
NEWSLETTER

International Association of Directors of Law Enforcement Standards and Training
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Homeland Security

AN OPEN LETTER FROM HOMELAND SECURITY SECRETARY JANET NAPOLITANO

Every year, Americans across our country pause to remember the thousands of lives lost on September 11, 2001, including the many law enforcement and first responders who sacrificed their own lives to save others.

September 11th was a day of sorrow and tragedy, but also a day of heroism and unity. Ten years later, we are still inspired by the police officers, fire fighters, and emergency personnel who rushed toward the World Trade Center, the Pentagon, and the empty field in Shanksville, Pennsylvania, to rescue others in need.

Many of you were part of this effort. Some of you lost family members, colleagues, and friends. But all of you played – and continue to play – a critical role in helping our country recover, rebuild, and emerge even stronger after 9/11.

America is more secure than we were a decade ago. We have bounced back from the worst attacks ever on our soil and have made progress on every front to protect ourselves. We are also smarter about the kind of threats we face and how best to deal with them. We have used this knowledge to make our nation and communities more resilient, not only to terrorist attacks, but also to threats and disasters of all kinds, while safeguarding the fundamental rights of all Americans.

At the Department of Homeland Security, we believe that homeland security begins with hometown security: it begins in the cities and communities where law enforcement and first responders work every day to maintain vigilance, enhance preparedness, and respond to threats and disasters.

And that is why we have been working hard to get tools, information, and resources out of

Washington, D.C., and into your communities where it can be used to strengthen state and local capabilities, enhance preparedness, and help all of us meet the shared responsibility of securing our nation.

We all play a role in keeping America safe. Today, I am proud to pay tribute to the brave men and women of our law enforcement and first responder communities who protect Americans everyday on the frontlines of these homeland security efforts. As we reflect on this 10th anniversary of the 9/11 terrorist attacks, I want to thank you for your continued service and sacrifice. We appreciate all that you do to support homeland and hometown security.

Janet Napolitano
Secretary of Homeland Security

MESSAGE FROM THE PRESIDENT

by: Richard Clark, Executive Director, Nevada POST



I thought this year would be a busy one, and I haven't been disappointed.

I was invited, as IADLEST President, to participate in FLETC's newly formed Federal Law Enforcement Training Advisory Council, and travel to Brunswick, Georgia, for the initial meeting, August 9, 2011.

I was surprised and impressed with the credentials of my fellow council members. The members are:

- Director and Assistant Director, FLETC
- Director of Training, Interpol
- Law Enforcement Advisor to the Secretary of Homeland Security

- Director of the DEA Academy, Department of Justice
- Assistant Director of the Department of Interior, Office of Law Enforcement Security
- Chief of Capitol Police, Washington, D.C.
- Director, Law Enforcement Policy and Support, Department of Defense

Needless to say, I was the only non-Federal agency CEO in the room.

For all of us, I was flattered to hear how impressed this group of high ranking professionals is with IADLEST and our accomplishments in raising the level of professionalism in law enforcement. They are anxious to learn more to enhance the quality and cost effectiveness of their training programs. They are also very impressed with our National Decertification Index (NDI) 2.0.

Our Strategic Plan subcommittee will be meeting in Denver, Colorado, September 9, 2011, where we will be revisiting the fundamental issues of our organization. Hopefully, we will have positive progress to report for the regional meetings and a finished product by the October meeting in Chicago.

Finally, the NDI 2.0 had a successful roll-out on August 1; and several states have been overwhelmed with requests for access by training managers and background investigators.

Congratulations to Bill Muldoon and the entire NDI working group on a huge success and for adding another feather in the cap of IADLEST!

As I understand, the NDI 2.0 project requires a presentation to all POST Directors which can be accomplished along with the Regional meetings. The BJA grant would pay for the POST Directors' travel to Regional meetings if a one day NDI presentation is added.

I want to remind the POST agencies to submit their Sourcebook Survey information ASAP. The information can be submitted electronically via: <http://surveys.verticalresponse.com/a/show/898179/d66454a7f4/0>. This is an important project, and we all

benefit from its results. Contact our IADLEST Executive Director if you need help.

There is much to do this year, but as the old saying goes, "Many hands make light work." I appreciate all of your efforts to make peace officers safer, raise the bar for professionalism, and reduce costs while developing quality training opportunities.

Editorial Note: The IADLEST Newsletter is published quarterly. It is distributed to IADLEST members and other interested persons and agencies involved in the selection and training of law enforcement officers.

The IADLEST is a nonprofit, tax-exempt organization comprised of law enforcement training managers and leaders. Its mission is to research and share information, ideas, and innovations that assist in the establishment of effective and defensible standards for the employment and training of law enforcement officers.

All professional training managers and educators are welcome to become members. Additionally, any individual, partnership, foundation, corporation, or other entities involved with the development or training of law enforcement or criminal justice personnel are eligible for membership. Recognizing the obligations and opportunities of international cooperation, the IADLEST extends its membership invitation to professionals in other democratic nations.

Newsletter articles or comments should be sent to IADLEST; 2521Country Club Way; Albion, MI 49224

BUSINESS MEETING SCHEDULED

IADLEST will meet in conjunction with the IACP annual fall conference in Chicago, Illinois. The IADLEST will meet at the Hilton Palmer House; 17 East Monroe Street; Chicago, Illinois 60603; (312) 726-7500. The Business Meeting is scheduled for 1:00 to 3:00 p.m., Saturday, October 22; and 9:00 a.m. to 3:00 p.m., Sunday October 23, 2011.

The IADLEST 2012 annual conference is tentatively scheduled for June 10-13, 2012, in Savannah, Georgia.

**IADLEST NATIONAL
DECERTIFICATION INDEX (NDI)**

*by: William Muldoon, Director Nebraska Law
Enforcement Training Center and NDI Chair*

The International Association of Directors of Law Enforcement Standards and Training (IADLEST) launched a complete redesign of the National Decertification Index (NDI) on August 1, 2011. The Index is a nationwide registry of law enforcement officer certificate or license revocation actions relating to misconduct. The information is provided by Peace Officers Standards and Training (POST) organizations via a secure internet-accessible platform.

The NDI keeps law enforcement agencies from potentially hiring officers with criminal backgrounds or who have had their certification revoked for cause by a contributing state. The NDI is a key component of a thorough background investigation. The system can flag potentially rogue officers who are jumping from one state to another after having their license or certification revoked in their home state.

“The NDI is a vital tool for maintaining credibility and our public trust in the law enforcement profession”, stated William Muldoon, Director of the Nebraska Law Enforcement Training Center and NDI Chairman. “Before we had the NDI, we had no way of knowing if an officer had been decertified for cause in another state.”

Information contained in the NDI is provided by participating state government agencies responsible for licensing or revoking law enforcement certificates. The NDI currently contains over 14,000 records.

Recently, the state of Delaware became the 30th state to join the NDI and actively contribute decertification records. “We hope that every state will join this effort,” stated Richard Clark, IADLEST President. “Access to the NDI is free of charge, and no law enforcement agency should hire an officer without making sure that they have checked the NDI first. It is our duty to uphold the highest professional standards.”

About the NDI: The purpose of NDI is to serve as a national registry of certificate or license revocation actions relating to officer misconduct. The records contained in the NDI are provided by participating state government agencies and should be verified with the contributing authority. Inclusion in the database does not necessarily preclude any individual from appointment as an officer. **The NDI no longer requires the SSN of subjects, therefore alleviating the concern of many states in providing sensitive information.** The National Decertification Index is a program funded through a grant from the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. Neither the U.S. Department of Justice nor any of its components operate, control, are responsible for, or necessarily endorse this website (including, without limitation, its contents, technical infrastructure, policies, and any services or tools provided).

What’s Next: Grant funding has been secured to conduct an introduction and training of the new NDI to state POST directors at upcoming IADLEST Regional Meetings. The grant will cover travel and lodging of POST directors; and in the case of a state not contributing, potentially paying for the state’s legal advisor or executive over the POST (if any). It is the goal of the NDI Committee to get every state to participate in contributing names of decertified officers to the index and every state or law enforcement agency checking the names of potential new hires against the index as a part of conducting a complete background check. A model decertification policy is also in the works to assist states who do not currently decertify or revoke law enforcement certification for cause.

For information, contact NDI Chair, William Muldoon at William.muldoon@nebraska.gov for more information.



OREGON CASE SHOWS NDI WORKS

by: Eriks Gabliks, Director

Oregon Department of Public Safety Standards and Training

IADLEST established the National Decertification Index (NDI) in the late 1990's to reduce the interstate rehiring of law enforcement officers decertified for misconduct by Peace Officer Standards and Training (POST) Boards and Commissions in the United States. This system provides general information regarding state policies and guidelines as well as access to the searchable index, the NDI, by approved law enforcement hiring entities. Participating states enter decertified criminal justice officers into the index that is used as a pointer system that directs employing agencies and/or certification bodies to the agency that made the entry. As of July 2011, the NDI contains more than 14,000 decertified officers from 30 states.

The following illustrates the benefit of the NDI. The Oregon Department of Public Safety Standards and Training (DPSST) revoked the police certification of an officer on July 19, 2005. He was a police officer in Coquille, Oregon, and was convicted of two counts of harassment. As part of his sentencing, the convicted officer was ordered to surrender his State of Oregon police officer certification and never work in any capacity as a police officer. DPSST entered the convicted officer's name in the NDI as an officer whose certification had been revoked.

Since that time, this same convicted officer has attempted to gain employment as a police officer in two other states. Three months after his conviction in Oregon, this same convicted officer applied to be a police officer in Klawock, Alaska. On his application he indicated that he had never been convicted of a crime nor had his police certification been revoked in any state. Later that month he applied to be a police officer in Cedar Vale, Kansas. On his application he again marked that he had never been convicted of any crimes. This same convicted officer was hired and served as Police Chief in Cedar Vale until May 12, 2006, when Kansas POST became aware of his revoked status and began an investigation. Kansas also looked into allegations that he may have engaged in other unlawful conduct while serving as a police officer. **The NDI was used as a vehicle by**

both states to identify the Oregon revocation and take appropriate action.

DPSST's revocation and denial process is under our eleven-member Standards & Certification Program. This program serves approximately 10,000 police, corrections, parole/probation officers, and 9-1-1 telecommunicators who work at more than 300 city, county, and state criminal justice agencies. In 2004, DPSST received legislative funding to establish a full-time Professional Standards Coordinator. Since that time, Oregon has revoked the certifications of more than 500 police, corrections and parole and probation officers, and 9-1-1 telecommunicators. DPSST also publishes a monthly Ethics Bulletin which describes cases which lead to loss of certification. To view a copy, please go to the publications section of the DPSST web page at www.oregon.gov/DPSST

MAINE LAW ENFORCEMENT PRE-SERVICE TRAINING PROGRAM

by: John Rogers, Director, Maine Criminal Justice Academy; Robert Schwartz, Executive Director, Maine Chiefs of Police Association; Paul M. Plaisted, President, Justice Planning and Management Associates

In August of 2011, the Maine Criminal Justice Academy (MCJA) unveiled a new training program that significantly expands upon previous levels of law enforcement pre-service training required for Maine officers. This program blends online training delivery, classroom, and practical instruction techniques, and supervised field training into an overall curriculum and certification that provides a foundation for officers to undertake law enforcement responsibilities.

Full-time Maine law enforcement officers are required to attend the 720-hour Basic Law Enforcement Training Program within one year of their employment. Since 1980, these officers (and all part-time officers) have been required to complete a 100-hour pre-service training program prior to undertaking any official duties. As is the case in other states (and particularly in rural areas), there has been continuing discussion concerning the question of how much training officers should have prior to being given law enforcement authority. This discussion

became even more pointed in Maine in 2007 following the unfortunate shooting and death of an 18 year-old man in the process of his resisting arrest by a 24 year-old part-time officer.

The new Law Enforcement Pre-Service (LEPS) training program is meant to strengthen the initial training effort and is organized into three components or Phases.

Phase 1 consists of a series of online trainings that may be accessed remotely and requires an estimated 40 hours to complete. The goal of Phase 1 is to offer a broad look at the role of a law enforcement officer. The classes within Phase 1 provide an overview of law enforcement without delving too deeply into any single topic. It provides the student the opportunity to evaluate what law enforcement is and if they wish to continue further with the training. After completion of the online trainings, students are required to take a written examination administered by the MCJA, testing for students' proficiency in the information learned in the online trainings. Students must pass this test to a standard of 70% correct in order to continue on to Phase 2 of the LEPS program.

Phase 2 consists of 80 hours of training involving scenario-based practical application of the information learned in Phase 1. The goal of Phase 2 is to provide a more in-depth study of those skills that a law enforcement officer will need on a regular basis. It is a more hands-on approach to learning, allowing students to develop the skill sets necessary to become better law enforcement officers, while also experiencing some of the stress associated with the occupation. Each block of instruction in Phase 2 incorporates lessons from Phase 1 and reinforces the lesson with scenario-based practical work. Through the use of practical exercises, students will be better able to determine if law enforcement is truly a career they want to pursue, or if it is not what they expected.

Phase 3 involves on-the-job supervised field training that is directed by the officer's employing agency. Officers who have successfully completed Phase 1 and Phase 2 of the LEPS training program and meet the entry

standards may now engage in actual "law enforcement work" on a supervised basis. This supervised field training may vary from agency to agency and may include additional field training over and above 80 hours. The Chief LEO of the hiring agency must file a form with the MCJA stating that the officer has completed a minimum of 80 hours of on the job supervised field training to the satisfaction of the Chief LEO. Proficiency in Phase 3 is determined by the Chief LEO at the officer's hiring agency.

Using an Internet-based approach to training delivery is not a new strategy for the Maine law enforcement community. Since 2004, Maine law enforcement agencies have been participating in an online program focused on addressing in-service training needs. The Maine Chiefs of Police Association (MCOPA) has provided the leadership for this program; and a private firm, Justice Planning and Management Associates (JPMA), has developed the online content and deployed it through a Learning Management System available to all Maine law enforcement agencies. The average Maine law enforcement officer has completed over 100 hours of online training within this program, and some have completed nearly all of the 150 classes available. Given this cost-effective and highly positive experience with online training delivery, the MCJA felt that it was only logical to leverage this technology into the pre-service training realm; and the MCOPA and JPMA agreed to help facilitate the effort.

In terms of development effort and cost, the preparation for Phase 1 training was clearly the most significant. The project to develop the Phase 1 materials, administered by the MCOPA and funded in part by the Maine Department of Public Safety, took approximately 18 months to complete. As it turned out, this effort was much larger in scope and more complex than anyone thought it would be. To give a sense of proportion, the 40 hours of online training represent somewhere in the vicinity of 3,500 learner-viewable screens, all containing written text and graphics, 75% of which have associated audio, with animations and interactions between all components. There are somewhere between 25,000 and 30,000 individual graphics items on the learner-viewable screens (photos, text boxes,

diagrams, pointers, etc). More than a dozen individuals were involved in the development process from the MCJA and JPMA, and scores of subject matter experts assisted with lesson plan development. In the quality assurance area, most of the project staff members reviewed all 3,500 screens generated at least once; and 3-4 of them reviewed the screens multiple times, all focused on insuring the accuracy and consistency of the materials presented.

Overall, the new MCJA Law Enforcement Pre-Service (LEPS) training program represents an innovative use of available training technology to address a major aspect of the critical public safety policy objective of ensuring that all Maine law enforcement officers are prepared for the responsibilities thrust upon them. While the first "cohort" of trainees will not complete all three phases of training until later this fall, all preliminary indications are that the program approach is a major step forward in advancing officer training and skill levels. Discussions are already underway concerning the potential to leverage the training resources developed to address related needs such as support of vocational-technical schools, community colleges, and university law enforcement educational programs, as well as officer training for lateral entry from other states or re-employment after breaks in service, training of federal law enforcement agents who will enforce Maine laws, and other potential applicants.

About the Maine Criminal Justice Academy (MCJA) - The Maine Criminal Justice Academy serves the people of Maine by promoting the highest level of professional standards and performance through the training of criminal justice personnel. The MCJA is the central training academy for law enforcement, corrections, and public safety dispatch personnel. The MCJA strives to: merit public confidence in the criminal justice system; provide high quality training; promote a work environment of mutual respect, support, and trust; advance policies and procedures developed in the interest of public safety and service; and encourage cooperation and coordination among criminal justice agencies.

About the Maine Chiefs of Police Association (MCOPA) - The Maine Chiefs of Police Association is a professional association that has 350+ members including active and retired chiefs, sheriffs, and senior law enforcement leaders. The association actively participates in new training initiatives, policy advancement, and progressive law enforcement tactics as the lead association for Maine's finest. The proud members stand together to improve upon their relationship with the public and become better prepared to protect the great citizens of our rural state.

About Justice Planning and Management Associates (JPMA) - Justice Planning and Management Associates is a public safety management consulting and training firm that has been in operation for over 15 years. JPMA has acquired an extensive set of skills and expertise in the area of applying the latest Internet-based training development techniques to public safety purposes. JPMA has produced a host of products using a variety of technological approaches and has emerged as clearly one of the leaders in the nation in this area. Hundreds of public safety agencies have accessed JPMA's services, either by incorporating JPMA products into their websites, engaging JPMA as a technical consultant, or participating in one of JPMA's distance learning events. JPMA currently provides statewide law enforcement online in-service training programs in Maine and Vermont.

For more information: john.rogers@maine.gov

**THE POLICE & EYEWITNESSES:
PREVENTING INJUSTICE IN THE FIELD**

*by: John Sofis Scheft, Esq.
Law Enforcement Dimensions, LLC*

Originally hailed as an investigative tool for increased convictions, DNA analysis had an unanticipated consequence. It confirmed the criminal justice system's worst fear. Over 250 prisoners – some on death row -- had been wrongfully convicted.

The leading cause of erroneous conviction was – undeniably -- faulty eyewitness identification.

Startled by these findings, the Justice Department formed a working group in 1999 featuring police officers, prosecutors, defense attorneys, and academic researchers. To their everlasting credit, these professionals did not go by the traditional Washington playbook (produce a 300 page report that nobody reads). They opted instead for a 38 page, practical manifesto outlining the best field practices.

Their common-sense techniques are the most important development in law enforcement since the *Miranda* decision. Most critical are four instructions provided to witnesses *before* they participate in any ID procedure (such as a showup, field view, or photo/live lineup).

Here is a concrete example. An officer is transporting Sarah to view a suspect who has been detained nearby. He matches the description of the person who assaulted her in the park fifteen minutes before. On route, the officer informs Sarah:

- **“Thanks for taking a ride with me. I’m going to have you look at someone. This person may or may not be the person who assaulted you.”**

[Note: According to a study by Gary Wells, renowned expert on this topic, this basic comment – *by itself* -- reduces the chance of mistaken identification by 42%! Most erroneous eyewitness cases do not involve the failure of the witness to pick out the real perpetrator - they involve procedures where the real perpetrator was not present at the time of the witness’s selection. That’s why this safeguard is the most critical.]

- **“Remember Sarah, it is just as important to clear an innocent person as it is to identify a guilty one.”**

[This reminds a witness that the goal of the police investigation is accuracy and fairness, not arrest and conviction at all costs.]

- **“Whether or not you identify this person, we will continue to investigate.”**

[Many victims (and even witnesses) feel pressure to identify *someone* because they are afraid that the police will abandon their case. This instruction helps prevent that desperate mindset.]

- **“If you do select this person, Sarah, I will ask you to tell me, in your own words, how certain you are of your identification.”**

[This “statement of certainty” is reliable because it is obtained immediately after the identification *before* any on-scene comments by officers or other people contaminate the witness’s own perceptions. The fact the witness uses her own words, rather than an artificial scale suggested by the officer, also adds to the accuracy of the procedure.]

Naturally, there are other critical components of the identification process that officers need to learn – such as pre-selection interview techniques, post-selection comments, proper lineup composition, the value of blind testing, etc.

But having these simple instructions on a card, so that officers always get it right, goes a long way toward preventing inaccurate identifications in the field and at the station.

For more on dynamic, identification training for sworn personnel, contact Attorney John Sofis Scheft at 781-646-4377 or john@ledimensions.com.

**2011 OREGON
LEGISLATIVE UPDATE**
*By Eriks Gabliks – Director
Oregon Department of Public Safety
Standards and Training (DPSST)*

The 2011 Session of the Oregon Legislative Assembly has concluded, and a number of bills have passed through both the House and Senate and are in route to the Governor for review and anticipated approval.

Senate Bill 405 allows public colleges and universities that are part of the Oregon

University System to establish law enforcement agencies if approved by the Chancellor's Office and the Oregon Board of Higher Education. Currently, only Oregon Health Sciences University (OHSU) has the legislative ability to have a police department. The passage of this legislation will make this same opportunity available for other state campuses with one major change. By state statute, OHSU Police Officers cannot carry firearms while working in the hospital. SB 405 has no such restrictions or limitations for university police officers even though concern about weapons on campus was raised by some student organizations during public testimony on the bill.

Senate Bill 412 will give statewide peace officer powers to tribal police officers whether they are on or off their respective tribal lands. Currently tribal police officers do not have state powers unless they have been deputized or commissioned by a county sheriff or police chief. A recent criminal arrest was dismissed because a tribal police officer made an arrest on the reservation, and the state statute that authorizes peace officer powers was at the center of this court's decision. The passage of this bill address this issue and will allow tribal police officers peace officer powers if they all meet state training and certification standards established by DPSST and submit proof of insurance to DPSST.

House Bill 2274-A permits certified peace officers from states adjoining Oregon to provide or attempt to provide law enforcement services if requested by an Oregon law enforcement agency. This bill was requested to help smaller rural communities and counties in southern Oregon (border Idaho, California, and Nevada) which have suffered from the economic downturn resulting in staffing reductions. Often agencies rely on mutual aid from cities and counties just across the state border to help with major incidents. This bill addresses several of the concerns that were raised by mutual aid agencies such as insurance, training, certification, and reimbursement.

Senate Bill 976 was also passed which establishes the Law Enforcement Medal of Ultimate Sacrifice. This Medal will be awarded

by the Governor to the family of a law enforcement officer killed in the line of duty by upon approval of the Governor's Commission on the Law Enforcement Medal of Honor. The Commission is staffed by DPSST and is an established board/commission of the State of Oregon.

As you can imagine, of the more than three thousand bills introduced, many did not make it through the session. Two of these bills would have had a significant impact on the criminal justice profession. The first, House Bill 2362 would have required that DPSST establish maintenance of certification standards for county and state corrections officers. The Oregon Department of Corrections, Oregon State Sheriff's Association, and DPSST were supportive of this proposed legislation; but, unfortunately, the fiscal impact prevented the bill from moving out of the Ways & Means Committee. The second, House Bill 2704 would have required that inspectors and investigators of the Oregon Liquor Control Commission be trained and certified by DPSST.

On the budget side, DPSST's budget for 2011-2013 (Senate Bill 5541) was approved.

Unfortunately, our 2011-2013 budget includes reductions in programs funded by the Criminal Fines and Assessments Account (CFAA) which some in the legislature consider a "different color" of general fund dollars. DPSST programs funded by dedicated taxes or fees (Fire Training, Traffic Safety, 9-1-1 Training, and Private Security) were not significantly affected by reductions. DPSST's budget was reduced by \$5,127,578 which resulted in the loss of 13 positions and two 16-week Basic Police classes (15 down to 13). The DPSST Leadership Team did take proactive steps to mitigate the impact of the economic downturn by holding a number of positions vacant during the budget development process. As a result, the impact is not as bad as it could have been; but, unfortunately, a number of layoffs were necessary.

During the discussion of the agency, our mission, and our budget, a number of committee members put on the record positive comments about the agency as well as a request that funds and positions be restored if budget dollars allow for this in the future. We did receive permission

to return and request additional funds if basic police classes need to be added. The reductions, unfortunately, reflect the budget challenges the state is facing.

WELCOME NEW MEMBERS

The IADLEST is proud and privileged to add the following new members. These professionals complement our Association's already extensive wealth of talent and expertise. We welcome them to the IADLEST.

Richard Askew, Strategies for Youth, Pasadena, CA
Robert Moore, Dir., LE Academy Weatherford, TN
Nicole Hendrickson, TCLEOSE, Austin, TX

POST DIRECTOR CHANGES

TEXAS: The Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) swore in its fifth Executive Director during a ceremony held September 9, 2011. Kim Vickers was sworn in by Presiding Officer Charles Hall replacing Chief Timothy Braaten who served as the agency's Executive Director and Chief of Police since 2005. Prior to assuming his new role, Chief Vickers served as the agency's Director for Education and Credentialing Services and as a Field Agent for the West Texas region.

Chief Vickers began his law enforcement career with the Abilene Police Department in 1979 and continued to serve until his retirement in 2006. During his 26 years with the Abilene Police Department, he served in many capacities, such as training officer with oversight of the applicant selection process, School Resource Officer, Detective, Public Information Officer, and Commander of the Critical Missing Response Team. It was while he was the commander of the team, they gained nationwide attention when they handled and quickly solved the first Amber Alert stranger kidnapping case in Texas. He is recognized nationally as an expert instructor and consultant in the area of Family Violence dynamics and law. He has drafted several pieces of Texas family violence law, testified as an expert witness before the Texas legislature, and is currently a member of the Board of Directors for the National Council of Family Violence and National Domestic Violence Hotline.

Chief Vickers has 26 years of teaching and education experience including teaching a variety of courses for universities, academies, associations, and law enforcement departments across the state of Texas.

Chief Vickers has been married to his wife, Chrys, for 38 years and has two children and two grandchildren. His son, Eric, is a crimes against persons detective with the Abilene Police Department; and their daughter, Jennifer, is a medical doctor in New York City.

NATIONWIDE SUSPICIOUS ACTIVITY REPORT INITIATIVE (NSI)

*by: Thomas J. O'Reilly, Director, NSI,
U.S. Department of Homeland Security*

Overview: Every day, law enforcement officers at all levels of government-state, local, tribal, and federal observe suspicious behaviors or receive reports from concerned civilians, private security, and other government agencies about behaviors that could have a potential nexus to terrorism. Until recently, this information was generally stored at the local level and shared within the agency or, at the most, regionally shared-as part of an incident reporting system. The findings in the 9/11 Commission and the Markel Foundation reports clearly demonstrated the need for a nationwide capacity to share information that could detect, prevent, or deter a terrorist attack. The Intelligence Reform and Terrorism Prevention Act (IRPTA) of 2004, followed by 2007 National Strategy for Information Sharing, indicated both legislative and executive intent to establish locally controlled, distributed information systems wherein potential terrorism-related information could be contributed to by the 1,800 state, local, and tribal enforcement agencies across the country for analysis and to determine if there are emerging patterns or trends. Following this guidance, the Nationwide Suspicious Activity Reporting (SAR) Initiative (NSI) was developed. The NSI is a partnership that establishes a capacity of sharing terrorism-related suspicious activity reports (SAR) or

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IACP CHICAGO CONFERENCE

STOP BY IADLEST VENDOR MEMBER BOOTHS

Booth 446



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MEMBERSHIP

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Director Member is an agency membership available to the director or chief executive officer of any board, council, commission, or other policy-making body. This agency is established and empowered by state law and possesses sole statewide authority and responsibility for the development and implementation of minimum standards and/or training for law enforcement, and where appropriate, correctional personnel.

General Member is available to any professional employee of an agency represented by a director; any member of the board, council, commission, or other policy-making body of any state, to which a director is responsible; any professional employee of a criminal justice academy or training center at a national, state, or local level, or other persons actively involved in the training/education of law enforcement personnel; or individuals employed by or within any country other than the United States whose employment and responsibilities are deemed equivalent.

Sustaining Member is limited to any individual, partnership, foundation, corporation, or other entity involved with the development or training of law enforcement or other criminal justice personnel.

General and Sustaining members must have the sponsorship of a state director member upon application for membership.

RECRUIT A NEW MEMBER
SHARE IADLEST WITH A COLLEAGUE

We ask each IADLEST member to recruit other distinguished law enforcement professionals. If each member recruited one other member, we would double in size overnight! The more members we have, the greater influence we will have on law enforcement standards and training. There is no reason why we should keep the IADLEST organization our best-kept secret.

Why should you become a member?

You can:

- Belong to an international association of professional law enforcement training directors, managers, leaders, and educators.
- Exchange information and advice with other professionals.
- Participate in national conferences and keep abreast of state-of-the-art training and employment standards.
- Access the IADLEST POST-NET (Internet) national curriculum library.
- Use the IADLEST POST-NET (Internet) national training calendar to list your training programs.
- Access IADLEST research studies and training products, e.g., Emergency Driving Training Guide, Radar/LIDAR Training Manuals, *IADLEST Sourcebook*, etc.
- Provide input on national policies affecting law enforcement standards and training.

information sharing environment (ISE) SARS (ISE-SARs). As outlined in ISE-SAR Functional Standard vs. 1.5, “an ISE-SAR is a SAR that has been determined, pursuant to a two-part process, to have a potential terrorism nexus (i.e., to be reasonably indicative of criminal activity associated with terrorism).



**JIM BURCH NAMED OJP
DEPUTY ASSISTANT
ATTORNEY GENERAL**

BJA is pleased to announce that Assistant Attorney General Laurie O. Robinson has selected Jim Burch as Deputy Assistant Attorney General for Operations and Management for the Office of Justice Programs (OJP). Jim leaves a long and proud legacy behind him at BJA, and his strong leadership and passion for our mission have made BJA the extraordinary bureau it is today.

Jim has dedicated his professional career, which includes nearly 17 years at OJP, to bringing state, local, and tribal needs and understanding to the forefront of our efforts and, as a result, serving local justice and public safety in a more responsive and responsible manner. In his roles as Deputy Director for Policy and as Acting Director at BJA, Jim oversaw efforts designed to provide leadership in criminal justice policy, training, and technical assistance and to further the administration of justice. Jim's vision has made BJA an important force for the development and implementation of evidence-based criminal justice policy and has focused on our core grant-management responsibilities that have resulted in more responsible grant management and improved responsiveness to our grantees.

Jim's most notable accomplishments include leading BJA in its administration of over \$2 billion in Recovery Act funding, substantially increasing BJA's communications efforts, and expanding BJA's performance management

efforts, including the creation and launch of "GrantStat," a CompStat-like strategy to improve program performance and accountability. The relationships Jim has encouraged and fostered over the years continues to benefit all of us.

"Much of what BJA has accomplished in recent years is due to the vision and leadership of Jim Burch," said Denise O'Donnell, BJA's Director. "Although Jim's loss will leave a huge void at BJA, we are confident that his extraordinary abilities will benefit the entire OJP family."

Please join us here at BJA in congratulating Jim for his willingness to take on the challenges that await him as OJP's new Deputy Assistant Attorney General for Operations and Management. Jim will officially begin his new duties on September 6, 2011.



**Learn to train the science-based
“Fair and Impartial Policing Perspective”**

For more information on the
Fair and Impartial Policing Perspective
and the two train-the-trainer sessions
(in 11/2011 and 3/2012),
see the article in this newsletter and/or go to:

<http://bit.ly/qzM98H>

**COPS OFFICE SPONSORS
TRAIN-THE-TRAINER SESSIONS ON
“FAIR AND IMPARTIAL POLICING”**

*by: Lorie A. Fridell, Department of Criminology,
University of South Florida*

The “Fair and Impartial Policing” (FIP) perspective is based on the science of bias. Pursuant to this perspective, even the best law enforcement officers may manifest bias because they are *human*, and even the best agencies will have biased policing because they *hire humans* to do the work. The USDOJ COPS Office has

funded the development of two curriculums based on the FIP perspective: one for recruits and patrol officers and the other for first-line supervisors. Two 2.5-day TOT sessions are scheduled—one in Rhode Island in November and the other in Hutchinson, Kansas, in March—so that trainers from around the nation can learn to train in these two cutting edge curriculums.

The FIP Perspective: While some of the bias in policing is likely caused by intentional discrimination against people of color and other groups, the research points to another mechanism producing biased behavior. Social psychologists have shown that “implicit” or “unconscious” bias can impact what people perceive and do, even in people who consciously hold non-prejudiced attitudes. Implicit bias might lead the line officer to automatically perceive crime in the making when she observes two young Hispanic males driving in an all-Caucasian neighborhood or lead an officer to be “under-vigilant” with a female subject because he associates crime and violence with males. It may manifest among agency command staff who decide (without crime-relevant evidence) that the forthcoming gathering of African-American college students bodes trouble, whereas the forthcoming gathering of white undergraduates does not. While training cannot easily undo the implicit associations that took a lifetime to develop, the social psychologists have shown that, with information and motivation, people can implement controlled (unbiased) behavioral responses that override automatic (biased) associations. The implication is that law enforcement departments need to provide training that makes personnel aware of their unconscious biases so that they are able and motivated to activate controlled responses to counteract them.

In response to this training need, the COPS Office funded the University of South Florida and Circle Solutions, Inc., to develop the two curriculums. One of these programs helps academy recruits and patrol officers to:

- Understand that even well-intentioned people have biases;
- Understand how implicit biases impact on what we *perceive/see* and can (unless prevented) impact on what we *do*;

- Understand that fair and impartial policing leads to *effective policing*; and,
- Use tools that help him or her (1) recognize his or her conscious and implicit biases, and (2) implement “controlled” (unbiased) behavioral responses.

To reinforce this training and facilitate adherence to anti-biased policing policy, the second curriculum helps first-line supervisors promote fair and impartial policing. The training:

- helps supervisors identify subordinates who may be acting in a biased manner—including those well-meaning officers whose biased behavior may not be consciously produced;
- provides guidance to supervisors on how they should respond to officers who exhibit biased policing behaviors;
- challenges supervisors to think about how bias might manifest in their own behavior; and
- provides guidance on how to speak about bias to individuals (e.g., officers, individual community members) groups and news media.

These two curriculums are very different from the “standard” biased policing training programs and have been very well received around the country. For more information on the FIP perspective and the two curricula, visit the COPS Office web site (www.cops.usdoj.gov), and view a video interview of Dr. Lorie Fridell (April 2011, “Biased Policing”) under “Resources” and “Media Center.”

The TOT Program: The newly-designed *Fair and Impartial Policing TOT Program (FIPTOT)* allows teams of trainers (that can be comprised of both sworn and non-sworn personnel) from academies and other law enforcement training organizations, to learn to implement both the recruit/patrol officers’ and first-line supervisors’ curricula. The 2.5-day TOT sessions “walk” trainers through every aspect of the *Fair and Impartial Policing Training Program* and provide opportunities to “practice” teaching the modules of both curricula. At the conclusion of the *FIPTOT*, trainers will be able to implement these innovative new curricula for their local

academies and law enforcement training organizations.

Two *FIPTOT* sessions will be held:

- November 2-4, 2011: Providence, Rhode Island
- March 12-14, 2012: Hutchinson, Kansas

Each session is limited to 25 participants to maximize learning, and registration is on a first-come, first-serve basis.

Since the *FIPTOT* is being sponsored by the COPS Office, there is no registration fee for the 2.5 day training session. All training materials and trainer resources will be provided to participants. Participants (or their agencies) are responsible for their own travel arrangements and costs.

Visit <http://bit.ly/qzM98H> to register and for comprehensive information about the *FIPTOT*, including how to identify and select training teams, logistics for both sessions, the training agenda, and the training team.

EXECUTIVE COMMITTEE MEETING Nashville, Tennessee June 19, 2011

CALL TO ORDER: President Rusty Goodpaster (IN) called the meeting to order on June 19th at 2:10 pm.

ROLL CALL: Members Present: Goodpaster, Clark, Muldoon, Halvorson, Crews, Floyd, Flink, Melville, Damitio, Becar (Grants Manager), and Judge (Executive Director). Members Absent: Westfall and Silva.

INTRODUCTION OF GUESTS: Dr. James Ness from the **University of Phoenix** spoke about the importance of education in policing. He has been involved in criminal justice education for over 30 years. He stated that the University of Phoenix is focused on quality and is a trustworthy organization. Corey Meyers from **Envisage Technologies** introduced his company and reminded the

members that they are heavily involved in both NLEARN and NDI. They have software that can track training and education for POST agencies and law enforcement agencies alike. Envisage will be hosting a late afternoon reception tomorrow. Lonnie Wilder from **LETN** stated that the collaboration with FLETC and RPI is going very well. They have 13,000 course enrollments. They are updating to a new interactive instructional platform and are working on a pilot with a large agency to access the curriculum library.

APPROVAL OF MINUTES: MOTION by Clark to approve the Executive Committee Meeting Minutes (as corrected) from the January 6-7, 2011 meeting in Palm Desert, California. **SECOND** by Bill Flink. **MOTION CARRIED** with all in favor. **MOTION** by Dick Clark to approve the Executive Committee Meeting minutes (as corrected) from the April 8, 2011, Conference Call. **SECOND** by Crews. **MOTION CARRIED** with all in favor.

EXECUTIVE DIRECTOR BRIEFING: Pat Judge reported new **POST Directors** are being appointed in Alaska, New Mexico, Oklahoma, Texas, Vermont, Wisconsin, Wyoming, Pennsylvania, and Iowa. Judge asked for permission from the Executive Committee to solicit the membership for volunteers to help the **National Alliance for the Mentally Ill** evaluate their training and curriculum. The members had no objections. The new **POST Directory** has been published. In addition the membership directory has been updated to include organization by region. Contact Pat Judge for the updated list and email link. Becar and Judge attended a meeting on the **IADLEST Web Page** in Bloomington, Indiana. They learned how to make it more user-friendly, and the website will be able to include pay-pal in the near future. Judge recommended that we look into finding a web page manager in the future. **IADLEST inventory and equipment** is still being looked at. Some of the inventory and equipment discussed at the meeting in Palm

Desert will be given away, some sold for a fee, and some will be destroyed. IADLEST is looking for a buyer for the \$3,600 Honda Generator. We have verified that IADLEST owns all of the property in question.

Approximately 75% is obsolete and can be destroyed. Judge read a letter from **California POST** congratulating Dick Clark on becoming President of IADLEST. The **Audit Reports** will be put on the website behind the members' only section. Judge reported that his business trip to **Mexico** went well. He provided a summary of the meetings and what he learned about the Mexican government, the Mexican police, and their criminal justice system.

Upcoming Meetings: The next General Business Meeting for IADLEST will be in Chicago on October 21-22, 2011, in conjunction with the IACP meeting. Our IADLEST representative to the IACP is no longer with Oklahoma POST. IADLEST will need to find a new representative to that committee. The winter meeting will be in Washington, DC; January 19-20, 2012; in conjunction with the NSA mid-winter meeting. We will need a representative for the NSA education committee as well.

GRANTS MANAGER BRIEFING:

Grant Writing: Mike Becar informed the members that he is successfully managing the grants we have been awarded. He expressed concern about not having enough time to seek out more grant opportunities as the grant writing process is very time consuming. He suggested that we consider contracting with an experienced grant writer to ensure that IADLEST does not miss out on good opportunities. **MOTION** by Clark to allow Mike Becar to send out a request for proposal to provide grant writing services to IADLEST. **SECOND** by Melville. **MOTION CARRIED** with all in favor. **FLETC Request:** IADLEST has received a request from FLETC to have query access to NDI. **MOTION** by Crews to allow FLETC query access to NDI for FLETC related background investigations. **SECOND** by Flink. **MOTION CARRIED** with all in favor.

Becar reported that during Phase II of the **Pursuit Grant**, eleven train-the-trainers have been done and 813 workshops have been completed. The enforcement of motorcycle laws has training sessions scheduled this weekend in Pennsylvania and in Texas later this month. Future **SFST assessments** are planned for Louisiana, South Carolina, Colorado, Texas, Puerto Rico, Idaho, and Alaska. Funding has been increased for **DDACTS** by \$296,000. Chris Bruce has been hired as a technical assistant. Dave Salmon, a retired NY State Police Major has been hired as the **Traffic Safety Outreach and Support Officer** for NHTSA's traffic safety initiative. Every state is now represented on **NLEARN** which now has 1,253 members. There is approximately \$4,000 in remaining funds. The NHTSA Pursuit Policy Workshop grant is also providing funds. We have received a one year extension for **NDI**, and we are working on a model policy to help get contributions from more states. The present umbrella agreement with NHTSA expires this September. There is a **new umbrella agreement** being negotiated with seven new projects and an approximate value of \$7.5 million. Offered under this new agreement could be almost one million dollars for **DDACTS** continuation, \$163,000 for other traffic safety initiatives, \$200,000 for the enforcement of motorcycle laws, \$60,000 to continue with **NLEARN** and other distance learning projects, and funds to renew the Officer Leadership program with NHTSA.

IADLEST TREASURY: Rusty Goodpaster has taken over the duties of Treasurer in Penny Westfall's absence. Goodpaster handed out and explained the statement of assets and liabilities and the general account ledger. The 2009 audit of IADLEST's financial accounts has been completed. It is available on the members' only section of the website. The 2010 audit is underway with the same firm. Becar stated that all of the necessary ledger changes and recommendations from the 2009 auditors have been implemented. Some of the same problems will be present when the 2010 audit is complete as the

changes did not get implemented in time. The new procedures will have been in place for all of 2011. **MOTION** by Clark to approve the Treasurer's Report. **SECOND** by Crews. **MOTION CARRIED** with all in favor.

ADMINISTRATIVE REVIEW

Sourcebook: Goodpaster indicated that Tom Jurkanin has requested funds to reimburse his expenses for his student assistant fees for work on the Sourcebook project. **MOTION** by Clark to reimburse Jurkanin for expenses up to \$1,000. **SECOND** by Flink. **MOTION CARRIED** with all in favor. **HSIN:** The discussion with Rick Eaton on the Homeland Security Information Network was deferred until the Technology meeting. **Strategic Plan:** Dick Clark informed the members that it was his desire to convene a meeting (possibly in Denver) early this fall to solidify our strategic plan. He stated it is an important process that cannot get left behind. The members agreed that we need to meet face to face-to-work on this. **Nominations Committee:** Dick Clark reported that at this time, no members have come forward with interest in serving as the 2nd VP or Treasurer. **Membership Drive:** The Redden Group was on hand to provide a conference update. They also reported that 44 new members have signed up since the conference in Texas.

ADJOURNMENT: **MOTION** to Adjourn by Halvorson. **SECOND** by Melville. **MOTION CARRIED** with all in favor.

GENERAL BUSINESS MEETING **Nashville, Tennessee** **June 21-22, 2011**

CALL TO ORDER: President Rusty Goodpaster (IN) called the meeting to order on June 21st at 1:30 pm.

ROLL CALL: States Present: Alaska, Arizona, Florida, FLETA, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland,

Mississippi, Montana, Nebraska, Nevada, North Dakota, South Dakota, Tennessee, Texas, Utah, and West Virginia. Twenty member entities were present to allow for a quorum. **MOTION** by Clark to recess until the scheduled meeting time tomorrow. **SECOND** by Crews. Motion carried with all in favor. Meeting in recess at 1:40 pm. **Call to Order:** President Goodpaster called the meeting back to order on June 22nd at 10:30 am. Additional members present include Georgia, Oklahoma, and Washington.

APPROVAL OF MINUTES: **MOTION** by Taylor (LA) to approve the General Business Meeting Minutes from the October 23-24, 2010 meeting in Orlando, Florida. **SECOND** by Chuck Melville. **MOTION CARRIED** with all in favor.

EXECUTIVE DIRECTOR BRIEFING: Pat Judge reported new POST directors are being appointed in Alaska, New Mexico, Oklahoma, Texas, Vermont, Wisconsin, Wyoming, Pennsylvania, and Iowa. Judge asked for volunteers from the members to review training and curriculum information developed by the National Alliance for the Mentally Ill. Arizona, Idaho, and Maryland will assist with this. An email group is now available for each region. E-mail Pat Judge and he will forward the link. The IADLEST inventory and equipment is still being looked at. Some of the inventory and equipment discussed at the meeting in Palm Desert will be given away, some sold for a fee, and some will be destroyed. IADLEST is looking for a buyer for the \$3,600 Honda Generator. Judge reported that his business trip to Mexico City, Mexico, went well. The next General Business Meeting for IADLEST will be in Chicago on October 21-22, 2011.

GRANTS MANAGER BRIEFING: Mike Becar reported that during Phase II of the **Pursuit Grant**, eleven train-the-trainers have been done and 813 workshops have been completed. The enforcement of motorcycle laws has training sessions scheduled this weekend in Pennsylvania and

in Texas later this month. Future **SFST assessments** are planned for Louisiana, South Carolina, Colorado, Texas, Puerto Rico, Idaho, and Alaska. Funding has been increased for **DDACTS** by \$296,000. Chris Bruce has been hired as a technical assistant. Dave Salmon, a retired New York State Police Major, has been hired as the **Traffic Safety Outreach and Support Officer** for NHTSA's traffic safety initiative. Every state is now represented on **NLEARN** which now has 1,253 members. There is approximately \$4,000 in remaining funds. The NHTSA Pursuit Policy Workshop grant is also providing funds. We have received a one year extension for **NDI**, and we are working on a model policy to help get contributions from more states. The present umbrella agreement with NHTSA expires this September. There is a **new umbrella agreement** being negotiated with seven new projects and an approximate value of \$7.5 million. Offered under this new agreement could be almost \$1 million for **DDACTS** continuation, \$163,000 for other traffic safety initiatives, \$200,000 for the enforcement of motorcycle laws, \$60,000 to continue with **NLEARN** and other distance learning projects, and funds to renew the Officer Leadership program with NHTSA.

The 2009 audit of IADLEST's financial accounts has been completed. It is available on the members' only section of the website. The 2010 audit is underway with the same firm. Tax returns have been submitted and are on file.

IADLEST TREASURY: Rusty Goodpaster has taken over the duties of Treasurer in Penny Westfall's absence. Goodpaster handed out and explained the statement of assets and liabilities and the general account ledger. The financial accounts look good. The general account is stronger than it has been in many years. **MOTION** by Melville (KY) to approve the Treasurer's Report. **SECOND** by Vance (GA). **MOTION CARRIED** with all in favor.

ADMINISTRATIVE REVIEW

Future Meetings: Goodpaster informed the members that the 2012 annual conference will be in Savannah, Georgia, June 10-13, 2012, and the 2013 conference will be held in the state of Washington.

RPI: The members were informed of training opportunities through the Rural Policing Institute.

Nominating Committee: The nominating committee consisted of Mike Crews, Bill Muldoon, and Dick Clark. Clark informed the members that the nominating committee approves of Jon Bierne (SD) for consideration as the 2nd Vice President. Bierne gave a short speech to the members as to why he was interested in the position. Goodpaster called for nominations from the floor pursuant to IADLEST by-laws. Hearing none, **MOTION** by Halvorson that nominations cease. **SECOND** by Crews. **MOTION CARRIED** with all in favor. Clark informed the members that the nominating committee approves of Charles Melville (KY) for consideration as the IADLEST Treasurer. Melville gave a short speech to the members as to why he was interested in this position. Goodpaster called for nominations from the floor pursuant to the IADLEST by-laws. Hearing none, **MOTION** by DAMITIO that nominations cease. **SECOND** by Crews. **MOTION CARRIED** with all in favor. **MOTION** by Damitio to encourage the President to cast his vote for Bierne for 2nd VP and for Melville for Treasurer. **SECOND** by Crews. **MOTION CARRIED** with all in favor. With only one candidate nominated in each position, President Goodpaster cast his vote for Bierne for 2nd Vice President and Melville for Treasurer.

Sourcebook: The Sourcebook was last updated in 2005. Tom Jurkanin is working on the update and reported that he would be sending the online survey out to members within about two weeks. He estimated that it would take about two to three weeks to get the surveys back. The Executive Committee

approved \$1,000 in reimbursement to Jurkanin for his student assistant expenses. RDPC: Steve Otto presented information on the status of available training offered by the Rural Domestic Preparedness Consortium.

REGIONAL REPORTS: Northeast: Only Maine and Maryland were present for the meeting today. Tony Silva, the regional representative was absent. He was re-elected to the position. **Central:** Regional representative Charles Melville reported that only two states were present today. The region met in May, and three states were able to attend. Chuck Sadler was elected regional representative. **South:** Mike Crews reported that Bill Floyd (SC) hosted a regional meeting on June 8th with six states and FLETA present. Floyd was re-elected as the regional representative. **Midwest:** Mark Damitio reported that seven states and 24 members were in attendance at the regional meeting hosted in Kansas. There are seven states represented at the meeting today from the Midwest, and five of the nine new POST Directors are from the Midwest Region. Kim Vickers (TX) was elected as the new Regional Representative. **West:** Bill Flink was re-elected as the regional representative. The West Region hosted a regional meeting in Sparks, Nevada. Seven out of ten states were in attendance at the annual conference this week. A regional meeting is planned for the first or second week of December.

NEW BUSINESS: LETN: Lonnie Wilder spoke of the e-learning initiative and LETN collaboration with RPI. They have 5,000 seats to fill, and they expect to have them filled in the next few weeks. The training they provide is available to "rural agencies". This definition has been clarified and includes over 16,000 of the 18,500 agencies in the nation. The Video Library is now available. **IACP and NSA:** Dick Clark reported that the IADLEST has membership on committees through the IACP and the NSA. Those seats are currently vacant, and we are in need of members to take on this important responsibility. In order to sit on

these committees, the IADLEST member must also be a member of IACP and/or NSA. Please contact Dick Clark if you are interested. **Swearing In Ceremony:** All of the current officers and new officers in attendance were sworn in and took the oath of office. The oath was administered by a representative for the Tennessee POST Commission. Following the ceremony, Rusty Goodpaster was presented a token of appreciation for his hard work and dedication this past year.

ADJOURNMENT: MOTION to Adjourn by Taylor. **SECOND** by Melville. **MOTION CARRIED** with all in favor.

LEGAL ISSUES AND CASE LAW REVIEW

SIXTH CIRCUIT UPHOLDS CONSENT DESPITE PRIOR REFUSAL

by: *Brian S. Batterton, J.D.*

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On August 15, 2011, the Sixth Circuit Court of Appeals decided the *United States v. Bond*¹, which serves as an excellent review of various legal rules related to consent to search. The facts of Bond, taken directly from the case, are as follows:

Kentucky State Police Officers Slinker and Young were canvassing a string of hotels in an unmarked SUV while they assisted in a drug sting operation. As the officers left a hotel parking lot, they noticed a car behind them "driving erratically, going from side to side and tailgating." Because the officers did not want to jeopardize their active case, they pulled into a gas station to let the car pass. The car, however, followed them and drove up beside their SUV. Bond emerged from the driver's seat, gestured at the officers' car, and tried to peer into its tinted windows. When the officers did not respond, Bond got into his car

and sped off, again weaving between lanes.

Slinker and Young, suspicious of Bond's peculiar behavior, requested temporary leave from their detail to investigate. The officers stopped Bond's car and approached it. Young smelled marijuana and requested that Bond exit the vehicle. During a pat-down, Young found a small baggie of marijuana in Bond's pocket. The officers asked Bond for identification. He presented an ID bearing the name "Kevin L. Mays." They ran the ID and discovered that "Mays" lacked driving privileges. The officers then received Bond's permission to search his vehicle and called a nearby canine officer, Trooper Jason Denny, to perform the search. Denny's dog alerted on a duffel bag in the trunk, where officers found more marijuana fragments. Because the officers did not want to abandon their sting investigation, they did not plan to arrest Bond and repeatedly told him this. The officers nonetheless warned him that because his circumstances were suspicious, they might need to investigate further. They then offered to drive him home. Bond accepted the proposal and stated that he was residing at a nearby hotel.

When the group arrived at the hotel, Denny accompanied Bond to the lobby, where Bond requested his key card. Bond told the officers that he was staying in room 103, but the card did not work when he tried it in the door. Slinker walked with Bond back to the lobby, handed the receptionist Bond's ID, and asked for his room number. The receptionist explained that Bond was staying in room 102; Bond immediately balked that 102 was not his room. As the four men approached room 102, Bond maintained that the receptionist was mistaken. Slinker replied that he questioned Bond's honesty, and that if Bond refused to cooperate, he would "attempt to obtain a search warrant." At

that point, Bond exclaimed, "F-ck it!," grabbed the key card, and unlocked the door. On entering the room, officers saw a large bag of marijuana sitting in plain view; Bond admitted that the bag was his. He also explained that he had firearms hidden under the mattress. The police then arrested Bond.ⁱⁱ

Bond filed a motion to suppress the marijuana and firearms arguing that he never consented to a search of his motel room. The district court, while acknowledging that this was a "close case," held that Bond did consent, and none of the officer's actions invalidated his consent. Bond then pleaded guilty with a right to appeal.

Bond then appealed the denial of the motion to suppress to the Sixth Circuit Court of Appeals. The issues before the court were (1) whether Bond first consented when he unlocked his room and opened the door for the police and (2) whether the totality of the circumstances surrounding the alleged consent rendered the consent invalid.

Regarding the first issue as to whether Bond consented when he unlocked his room and opened the door for the police, the court first examined several rules applicable to consent. First, the court stated

When the government offers consent as justification for the warrantless search of a defendant's property, it must show that consent was voluntary—that it was unequivocal, specific, and intelligently given, uncontaminated by any duress and coercion. [W]hether a consent to a search was in fact 'voluntary' . . . is a question of fact to be determined from the totality of all the circumstances.ⁱⁱⁱ [internal citations and quotations omitted]

Second, the court noted several factors that are relevant to a determination of consent. The factors are

the age, intelligence, and education of the individual; whether the individual understands the right to refuse to

consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police.^{iv}
[internal quotations omitted]

Lastly, the court stated that

[T]he voluntariness of a defendant's consent must be examined within the overall context and psychological impact of the entire sequence of events.^v
[internal quotations omitted]

When considering facts of Bond's case in light of the above rules, the court noted that, although Bond originally attempted to hide his room number clearly indicating a lack of consent, after the police learned his correct room, Bond "snatched" the key and unlocked the door, exclaiming "F—k it!" The district court found that, in light of the officer's comment that they could go get a search warrant, Bond made a reasoned decision when he took the key, unlocked, and opened the door. After considering the facts, the rules and the district court's findings, the court of appeals stated

[A]lthough Bond initially tried to deceive the police, when he realized that his scheme would fail, he made a calculated decision to abandon the plan and consent to a search. The court's findings are thus not clearly erroneous.^{vi}

Thus, the court of appeals resolved the first issue by finding that Bond did consent to the search when he unlocked and opened the door for the police.

The court of appeals then sought to determine whether coercion or duress on the part of the officers invalidated the consent to search.

In support of his argument, Bond asserts that the fact that the police never told him that he had the right to refuse consent should work to invalidate the consent by rendering it involuntary. However, the court of appeals noted that, while whether the officers told

the defendant of the right to refuse consent is one factor to consider, this one factor, in and of itself, will not invalidate a consent to search.^{vii} The court of appeals stated

Although the officers' failure to warn Bond of his right to refuse a search does weigh in Bond's favor, its overall effect is not outcome determinative, especially in light of his own conflicting testimony.^{viii}

Next, Bond argued that by opening his door for police, he did not consent to their entry but rather "succumbed" to the officer's "persistent efforts to gain entry."^{ix} Specifically, Bond complains of the overwhelming police presence based on the fact that there were three officers present and two wore tactical body armor and BDU's. However, the court noted that there was no evidence that Bond was intimidated by these officers. Bond was described as "jovial, calm, and laughing" during the incident. Additionally, when officers drove him back to his motel, they clearly told him he was not under arrest; and he rode in the police car unrestrained and engaged in casual conversation with the officers. In fact, Bond only lost his composure at the hotel clerk when the clerk exposed his lie regarding his room number. Thus, the court held that the "overpowering police presence" did not appear to influence Bond in his decision to consent.

Lastly, Bond alleged that the officer's threat to obtain a search warrant coerced his consent. The court stated

In limited circumstances, an officer's threat to obtain a warrant if a defendant does not consent to a search can taint that defendant's consent—namely, when the threats are "baseless" or a pretext to coerce the defendant.^x

Here, the court of appeals stated that the officer's threat to obtain a search warrant was not baseless in light of the fact of their underlying investigation, Bond's evasive behavior, the empty duffel bag that smelled of marijuana, the shake present, and the smell of burnt marijuana in the car. As such, the court held the threat did not invalidate the consent.

Therefore, the court of appeals affirmed the denial of the motion to suppress and upheld the consent.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

ⁱ *United States v. Bond*, No. 10-5061, 2011 U.S. App. LEXIS 16882 (6th Cir. Decided August 15, 2011 Unpub.)

ⁱⁱ *Id.* at 1-4

ⁱⁱⁱ *Id.* at 5 (quoting *United States v. Williams*, 754 F.2d 672, 674-75 (6th Cir. 1985) and *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973))

^{iv} *Id.* at 5-6 (quoting *United States v. Worley*, 193 F.3d 380, 386 (6th Cir. 1999))

^v *Id.* at 6 (quoting *United States v. Jones*, 846 F.2d 358, 361 (6th Cir. 1988))

^{vi} *Id.* at 8

^{vii} *Id.* (citing *Schneckloth*, 412 U.S. at 227)

^{viii} *Id.* at 9

^{ix} *Id.*

^x *Id.* at 11 (citing *United States v. Salvo*, 133 F.3d 943, 954 (6th Cir. 1998); *United States v. Blanco*, 844 F.2d 344, 351 (6th Cir. 1988))

OFFICER MISTAKES FIREARM FOR TASER 9TH CIRCUIT DENIES QUALIFIED IMMUNITY

By Brian S. Batterton, Attorney

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Torres v. City of Madera et al., No. 09-16573,
2011 U.S. App. LEXIS 17459 (9th Cir. Decided
August 22, 2011)

On October 27, 2002, officers of the City of Madera (CA) Police Department arrested Everardo Torres. While he was seated handcuffed in the backseat of a patrol car, he began yelling and kicking at the rear door window. Officers standing at the rear of the police car in which Torres was located discussed that someone should tase Torres because he would injure himself if he managed to kick out the glass on the car window.

One of the officers walked to the rear of the police car, opened the door with her left hand and mistakenly drew her department issued Glock handgun, rather than her Taser. She aimed center mass on Torres using the weapons laser site and fired one shot, killing Torres. The officer asserted (the plaintiff did not dispute this assertion) that she in fact intended to draw her Taser which was located in a leg holster, on her dominant side, below the holster for her firearm. She had intended to use the Taser in the dart mode rather than drive-stun mode.

Also relevant to the case was the fact that the officer had been issued her Taser slightly less than one year before this incident and she attended a three hour training class. The officer carried the Taser in the department issued holster on her dominant or weapons side. Shortly after being issued the Taser, she had mistakenly drawn her firearm, rather than her Taser, on two other occasions. Both times, she reported the mistake to her sergeant, whose advice was to keep practicing drawing her Taser. The officer did practice daily and had no mistakes in the nine months preceding the incident with Torres. Torres' family sued the

unreasonable seizure, particularly excessive force. The district court granted the officer's motion for summary judgment finding that the *Fourth Amendment* was not applicable since this was a mistaken use of force. The Ninth Circuit Court of Appeals reversed the district court holding that the Ninth Circuit follows the "continuing seizure" doctrine which states that once a seizure has occurred, such as Torres' arrest, the *Fourth Amendment* implications continue throughout the time that the arrestee is in the custody of the arresting officers.ⁱ

The case was remanded back to the district court for further review in light of the "continuing seizure" doctrine. The district court found that the officer's mistaken use of the Taser was reasonable and granted qualified immunity because it would not have been clear to a reasonable officer at the time of the seizure that a mistaken use of force violated the *Fourth Amendment*. Torres' family again appealed to the Ninth Circuit Court of Appeals.

First, the Ninth Circuit stated

Where an officer's particular use of force is based on a mistake of fact, we ask whether a reasonable officer would have or should have accurately perceived that fact.ⁱⁱ

The court also noted that, when reviewing an officer's use of force against a suspect, the court must

[Stand] in the shoes of the "reasonable officer," [and] ask whether the severity of force applied was balanced by the need for such force considering the totality of the circumstances, including (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.ⁱⁱⁱ

In light of the rules above, the issue before the court was whether the officer's conduct in mistakenly applying deadly force to Torres was

objectively reasonable under the totality of the circumstances.^{iv}

In its analysis of the case the court of appeals stated

[I]f [the officer] knew or should have known that the weapon she held was a Glock rather than a Taser, and thus had been aware that she was about to discharge deadly force on an unarmed, non-fleeing arrestee who did not pose a significant threat of death or serious physical injury to others, then her application of that force was unreasonable. See *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). That she intended to apply lesser force is of no consequence to our inquiry, for objective reasonableness must be determined "without regard to [the officer's] underlying intent or motivation." *Graham*, 490 U.S. at 397. Just as "[a]n officer's evil intentions will not make a *Fourth Amendment* violation out of an objectively reasonable use of force[,] nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* (citing *Scott v. United States*, 436 U.S. 128, 138 (1978)).^v

The court then identified five factors that they must consider when determining whether the officer should have known that she was holding the wrong weapon. The factors are

(1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that [s]he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.^{vi}

When applying the factors above to the facts of the case, the court first noted that the officer did perform inconsistent with her practice with the Taser. Second, the court noted that the officer articulated that she was more concerned with the danger Torres posed to himself by being cut by glass than danger to the officer or to others. Lastly, there was no evidence that the officer perceived that she was in danger and had to act hastily. Additionally, the court noted that the officer's previous two experiences in weapons confusion should have alerted the officer to the risks in this situation.

Another factor noted by the court was that it did not intend to distinguish between the officer's informal daily practice and more "formal" type training; thus, the court of appeals apparently gives weight to each type of training. The court stated

[The officer's] daily practice drawing the two weapons was conducted pursuant to Sergeant Lawson's instructions; and, as the Torres family argues, the definition of "training" does not necessarily require supervision and can include "the skill, knowledge, or experience acquired by . . . instruction, discipline, or drill." *Merriam Webster's Collegiate Dictionary 1326 (11th ed. 2004)*. Accordingly, a reasonable jury could conclude from the totality of this evidence that [the officer] had trained for nine months specifically to prevent incidents of weapon confusion like this from happening, that she did not act in accordance with what she had practiced on the evening of Everardo's shooting, and that had she done so, Everardo's death could have been avoided.^{vii}

Additionally, the court considered that since the officer did not articulate a concern for her safety or the safety of anyone other than the suspect (Everardo Torres), this may not be the type of "tense, rapidly evolving" circumstance contemplated by *Graham v. Connor*. Further, the court found that a reasonable jury could find, based on the facts that the officer acted with undue haste. Lastly, the court noted that, while

the officer's mistake was an honest mistake, with no ill will toward Torres, the *Fourth Amendment* is only concerned that the officer acted "reasonably" and is not concerned whether the officer acted with "good faith" or "bad faith."

In light of the rationale discussed above, the court of appeals found that sufficient facts existed to allow a reasonable jury to conclude that the officer's mistaken belief was not reasonable. As such, summary judgment is not appropriate.

The court of appeals next examined whether the officer was still entitled to qualified immunity. The officer would be entitled to qualified immunity if the unconstitutionality of her conduct was not "clearly established" on the date of the incident. The court stated

The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.^{viii}

The court then stated that in Torres' case

[H]ad [the officer] realized that she was pointing a Glock at Everardo's chest, she could not have been reasonably mistaken as to the legality of [her] actions. *Jensen and Wilkins* adequately put [the officer] on notice that an unreasonable mistake in the use of deadly force against an unarmed, non-dangerous suspect violates the Fourth

Amendment.^{ix} [internal citations and quotations omitted]

As such, the Ninth Circuit held that qualified immunity was not appropriate and reversed the decision of the district court.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

ⁱ *Torres v. City of Madera et al.*, No. 09-16573, 2011 U.S. App. LEXIS 17459 (9th Cir. Decided August 22, 2011) at fn 8 (citing *Robins v.*

ⁱⁱ *Id.* at 10 (citing *Jensen v. City of Oxnard*, 145 F.3d 1078, 1086 (9th Cir. 1998) (mistaken shooting of fellow police officer was unreasonable if it occurred in conditions in which the officer should have been able to recognize the figure before him))

ⁱⁱⁱ *Id.* at 12 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989))

^{iv} *Id.* at 12

^v *Id.* at 13

^{vi} *Id.* at 14 ((citing *Henry v. Purnell*, 501 F.3d 373, 383 (4th Cir. 2007))

^{vii} *Id.* at 17

^{viii} *Id.* at 21-22

^{ix} *Id.* at 27 (citing *Wilkins v. City of Oakland*, 350 F.3d 949 (9th Cir. 2003) and *Jenson v. City of Oxnard*, 145 F.3d 1078 (9th Cir. 1998))

FIRST CIRCUIT DENIES QUALIFIED IMMUNITY FOR OFFICERS FOR ARREST OF CITIZEN VIDEO TAPING AN ARREST

by: Brian S. Batterton, J.D.

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The popularity of various social media websites as well as the seemingly infinite number of news media websites, combined with the fact that virtually every cellular phone is also a video recorder, has made it quite common for private citizens to video record police officers in action, particularly those making arrests. This trend has led to litigation against police for seizing such video recordings and arresting the citizen making the video recording. Therefore, officers facing this type of situation must be mindful that the *First Amendment* to the United States Constitution provides significant protection of this type of activity.

Recently, the First Circuit Court of Appeals decided *Glik v. City of Boston et al.*,ⁱ which serves as an excellent review of the law regarding a citizen's right to video tape the police. The facts of *Glik* taken directly from the case are as follows:

As [Glik] was walking past the Boston Commons on the evening of October 1, 2007, [he] caught sight of three police officers -- the individual defendants here -- arresting a young man. Glik heard another bystander say something to the effect of, "You are hurting him. Stop." Concerned that the officers were employing excessive force to effect the arrest, Glik stopped roughly ten feet away and began recording video footage of the arrest on his cell phone.

After placing the suspect in handcuffs, one of the officers turned to Glik and said, "I think you have taken enough pictures." Glik replied, "I am recording this. I saw you punch him." An officer then approached Glik and asked if Glik's cell phone recorded audio. When Glik affirmed that he was recording audio,

the officer placed him in handcuffs, arresting him for, inter alia, unlawful audio recording in violation of Massachusetts' wiretap statute. Glik was taken to the South Boston police station. In the course of booking, the police confiscated Glik's cell phone and a computer flash drive and held them as evidence.

Glik was eventually charged with violation of the wiretap statute, *Mass. Gen. Laws ch. 272, § 99(C)(1)*, disturbing the peace, *id. ch. 272, § 53(b)*, and aiding in the escape of a prisoner, *id. ch. 268, § 17*. Acknowledging lack of probable cause for the last of these charges, the Commonwealth voluntarily dismissed the count of aiding in the escape of a prisoner. In February 2008, in response to Glik's motion to dismiss, the Boston Municipal Court disposed of the remaining two charges for disturbance of the peace and violation of the wiretap statute. With regard to the former, the court noted that the fact that the "officers were unhappy they were being recorded during an arrest . . . does not make a lawful exercise of a *First Amendment* right a crime." Likewise, the court found no probable cause supporting the wiretap charge, because the law requires a secret recording and the officers admitted that Glik had used his cell phone openly and in plain view to obtain the video and audio recording.

Glik filed an internal affairs complaint with the Boston Police Department following his arrest, but to no avail. The Department did not investigate his complaint or initiate disciplinary action against the arresting officers. In February 2010, Glik filed a civil rights action against the officers and the City of Boston in the United States District Court for the District of Massachusetts. The complaint included claims under 42 U.S.C. § 1983 for violations of Glik's *First and Fourth Amendment* rights, as well as state-law claims under the

Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11I, and for malicious prosecution.ⁱⁱ

The defendant officers in this case filed a motion to dismiss Glik's lawsuit based on qualified immunity. The district court denied the motion holding that Glik's rights were clearly established at the time of his arrest. The defendant officers appealed their denial of qualified immunity to the First Circuit Court of Appeals.

On appeal, the First Circuit had to decide first whether the officers, in arresting Glik for video recording their activity, violated the *First and Fourth Amendments*. If so, the court then had to decide whether the right was clearly established such that a reasonable officer should have known that he or she was violating the constitution. If the court decides that the officers did not violate a constitutional right, then the officers are entitled to summary judgment. If the court decides that the officers violated Glik's constitutional rights, but also decides that those rights were not clearly established such that a reasonable officer would have recognized (or had fair warning of) the unlawfulness of the conduct, then the officers are entitled to qualified immunity from suit. However, if the court decides that the officers violated Glik's constitutional rights and the rights were clearly established such that a reasonable officer should have known his conduct was unlawful, then the officers are not entitled to qualified immunity and the suit can proceed.

The first issue the court set out to answer was whether the officers violated Glik's *First Amendment* rights when they arrested him for video recording them making an arrest of a third party. The court first examined general *First Amendment* principles and stated

[T]he *First Amendment* goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783, (1978); see

also *Stanley v. Georgia*, 394 U.S. 557, 564, (1969) ("It is . . . well established that the Constitution protects the right to receive information and ideas."). An important corollary to this interest in protecting the stock of public information is that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11, (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681-82, (1972)).ⁱⁱⁱ

The court also looked at a case similar to Glik's case from the First Circuit. Particularly, the court discussed *Iacobucci v. Boulter*^{iv} and noted that, in this case

[A] local journalist brought a § 1983 claim arising from his arrest in the course of filming officials in the hallway outside a public meeting of a historic district commission. The commissioners had objected to the plaintiff's filming. When the plaintiff refused to desist, a police officer on the scene arrested him for disorderly conduct. The charges were later dismissed. *Id.* Although the plaintiff's subsequent § 1983 suit against the arresting police officer was grounded largely in the *Fourth Amendment* and did not include a *First Amendment* claim, we explicitly noted, in rejecting the officer's appeal from a denial of qualified immunity, that because the plaintiff's journalistic activities "were peaceful, not performed in derogation of any law, and done in the exercise of his *First Amendment* rights, [the officer] lacked the authority to stop them."^v [internal citations omitted]

Further, in *Glik*, the First Circuit noted that they do not consider it significant that Glik was a private citizen and *Iacobucci* involved a member of the news media, as both are afforded the same *First Amendment* rights in this type of situation.^{vi} Additionally, the First Circuit recognized that there was similar precedent from the 7th, 9th and 11th Circuits as well as various district courts.^{vii}

While the First Circuit did state that the right to film is not without limitation in that it is subject, in certain circumstances, to reasonable time, place, and manner restrictions, the court did not expound on the circumstance where it would be permissible, as they limited their inquiry to the facts of the case at hand.^{viii} However, the court articulated the rule regarding video recording police under circumstances similar to *Glik* as follows:

The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal *First Amendment* interest in protecting and promoting "the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218, (1966).^{ix}

Additionally, the court stated

[T]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. The same restraint demanded of law enforcement officers in the face of "provocative and challenging" speech, must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.^x [internal citations and quotations omitted]

In light of the above rules, the court held that the officers did violate Glik's *First Amendment* rights in this case.

Although the court determined the officers violated Glik's *First Amendment* rights, the officers may still be entitled to qualified immunity, if the law in this area was not clearly established. As such, the court then had to decide whether Glik's *First Amendment* rights in this case were clearly established such that the officers in this case had fair warning that their conduct was unconstitutional. The court held

that their previous holding in *Jacobucci* was sufficient to give the officers fair warning in this case.

The First Circuit then summarized its holding as follows:

[T]hough not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the *First Amendment*. Accordingly, we hold that the district court did not err in denying qualified immunity to the appellants on Glik's *First Amendment* claim.^{xi}

The second issue the court had to decide in this case was whether the officers violated Glik's *Fourth Amendment* rights when they arrested him for the various Massachusetts law violations. It is well known that arrests must be supported by probable cause and arrests without probable cause violate the *Fourth Amendment*.^{xii}

In *Glik*, the plaintiff argued that he was arrested without probable cause and the defendant officers argue that they had probable cause to arrest Glik for a violation of the Massachusetts wiretap statute. As such, this issue required the First Circuit to examine the Massachusetts wiretap statute and Massachusetts Supreme Judicial Court precedent regarding this statute.

In examining the statute, the First Circuit noted that the statute requires that the violator "secretly" video record the officers. In this case, Glik openly held his phone and video recorded the officers: in fact, the officers observed him and asked him if he was also audio recording them. Further, the criminal complaint against Glik states that he "openly recorded the police officers" with his cellular phone.^{xiii}

In light of the facts of *Glik* and court precedent^{xiv} regarding the statute at issue, the First Circuit held

We thus conclude, on the facts of the complaint, that Glik's recording was not "secret" within the meaning of

Massachusetts's wiretap statute, and therefore the officers lacked probable cause to arrest him. Accordingly, the complaint makes out a violation of Glik's *Fourth Amendment* rights.^{xv}

Although the court determined the officers violated Glik's *Fourth Amendment* rights, the officers may still be entitled to qualified immunity, if the law in this area was not clearly established. Thus, the court next had to determine whether Glik's *Fourth Amendment* right to be free from arrest for this statute was clearly established at the time of his arrest such that a reasonable officer would have known that he or she would violate the *Fourth Amendment* in arresting Glik for a violation of the wiretap statute. If the law was not clearly established, then officers are entitled to qualified immunity on the *Fourth Amendment* claim.

Regarding this qualified immunity analysis, the court noted that officers do not even need full probable cause in order to receive qualified immunity for an unlawful arrest claim under the *Fourth Amendment*. Rather, "officers are entitled to qualified immunity so long as the presence of probable cause is *at least arguable*."^{xvi} However, the First Circuit held that under the facts of this case, the officer did not even have "arguable probable cause" to believe that Glik violated the wiretap statute by his conduct in this case.

As such, the First Circuit Court of Appeals affirmed the decision of the district court in denying qualified immunity for the defendant officers on the *First and Fourth Amendment* claims.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

ⁱ No. 10-1764, 2011 U.S. App. LEXIS 17841 (1st Cir. Decided August 26, 2011)

ⁱⁱ *Id.* at 2-5

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- iii *Id.* at 10
- iv 193 F.3d 14 (1st Cir. 1999)
- v *Id.* at 12-13
- vi *Id.* at 15
- vii *Id.* at 13-14 (citing “See, e.g., *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The *First Amendment* protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a “*First Amendment* right to film matters of public interest”); *Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (finding it “highly probable” that filming of a public official on the street outside his home by contributors to public access cable show was protected by the *First Amendment*, and noting that, “[a]t base, plaintiffs had a constitutionally protected right to record matters of public interest”); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (holding that police interference with television newsman’s filming of crime scene and seizure of video camera constituted unlawful prior restraint under *First Amendment*); cf. *Schnell v. City of Chi.*, 407 F.2d 1084, 1085 (7th Cir. 1969) (reversing dismissal for failure to state a claim of suit claiming police interference with news reporters’ and photographers’ “constitutional right to gather and report news, and to photograph news events” under the *First Amendment* (internal quotation mark omitted)), overruled on other grounds by *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973); *Connell v. Town of Hudson*, 733 F. Supp. 465, 471-72 (D.N.H. 1990) (denying qualified immunity from *First Amendment* claim to police chief who prevented freelance photographer from taking pictures of car accident).”
- viii *Glik* at 16 (citing *Smith*, 212 F.3d at 1333)
- ix *Id.* at 10-11
- x *Id.* at 17
- xi *Id.* at 20
- xii *Id.* at 21
- xiii *Id.* at 26
- xiv See *Commonwealth v. Hyde*, 434 Mass. 594, 750 N.E.2d 963 (Mass. 2001)
- xv *Id.* at 29
- xvi *Id.*

DOES PUBLIC FIREARMS POSSESSION JUSTIFY A TERRY STOP?

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Questions often arise as to whether the mere possession of a firearm in public, absent some other illegal conduct, legally justifies a brief investigatory detention or *Terry* stop. This is not an easy question to answer because each state is free to interpret their firearms possession and firearms permit laws as they wish. Typically, if a state views a firearms permit as an affirmative defense to the state statute that prohibits unlawful possession of a firearm or concealed weapons, then the fact that a person possesses a firearm in public is likely to amount to sufficient reasonable suspicion to justify a brief investigatory detention to determine if the person possesses a firearms permit. On the other hand, if a state views the absence of a permit as an element of the crime of unlawful possession of a firearm or concealed weapon, then questions arise as to whether mere possession of a firearm, without some other articulable manifestations of criminal conduct, will justify an investigatory detention.

Recently, the Eleventh Circuit Court of Appeals decided the *United States v. Montague*¹, which illustrates the principles above. In this case, officers in Florida received information from a local security guard (who was known to provide reliable information) that Montague was carrying a concealed firearm. The officers located Montague and conducted a *Terry* stop and frisk based on the security guard’s information. They located a firearm and ammunition.

Montague was arrested and ultimately charged with firearms violations under federal law. He filed a motion to suppress the gun and ammunition and argued that mere possession of a firearm in public did not provide the officers with sufficient reasonable suspicion to justify a *Terry* stop because it was legal to carry such a weapon with a permit and the officers did not know if he possessed a permit prior to detaining and frisking him. The district court denied the

motion to suppress and Montague was convicted. He appealed to the Eleventh Circuit Court of Appeals.

The issue before the court of appeals was whether the *Terry* stop and frisk of Montague was reasonable under the *Fourth Amendment*, in light of Florida's firearms possession laws.

The court of appeals first noted several rules that apply to this case. First, they noted

The *Fourth Amendment*, however, does not prohibit a police officer from seizing a suspect for a brief, investigatory stop where the officer has a reasonable suspicion that the suspect was involved in, or is about to be involved in, criminal activity.ⁱⁱ

Second, the court clarified that

[R]easonable suspicion is a less demanding standard than probable cause, but requires at least a minimal level of objective justification for making the stop in light of the totality of the circumstances.ⁱⁱⁱ [internal quotations omitted]

Lastly, the court stated

In connection with a *Terry* stop, a police officer who has reason to believe that he is dealing with an armed and dangerous individual may also conduct a reasonable search for weapons in support of his own protection and that of others, even if he is not absolutely certain that the individual is armed. An officer may conduct a *Terry* pat-down search for weapons on a suspect's person if the requisite reasonable suspicion is present, and that search may continue when an officer feels a concealed object that he reasonably believes may be a weapon.^{iv} [internal citations omitted]

Thus, when considering the above rules, the court must resolve whether the officers initially had sufficient reasonable suspicion of criminal activity, particularly the State of Florida's concealed weapons statute, to justify the initial

Terry stop and frisk. The court of appeals noted that Florida's concealed weapons statute states

A person who carries a concealed firearm on or about his or her person commits a felony of the third degree.^v

However, this same statute, in subsection (3) provides that the prohibition above does not apply "to a person licensed to carry...a concealed firearm pursuant to the provision of section 790.06."^{vi} Section 790.06 provides that the concealed firearm permit must be carried at all times while carrying a concealed firearm and the permit must be displayed upon the demand of a law enforcement officer.

The court of appeals then looked at how the Florida appellate courts interpret the above statutes. Montague cited *Regalado v. State*,^{vii} a Florida Fourth District Court of Appeals case. *Regalado* held

Because it is legal to carry a concealed weapon in Florida, if one has a permit to do so, and no information of suspicious criminal activity was provided to the officer other than appellant's possession of a gun, the mere possession of a weapon, without more, cannot justify a *Terry* stop.^{viii}

The prosecution cited first to the *State v. Navarro*^{ix} and stated

The en banc Florida Third District Court of Appeals, while not explicitly addressing the possibility of a concealed weapons permit, found that probable cause existed to pat down and search a defendant where the officer observed the bulge of what appeared to be a concealed firearm protruding from the defendant's jacket. The court adopted the dissenting opinion from the panel decision, holding that the "officer's observation of the outline of a firearm amounted to probable cause to believe that [the defendant] was carrying a concealed weapon..."^x

Further, the Eleventh Circuit noted that, in *State v. Burgos*^{xi}, the Florida Fifth District Court of Appeals held

[T]hat a suspect's admission that he was carrying a weapon supported a reasonable suspicion that he was committing a crime because [a]lthough some citizens do have the right to carry concealed firearms lawfully, the vast majority do not.^{xii} [internal quotations omitted]

After the Eleventh Circuit Court of Appeals examined the above cases from the Florida Third, Fourth, and Fifth District Courts of Appeals, they noted that the incident in *Montague* took place in the Third District. Further, in Florida,

[I]n the absence of interdistrict conflict, district court decisions bind all Florida trial courts unless and until they are overruled by the Florida Supreme Court. [I]f the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive.^{xiii}

Thus, since the incident in *Montague* took place in the Third District, the Eleventh Circuit must follow the precedent from that District. The other cases are considered "persuasive" but are not binding on the Third District.

As such, the Eleventh Circuit Court of Appeals held

Under the facts of this case, the officers did not need to ascertain whether *Montague* had a permit before they conducted a *Terry* stop and search because they had reasonable suspicion that he was carrying a concealed weapon based on a reliable informant's tip that *Montague* was carrying a gun.^{xiv}

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or

legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

ⁱ No. 10-15693, 2011 U.S. App. LEXIS 16983 (11th Cir. Decided August 15, 2011 Unpub.)

ⁱⁱ *Id.* at 2-3 (citing *Terry v. Ohio*, 392 U.S. 1 (1968))

ⁱⁱⁱ *Id.* at 3 (quoting *State v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011))

^{iv} *Id.* (citing *Terry*, 392 U.S. at 27; *United States v. Clay*, 483 F.3d 739, 743-44 (11th Cir. 2007))

^v *Id.* at 4 (quoting *Fla. Stat. § 790.01 (2) (2006)*)

^{vi} *Id.* (quoting *Fla. Stat. § 790.01 (3) (2006)*)

^{vii} 25 So. 3d 600 (*Fla.* 4th DCA 2009)

^{viii} *Id.* at 5 (citing *Regalado*, 25 So.3d at 601)

^{ix} 464 So.2d 137, 139-40 (*Fla.* 3rd DCA 1985)

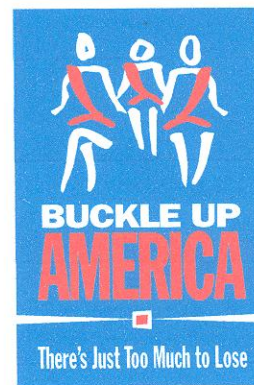
^x *Id.* at 5-6 (citing *Navarro*, 464 So.2d at 139)(see also fn 3 – "The wording of *Fla. Stat. § 790.01* was different at the time *Navarro* was decided: but, like the current statute, it provided that a person carrying a concealed firearm was guilty of a felony in the third degree and separately stated that this provision did not apply to individuals with a license to carry concealed firearms.")

^{xi} 994 So.2d 1212 (*Fla.* 5th DCA 2008)

^{xii} *Id.* at 6 (citing *Burgos*, 994 So.2d at 1214)

^{xiii} *Id.* at 6-7 (quoting *Pardo v. State*, 596 So.2d 665, 666 (*Fla.* 1992))

^{xiv} *Id.* at 7



**SIXTH CIRCUIT CLARIFIES
THIRD PARTY CONSENT RULE FROM
GEORGIA V. RANDOLPH**

by: Brian S. Batterton, Attorney

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On August 29, 2011, the Sixth Circuit Court of Appeals decided the *United States v. Lanerrick Johnson*,ⁱ which serves as an excellent review of consent rules as they apply to a person's refusal to consent to a search of a mutual residence. The facts of Johnson taken directly from the case are as follows:

On October 30, 2007, four law enforcement officers conducted a "knock and talk" at 220 Benefield Avenue ("the residence") in Smyrna, Tennessee. They went to the residence to investigate a tip that they received from an anonymous caller indicating that residents at the address possessed marijuana and a firearm. At the time of the knock and talk, the home was owned by Angela Rawls, who is the Defendant's mother-in-law. Rawls lived in the home with her mother, Maudie Conerly, and her daughter, Karen Johnson (the Defendant's wife) ("Karen"), along with several children. *Although the Defendant and Karen had been separated for some time, he had been staying with her intermittently at the residence since May 2007. [emphasis added]*

When the officers knocked, Conerly answered the door. The officers explained the purpose of their visit and told her that they would like to search the house. When they asked who else was home, Conerly said that Karen was in the back bedroom with her husband (the Defendant), and that Rawls was sick in her bed. Karen and the Defendant emerged from the bedroom and came into the living room. The police asked who lived at the residence, and it is undisputed that Conerly and

Karen indicated that they lived there. The Defendant's response is disputed.

According to the Defendant, he told the police that he, too, lived at the residence. He further claims that he expressly objected to a search. The police officers testified that the Defendant stated that he did not live at the residence, but that he "came and went" freely to visit his children. They further testified that he did not object to a search. Two of the officers took Conerly and Karen outside and obtained formal consent forms from them authorizing a search of the home. The Defendant claims that he again objected to the search when everyone came back inside. The police maintain that he never objected.

Before the police started their search, Karen voluntarily turned over a small amount of marijuana from her dresser drawer. Detective Weaver then began to search the bedroom that Karen shared with the Defendant. In the bedroom, Weaver found a handgun, counterfeit money, 100 grams of marijuana, digital scales, computer equipment, and some media storage devices, all of which belonged to the Defendant.ⁱⁱ

Johnson was subsequently indicted for various federal criminal violations, and he filed a motion to suppress. The district court found that Johnson did tell the police that he lived at the residence (at least part-time) and did refuse consent; however, the district court denied the motion to suppress based on the opinion that Johnson, as a part-time resident had a lesser privacy interest than the full-time residents that did consent to search. Johnson pleaded guilty with a right to appeal. He then appealed the denial of his motion to suppress to the Sixth Circuit Court of Appeals.

The issue before the court of appeals was *whether Johnson's refusal to consent to a search of his part-time residence prevented the state from using evidence obtained during the consent*

search that was conducted based on consent of two full-time resident's of the premises.

The Sixth Circuit began by noting that consent is one of the exceptions to the search warrant requirement and, based on the United States Supreme Court holding in *Georgia v. Randolph*,ⁱⁱⁱ stated

One such exception is voluntary consent from an individual possessing authority. That person may be the one against whom evidence is sought, or it may be a co-occupant who shares common authority over the premises. [T]he exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant. **However, in situations where one co-tenant consents to a search but another, physically present co-tenant expressly refuses consent, a warrantless search is not reasonable as to the objecting co-tenant.**^{iv} [internal citations and quotations omitted] [emphasis added]

As a review, in *Georgia v. Randolph*, a husband and a wife were in a domestic dispute regarding child custody matters. The police responded and, based on statements the wife made about her husband's drug use, the police asked both for consent to search the house. The wife granted consent and the husband refused. The house was searched and evidence of illegal drugs was found. The police then obtained a search warrant based on the evidence that was located during the consent search. Ultimately, the case was heard by the United States Supreme Court which held that where one co-tenant consents to a search and another physically present co-tenant refuses consent, any evidence found if the search is conducted is not admissible against the co-tenant that refused consent. As such, the evidence in *Randolph* must be suppressed.

The Sixth Circuit then noted that there is no precedent that addresses the issue of whether *Randolph's* holding requires residential co-

tenants to have *equal* possessory interests in order to be binding or applicable. To the contrary, the court noted that the Supreme Court never attempted to distinguish among the "multiplicity of living arrangements," as did the district court in the case at issue.^v First, to support this contention, the Sixth Circuit observed that the Supreme Court noted that its holding in *Randolph* applies to all "residential co-occupancies" in spite of the fact that this might cover a "multiplicity of living arrangements."^{vi} Second, in *Randolph*, the Supreme Court stated

Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior.^{vii}

Lastly, in *Randolph*, the Supreme Court, relying on *Fourth Amendment* jurisprudence, stated that

[T]hird-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes."^{viii}

The Sixth Circuit, finding that Johnson did have a reasonable expectation of privacy at the residence, held that the evidence obtained in spite of his objection must be suppressed. Specifically, the court stated

Randolph does not distinguish among the multiplicity of living arrangements, and this particular arrangement of adult co-occupants—a grandmother-in-law, mother-in-law, wife, and husband—does not fall within any "recognized hierarchy", Johnson's express objection to the search was sufficient to render the search of the bedroom unreasonable as to him, notwithstanding the consent given by Karen and Conerly.^{ix} [internal citations and quotations omitted]

As such, the Sixth Circuit reversed the district court's denial of the motion to suppress.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

ⁱ No. 09-6461, 2011 U.S. App. LEXIS 18006 (6th Cir. Decided August 29, 2011)

ⁱⁱ *Id.* at 2-3

ⁱⁱⁱ 547 U.S. 103 (2006)

^{iv} *Johnson*, No. 09-6461 at 5 (quoting *Georgia v. Randolph*, 547 U.S. 103, 109 (2006))

^v *Id.* at 9 (quoting *Randolph*, 547 U.S. at 109, fn 2)

^{vi} *Id.*

^{vii} *Id.* at 9 (quoting *Randolph*, 547 U.S. at 114)

^{viii} *Id.* at 9-10 (quoting *Randolph*, 547 U.S. at 110)

^{ix} *Id.* at 10

