended several premier COP courses conducted by the state and federal government, where they learned state-of-the-art COP principles and techniques. The balance of the officers continued to use the traditional policing model and naturally were apprehensive about visiting residents, coordinating meetings, and solving problems in an assigned area.

As part of their goals for the subsequent year, these officers received the option of completing the basic training course. Surprisingly, every line officer and sergeant in the department made this training one of their personal goals for the year. In retrospect, this may have been the result of the department's commitment to TQM and the formal recognition officers receive after completing COP training. Once the department made the transition to a departmentwide approach to COP, Basic COP Proficiency Training became mandatory for all recruits.

COP Success Insurance Strategy #16: CEOs should provide all officers and their supervisors at least rudimentary in-service COP

training until they can attend a formal police academy course.

COP Success Insurance Strategy #17: Officers should receive rewards for their participation in this new philosophy of policing.

Performance Evaluation

The dynamic nature of community policing requires that agencies regularly evaluate their programs and personnel from top to bottom. In Whiteville, the command staff meets monthly to review its progress on the previous month's goals and to set new ones. Command staff members do the same with team leaders, who, in turn, meet with line officers.

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COP Success Insurance Strategies can help CEOs triumph over the pitfalls and successfully merge community policing in to their agencies.
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This approach proves rewarding in two respects. First, neglecting a neighborhood creates disharmony in that community. Reviewing the progress and effectiveness of the police response and modifying it when necessary minimizes complaints from customers. Second, community policing officers

sometimes procrastinate when developing partnerships and kicking off community watch meetings. Monthly meetings with supervisors do not allow officers to neglect these vital activities.

Either positive or negative ratings from monthly progress reviews should apply toward annual performance appraisals. WPD community policing officers use a variety of in-house forms and checklists to document their COP activities. These then form the basis to evaluate the officers' performance. The officers' annual appraisal lists goals for the subsequent year that include developing a community watch in their zones, solving problems, and several other COP activities.

Disciplinary Problems

The department had difficulty with one COP officer who did not achieve his COP goals. For example, one of the officer's monthly goals was to introduce himself to 40 residents on his beat, spend about 10 minutes with each resident, and use a visitation form to guide the encounter. Instead, he made all 40 contacts on the last two days of the month. These contacts could not have lasted longer than a minute or two, which was unsatisfactory. In addition, instead of working with residents to solve problems in his assigned neighborhood, the officer spent time issuing volumes of traffic citations and warnings to motorists outside his assigned area.

Neither counseling nor disciplinary action worked. Just as he was about to be fired, the officer quit to join a department that emphasized a more traditional policing style. This situation reflects another

challenge to implementation: the leadership of community policing officers. Even though there may be little organized backlash against COP, it can be difficult to motivate every officer to follow the COP philosophy.

- . *COP Success Insurance Strategy #18:* In addition to the traditional annual or semiannual performance appraisal, the CEO should meet monthly with key personnel to establish and monitor goals. Postponing regular progress reviews may deteriorate any positive achievements or may put the COP effort gravely behind schedule.
- . *COP Success Insurance Strategy #19:* Overall, the department's performance evaluation system must coincide with the goals of the agency's COP endeavor. Officers who meet their goals should be recognized on their appraisals. Officers who continually falter, assuming they have received proper training (including remedial training), support, resources, and time, should receive ratings commensurate with such marginal performance.
- . *COP Success Insurance Strategy #20:* Officers who receive the necessary support, training, time, and resources and still fail to attain acceptable COP objectives should receive progressive discipline. However, officers who achieve planned objectives should be recognized and rewarded.



THE REWARDS

The Whiteville Police Department's successful COP endeavors earned the department the North Carolina Governor's Award for Excellence in Community-Oriented Policing in 1996 and 1997. Additionally, the department serves as a teaching model for the North Carolina Justice Academy and has been selected, along with six other state agencies, to provide input in a major state research study to develop a comprehensive primer for effectively developing COP. These honors cap off the intrinsic rewards that come from tackling a major task and completing it well.

CONCLUSION

The Whiteville Police Department moved slowly from a traditional policing model to a community-oriented approach. First, the department built a positive organizational culture and implemented Total Quality Management principles. From this foundation, two WPD officers instituted community policing in one inner-city

neighborhood. This methodical, targeted approach allowed WPD to integrate community policing successfully throughout the department and the city.

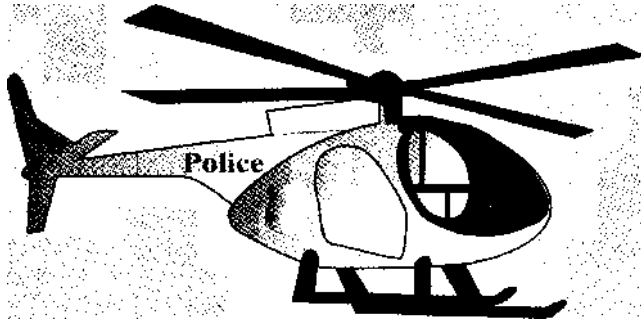
Though COP often is viewed as a silver bullet, capable of reducing crime, the fear of crime, and neighborhood disorder and decay, CEOs must remain acutely attuned to the unique adverse side effects that sometimes flow from the implementation of this new philosophy of policing. COP Success Insurance Strategies can help CEOs triumph over the pitfalls and successfully merge community policing into their agencies. +

Endnotes

¹ See Stephen R. Covey, *The Seven Habits of Highly Effective People* (New York: Simon & Shuster, 1989).

- International Association of Chiefs of Police, *Operational Issues in the Small Law Enforcement Agency* (Dubuque, IA: Kendall/Hunt Publishing Co., 1990) 156.

³ One of several problem-solving models, the SARA model comprises scanning, analysis, response, and assessment. See John E. Eck and William Spelman, *Problem-Oriented Policing in Newport News* (Washington, DC: Police Executive Research Forum, 1987).



Thermal Imaging Much Heat but Little Light

By THOMAS D. COLBRIDGE, J. D.



Criminals quickly adopt advances in technology to pursue ill-gotten gains. Law enforcement officers should just as quickly adopt new technology as weapons against those criminals. However, unlike criminals, police officers must act within the confines of their federal and state constitutions. The use of advanced technology in the "often competitive enterprise of ferreting out crime"¹ raises concerns that individual liberties will be sacrificed in the increasingly complex war on crime. Right or wrong, the specter of Orwell's "Big Brother" looms large in the public's mind whenever a new crime-fighting device is

unveiled. The thermal imager, or forward looking infrared device (FLIR), is an example.

Several court decisions illustrate the constitutional arguments for and against police use of thermal imagers without a search warrant. Within certain guidelines, law enforcement can use thermal imagers in compliance with the requirements of the Fourth Amendment of the U.S. Constitution.

THE TECHNOLOGY

All objects with a temperature above absolute zero emit infrared radiation. The hotter an object gets, the more infrared radiation it emits. These emissions cannot be seen

with the naked eye. However, a thermal imager can detect infrared radiation emitted from an object and convert its readings into a two-dimensional, black-and-white picture.

The picture contains various shades of gray, depending upon how much infrared radiation the object is emitting. The hotter areas emit larger amounts of infrared radiation and are lighter in color; the cooler areas appear darker. The device does not measure the actual temperature of its target; it only detects the relative temperatures of different areas of the object. A thermal imager is extremely sensitive and reportedly can detect

temperature variations as small as 0.1 degrees centigrade? The images created by the device can be projected onto a small viewing screen or preserved on video- tape or photographs. The thermal imager is small enough to be hand- held, but often is mounted under a helicopter and flown over its target.

The technology is not new. The military has used it for years on the battlefield. Law enforcement has adopted the device only recently, using it in search and rescue operations, fugitive apprehensions, and along the border to detect drug smugglers and illegal border crossings. Moreover, thermal imagers have been particularly helpful, albeit controversial, in the detection of indoor marijuana-growing operations.³

FOURTH AMENDMENT BASICS

The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures by the government.⁴ In the now famous case of *Katz v. United States*,⁵ the Supreme Court redefined a search. Recognizing that the Fourth Amendment protects "people, not places,"^h the Court said that a search occurs whenever the government intrudes into a person's reasonable expectation of privacy.

Justice Harlan, concurring in *Katz*, formulated a useful, two-pronged test to determine when there is a reasonable expectation of privacy: 1) Does the person have a subjective or actual expectation of privacy? and 2) Is that expectation one that society is willing to accept as reasonable?⁷ If the answer to both questions is "yes," any police

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The Supreme Court has acknowledged that police may use new technology to enforce the laws but has cautioned that there are limits.

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infringement upon that expectation is considered a search.

If the police action is a search under the *Katz* definition, the next question is whether the search is reasonable. The Fourth Amendment does not prohibit all searches, only unreasonable ones. The Supreme Court has made this inquiry simple. Any search made without a warrant is *per se* unreasonable, unless it can be justified by one of several narrowly defined exceptions to the warrant requirement.* The Supreme Court prefers the use of search warrants. The application for the warrant takes the issue of the existence of probable cause to search away from the investigating officer and places it before a neutral and detached magistrate, adding an additional measure of protection for the private citizen.⁹

The Supreme Court has not heard a case on whether targeting a residence with a thermal imager is a search requiring a warrant. However, the question has reached several lower federal courts and some state courts. Decisions have

gone both ways. Officers using thermal imagers must understand both sides of this argument in order to avoid violating constitutional requirements.

MAJORITY VIEW

Most of the courts have decided that targeting a building with a thermal imager is not a search under the Fourth Amendment.^h *United States v. Penniv-Feeney*^h was one of the first cases to consider the matter. The court's reasoning has influenced many other courts on the issue.

The Facts

Officers in Hawaii received information from two anonymous sources that Penny-Feeney had sold marijuana in California before moving to Hawaii and continued to do so. They told police that Penny-Feeney had grown marijuana in her home for 3 years, and plants were being harvested every 6 weeks. They provided a wealth of detail about the operation. Officers obtained a search warrant for a

package sent to Penny-Feeney from California. They discovered \$2,700 in cash that was detected by a narcotics dog. Officers observed Penny-Feeney pick up the package and take it to her home. Police later contacted a known informant who had visited Penny-Feeney's residence and seen the marijuana-growing operation. He, too, described the operation in great detail. Many of the details provided by the informants were corroborated by the police.

Without a warrant, police flew over Penny-Feeney's residence at an altitude of between 1,200 and 1,500 feet in a helicopter fitted with FLIR. The thermal image of her house showed the walls and other areas of her garage as bright white, indicating significant heat was escaping from the garage. Adjacent but similar structures did not appear the same when scanned by the FLIR. The FLIR operator said the thermal image of her house was consistent with that of a structure being used for an indoor marijuana-growing operation.

Police got a warrant to search Penny-Feeney's residence using all of this information, including the results of the FLIR scan. During execution of the warrant, police found marijuana plants and paraphernalia used to grow marijuana indoors. Penny-Feeney and her husband were indicted. They filed a motion to suppress the evidence, alleging, among other things, that the warrantless use of the FLIR by police was an illegal search under the Fourth Amendment.

No Subjective Expectation of Privacy in "Waste Heat"

Using the *Katz* analysis, the district court concluded that the defendants had no subjective or actual expectation of privacy in the area scanned by the police with the FLIR. The court said that FLIR is limited to "detecting differences in temperature on the surface of the object being observed," and "did no more than gauge and reflect the amount of heat that emanated"¹² from the defendants' house. In other words, the FLIR registered only heat escaping from the defendants' house. The court described this escaping heat as waste heat, or "abandoned heat,"¹³ because the defendants had not tried to prevent



its escape. Indeed, they used fans to vent the heat to the outside, voluntarily exposing it to the public. They never attempted "to impede its escape or exercise dominion over it."¹⁴

Under these circumstances, the court concluded that the defendants did not have an actual or subjective expectation of privacy in the waste heat. Consequently, the first prong of the *Katz* case was not satisfied: There was no actual expectation of privacy, so there was no search

under the Fourth Amendment that would require a warrant.

Expectation of Privacy Not Objectively Reasonable

The court went on to say that even if the defendants had an actual expectation of privacy in this waste heat, it is not an expectation that society is willing to accept. In other words, the defendants could not satisfy the second prong of the *Katz* test. The court compared heat vented to the outside to trash left for collection on a public street. The Supreme Court has said that garbage bags left for pickup generally are known to be accessible to all manner of animals and people while awaiting the trash collector. In addition, the trash is voluntarily

given to trash collectors, who may handle it in any fashion they choose, including giving it to government agents. Therefore, any actual expectation that the garbage will be private is not objectively reasonable.¹⁵ By analogy, the court reasoned that waste heat is like trash: Any expectation of privacy in waste heat is objectively unreasonable because individuals may do what they want with it once it is exposed to the public.

Sense-Enhancing Technology Not Overly Intrusive

The *Penny-Feeney* court did not consider the fact that waste heat can only be detected with a FLIR, and not the naked eye, to be legally significant. It relied upon several Supreme Court cases approving the warrantless use of "extrasensory, nonintrusive equipment, such as the

FLIR" to investigate people and objects: *United States v. Knotts*⁶ (a beeper placed in a container), *United States v. Place*" (use of a drug detection dog), and *Smith v. MaryZand*⁸ (use of a pen register). The court thought the analogy to the use of a drug detection dog was the strongest, citing *United States v. SoZis*.⁹ Like marijuana odor emanating from a package, Penny-Feeney expected the heat to leave the garage because she deliberately vented it to the outside. Moreover, the court concluded that the use of FLIR by police, like the use of a dog in *Solis*, was inoffensive because it did not embarrass the defendants or involve a search of their persons. In addition, heat and odor emanations are physical facts indicating a possible crime, not protected communications between people. Finally, the use of the helicopter to aim FLIR at Penny-Feeney's house was deemed lawful under *California v. Ciraolo*²⁰ and *Florida v. Riley* because the police remained in navigable airspace, and the observation was physically nonintrusive because there was no "invasion of the home or curtilage."²²

The Court's Conclusion

The *Penny-Feeney* court concluded that the police did "no more than aim a passive infrared device at defendant's home from an aerial vantage point for the purpose of detecting disposed waste heat on the exterior of the house. No intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, no wind, dust, or threat of injury."²³ In other words, there was no search

within the meaning of the Fourth Amendment.

The majority of courts that have considered the use of thermal imagers have adopted the *Penny-Feeney* result but have employed slightly different analytical reasoning. One court reasoned that whether a subject takes no steps to prevent heat from escaping or actively vents it outside, both actions demonstrate a

The court compared heat vented to the outside to trash left for collection on a public street.

"lack of concern for the heat."²⁴ Another court found that from the "balance of the evidence," the defendant had a subjective expectation of privacy because he concealed his growing operation in an underground structure; however, the court decided his expectation was objectively unreasonable.²⁵ All courts upholding the warrantless use of thermal imagers have agreed on the importance of two factors: the lack of a physical intrusion into the targeted area and the scanned image's lack of intimate detail.

THE MINORITY VIEW

The case of *United States v. Cusumano*^{2h} expresses the minority view that the warrantless use of a thermal imager by the police violates the Fourth Amendment. This case was decided by a three judge panel of the federal Tenth

Circuit Court of Appeals. When the judges heard the case, the panel was vacated because they concluded that the issue of using the thermal imager did not have to be resolved in this particular case. However, the panel's opinion remains a clear statement of the minority view.

The Facts

In their affidavit for a search warrant, police in Cheyenne, Wyoming, included, among many other facts, the results of a warrantless thermal scan of the defendant's home and attached garage. The thermal image showed a large hot spot on one wall of the garage and a number of hot spots along the roof and near the front door of the house.

When police executed their warrant, they found an indoor marijuana-growing operation in the basement. The defendants were indicted and convicted of manufacturing marijuana. On appeal, they contended that the warrantless use of the thermal imager violated their Fourth Amendment rights. A panel of the Tenth U.S. Circuit Court of Appeals agreed.

Heat Reveals Private Activity in the Home

Using the *Katz* analysis, the court concluded that the defendants had an actual expectation of privacy. This court, however, framed its inquiry quite differently. The court based its analytical framework on the private activities within the house that generated the heat rather than merely focused on the heat escaping from the house.

The court said heat emitted outside the home and measured by the thermal imager is directly related

to, and a function of, activities going on in the home. Viewed from that perspective, the court reasoned that the thermal imager actually created a "heat signature"²⁷ capable of revealing information about heat-generating activities going on inside the house. In other words, the imager painted a picture that police could translate into information regarding what the defendants were doing inside the building.

According to the *Cusumano* court, the question to ask is not whether the defendants expected the escaping heat to remain private, but whether they expected the indoor activities that the heat signature revealed to remain private. Clearly the defendants did, the court concluded, because they had hidden their operation in the basement and blocked the windows.

Obviously, the defendants did not take all possible steps to protect their operation from a thermal scan, but the court concluded that they should not have to anticipate and guard against "every investigative tool in the government's arsenal"²⁷ in order to claim an actual expectation of privacy. Otherwise, the court said, the public would be at the mercy of advances in government technology, drawing citizens into a lopsided game of "hide and seek played by the government and the people."²⁹

Protecting the Privacy of Activities Within the Home Is Objectively Reasonable

The court then turned to *Katz*' second prong, whether the defendants' expectation of privacy was objectively reasonable. The

court said the expectation that activities within someone's home would remain private is objectively reasonable because society still believes that activities carried on in the home, and not knowingly exposed to the public, should remain private. The defendants had met the second prong of the *Katz* test, as well. Consequently, the defendants had both an actual and an objectively reasonable expectation of privacy in the activities within their home. Therefore, the Court decided that this use of the thermal imager was a search, and the police should have obtained a warrant before scanning the home with a thermal imager.

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Given the current debate over thermal imagery, a warrant should be obtained whenever possible...
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Protecting the Sanctity of the Home

The *Cusumano* court acknowledged the government's right to use modern technology to fight crime, but it refused to permit the warrantless use of technology that reduces the security of people in their homes. In that regard, the court cited the case of *United States v. Karo*³⁰ to support its position. In *Karo*, the government placed a beeper inside a can of ether to track its movements. The beeper-laden can was taken into the defendant's house. Agents activated the beeper,

revealing that the can was stored inside the residence. The Supreme Court condemned that particular use of the beeper as a warrantless search in violation of the Fourth Amendment. Using the beeper, the agents obtained information they could not have obtained from outside the curtilage of the house: namely, that the can of ether was inside.

The *Cusumano* Court reasoned that the use of the thermal imager was similarly objectionable: It revealed information about activities going on inside the house that police could not obtain from outside the curtilage of the home. This revelation of a single detail about activities inside the home was sufficient to violate the Fourth Amendment. Moreover, the court did not believe that the heat signature of the defendants' home was in plain view or knowingly exposed to the public because it is not customary for individuals seeking privacy to control their heat emissions, and privacy should not "hinge upon the insulating capacity of the walls."³¹

The Voluntary Relinquishment Rationale

The abandoned waste analogy was equally unconvincing to the *Cusumano* court. The relinquishment of control over heat emissions is hardly voluntary as it is with trash. The loss of heat is governed by the laws of physics and is not an area where people usually seek control to guard their privacy. In addition, while people expect that their trash may be invaded' by scavengers, they hardly expect their homes to be scanned with thermal imagers.

For similar reasons, the court dismissed the analogy to a pen register. Because the telephone company is expected to record dialed numbers, users can be said to relinquish that information to the company voluntarily. For that reason, telephone users cannot be said to have either an actual or objective expectation of privacy in their dialing information. Therefore, police use of the pen register does not infringe upon any such expectation.

Distinguishing Lawful Activities from Contraband

The dog sniff analogy offered a more precise comparison. However, the court noted that the dog sniff detects only contraband that a person may not possess legally. The thermal imager, on the other hand, identifies heat from both legal and illegal activities in the home. The court also noted that dog sniffs generally take place in public areas, such as airports or border crossings, while in this case, a private home was the target.

Many law review commentators echo the *Cusumano* panel view that the use of a thermal imager is a search requiring a warrant.³² Two state Supreme Courts have agreed.³³

IMPLICATIONS FOR LAW ENFORCEMENT

It is impossible to predict when, or even if, the U.S. Supreme Court will resolve this debate. In light of the disagreement over the warrantless use of thermal imagers, the following general guidelines for police officers using thermal imagers should ensure the lawful use of this technology.

Search Warrants

Law enforcement officers should consult their legal advisors to determine whether a search warrant is required to use a thermal imager in their jurisdictions. Of course, search warrants are always preferred. Given the current debate over thermal imagery, a warrant should be obtained whenever possible before using the thermal imager.

Photo © PhotoDisc



Probable Cause

None of the cases reviewed advocate that a thermal scan alone provides probable cause for a search. Heat is generated by many different activities, both legal and illegal. The results of a thermal scan provide but one of many facts the officer must combine into the mix of probable cause to obtain a search warrant and search the scanned building.

Placement of the Thermal Imager

The courts that have upheld the warrantless use of thermal imagers have stressed that officers using the device did not physically intrude upon the area scanned. Scanners were aimed at the target by officers standing outside the curtilage of the

home or business or from aircraft flying within navigable airspace above the area. Thermal scanning conducted from within the curtilage of a home or from a helicopter flying below navigable airspace is plainly more intrusive. Officers should ensure that any scan is conducted from a location where they have authority to be.

The Capability of the Thermal Imager

One of the most important factors in this ongoing debate is the nature of the information the thermal imager provides. The Supreme Court has acknowledged that police may use new technology to enforce the laws³⁴ but has cautioned that there are limits: "An electronic device to penetrate walls or windows so as to hear and record confidential discussions.. .would raise very different and far more serious questions..."³⁵

Does the thermal imager penetrate walls and reveal such "intimate details"³⁶ so as to implicate the Fourth Amendment? One federal court has noted that infrared photographs of a mobile home revealed rafters inside and that the home appeared to be split into two rooms.³⁷ If FLIR devices do reveal such intimate detail, either directly or through interpretation of the images, the argument against warrantless use of the device is stronger. If, on the other hand, the device merely reveals whether one structure is emitting more heat than another, the argument against warrantless use is weaker.

Officers using thermal imagers should document clearly the capabilities of their machines. A

reviewing court certainly will inquire whether the particular imager can distinguish intimate details within the targeted building. Videotapes or still photographs of any thermal images should be made and retained for the court to see. Interpretation of the thermal images should be limited to the question of whether the targeted structure is emitting substantially more infrared radiation than similar structures in the area.

Technological innovation, like thermal imaging, continually will test the meaning and limits of the Fourth Amendment of the U.S. Constitution. The U.S. Supreme Court will no doubt have to shed additional light on the issue before the debate over the use of thermal imaging will cool. +

Endnotes

- ¹ *Johnson v. United States*, 333 U.S. 10, at 14 (1948).
- ² **Michael L. Huskins**, *Marijuana Hot Spots.. Infrared Imaging and the Fourth Amendment*, 63 U. Chi. L. Rev. 655, at 660 (Spring 1996).
- ³ Growing marijuana indoors requires the use of powerful artificial lights to simulate sunlight. These powerful lights generate a great deal of heat. That heat must be expelled to avoid killing the plants.
- ⁴ U.S. Const. Amend IV reads: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."
- ⁵ 389 U.S. 347 (1967).
- ⁶ *Id.* at 351.
- ⁷ *Id.* at 361 (J. Harlan, concurring).
- ⁸ *Id.* at 357.
- ⁹ 333 U.S. 10, at 14.
- ¹⁰ See e.g., *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994); *United States v. Ford*, 34 F.3d 992 (11th Cir. 1994); *United States v. Robinson*, 39 F.3d 891 (8th Cir. 1994); *United*

States v. Myers, 46V M 668 (7th Cir. 1995); *United States v. Ishmael*, 48 F.3d 850 (5th Cir. 1995); *United States v. Robinson*, 62F.3d 1325 (11th Cir. 1995).

" 773 F.Supp. 220, (D. Hawaii 1991), *aff'd on other grounds*, 984 F.2d 1053 (9th Cir. 1993). On appeal, the Ninth Circuit Court of Appeals declined to address the use of FLIR because it felt police had sufficient probable cause for the search independent of FLIR readings.

¹² *Id.* at 225.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *California v. Greenwood*, 486 U.S. 35 (1987).

¹⁶ 460 U.S. 276 (1983).

¹⁷ 462 U.S. 696 (1983).

¹⁸ 442 U.S. 735 (1979).

“
**Officers using
thermal imagers
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”

¹⁹ 536 F.2d 880 (9th Cir. 1976).

²⁰ 476 U.S. 207 (1986). The defendant shielded his backyard marijuana plants with two high fences. Police use of an airplane to see the plants from 1,000 feet overhead was not a search under the Fourth Amendment.

²¹ 488 U.S. 445 (1989). The defendant grew marijuana in a greenhouse located 10 to 20 feet behind his home. The home and greenhouse were surrounded by barbed wire posted with a Do Not Enter sign. Police used a helicopter flying at 400 feet to look through holes in the roof to see the marijuana. The Court held that was not a Fourth Amendment search.

²² 773 F. Supp. at 228.

²³ *Id.* (Emphasis the court's).

²⁴ *United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995), at 1329. "...the record does not indicate that he took any action to prevent the resulting heat from being emitted into the atmosphere above his house...Robinson's inaction regarding the heat generated from his

marijuana cultivation demonstrates his lack of concern for it. Thus we conclude that Robinson has not established a subjective expectation of privacy in this heat emitted from his home." (Emphasis the court's).

²⁵ 48F.3d at 857. "The device, when used in an open field, does not offend the Fourth Amendment because it is passive and non-intrusive. The sanctity of one's home or business is undisturbed."

²⁶ 67 F.3d 1497 (10th Cir. 1995), vacated on rehearing *en banc*, 83 F.3d 1247 (10th Cir. 1996).

²⁷ *Id.* at 1501.

²⁸ *Id.* at 1503.

²⁹ *Id.* at 1505-1506.

³⁰ 468 U.S. 705 (1984).

³¹ 67F.3dat 1507.

³² See e.g., Michael L. Huskins, *Marijuana Hot Spots: Infrared Imaging and the Fourth Amendment*, 63 Chi. L. Rev. 655 (Spring 1996); James Francis Barna, *Reforming the Katz Fourth Amendment 'Reasonable Expectation of Privacy' Test: The Case of Infrared Surveillance of Homes*, 49 Wash. U. J. Urb. & Contemp. L. 247 (Summer 1996); Michael D. O'Mara, *Thermal Surveillance and the Fourth Amendment: Heating Up the War on Drugs*, 100 Dick. L. Rev. 415 (Winter 1996); Jonathon Todd Laba, *If You Can 't Stand the Heat, Get Out of the Drug Business: Thermal Imager, Emerging Technologies, and the Fourth Amendment*, 84 Calif. L. Rev. 1437 (October, 1996).

³³ *State v. Young*, 867 P.2d 593 (Wash. 1994) (The use of the thermal imager is a violation of both the Washington state and the federal constitutions.); *State v. Siegal*, 934 P.2d 176 (Mont. 1997) (Use of a thermal imager in a law enforcement context is a search under the Montana Constitution.).

³⁴ *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

³⁵ *Id.* at 239.

³⁶ *Id.* at 238.

³⁷ *United States v. Olson*, 21 F.3d 847 (8th Cir. 1994) at 848, note 5. The court did not reach the issue of the use of the FLIR device, holding there was sufficient other evidence to support a finding of probable cause.

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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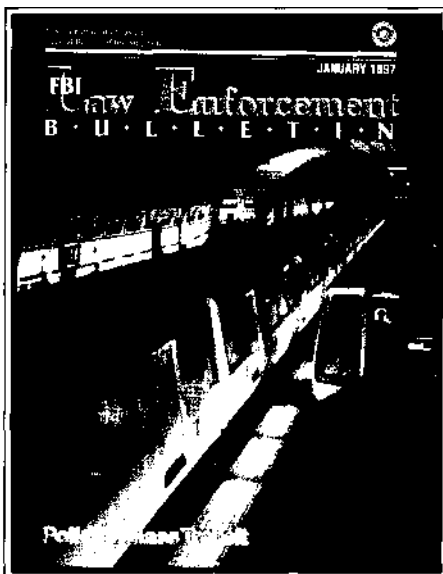
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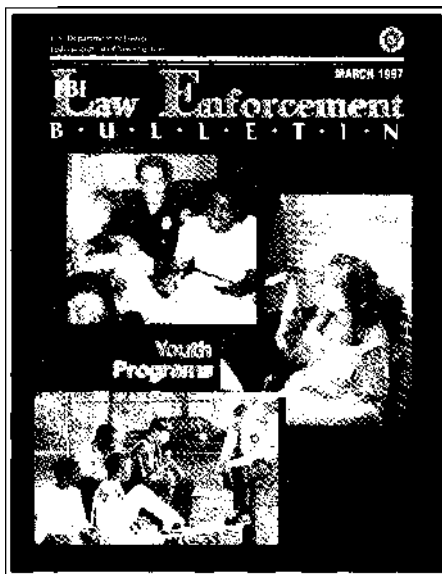
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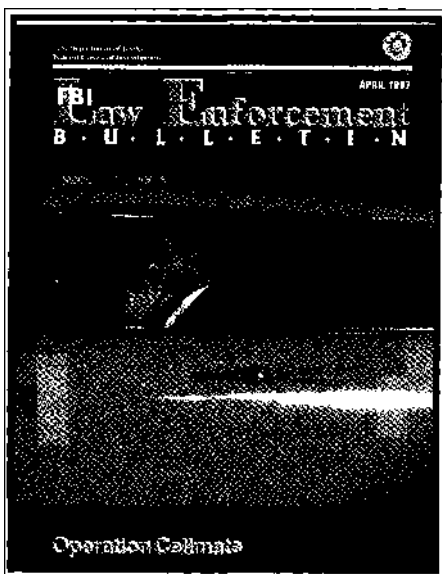
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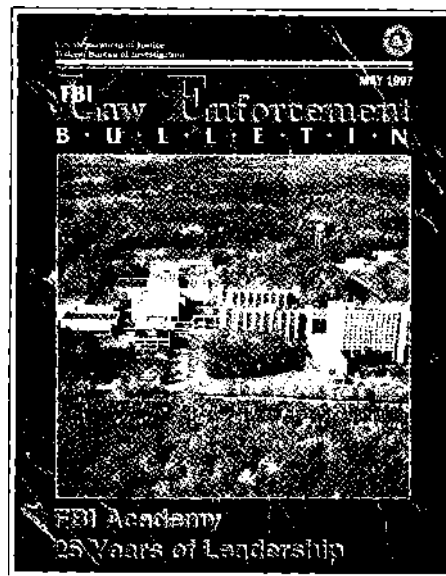
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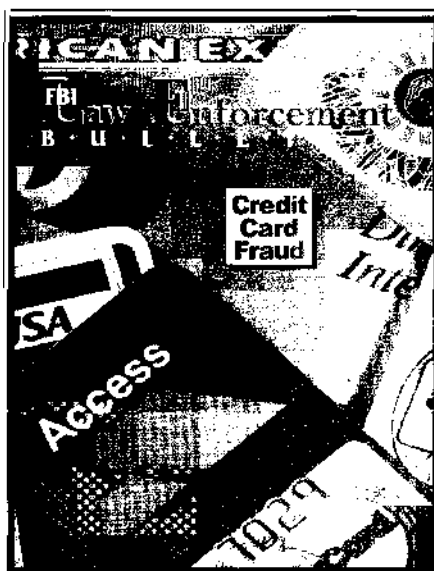
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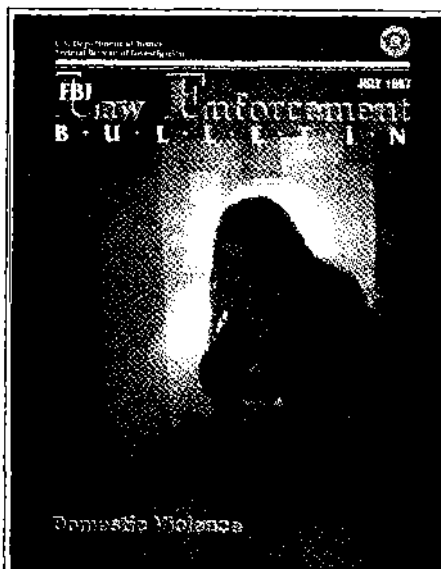
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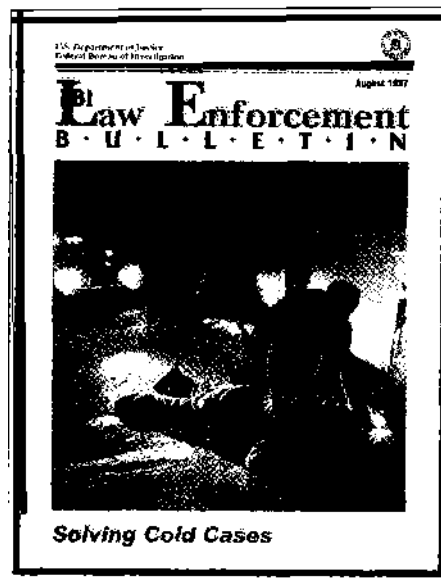
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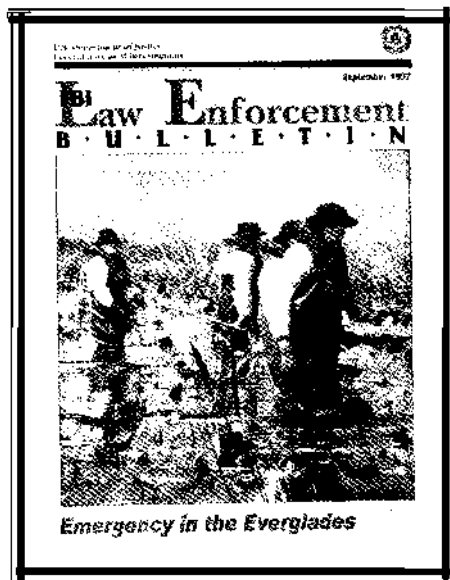
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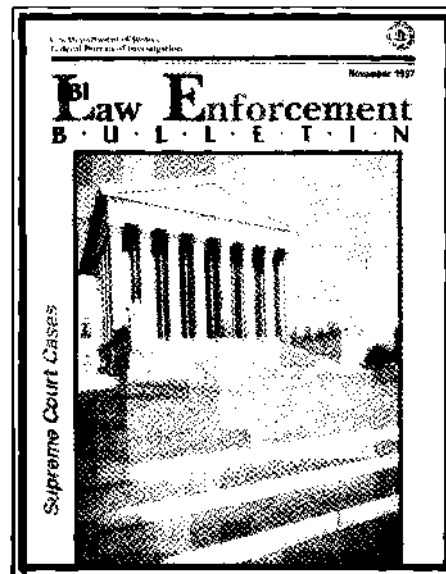
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