NEWSLETTER

International Association of Directors of Law Enforcement Standards and Training
3287 Tasa Drive; Meridian, Idaho 83642-6444
http://www.iadlest.org

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Contents

LETTER FROM THE PRESIDENT

From: Richard P. Clark, IADLEST President

As the weeks and months go by, I am beginning to see the end of this very exciting thrill ride I've been on since last June as President of IADLEST. It has been an exciting and rewarding adventure.

This year, I've attended more important meetings, traveled to more interesting locations, and met more distinguished professionals in the national criminal justice community than the rest of my 50 years in law enforcement combined.

I have enjoyed a front row seat representing our IADLEST membership on several training advisory boards and councils, and I want to share with you how well respected you are nationally.

Our collaborative relationships with DOJ, NHTSA, FLETC, FBI, DHS, NSA, and IACP have been extremely fruitful and reflect an increasing acknowledgment from the highest levels of the criminal justice community on the significant role that IADLEST plays in raising the bar on professionalism and quality training for peace officers nationally.

I've learned that anything worth having is worth working for, and the more you invest, the greater the reward.

I highly recommend that you invest your time and energy in IADLEST subcommittees and projects. The more involved you are, the greater you and your state will benefit. We certainly have in Nevada.

Thanks to Executive Director, Mike Becar; Deputy Director, Pat Judge; First Vice President, Bill Muldoon; Second Vice President, Jon Bierne; Treasurer, Charles Melville; Secretary, Lloyd Halvorson; and all the Regional Representatives for a great team effort.

See you in Savannah.

FROM THE EXECUTIVE DIRECTOR

Mike Becar, CEO IADLEST

Having just been appointed Executive Director of IADLEST, I am very humbled by your faith in my abilities and grateful to be involved in the most valuable membership organization I have ever been associated with. As a past President of IADLEST and a member now for over 20 years, I have seen many POST directors and good friends come and go, along with many exciting changes these past few years. Knowing how valuable this organization was when I was a new POST director, I want to do everything I can to get the membership involved. I will work to get the various committees active and reporting to the membership at the annual conferences, help grow the membership and increase opportunities for the association. I have recently talked with authorities in Mexico, who want to start a POST organization there, as well as the Virgin Islands. I hope to meet the new POST directors at the past and upcoming regional meetings and for those who don't make the meetings, I will try and come out your way for a short visit and orientation to this great association. I have been very fortunate to work with such visionary leaders from Ray Beach, Mike Crews, Rusty Goodpaster, Dick Clark, Bill Muldoon, Jon Bierne, as well as the entire executive board and Deputy Director Pat Judge, who is a great resource.

As I start my new duties, please don't hesitate to call upon me for any assistance that I may provide; and I am looking forward to working with each of you on future projects.

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 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; or pjudge@att.net.

MEETINGS SCHEDULED

The IADLEST Executive Committee will meet Sunday, June 10, 2012, at the Hilton Desoto Hotel 15 East Liberty Street; Savannah, GA 31401; phone 912-232-9000 and conduct its Business meeting at the same location Tuesday, June 12, 2012.

IADLEST will hold its business meeting Saturday, September 29, and Sunday, September 30, 2012, in San Diego, California, in conjunction with the IACP Conference. The meeting location is to be announced.

2012 MEMBERSHIP DUES

Please ensure that you have paid your 2012 membership dues. Your IADLEST membership fees were due January 1 and members are in the arrears April 1. Upon payment of dues, a renewal letter along with the 2012 membership card is mailed to each member. Call the IADLEST business office at (517) 857-3828 if you have questions.

NOMINATIONS AND ELECTIONS

Elections will be held at the June Savannah, Georgia, business meeting. Bill Muldoon (NE), Jon Bierne (SD), and Rusty Goodpaster (IN) will serve as the 2012 Nominating Committee. The committee will submit a list of eligible candidates for the offices of second-vice president and secretary to the membership at the business meeting. Members who wish to nominate candidates or are interested in running for office should contact Bill Muldoon, William.muldoon@nebraska.gov; Jon Bierne, jon.bierne@state.sd.us or Rusty Goodpaster, rgoodpaster@ilea.state.in.gov. Candidates for office are asked to make a brief statement at the Savannah business meeting just prior to the election as to their position and goals for the Association. The elections will take place at the conclusion of the June business meeting.

WELCOME TO GEORGIA

Dear IADLEST Members:

I'd like to take this opportunity to personally invite you to Historic Savannah, a great walkin' town! We'll be staying just a block or two from where they filmed the park bench scenes from Forrest Gump and the "squares" are just beautiful and lush. We're only about three blocks from River St. so I can guarantee that there will be plenty to do and see when we are not in class. In the evening, the Georgia POST folks will host a Hospitality Room, and on one night, we are going to make home-made peach ice cream made on the spot so if you've been hesitant about coming, PLEASE COME ON. Like Mike said, the lodging is paid for by the good folks at FLETC. Savannah is a great town where everything is within a short walk, and the Georgia POST people will treat y'all just right!

Ken Vance
Executive Director, Georgia POST

SPECIAL OLYMPICS AUCTION ITEMS NEEDED

A Special Olympics auction will be held at the Savannah, Georgia, June 2012 IADLEST Annual Conference. IADLEST members are welcome to contribute items for sale. In the past, IADLEST members have generously contributed products, often items that represent their state, to the auction. All proceeds from the sale of items are given directly to the Special Olympics. You are invited to bring your item with you when come to the conference or send it to: *continued on page 5*

Mark your calendar! The Annual IADLEST Conference will be held June 10-13, 2012.

Join fellow Law Enforcement Executives, Training Managers, POST Directors and Academy Directors at the Conference in Historic Downtown Savannah.

What's new this year?

- Presentation by Keynote Speaker, Jack Enter on Leadership in Law Enforcement
- Facility tour and training at the Federal Law Enforcement Training Center (FLETC)
- Scheduled roundtable discussions to exchange ideas and experiences regarding standards, certifications and course development
- BELOW 100 and Brady-Giglio training
- Exciting social activities for attendees and their guests, including a welcome reception, dinner and entertainment at the Railroad Museum, a poolside reception, and a hospitality room sponsored by the Georgia POST

AND…. FLETC will be sponsoring hotel rooms for registered attendees, Sunday through Thursday – saving you more than $600!

Registration will open February 1st – keep an eye on the website for a schedule and updates: IADLEST2012.org. For questions about the conference, email alyssa@iadlest2012.org or call (888) 902-1088

For the 2012 IADLEST Conference, the Federal Law Enforcement Training Center (FLETC) is providing training in *BELOW 100* and *Brady-Giglio*, is sponsoring the roundtable discussions, is hosting attendees at its facility on June 13, and is funding lodging for eligible conference attendees for the nights of June 10 through 13. All other activities, fundraisers, events, etc., are sponsored solely by IADLEST and the Georgia POST and are completely independent of the Department of Homeland Security (DHS) and the Federal Law Enforcement Training Center (FLETC). The registration fee will be used to defray costs separate from those associated with activities provided or sponsored by the FLETC.

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IADLEST Special Olymics Auction
c/o Georgia Peace Officers
Standards and Training Council
P.O.Box 349
Clarkdale, Georgia 30111-0349

ONLINE - FREE

Pursuit Policy Workshop is now available as an online training module!

This training is available to ALL police officers. You do not need to be a member of NLEARN to take advantage of this training opportunity.

In this one-hour lesson, your patrol officers will achieve the following objectives:

- Discuss US Supreme Court decisions and state-specific statutes that have impacted and governed vehicular pursuit operations
- Discuss the components of the IACP vehicular pursuit policy guide
- Compare your agency's current pursuit policy with the IACP pursuit guidelines
- Develop an action plan for your agency that supports vehicular pursuit operations and addresses any weak or missing areas within the current pursuit policy

Just go to the IADLEST web site at: https://www.iadlest.org/ and click on the Pursuit Training icon or link. If you would like to have a DVD, please contact IADLEST at (208) 5594751

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.

Jennifer Wiwi, Florida Fish & Wildlife, Tallahassee, FL
Joseph Wright, Asst. Director, FLETC, Artesia, NM
William Baldwin, Captain, Honolulu PD, Waipahu, HI
Darin Beck, Kansas POST, Hutchinson, KS
Alfred Cannon, Federal Protective Serv., Raid City, SD
Mary Davis, Dep. Dir., Ohio POST, London, OH
Tisha Ehret, Manager, POST, Burien, WA
Michael Ferguson, Lt, Grand Forks PD, ND
Phillip Gallegos, Bur. Chief, POST, Santa Fe, NM
Charles Gerhart, Asst. Dir., Oklahoma POST, Ala, OK
Jeff Glazier, Major, Atlanta PD, Atlanta, GA
John Green, Asst. Dir., Kansas POST, Hutchinson, KS
James Helgoe, Dir., Public Safety Academy, Sitka, AK
Doreen Olko, Commissioner, MI POST, Lansing, MI
Jennifer Pritt, Director, Florida POST, Tallahassee, FL
Michael Quinn, Iowa Law POST, Johnston, IA
Sue Rahr, Director, POST, Burien, WA
Lisa Reich, Municipal POST, Boylston , MA
Dave Sexton, Director, Alaska POST, Juneau, AK
Gary Steed, Interim Dir., Kansas POST, Wichita, KS
Bob Stresak, Asst. Director, POST, Sacramento, CA
Jennifer Tatum, Manager, POST, Columbia, SC
Lynne Uyema, Legal Advisor, Honolulu PD, HI

INSTALLATION OF LIFE MEMBER

At its January 2012, Washington, DC, meeting, the Executive Committee voted unanimously to install **Michael Crews** as an IADLEST Life Member.

Mike has been appointed Deputy Director of the Florida Department of Corrections. He served on the Executive Committee as a regional representative and Executive Committee member before becoming the IADLEST president in 2007.

POST DIRECTOR CHANGES

Florida: Jennifer Cook Pritt ("Cookie") was appointed as the Director of Criminal Justice Professionalism and Training for FDLE in January 2012. In her current role, she provides oversight and direction for the Criminal Justice Standards and Training Commission, the Bureau of Standards, the Bureau of Training, the Florida D.A.R.E. Program, the Alcohol Breath Testing Program, the Florida Medical Examiners Commission, and the Commission on Florida Accreditation. She represents FDLE on matters related to the employment, training, leadership

development, and education of law enforcement, correctional, and correctional probation officers.

Ms. Pritt has over 20 years of law enforcement experience. Cookie started her law enforcement career at the University of Florida Police Department while obtaining her B.S. in Criminology (Cum Laude) and Law and then her M.S. in Political Science (Magna Cum Laude). During graduate school, Jennifer also served as the Interim Director for the Community Oriented Policing Institute in Gainesville. In this capacity, she coordinated the development and delivery of Community Policing training to officers throughout North Florida. While at the University of Florida Police Department, Jennifer had assignments to the Patrol Division,

the Special Investigations Division and the Community Services Division as DARE Officer. In 1997, Ms. Pritt was hired as an Investigator for the Office of the State Attorney Eighth Judicial Circuit and assigned to the DEA Task Force to work major drug trafficking and money laundering investigations.

Jennifer joined the Florida Department of Law Enforcement in 1999. During her time with the department, Director Pritt has served in the Office of Executive Investigations, working public corruption and Governor ordered investigations, and the Office of Statewide Intelligence as the Drug Intelligence Agent. Jennifer was promoted to Special Agent Supervisor in 2003 with oversight for major drug, violent crime and economic crime cases. In 2007, Cookie became the Chief of Investigations and Intelligence and the Director of the Florida Fusion Center. In this role, Chief Pritt provided oversight for FDLE's strategic intelligence functions across all crime focus areas and ensured that a network of local, state, and federal agencies were provided with comprehensive threat assessment capabilities and meaningful intelligence products.
In 2010 Ms. Pritt briefly left service with FDLE to join the Institute for Intergovernmental Research (IIR). While at IIR, Jennifer led projects and training associated with the Nationwide Suspicious Activity Reporting Initiative (NSI), the Fusion Center Technical Assistance Program, and the National Criminal Intelligence Resource Center. She assisted in the design of curriculum, websites, and distance learning training platforms in support of intelligence training.

Jennifer has two daughters; and her husband works for the Department of Justice, Federal Bureau of Prisons. She is an advocate for Autism Awareness programs.

Kansas: Gary Steed has been appointed Interim Director. For the past year, Gary has been a part-time investigator with KSCPOST. Prior to that, Gary worked for 1.5 years as a Senior Program Manager for Continuing Education. Prior to that, he served 32 years with the Sedgwick County Sheriff's Office Wichita, Kansas, starting as a Deputy and was ultimately elected Sheriff for two terms before retirement. Gary served for eight years as the Sheriff's Representative on the KSCPOST, and he has a good background on POST and IADLEST issues.

FLETC'S LAW ENFORCEMENT ONLINE PROJECT BRINGS FREE TRAINING TO OFFICERS NATIONWIDE

by: Cory Meyers, Envisage Technologies

During these austere times for public safety, the Federal Law Enforcement Training Center (FLETC's) Rural Policing Institute and Office of State and Local Training (OSL) are doing their part to help sworn officers get the training they need.

FLETC contracted with Envisage Technologies and teammate LETN (a division of Critical Information Network – CiNet) to provide tuition-free online training for state and local Law Enforcement agencies across the United States. The LEO Online Learning catalog gives enrolled officers access to 200 high-quality learning modules addressing important subjects such as Officer Survival, Use of Force, Narcotics, Gangs, Cybercrime, and Active Shooter.

Many of the courses are certified by state agencies to provide officers with in-service or continuing education credits. We ask that POST directors please share this information with departments across their state.

To learn more or to sign up for this free program, go to: http://www.acadis.net/fletc

TOWARDS BETTER DATA-DRIVEN OPERATIONS: THE DDACTS SUCCESS STORY

by: Christopher W. Bruce ● Analytical Specialist Data-Driven Approaches to Crime & Traffic Safety

For decades, different policing models have encouraged police agencies to become more *data-driven*. These include CompStat, which puts a high value on tracking crime and performance statistics; Intelligence-Led Policing, which focuses on synthesizing crime and intelligence data into a business model; Problem-Oriented Policing, which encourages the thorough analysis of data on substantive crime problems; and Predictive Policing, which combines past and current data to forecast future events, in both the short-term and long-term.

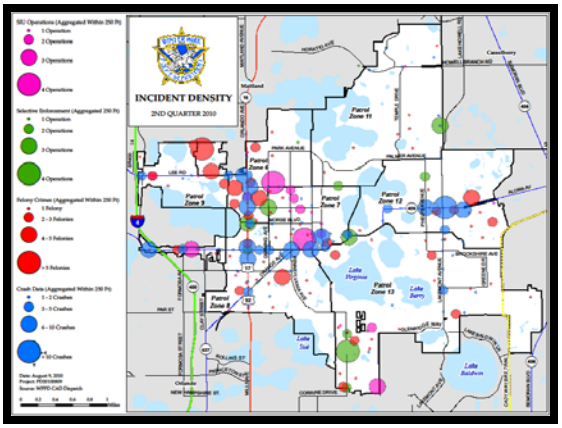
Data-Driven Approaches to Crime and Traffic Safety (DDACTS), a model developed by the National Highway Traffic Safety Administration (NHTSA) in partnership with the National Institute of Justice (NIJ) and the Bureau of Justice Assistance (BJA), synthesizes the best techniques and practices of other models into an immediately-implementable system that works at multiple levels and types of law enforcement agencies. It is the first program since the Law Enforcement Assistance Administration of the 1970's in which the federal government has provided direct assistance—through workshops, literature, and follow-up assistance—to law enforcement agencies seeking to improve their data, analysis, response, and evaluation strategies.

DDACTS reduces crime, crashes, and other social harms by teaching police agencies to analyze data and pursue synthesized enforcement strategies. DDACTS emphasizes the use of both patrol and traffic units to address both crime and crashes; for instance, by conducting highly-visible enforcement at locations that experience both crime and traffic problems, or by assigning traffic units to emerging hot spots as part of a suppression strategy.

The DDACTS program is largely about capacity-building rather than a specific operational model. As we emphasize in the DDACTS workshops (managed by IADLEST), DDACTS can be a *tactic* that drives day-to-day operations, a *strategy* that informs long-term policy and practice, or a *philosophy* that permeates all aspects of the agency's operations. Instead of following a step-by-step process, participants at the DDACTS workshops learn how to overcome obstacles and improve their capabilities to implement data-driven operations at whatever level, and with whatever goals, that make the most sense to them. These challenges might include:

- Setting specific goals for crash reduction, crime reduction, and organizational improvement
- Identifying key partners in the residential, business, government, and educational communities in the jurisdiction

- Accessing previously unavailable data sources
- Improving data quality
- Developing analytical and mapping capabilities
- Selecting the right technologies for data analysis and mapping
- Developing more effective responses to crash and crime hot spots
- Evaluating responses to objectively determine the level of success
- Effectively communicating with stakeholders in the community



The ability to map crime, collisions, and other social harms, as well as enforcement data, is a key element of DDACTS.

Approaches to DDACTS

There are four major approaches to implementing DDACTS in a police agency. These are not necessarily exclusive of each other, and it is possible to construct a model that combines elements of all four, but it is useful to consider them individually.

1. Strategic DDACTS. This approach is favored by most of the agencies that have implemented DDACTS so far. It attempts to predict hot spots for crime, crashes, and other social harms (usually based on past data). The agency selects a number of target areas and times, assigns traffic and patrol units to conduct highly-visible enforcement in the area, and evaluates the effects on crime and crashes at the end of the implementation period (usually several months). The advantage to this model is its simplicity. It requires nothing more analytically intensive than a map of hot spots at different times of day. It keeps the implementation fully within control of the police agency, and the responses use existing resources.

2. Tactical DDACTS. This more tactical approach is not as concerned with "hot spots" in the long-term, but rather those locations that have emerged as hot spots, or potential target locations, very recently. The technique depends on techniques like series analysis and threshold analysis to identify locations with recent above-average activity or locations that might be targeted in a current crime pattern. The agency conducts highly-visible enforcement, directed patrols, and field interviews at the target locations, hoping to suppress activity or apprehend offenders. It is more complex than the strategic focus because it relies on daily or weekly analyses of emerging patterns and hot spots. It is also more difficult to evaluate because the target areas are constantly shifting.

3. Problem-Oriented DDACTS. Based on the principles of problem-oriented policing, the problem-oriented method starts with hot spot identification similar to the strategic method. But rather than simply implement highly-visible enforcement at the target locations, the agency disaggregates the data to identify discrete crime, disorder, and crash problems within the target areas. The analyst then engages in a thorough analysis of these discrete problems, using field research and qualitative methods to supplement what is collected in the agency's data systems. Response involves long-term prevention methods, enlisting key partners and stakeholders in the community. Evaluation is complicated, involving both qualitative and quantitative methods and a consideration of displacement and diffusion

of benefits. This is the most analysis-intensive of the approaches.

4. Intelligence-Oriented DDACTS. The emphasis in this model is on the idea that criminal offenders are likely to drive vehicles through the jurisdiction. The intelligence-led focus leverages information about known offenders, organizations, and routes of travel to inform "total stops" and field interviews along key routes, with the goals of collecting field intelligence, suppressing offender activity, boosting warrant arrests, and generating arrests for offenses such as drug violations, weapon violations, and stolen property. In the short-term, evaluation for this approach generally focuses on outputs such as stops, field interview reports, arrests, and other criminal charges; in the long-term, it should have a jurisdiction-wide effect on crime.

The role of traffic enforcement differs among these four approaches. In the strategic approach and the problem-oriented approach, crashes may be among the social harms identified and targeted in the hot spots. Strategies and tactics, including highly-visible enforcement, are meant to directly impact these hot spots, and reductions in crashes at these locations are among the outcomes evaluated.

In the tactical and intelligence-led approaches, on the other hand, traffic enforcement is used as a *tool to achieve other goals* related to crimes and offenders. Such enforcement will likely have a generalized deterrent effect among those stopped, and among those who pass through the enforcement area, but not in a way that is directly assessable.

An agency can mix models. For instance, a police department might start with the strategic approach, to get an operation going quickly, but gradually transition to a more problem-oriented approach as it enlists key partners and stakeholders and has more time for analysis. The intelligence-led approach, in the right places, could be combined with the other approaches to add benefits to the DDACTS implementation.

The Workshops and Their Results

Participants at a DDACTS workshop in San Diego, California

The 16-hour workshops open with 4 hours of lecture on DDACTS guiding principles and case studies from agencies who have implemented it. Participants are then divided into three discipline groups—commanders, supervisors, and analysts—for 6 hours of structured discussion about the DDACTS guiding principles and the obstacles that the participating agencies face in following them. After the discipline group discussions, the participants get back together with the other representatives of their agencies to craft a synthesized implementation plan, which they present to the entire group on the final morning.

Altogether, IADLEST has organized 35 implementation workshops in 23 states plus the District of Columbia. Nearly 1,200 law enforcement professionals representing 39 county police agencies, 201 local police agencies, 15 state police agencies, and 3 institutional police agencies have attended the training. Judging by the reviews completed by the students at the end of the workshops, the workshops are wildly successful: Of the 27 workshops in the past

TABLE 1-2: APPROACHES TO DDACTS

Approach	Goals	Target Areas	Analysis Involvement	Types of Responses	Monitoring, Evaluation, and Adjustment
Strategic	Abate crime, disorder, and crash hot spots and times	Locations with historically high volumes of activity	Basic. Needed to identify hot spots and times, perform evaluation. Basic mapping required.	Highly-visible enforcement Directed patrol	3-6 months, looking for statistically significant decreases in target crimes, crashes, and other social harms. Some consideration of displacement.
Tactical	Quickly respond to emerging patterns and hot spots.	Locations with recent higher-than-average activity; locations that may be targeted in a crime pattern.	Heavy. Needed to regularly monitor current activity compared to baseline thresholds, create reports.	Highly-visible enforcement Directed patrols Field interviews	Daily or weekly. Evaluation is difficult; generally looking at individual cases rather than total volume.
Problem-Oriented	Solve long-term or chronic crime, crash, and safety problems.	Chronic crime, crash, and disorder hot spots.	Heavy. Must engage in thorough quantitative analysis of police data and qualitative analysis of hot spots.	Preventative measures involving key partners and stakeholders	Long term (yearly or more). And, just like the analysis, both qualitative and quantitative.
Intelligence-Oriented	Increase arrests, suppress activity, collect intelligence	Locations through which offenders may travel.	Moderate. Needed to identify best locations and types of offenders, vehicles, and activities to watch for.	Highly-visible enforcement “Total stops” Field interviews	In the short-term, based on outputs (activity, arrests); in the long-term, based on total crime volume.

year, 70% of attendees had entirely positive comments about the workshop and the program; 28% had a mix of responses; and only 2% had negative responses.

The real "success" of DDACTS, of course, comes from the agencies that have chosen to implement it. Every agency's implementation is slightly different; the model stresses the plurality of "approaches" rather than a single dogmatic process. Among the departments that have chosen to implement DDACTS, we find success stories like the following.

- The Fargo, North Dakota Police Department (105,000 population; 144 officers) saw an 8% decrease in property crime and a 9% decrease in violent crime during a period in which they increased citations by 12% and drunk driving arrests by 29%.
- The Thibodaux, Louisiana Police Department (20,000 population; 56 officers) decreased crashes by 73%, burglaries down 42%, thefts down 80%, and criminal damage down 68% in a single hot spot through intensive enforcement.
- The Philadelphia Police Department (1.5 million population, 6,734 officers) focused their DDACTS efforts on a small pocket of drug and gun violence, effecting a 38% decrease in violent crime and a 15% reduction in crashes (in the target area) during the first two months of 2012.

In addition to these substantive results, agencies are reporting key internal outcomes as well. The Winter Park, Florida Police Department credits DDACTS with better community relations. Because of its DDACTS strategy, the Mount Laurel, New Jersey Police Department is developing a crime analysis capability for the first time. In Clarksville, Tennessee, DDACTS has improved communications between divisions and is transforming how the agency conducts officer performance evaluations. Outcomes experienced by dozens of police departments and sheriffs' offices include improved data quality, better strategies, and enhanced crime mapping technologies.

Conclusion

The success of DDACTS lies both in the substance of the model and the way it has been conveyed to police agencies. The workshops, led and taught by law enforcement professionals with direct DDACTS experience, supplemented by follow-up resources and assistance, are unique among federal law enforcement training programs. Every month, more agencies become exposed to the model and learn how to use its seven guiding principles to enhance their approaches to data, analysis, response, and evaluation. In the coming years, the DDACTS model should continue to help agencies of all types and sizes in their quests to implement and improve data-driven operations.

OREGON LEGISLATIVE UPDATE

by: Eriks Gablisks, Director Oregon POST

The 2012 Oregon Legislative Session just completed its one-month session, and a lot was done in a short amount of time. The shortened sessions are held on even years, and the longer six-month session is held during odd calendar years.

SB 1525 - Restores language that was inadvertently taken out of Department of Public Safety Standards and Training (DPSST) statutes regarding the training and certification of tribal law enforcement officers when SB 412 was passed last session. SB 412 gives the same law enforcement officer powers to tribal officers whose agencies comply with a number of elements. Since SB 412 took effect on January 1, 2012, two Oregon tribes have complied with the requirements and have been authorized statewide law enforcement powers. SB 1525 was needed for those tribal law enforcement agencies that do not as yet comply with SB 412.

HB 4613 - Creates Judicial Marshals within the Oregon Judicial Department. This group of individuals, in the Court's Safety and Prevention Unit, will be trained and certified as law enforcement officers by DPSST. These are not the security staff at county courthouses: those employees are under the purview of the County Sheriff.

SB 1528A - Requires that DPSST train and certify Agents of the Oregon Liquor Control Commission (OLCC). This will be a new profession added to DPSST's menu of regulatory and training responsibilities. OLCC will provide funding to DPSST for the development and delivery of training. This will be an OLCC-specific class that will not include firearms training nor will it be connected to the Basic Police Course.

On the budget front, the Legislature's Ways & Means Committee approved an $873,897 decrease of Other Funds expenditure limitation for the Criminal Justice Training program at DPSST. This reduction corresponds with a decrease in the allocation of Criminal Fines Account (CFA) resources to the agency that is included in House Bill 5702 (2012). This allocation adjustment increases the amount of CFA resources available for the General Fund.

This reduction in training funding will result in the discontinuation of the child abuse training program and the elimination of six positions (3.75 FTE) including a Training Support Specialist, two Range Masters, a Training Development Coordinator, a Health and Fitness Coordinator, and a general trainer position.

These reductions will not affect the number of basic law enforcement training classes being offered by DPSST for the remainder of the biennium. The positions impacted by this reduction will be lost effective April 1, 2012.

If you are interested in reading any of these bills or tracking their status, please go to http://www.leg.state.or.us/bills_laws/

NEW FAAC POLICE SIMULATOR IS FEATURE-RICH WITH ENTRY-LEVEL PRICEL

LE-1000 Captures Return on Investment in Less Than One Year

by: Mike McLelland, FAAC, Inc., Ann Arbor, Michigan

High fidelity and low cost have converged in the new LE-1000 law enforcement driver training simulator, recently launched as the newest product in FAAC Incorporated's public safety simulator lineup.

The LE-1000 is a sleek, inexpensive simulator laden with the latest technology and features/functions requested by experts in the field – and it is the most competitively priced simulator in the industry.
"Due to recent technological advances and FAAC's desire to bring the highest fidelity at the lowest price, we are pleased to be able to produce this incredibly powerful training tool for the law enforcement field," said David Bouwkamp, Executive Director of Business Development. "When you compare the cost of this simulator with its capabilities, it is very clear there is nothing like it in the industry. It is an advanced training system at an entry-level price."
The LE-1000 is feature-rich, with advancements to its physical architecture, instructor convenience, build time, a bona fide pedigree in the law enforcement community, ergonomic improvements, and even more training scenarios.

"This is a mature product from a company that is a mainstay in the marketplace and knows how to innovate," Bouwkamp said. "We have gathered advice from industry experts, focused on maximizing training dollars, and developed a simulator with a return on investment of less than one year."
The LE-1000 includes:

- Three large LED screens that retain a 225-degree horizontal field-of-view

- All-in-one instructor console manageable with Apple I products, such as Ipad, Ipod, and Iphone
- Streamlined physical footprint
- Charger and Crown Victoria dashboard cab models
- Open-style cockpit that makes it easier for Driving Force© customers to transition from driving to force options simulation training
- Scientifically tested vehicle dynamics
- Mobile Data Terminal that receives live and pre-programmed dispatch information
- Most comprehensive curriculum available, including networked response and supervisory scenarios

In addition to physical and software improvements, FAAC is adding its newest public safety scenarios to its already rich training curriculum. FAAC's curriculum features more than 100 training scenarios, from simple skill-building exercises to complex multi-tasking and decision-making lessons.

"We're able to celebrate this breakthrough because of the in-house resources that FAAC possesses; it gives us an advantage in product development and quality control," Bouwkamp said. "We were able to test technology and try different approaches in real time to get the best sense of what would work."

The willingness to listen to the market and its customers is part of FAAC's Customer for Life program, which consists of three main areas.

- Specialists Program – small group of highly skilled simulator training pioneers whose mission is to educate others on the power of simulator training and determine future issues in the market.
- Customer Experience – create events for customers and others to share knowledge of simulator training, including an annual user conference.
- Support Program – proactive department whose primary mission is to maximize your uptime.

With all of these attributes, FAAC delivers the best driver training simulator available and the best value for successful training programs.

FAAC is planning a nationwide tour of the LE-1000 throughout the year to coincide with conferences and tradeshows.
For more information on the tour, the LE-1000, and FAAC's other public safety simulators, contact Bill Martin at wbmartin@faac.com or call 734-761-5836 or visit www.faac.com/le1000.html

ARMENIAN LAW ENFORCEMENT OFFICIALS VISIT KLETC KANSAS NATIONAL GUARD'S STATE PARTNERSHIP PROGRAM

The Kansas-Armenia Partnership

by: Ed H. Pavey, Director
Kansas Law Enforcement Training Center

For the third time in four years, high-ranking Republic of Armenia law enforcement officials visited Kansas in an ongoing collaborative partnership between Kansas law enforcement agencies, the Organization for Security and Co-operation in Europe, the Bureau of International Narcotics and Law Enforcement Affairs, and the Kansas National Guard's State Partnership Program. These collaborative efforts are a part of the Kansas National Guard's State

Partnership Program which partners Armenia with Kansas on various initiatives. Armenia, formerly a part of the Soviet Union until 1991, has both a national police force and local departments, and is interested in developing programs similar to those employed in the U.S. and other European nations. The Kansas goal is to assist Armenia in its effort to develop a community policing program and exchange ideas with regard to law enforcement reform in their country. One of the original 15 Republics of the former Soviet Union, Armenia is surrounded by Turkey, Iran, Republic of Georgia, and Azerbaijan.

A delegation of four Armenian police officials accompanied by interpreters and officials from the U.S. Embassy in Yerevan, Armenia, met with over 30 Kansas police chiefs, sheriffs and state law enforcement & National Guard officials at the Kansas Law Enforcement Training Center (KLETC) on March 7, 2012, to discuss policing issues confronting Armenian police. Kansas law enforcement representatives included KLETC administrators, police chiefs, and sheriffs from small to large size agencies in south central Kansas, the Kansas Bureau of Investigation, the Kansas Highway Patrol, the Kansas National Guard, Kansas City Kansas police command staff, and the Kansas State Fire Marshal's office.

Following roundtable discussions focusing on crime and community policing issues in Armenian, the delegation toured KLETC campus facilities to learn how technology is incorporated into basic police training and continuing education programs (FATS, ISIMS driving simulators, classroom technology, etc.) and to view KLETC's 140-acre, 1.78 mile Emergency Vehicle Operations driving training facility.

While their third visit to Kansas was brief, the delegation was exposed to many facets of Kansas policing and police training, including participating in a ride-along with Kansas City Kansas community policing officers. During discussions, the Armenian officials commented on the multi-tasking that American police officers must undertake while operating a police vehicle (i.e. driving the vehicle, operating police radios, mobile data terminals and radars, cell phones) while still being observant for criminal and traffic activities. The delegation shared with participants that police agencies in Armenia prefer to assign two officers to a patrol vehicle for both safety and task responsibilities.

At the present time, it appears the Kansas-Armenian law enforcement partnership will continue with additional future opportunities to exchange information and ideas.

Armenian officials meeting with Kansas law enforcement representatives at KLETC:

Tatul R. Petrosyan - Head of the Legal Department of the Police of the Republic of Armenia, Police Colonel; **Aram M. Smbatyan -** *Head of the Prevention Division of the Public Order Department of the Police of the Republic Of Armenia, Police LTC***; Artur A. Ter-Poghosyan -** *Deputy Commander (for Operational Service) of Yerevan Patrol Service Regiment of the Police of the Republic of Armenia, Police Major***; Sahak S. Sahakyan -** *Senior Inspector for Particularly Special Assignments at the Reform and Development Division under the Organizational-Analytical Department of the Headquarters of the Police of the Republic of Armenia, Police Major***.**

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THE FOURTH AMENDMENT AND MOTEL ROOMS

By Brian S. Batterton, Attorney

On September 1, 2011, the Court of Appeals of Georgia decided the *State v. Woods*[i], which serves as an excellent review of criminal procedure issues related to the motel rooms, consent, detentions and the *Fourth Amendment*. The facts of *Woods*, taken directly from the case are as follows:

> Six police officers, including Officer Tommy Grier, the state's only witness at the suppression hearing, went to a motel to execute a warrant for the arrest of Lee on aggravated assault charges. The officers went to the room listed on the warrant, but it was unoccupied. Officer Grier testified that the manager said that Lee was staying in Room 214. Neither Lee nor Woods, however, were on the registry for the room. In fact, the room was registered to Lee's sister. At the hearing, the manager testified that he did not know whether Lee, a long-term resident of the motel, was staying in Room 214, but he suspected it.
>
> The officers went to Room 214 and knocked on the door. At least one of the officers had his weapon drawn. Woods opened the door. The officers asked Woods if Lee was in the room, and he said no. They asked if they could enter the room to look for her, and Woods gave permission. As they were completing the search, a passerby mentioned that Lee was in Room 306. Most of the officers left the room, but one or two stayed with Woods to make sure he did not call Lee to warn her of the officers' arrival. At this point, the officers in the room holstered their guns.
>
> The officers found Lee in a room on the next level of the motel and took her into custody. Ten to 15 minutes later, Officer Grier returned to Room 214 to speak with Woods. As he was walking into the room, another officer with Grier's unit, Officer Benjamin Griggs, recognized Woods and identified him by his street name, Blue. Griggs said that Woods had just been released from prison where he had been incarcerated for cocaine trafficking. Grier confirmed this information with Woods and began asking him questions. Woods told Grier that he had nothing illegal in the room, that clothes hanging next to the sink were his, and that he stayed in the room. Grier then asked Woods for permission to search the room. Woods consented.
>
> The officers began searching the room. In a drawer, they found men's underwear and socks, which Woods identified as his. They also found a picture of Woods and his son and his paperwork, including a check stub. The officers asked Woods what was in the room safe. Woods responded, "I don't know what's in the safe, but it ain't mine." Grier asked Woods if he could search the safe, and Woods responded, "Go ahead. But I don't know the combination." Grier retrieved a device for opening the safe [4] from the manager's office. As Grier walked by, the officer who was detaining Lee told Grier that Lee had admitted that there was marijuana and crack in the safe and that it was hers.
>
> Grier returned to the room, opened the safe and found crack cocaine and drug paraphernalia inside. Grier then arrested Woods.[ii]

At a motion to suppress, the trial court ruled that both Lee and Woods had standing to challenge the search of the motel room since Lee was a resident of the room and Woods was an overnight guest who kept personal items in the room. Further, the trial court held that the police lacked reasonable suspicion to detain Woods' after learning Lee was not in the room and after Lee was arrested at another room. Thus, Woods detention was unlawful, and, as such, his consent to search the safe was not voluntary. The state appealed the ruling of the trial court to the Court of Appeals of Georgia.

I. Lee

Issue One: Was Lee a resident of the motel room with standing to object to the search of the motel room?

The court of appeals first examined whether Lee had standing to object to a search of the motel room. The state argued that there was insufficient evidence for the trial court to determine that Lee was, in fact, a resident of the motel room that was searched. To this argument, the court of appeals noted the motel manager told the police that Lee was a resident of motel room at issue and stated that she stayed there with her sister, the woman who actually rented the room. Because the motel manager testified at trial and was subject to cross examination on his testimony, the court found that it was not clearly erroneous for the trial court to have held that Lee was a resident of the motel room at issue.

As such, Lee had standing to object to the search of the motel room because she was a resident of that room and, as a resident, she possessed a reasonable expectation of privacy in the room.[iii]

II. Woods

Next the court examined whether the trial court was correct in granting Woods' motion to suppress. The state put forth three arguments to support their contention that Woods' motion to suppress the evidence should have been denied. First, the state argued that Woods lacked a reasonable expectation of privacy in the motel room (thus he would have no standing to contest the search). Second, the state argued that Woods "abandoned" his interest in the safe and therefore lacked a reasonable expectation of privacy in its contents. Third, the state argued that Woods validly consented to a search of the safe.

Issue Two: Did Woods possess a reasonable expectation of privacy in the motel room?

The state proffered that Woods was merely a guest at the motel room, and, as such, did not possess a reasonable expectation of privacy in the room. The state points that the fact that Woods was not a registered guest at the room, did not have a key and only had Lee's permission to sleep there. However, Woods argued that he did stay overnight in the room, and, as the police saw, he did keep clothes and other personal items in the room. The court of appeals then held that because he occupied the room as an overnight guest, he possessed a reasonable expectation of privacy in the room with standing to object to the search.[iv]

Issue Three: Did Woods abandon his expectation of privacy in the safe when he denied possessing the safe and its contents?

Regarding the issue of abandonment, the court of appeals stated

> The question of abandonment for *Fourth Amendment* purposes turns on whether under the totality of the circumstances, the investigating officer reasonably believed at the time of the search that the accused had relinquished his interest in the property to such an extent that he no longer had a reasonable expectation of privacy in it.[v]

The court of appeals then stated that because the police asked Woods for consent to search the safe, they possessed a reasonable belief that Woods actually did possess a reasonable expectation of privacy in the safe. In further support of this was an officer's testimony in court that he did believe that Woods possessed authority to consent to a search of the safe.

As such, the court held that Woods did not abandon his expectation of privacy in the safe.

Issue Four: Did Woods validly consent to a search of the safe?

The court of appeals began its analysis of this issue by stating

> Police-citizen encounters fall into three categories: "(1) communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, (2) brief 'seizures' that must be supported by reasonable suspicion, and (3) full-scale arrests

> that must be supported by probable cause.[vi]

The court of appeals then noted that, in Woods case, the state did not argue that Woods was validly detained based on reasonable suspicion or probable cause. As such, the contact with Woods', to be legal, must have been a valid consensual encounter. If the encounter was consensual, Woods consent could be deemed voluntarily, rather than the product of an unlawful detention.

The court then examined whether the encounter de-escalated from a second tier encounter (investigative detention) to a first tier encounter (a consensual encounter). The court stated that it must look at the totality of the circumstances and consider the following factors:

> [W]hether there was a clear and expressed endpoint to any such prior detention; the character of police presence and conduct in the encounter under review (for example — the number of officers, whether they were uniformed, whether police isolated subjects, physically touched them or directed their movement, the content or manner of interrogatories or statements, and "excesses" factors stressed by the United States Supreme Court); geographic, temporal, and environmental elements associated with the encounter; and the presence or absence of express advice that the citizen-subject was free to decline the request for consent to search.[vii]

When comparing the facts of Woods' case to the factors above, the court observed that there was no clear endpoint to the initial detention indicating Woods was free to go. Further, several officers entered Woods room and questioned him after Lee was arrested which does not indicate the encounter is consensual. Further, the reduction in officers when they initially learned that Lee was not in the room did not deescalate the encounter into a consensual encounter.

The court of appeals then stated that because the officers did not have sufficient reasonable suspicion or probable cause to continue the detention, the detention was illegal. Further, because the detention was illegal, the consent is not valid because a person subject to an unlawful detention cannot give valid consent.[viii]

Lastly, the state attempted to argue that the police saw marijuana in the room which justified Woods' detention. However, there was evidence that this evidence was not seen until after Woods was detained and had given his consent (which was invalid consent) to search the room. The court stated

> Post-seizure events cannot justify, after the fact, a detention that was unreasonable when it occurred.[ix]

In conclusion, the court of appeals affirmed the trial court in its granting of the motion to suppress in favor of both Lee and Woods.

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.

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[i] A11A1199, 2011 Ga. App. LEXIS 790
[ii] Id. at 2-4
[iii] Id. at 7
[iv] Id. at 9 (citing Snider v. State, 292 Ga. App. 180, 182 (663 SE2d 805) (2008)(Compare Smith v. State, 284 Ga. 17, 21 (3) (663 SE2d 142) (2008) (because defendant was not an overnight guest of the registered guest, did not have a key to the room, and had no luggage in the room, he had no expectation of privacy in the room).
[v] Id. at 9-10 (quoting State v. Browning, 209 Ga. App. 197, 197-198 (1) (433 SE2d 119) (1993))
[vi] Id. at 11 (quoting State v. Davis, 206 Ga. App. 238 (424 SE2d 878) (1992))
[vii] Id. at 12
[viii] Id. at 14 (citing Pledger v. State, 257 Ga. App. 794, 797 (572 SE2d 348) (2002))
[ix] Id. (citing See Norton v. State, 283 Ga. App. 790, 793-794 (2) (643 SE2d 278) (2007); State v. Combs, 191 Ga. App. 625, 628 (2) (382 SE2d 691) (1989) (physical precedent only))

STOPPING A VEHICLE FOR NO INSURANCE 5TH CIRCUIT LEGAL QUESTION

By Brian S. Batterton, Attorney

Legal Question: I recall reading a Court decision (Texas) that allowed officers to stop a vehicle for reasonable suspicion if we run the license plate and receive information that there is no insurance, or that it has expired. I know that there is more to it, but can you give me the case information?

Answer: The Court of Appeals of Texas, Ninth District, Beaumont, decided *Tellez v. State*[i] on August 24, 2011. While the case was not designated for publication, and as such, is not considered precedent, the rationale of the case involves sound legal principals which are instructive in answering this question.

The facts of *Tellez*, taken directly from the case are as follows:

> On routine patrol, Officer Jeremy Whatley ran a check on a vehicle license plate. Officer Whatley stated it was his normal practice to randomly run license plates when he is on call—"[j]ust something that I do on a regular basis, look for traffic offenses and run license plates." He testified that he entered the license plate number in the "Spillman" database in his car, whose data is maintained and updated by the State of Texas. The system "checks NCIC/TCIC" for, among other things, "insurance information."
>
> Whatley explained the meaning of the information he receives from the system. The printout shows whether insurance is "confirmed" or "unconfirmed," or if the officer needs to verify insurance coverage manually. Whatley stated that "confirmed" means the insurance policy is valid. "Verify manually," which usually "pops up" on new vehicles, means the system "has no information at all." An entry of "unconfirmed" by itself means "expired or no insurance." When the entry is "unconfirmed" coupled with insurance information, "[t]hat means it's just expired." The system gives the policy expiration date. Whatley also testified that an "unconfirmed status" could mean the database is not able to verify whether or not the person has insurance. Based on his experience with the system, Whatley stated it was "very accurate[,]" and the database was operating correctly on that night. He testified he did not know how often the system was updated.
>
> *The report on the license plate check on the Tellez vehicle stated "unconfirmed," and the insurance information accompanying that notation showed the insurance was expired.* [emphasis added] Based on this report, Whatley explained he "suspected that there was not a valid insurance policy on the vehicle[,]" and he made the traffic stop. Whatley testified the only indication he had of reasonable suspicion for stopping the vehicle was the "unconfirmed" report on the insurance.[ii]

At the outset, the court noted that a traffic stop is considered an investigative detention and, as such, it must be justified by at least "reasonable suspicion."[iii] The court also stated that "reasonable suspicion" exists when

> [T]he officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead the officer to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity.[iv]

Additionally, the court noted that Texas law requires driver's to maintain proof of financial responsibility and a failure to do so is considered a misdemeanor.[v] Lastly, the court noted that

> To stop or briefly detain a person, an officer must be able to articulate

> something more than an "inchoate and unparticularized suspicion or 'hunch[.]'" *Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).* "[T]he *Fourth Amendment* totality-of-the circumstances test requires only 'some minimal level of objective justification' for the stop . . ." *Foster v. State, 326 S.W.3d 609, 614 (Tex. Crim. App. 2010).*[vi]

With the above legal principals in mind, the court then examined Tellez's argument. Specifically, Tellez argued that his insurance status of "unconfirmed" with a note that the insurance was "expired" listed on his tag return did not establish a sufficient indicia of reliability to meet the "reasonable suspicion" standard required for a stop.

Tellez cited two Texas cases to support his position, particularly *Contraras v. State, 309 S.W.3d 168 (Tex.App.—Amarillo 2010, pet. ref'd)* and *Gonzalez-Gilando v. State, 306 S.W.3d 893 (Tex. App.—Amarillo 2010, pet. ref'd).* The court stated that these two cases are distinguishable from Tellez's case because the officers in those cases relied on tag returns that stated that the insurance information was "not available" or "undocumented."[vii] In one case the trooper testified that these returns meant the car "could or could not" have been covered by insurance.[viii] As such, the court found that there was not sufficient reasonable suspicion to justify a stop based on this type of tag return.

However, in contrast, in Tellez's case the court stated that the tag return at issue ("unconfirmed" with a note that the insurance was "expired") did provide the officer with sufficient reasonable suspicion to justify the stop, thus, the stop was reasonable. The court cited several Texas cases that allow stops based on NCIC returns, including one not yet released for publication that allowed a stop based on a return for lapsed insurance.[ix] Further, the court also analogized the type of stop in *Tellez* to a stop based on an NCIC return for a stolen vehicle.[x]

As such, the court affirmed the decision of the trial court and held that the stop was reasonable.

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.

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[i] 2011 Tex. App. LEXIS 6990 (not designated for publication)

[ii] *Id.* at 1-3

[iii] *Id.* at 4 (citing *Davis v. State*, 947 S.W.2d 240, 245 (Tex. Crim. App. 1997); *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005))

[iv] *Id*. (citing *Castro v. State*, 227 S.W.3d 737, 741 (Tex. Crim. App. 2007))

[v] *Id.* (citing *Tex. Transp. Code Ann. §§ 601.051, 601.191*)

[vi] *Id*, at 4-5

[vii] *Id*. at 6

[viii] *Id.*

[ix] *Id.* at 7 (See *Delk v. State*, 855 S.W.2d 700, 711 (Tex. Crim. App. 1993) (Court of Criminal Appeals considered the legality of a traffic stop based on information obtained from the NCIC computer system and concluded that an officer "could defensibly act in reliance on [a report from NCIC]."), overruled on other grounds by *Ex parte Moreno*, 245 S.W.3d 419, 425 (Tex. Crim. App. 2008); *Crawford v. State*, No. 01-10-00559, 2011 Tex. App. LEXIS 3609, 2011 WL 1835270, at **2-4 (Tex. App.—Houston [1st Dist.] May 12, 2011, pet. filed) (not yet released for publication) (Based on report of lapsed insurance from the computer database system, officer had reasonable suspicion to stop vehicle.)

[x] *Id*. (see *Brown v. State*, 986 S.W.2d 50, 51-53 (Tex. App.—Dallas 1999, no pet.) (holding that NCIC computer database report indicating vehicle was stolen provided officers with probable cause for warrantless arrest of driver); see also *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1205-11 (10th Cir. 2007))

10TH CIRCUIT REVIEWS CASE OF ALLEGED PROFILING AND EXCESSIVE FORCE DURING A FELONY STOP

By Brian S. Batterton, Attorney

On October 3, 2011, the Tenth Circuit Court of Appeals decided *Henry v. Storey et al.*[i], which involved a claim of racial profiling and excessive force by virtue of the use of a "felony stop" on a suspected stolen vehicle. The facts of *Henry* are as follows:

> While on patrol in central Albuquerque around midnight, Officer Storey entered the license plate of Mr. Henry's vehicle into his dashboard computer. The computer, which was connected to the National Crime Information Center ("NCIC"), returned a "hit," meaning that the license plate number had been reported as stolen. Upon returning a hit, other officers were automatically dispatched to the scene. When a second patrol car arrived, Officer Storey turned on his emergency lights, and Mr. Henry pulled to the side of the road.
>
> Officer Storey remained in his vehicle and, using the PA system, ordered Mr. Henry to show his hands, turn the vehicle off, get out of the vehicle, and stand with his back to the officers. At this point, six officers were at the scene. Mr. Henry testified that he saw six guns aimed at him, although he did not know whether Officer Storey had his weapon drawn. Officer Storey testified that his weapon was holstered because he was using the PA.
>
> Over the PA, Officer Storey ordered Mr. Henry to pull up his shirt to reveal the waistband of his pants and turn in a circle. Satisfied that Mr. Henry did not have a weapon tucked into his pants, Officer Storey ordered him to walk slowly backwards towards the officers' vehicles. When Mr. Henry was close to the vehicles, Officer Storey ordered him to kneel or lie down. Officer Fangio handcuffed Mr. Henry, performed a pat-down, and placed him in the back seat of Officer Storey's police vehicle. After Mr. Henry was placed in the police vehicle, officers approached the rental vehicle he was driving to make sure no one else was inside.
>
> Mr. Henry promptly complied with all orders. He did not violate any traffic laws. Mr. Henry testified that he was told to "shut up" over the PA system, presumably by Officer Storey. He also testified that Officer Fangio knelt on his back and that the handcuffs were too tight, causing bruising and discomfort.
>
> Mr. Henry [alleged] that Officer Storey used excessive force against him by "aiming a deadly weapon at [his] head from mere feet away." According to Mr. Henry, Officer Storey had no reason to believe that he stole the vehicle by violence. When the officers learned that the vehicle had been erroneously reported stolen, Mr. Henry was released.[ii] [internal citations omitted]

Mr. Henry filed suit against Officer Storey and Officer Fangio and claimed that both officers impermissibly racially profiled him and both used unreasonable force when they pointed guns at him and told him to "shut up" during the felony stop." The case went before a jury and at the close of the evidence, the judge entered a Judgment as a Matter of Law (JMOL) in favor of Officer Fangio on the racial profiling claim and JMOL for Officer Storey on the excessive force claim. A jury heard the remaining claims and found the officers were not liable for the claims before them (Fangio – excessive force and Storey – racial profiling).

Mr. Henry appeals the district court's grant of JMOL for the officers and the district court's refusal to issue a particular jury instruction requested by Mr. Henry.

On appeal, in order to review the grant of a JMOL, the Tenth Circuit had to determine if "a jury would not have had a legally sufficient basis to find for the [plaintiff] on that issue." If the Tenth Circuit determines that the evidence would not support a verdict on behalf of the plaintiff for the particular claim, then the JMOL was appropriate and should be affirmed.

The first issue before the court was whether there was sufficient evidence for a jury to find that Officer Storey may have committed excessive force during the detention of Mr. Henry. The evidence showed that Officer Storey remained in his vehicle and used the PA system to give verbal commands to Mr. Henry during the stop. Mr. Henry said that he did not know specifically if Officer Storey was pointing his gun at him. Officer Storey testified that he had his gun holstered. Mr. Henry alleged that Officer Storey told him to "shut up" over the PA system. Ultimately, Mr. Henry was ordered to lie on the ground, and he was handcuffed.

Mr. Henry thus alleged that Officer Storey used excessive force by "aiming a deadly weapon at his head from mere feet away."[iii] Further, he alleged that the pointing of guns was unreasonable because there was no information that he stole the vehicle by violence.[iv]

As to this issue, the court first noted that they doubted there was sufficient evidence to show that Officer Storey pointed his weapon at Mr. Henry. However, second, they noted that, even if there was sufficient evidence, the felony stop tactics (PA for verbal commands, covering Mr. Henry with firearms, and handcuffing) used by Officer Storey in this case was not excessive under the facts known to the officers at the time of the stop.

The court noted that Mr. Henry's claim for excessive force rests on the fact that weapons were pointed at him during the stop. He alleges that since there was no information that the vehicle was stolen by violence, it was unreasonable to point guns at him during the stop. The court then examined applicable rules that govern the use of force and stated

> In determining whether a use of force is reasonable under the *Fourth Amendment,* we balance the nature and quality of the encroachment on the individual's *Fourth Amendment* interests against the government's countervailing interests." *Lundstrom v. Romero, 616 F.3d 1108, 1126 (10th Cir. 2010)* (citation omitted). When conducting this inquiry, "the 'reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Sturdivan v. Murr, 511 F.3d 1255, 1259 (10th Cir. 2008)* (quoting *Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989*)). We consult three non-exclusive factors to determine whether an officer's use of force is reasonable: (1) the severity of the crime, (2) whether the suspect poses an immediate threat to the safety of officers or others, and (3) whether the suspect is actively resisting arrest or evading arrest by flight. See *Lundstrom, 616 F.3d at 1126.*[v]

The court then applied the facts of Mr. Henry's case to the rules above. First, the court noted that the officers had probable cause to believe that Mr. Henry had stolen a vehicle, which is a felony. The court also stated that it was reasonable for officers to conclude that Mr. Henry posed an immediate threat to the safety of officers and the public since a driver caught in a stolen vehicle has a "strong incentive to evade arrest, given the seriousness of the crime."[vi] The court then stated

> Further, the means of evading arrest were close at hand: the driver was in the vehicle with the engine running. The incident took place late at night, within Albuquerque city limits. Any resulting chase could place the officers and the public at risk. Although Mr. Henry was not actively resisting or evading arrest by flight, under the circumstances the amount of force used by Officer Storey was reasonable. To conclude otherwise

> would merely second-guess an officer's on-the-ground decision using the benefit of 20/20 hindsight.[vii]

As such, the court held that, from a reasonable officer's perspective, Officer Storey did not commit excessive force even if he did point his weapon at Mr. Henry.

The second issue before the court was whether there was sufficient evidence for a jury to find that Officer Fangio committed racial profiling when Mr. Henry's tag was checked by Officer Storey. Mr. Henry alleged that Officer Storey committed racial profiling when he checked his tag which led to his stop; he alleged the officer checked his tag because he is black.

The court noted that clearly the evidence supports the fact that Officer Storey checked the tag and that Officer Fangio had no part in the decision to check the tag. Officer Fangio arrived after the tag was checked as a "back-up" officer. Mr. Henry argued that that does not matter because, since he participated in the detention, he could still be liable for racial profiling. The court described the applicable rule regarding § 1983 liability as follows:

> …*§ 1983* imposes liability for a defendant's own actions—personal participation in the specific constitutional violation complained of is essential. See, e.g., *Foote v. Spiegel, 118 F.3d 1416, 1423-24 (10th Cir. 1997)* ("Individual liability under *§ 1983* must be based on personal involvement in the alleged constitutional violation." (citation omitted)); *Trujillo v. Williams, 465 F.3d 1210, 1228 (10th Cir. 2006)* ("In order for liability to arise under § 1983, a defendant's direct personal responsibility for the claimed deprivation . . . must be established." (emphasis added) (citation omitted)).[viii]

In light of the above rules, the court held that Officer Fangio could not be liable for racial profiling when there is no evidence that she engaged in any discriminatory conduct.

As for the jury instruction, the court held that that the district correct and clearly stated the law during its jury instruction therefore the court did not abuse its discretion.

Thus, the decisions of the district court were affirmed.

It should be noted that the jury trial involved the following issues:

1. Whether Officer Storey committed racial profiling when he chose to run Mr. Henry's tag; and

2. Whether Officer Fangio committed excessive for when she pointed a gun at Mr. Henry during the felony stop.

The jury found that both officers acted reasonably and returned verdicts in favor of the officers.

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.

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[i] No. 10-2211, 2011 U.S. App. LEXIS 20017 (10th Cir. Decided October 3, 2011)

[ii] *Id.* at 4-6

[iii] *Id.* at 6

[iv] *Id.*

[v] *Id.* at 8

[vi] *Id.* at 9

[vii] *Id.*

[viii] *Id.* at 15

SEVENTH CIRCUIT UPHOLDS INJUNCTION, SUMMARY JUDGMENT AGAINST SCHOOL IN FIRST AMENDMENT CASE

By Brian S. Batterton, Attorney

School officials often have to make determinations regarding student speech or expression and its likelihood to interfere with the proper educational environment. Much of the time, the school officials are operating in a legal "gray area" with no clear guidance from prior court decisions. In March of 2011, the Seventh Circuit Court of Appeals decided *Zamecnik v. Indian Prairie School District # 204, et al.*[i], which is instructive in explaining the legal standard required to regulate expression in a public school. The facts of *Zamecnik* are as follows:

> A private group called the Gay, Lesbian, and Straight Education Network promotes an annual event called the Day of Silence that is intended to draw critical attention to harassment of homosexuals; the idea behind the name is that homosexuals are silenced by harassment and other discrimination. Students participate in the Day of Silence by remaining silent throughout the day except when called upon in class, though some teachers, as part of their own observance of the Day of Silence, will not call on students that day. Some students and faculty wear T-shirts on the Day of Silence that display slogans such as "Be Who You Are." None of the slogans criticizes heterosexuality or advocates homosexuality, though "Be Who You Are" carries the suggestion that persons who are homosexual should not be ashamed of the fact or try to change it.
>
> The plaintiffs, who disapproved of homosexuality on religious grounds, participated (we use the past tense because both have now graduated) with other like-minded students in a Day of Truth held on the first school day after the Day of Silence. Plaintiff Zamecnik wore a shirt that read "My Day of Silence, Straight Alliance" on the front and "Be Happy, Not Gay" on the back. A school official inked out the phrase "Not Gay" and has banned display of the slogan as a violation of a school rule forbidding "derogatory comments," spoken or written, "that refer to race, ethnicity, religion, gender, sexual orientation, or disability" (emphasis added). He did not object to the slogan on the front of the shirt.[ii]

Zamecnik and Nuxoll, the two plaintiffs, sued the Indian Prairie School District (school district) for violating their *First Amendment* rights and also requested a preliminary injunction preventing the school district from disciplining them for wearing the Be Happy, Not Gay t-shirt. The district court denied the request for the preliminary injunction and the plaintiff's appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit reversed the district court and remanded the case to the district court judge directing the judge to issue the preliminary injunction allowing the plaintiff's to wear the shirt at issue. The preliminary injunction was issued and the lawsuit progressed. Ultimately, on April 29, 2010, the district court entered summary judgment in favor of the plaintiffs, awarded each $25 in damages, and issued a permanent injunction allowing any student to display the slogan at issue on their clothing. The school district appealed the grant of the permanent injunction, and the award of summary judgment on behalf of the plaintiffs.

There were three issues before the court on appeal. The issues were as follows:

1. Was the need for the permanent injunction moot since both plaintiffs have since graduated and left the school?
2. Was summary judgment warranted in favor of the plaintiffs in light of evidence provided by the school district?

3. Was the monetary award to the plaintiffs appropriate?

Before addressing the issues, the court first stated

> [A] school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality. The school argued (and still argues) that banning "Be Happy, Not Gay" was just a matter of protecting the "rights" of the students against whom derogatory comments are directed. But people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life. *R.A.V. v. City of St. Paul, supra, 505 U.S. at 394; Boos v. Barry, 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988).*[iii]

The court also stated that in order to regulate speech and expression, such as the Be Happy, Not Gay T-shirt, the school must be able to present "facts which might reasonably lead school officials to forecast a substantial disruption."[iv] When applying this standard to the facts of this case, the court stated

> In this factual vacuum, we described "Be Happy, Not Gay" as "only tepidly negative," saying that "derogatory" or "demeaning" seemed too strong a characterization. As one would expect in a high school of more than 4,000 students, there had been incidents of harassment of homosexual students. But we thought it speculative that allowing the plaintiff to wear a T-shirt that said "Be Happy, Not Gay" "would have even a slight tendency to provoke such incidents, or for that matter to poison the educational atmosphere. Speculation that it might is, under the ruling precedents, and on the scanty record compiled thus far in the litigation, too thin a reed on which to hang a prohibition of the exercise of a student's free speech." [v] [internal citations omitted]

Once the court established that they felt the students' expression was unreasonably interfered with in this case, they set forth to address the issues at hand.

First, the court examined whether the need for the permanent injunction was moot. As to this issue, the court stated

> The claim of mootness evaporates completely when one notes that the permanent injunction runs in favor of any student at the high school, not just Nuxoll; it is not unlikely that one or more of its 4,000-plus students may someday want to display the slogan. Injunctions often run in favor of unnamed members of a group, and this is proper as long as the group is specified. *Rule 65(d)(1)(C)* of the *Federal Rules of Civil Procedure* requires that an injunction "describe in reasonable detail . . . the act or acts restrained or required," but the rule does not require that the injunction name the parties who may enforce the injunction. *See, e.g., Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248 (7th Cir. 1985).* [vi]

Thus, the court held that the need for the permanent injunction was not moot.

The second issue was whether it was inappropriate for the district court to enter summary judgment on behalf of the plaintiffs. Summary judgment is not appropriate in this case if the school had a reasonable belief that the T-shirt at issue posed a threat of a substantial disruption.[vii] The court noted that the school presented three pieces of evidence in an effort to prove that that they reasonably believed the t-shirt posed a threat of substantial disruption.

First, the school pointed to incidents of homosexual harassment at the school. To this evidence, the court stated that there were only a "handful" of incidents in a school of thousands of students. Further, the school admitted that the incidents had not been confirmed and no discipline had been issued from the complaints. As such, the court called this evidence "negligible."

Second, the school pointed to the harassment received by the plaintiff, Zamecnik. The plaintiff received many negative comments and even a threat of violence. To this, the court stated

> Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker's opponents' mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response. So the fact that homosexual students and their sympathizers harassed Zamecnik because of their disapproval of her message is not a permissible ground for banning it.[viii]

The court stated that the above principle is named the doctrine of the "heckler's veto." The court stated that this doctrine prevented the defendants from using this evidence.[ix]

Third, the court pointed to an expert's report that stated that the slogan, Be Happy, Not Gay, was "particularly insidious." Regarding the expert's opinion, the court stated

> [T]he expert's report contains no indication of the "facts or data" relied on, no indication that testimony based on the report would be "the product of reliable principles and methods," and no indication that in formulating his opinion the expert "applied the principles and methods reliably to the facts of the case." Dr. Russell is an expert, but fails to indicate, however sketchily, how he used his expertise to generate his conclusion. Mere conclusions, without a "hint of an inferential process," are useless to the court.[x]

As such, the court was not persuaded by the expert.

The final issue before the court was whether the damages, in particular $25 to each plaintiff, were appropriate. The court noted that plaintiff Zamecnik's shirt was defaced and plaintiff Nuxoll's chose not to wear his shirt despite his desire to do so, because of a fear of punishment. As such, the court stated the award of damages was justified.

Therefore, the Seventh Circuit held that the district court was correct in its grant of summary judgment for the plaintiffs and injunctive relief was appropriate.

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.

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[i] 636 F.3d 874 (7th Cir. 2011)

[ii] *Id*. at 876

[iii] *Id.*

[iv] *Id*. (citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); see *Boucher v. School Board of School District of Greenfield*, 134 F.3d 821, 827-28 (7th Cir. 1998); *Walker-Serrano ex rel. Walker v. Leonard*, *supra*, 325 F.3d 412, 416 (3d Cir. 2003); *LaVine v. Blaine School District*, 257 F.3d 981, 989 (9th Cir. 2001).

[v] *Id.* at 877

[vi] *Id*. at 879

[vii] *Id.*

[viii] *Id*.

[ix] *Id*.

[x] *Id.* at 880

FACEBOOK AND THE FIRST AMENDMENT RIGHTS OF POLICE OFFICERS©

by: Jack Ryan, Attorney

An area which raises a great many questions among law enforcement supervisors and administrators is how far may a department go when restricting, through policies, an officer's use of social media, and under what circumstances can a department discipline an officer without violating the officer's First Amendment Right of free speech.

There is a basic framework for analyzing any public employee's claim of First Amendment protection with respect to freedom of speech.

The right of public employees to engage in speech on matters of public concern without fear of retaliation is clearly established.[1] The determination as to whether speech pertains to a matter of public concern must be determined by the content, form, and context of a given statement.[2] The "ultimate issue of whether speech is protected is a question of law, not fact."[3] If it is determined that the speech is "of public concern," then a second inquiry must be undertaken to determine if an employee may be sanctioned for the speech.

Once it is determined that an employee's speech relates to a matter of public concern, an inquiry is undertaken to "balance the employee's interest in making the statement against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[4] It should be noted that an employee's position in a labor organization does not appear to give any heightened protection under the First Amendment but may establish some protection under state and federal labor laws designed to protect unions in labor disputes.[5] In Broderick the United States District Court of Massachusetts asserted: "While *Broderick* has a right to disagree with his employer, belong to a union and use the courts and other dispute resolving forums to further and safeguard his rights, the First Amendment does not afford him special protection as a public employee for these activities."[6]

The pertinent considerations concerning the departments' interests are: "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.[7] The State interest element focuses on the effective functioning of the public employer's enterprise. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function. Avoiding such interference can be a strong state interest."[8]

The United States Supreme Court has recognized that government entities have a "freer hand" in regulating the speech of its employees than it does in regulating the speech of citizens when acting as a sovereign.[9] It was also asserted that the Court gives greater deference "to government predictions of harm used to justify restrictions of employee's speech than to predictions of harm used to justify restrictions on the speech of the public at large."[10] The Court asserted in *Churchill*:

> But we have given substantial weight to government employer's reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign, our

[1] *Rankin v. McPherson*, 483 U.S. 378 at 383 (1987).
[2] *Connick v. Myers*, 461 U.S. 138 at 147-148 (1983).
[3] *Connick v. Myers*, 461 U.S. 138 at 147 n.7. (1983).
[4] *Rankin v.McPherson*, 483 U.S. 378 at ___ (citing *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick*) (1987).
[5] See e.g. *Broderick v. Roache*, 751 F.Supp. 290 at 293 (D. Mass. 1990).
[6] Id.
[7] Id. Citing *Pickering.*
[8] Id.
[9] *Waters v. Churchill*, 114 S.Ct. 1878 at 1886 et seq. (1994).
[10] Id.

> review of legislative predictions of harm is considerably less deferential.[11]

The Court pointed out that the First Amendment does have a role in these employment decisions.

> Government employees are often in the best position to know what ails the agencies for which they work: public debate may gain much from their INFORMED (emphasis added) opinions…Rather the extra power the government has in this area comes from the nature of the government's mission as an employer…When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

The Court concluded:

> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

As a result of the foregoing, it is clear that police officers, as government employees, can be restricted in their speech. One must examine officers' statements on a case by case basis and determine the following:

- Is the officer speaking on a matter of public concern?
- If the statement is not a matter of "public concern," it is not protected by the First Amendment with respect to employment
- If the statement is one of "public concern" then the department must examine the statement and make a reasonable determination if the statement may lead to "disruption" in the workplace. If the statement may lead to disruption in the workplace, then the employee may be disciplined.

[11] Id.

Social Media and First Amendment Rights

In determining whether or not it is appropriate to discipline a public employee for social media postings, law enforcement supervisors and managers must apply the framework set forth by the United States Supreme Court to determine if the social networking speech is protected by the First Amendment or some other provision of law.

First Amendment Application

A 2011 case from the United States District Court for the Northern District of Georgia provides an example of how a court may apply First Amendment analysis to a case where an officer is disciplined based on Facebook postings. In *Gresham v. City of Atlanta,*[12] the federal trial court reviewed the officer's lawsuit based on the discipline. A magistrate reviewing the case had made recommendations favorable to the officer. The trial court issued written findings rejecting these recommendations.

> Plaintiff is a City of Atlanta police officer in the Atlanta Police Department ("APD"). In August of 2009, Plaintiff was on the list of officers eligible for promotion to an investigative position, where she ranked number twenty. In the spring of 2010, promotions were made to investigative positions, but Plaintiff

[12] *Gresham v. City of Atlanta*, 2011 U.S. Dist. LEXIS 113347 (Northern Dist. GA. 2011).

was not promoted. It is undisputed that Plaintiff was not promoted because she had an open complaint against her with the Office of Professional Standards ("OPS") regarding an incident discussed below.

The Arrest

In December of 2009, before any promotions to investigator from the list of eligibles were made, Plaintiff arrested an individual named Jeriel Scrubb ("Scrubb"). Plaintiff was told at the time that Scrubb was a nephew of City of Atlanta police investigator Barbara Floyd ("Floyd"). In the arrest report, Plaintiff records that Floyd accompanied Scrubb alone to another room, took money and two cell phones from Scrubb's pockets, and possibly spoke to Scrubb. Plaintiff states that the "transfer of money was witnessed by other . . . investigators."

Defendants admit that Plaintiff arrested an individual named Jeriel Scrubb on December 8, 2009, but object to Plaintiff's identification of Scrubb as Floyd's nephew.

Plaintiff's Response to the Incident

On December 15, 2009, Plaintiff made a "newsfeed" post on her Facebook site, 3 which stated the following:

Who would like to hear the story of how I arrested a forgery perp at Best Buy only to find out later at the precinct that he was the nephew of an Atlanta Police Investigator who stuck her ass in my case and obstructed it?? Not to mention the fact that while he was in my custody, she took him into several other rooms alone before I knew they were related. Who thinks this is unethical?

The court began its analysis by outlining the applicable law as follows:

[In order] to state a claim for retaliation in violation of the First Amendment, Plaintiff, as a government employee, must show that her speech was constitutionally protected and that the speech was a substantial or motivating factor in Defendants' decision not to select her from the list of employees eligible for promotion to an investigative position. Whether Plaintiff has made this showing is governed by the four-part Pickering analysis, under which the Court must find that (1) Plaintiff's speech involved a matter of public concern; (2) Plaintiff's interest in speaking outweighed the government's legitimate interest in efficient public service; and (3) the speech played a substantial part in the government's challenged employment decision. If the employee can make the above showing, the burden shifts to the government to show that (4) it would have made the same employment decision even in the absence of the protected speech. The first two prongs of this test are questions of law while the latter two are questions of fact. In light of the Court's conclusions presented below, only the first two prongs of this test must be considered. [cites omitted].

The court in applying the law began by reviewing whether the officer spoke as a citizen on **a matter of public concern**. The court wrote:

The Court accepts the conclusion of the Report and Recommendation that Plaintiff's speech in this case was entitled to constitutional protection as speech of a citizen related to a matter of public concern. The government as employer has a stronger interest in regulating the speech of its employees than in regulating the speech of the citizenry in general. Nonetheless, it is well-settled that "[a] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." Accordingly, the *First Amendment* protects government employee speech if the employee

> speaks "as a citizen upon matters of public concern." If, on the other hand, the employee speaks "as an employee upon matters only of personal interest," the speech is not entitled to constitutional protection. An employee's speech concerns a matter of public concern if it can be "fairly considered as relating to any matter of political, social, or other concern to the community"… The Magistrate Judge concluded that Plaintiff's Facebook posting addressed a matter of public concern, specifically, "the integrity of the law enforcement services" provided to the public by the Atlanta Police Department (APD). Although the Court considers this a close question, the Court accepts the Magistrate Judge's conclusion that Plaintiff's speech did pertain to an issue of public concern and thus is entitled to First Amendment protection.

The court then moved to the second issue: did the officer's interest in speaking on this matter of public concern, outweigh the police department's countervailing interests?

On this second prong the court wrote:

> Under the second prong of the Pickering analysis, the Court must weigh Plaintiff's First Amendment interests against Defendant's interest "as an employer, in promoting the efficiency of the public services it performs through its employees." This balancing test reflects the fact that government employers must be given "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment," and must be permitted to "take action against employees who engage in speech that 'may unreasonably disrupt the efficient conduct of government operations,'"
>
> The government's interest in efficient public service is particularly acute in the context of police departments, which "have more specialized concerns than a normal government office." Indeed, the Supreme Court has noted a particular "need for discipline, esprit de corps, and uniformity" within the police force.[13] The Eleventh Circuit has likewise recognized the unique needs of police departments, noting, "Order and morale are critical to successful police work: a police department is a 'paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers.'" Several factors must be considered in determining whether the government's legitimate interest in efficient public service outweighs the government employee's interest in protected freedom of speech. In particular, courts must assess "'(1) whether the *speech at issue* impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made.' [cites omitted]
>
> The Court finds that the Report and Recommendation failed to give sufficient consideration to the [Police Department's] interests in conducting the Pickering balancing test. In its submissions to the Court, Defendant argued that Plaintiff's speech violated APD Standard Operating Procedure (SOP) Work Rule 4.1.06, Criticism, which provides:
>
> 'Employees will not publicly criticize any employee or any order, action, or policy of the Department except as officially required. Criticism, when required, will be directed only through official Department channels, to correct any deficiency, and will not be used to the disadvantage of the reputation or operation of the Department or any employees.'

[13] *Kelley v. Johnson,* 425 U.S. 238, 246, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976).

In rejecting the magistrate's recommendations, the court analyzed as follows:

> First, as the Supreme Court stated in *Connick*: When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.
>
> Thus, the fact that Defendants have not come forward with specific evidence of workplace disruption is not fatal to their argument. Defendants should not be required to allow employee speech to completely erode the loyalty and discipline of the police force before they can take action against such speech.

Consistent with prior holdings, the court noted the need for even greater latitude to control speech by law enforcement agencies in citing prior cases where it was held:

> In this regard, appellee's case is strengthened by the fact that the [police department] is a quasi-military organization. In quasi-military organizations such as law enforcement agencies, comments concerning coworkers' performance of their duties and superior officers' integrity can directly interfere with the confidentiality, esprit de corps, and efficient operation of the police department. The court continued:
>
> Discipline is a necessary component of a smoothly-operating police force. Although this necessity of discipline does not rise to the same level as required by the military, discipline must be maintained among police officers during periods of active duty. . . . We agree that courts should consider and give weight to the need for maintaining a close working relationship in quasi-military organizations like police departments.

In this case, Defendants have the same interest as the appellees in Busby in maintaining solidarity, order, and discipline within the police force, and in maintaining public trust and confidence in its capabilities. **Plaintiff's Facebook comments threaten these interests by imputing to the police force nepotism or corruption and by, more generally, weakening the public appearance of the police force as a unified "force." Instead, Plaintiff's comments portray the police force as riddled with infighting, insubordination, and dysfunction. These are the very dangers recognized by the Eleventh Circuit in Busby that courts must guard against when considering a police department's interests in limiting employee speech critical of the department's internal affairs.**

On the other side of the scale, the Court recognizes Plaintiff's First Amendment interest in speaking out against what she perceives to be unethical conduct within the police force. Indeed, the Court believes that the ability of the citizenry to expose public corruption is one of the most important interests safeguarded by the First Amendment.

As for the form of Plaintiff's speech, Plaintiff, it appears, did not present her grievances to superiors or any other persons in a position to change police department policy or sanction employees: she did not prepare any documentation, such as a formal complaint, specifically articulating the alleged misconduct; nor did she seek to expose the alleged misconduct to the public, generally, such as through radio, television, newspapers, or even a meeting at City Hall. Instead, Plaintiff chose to address the alleged misconduct through a "newsfeed" post on her personal profile of the social networking website, Facebook. While

> this choice of forum certainly does not exempt her speech from First Amendment protection, which extends to all forms of protected speech, it does suggest that her interest in making the speech is less significant than if she had chosen a more public vehicle, calculated to lead to serious public scrutiny of the APD's internal affairs…[T]he Court is not convinced that Plaintiff was truly *crying out to the public* about police department misconduct, as opposed to venting frustration with a superior. Although Plaintiff's speech does allege "unethical" misconduct, it does so only loosely, in a non-specific and largely rhetorical fashion.

It should be noted that when an officer makes a statement:

> [P]ursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline… In the Garcetti case, the Supreme Court held that a deputy district attorney was not entitled to First Amendment protection from retaliatory discipline for views that he had expressed in work-related memoranda questioning the credibility of an officer-affiant, views that he had then repeated when called to testify at a court proceeding. The Court, in effect, carved out a First Amendment exception for work-related speech. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.[14]

[14] See e.g. *Cardarelli v. MBT*A, 2010 U.S. Dist. LEXIS 34185 (Dist. Massachusetts 2010) citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

It should also be noted that there have been decisions from the National Labor Relations Board criticizing and overturning discipline related to social networking posts. Two significant items should be recognized. First, the National Labor Relations Act specifically excludes government entities from its definition of employers due to the fact that the act was passed to assist employees of private entities in forming unions and participating in collective bargaining. The current decisions of the NLRB have no application to public entities such as police departments. While such decision may be instructive, they largely rest on discipline which would impair an employee's ability to collectively bargain or speak to others on working conditions.

The United States Supreme Court has reviewed a law enforcement case which involved the termination of an officer for his use of the internet while off-duty.[15] The Court described the facts in *San Diego v. Roe*, as follows:

> Respondent John Roe, a San Diego police officer, made a video showing himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay, the popular online auction site. His username was "Code3stud@aol.com," a wordplay on a high priority police radio call. The uniform apparently was not the specific uniform worn by the San Diego police, but it was clearly identifiable as a police uniform. Roe also sold custom videos, as well as police equipment, including official uniforms of the San Diego Police Department (SDPD), and various other items such as men's underwear. Roe's eBay user profile identified him as employed in the field of law enforcement.
>
> Roe's supervisor, a police sergeant, discovered Roe's activities when, while on eBay, he came across an official SDPD police uniform for sale offered by an individual with the username "Code3stud@aol.com." He searched for

[15] *San Diego v. Roe*, 543 U.S. 77 (2004).

> other items Code3stud offered and discovered listings for Roe's videos depicting the objectionable material. Recognizing Roe's picture, the sergeant printed images of certain of Roe's offerings and shared them with others in Roe's chain of command, including a police captain. The captain notified the SDPD's internal affairs department, which began an investigation. In response to a request by an undercover officer, Roe produced a custom video. It showed Roe, again in police uniform, issuing a traffic citation but revoking it after undoing the uniform and masturbating.
>
> The investigation revealed that Roe's conduct violated specific SDPD policies, including conduct unbecoming of an officer, outside employment, and immoral conduct. When confronted, Roe admitted to selling the videos and police paraphernalia. The SDPD ordered Roe to "cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public. Although Roe removed some of the items he had offered for sale, he did not change his seller's profile, which described the first two videos he had produced and listed their prices as well as the prices for custom videos. After discovering Roe's failure to follow its orders, the SDPD--citing Roe for the added violation of disobedience of lawful orders--began termination proceedings. The proceedings resulted in Roe's dismissal from the police force. [cites omitted]

In analyzing the case the Court distinguished public employees from the general public as follows:

> A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. We have little difficulty in concluding that the City was not barred from terminating Roe under either line of cases…
>
> To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* Court adopted a balancing test. It requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'… *Pickering* did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices… This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a public employee's speech must touch on

> a matter of 'public concern'… *Connick* held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest."

The Court then outlined how a court would determine if something was a matter of public concern:

> Although the boundaries of the public concern test are not well defined, *Connick* provides some guidance. It directs courts to examine the "content, form, and context of a given statement, as revealed by the whole record" in assessing whether an employee's speech addresses a matter of public concern. In addition, it notes that the standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present. That standard is established by our decisions in *Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975)*, and *Time, Inc. v. Hill, 385 U.S. 374, 387-388, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967)*. **These cases make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing.**

The Court concluded:

> Roe's activities did nothing to inform the public about any aspect of the SDPD's functioning or operation. Nor were Roe's activities anything like the private remarks at issue in *Rankin*, where one co-worker commented to another co-worker on an item of political news. Roe's expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image.
>
> The speech in question was **detrimental to the mission and functions** of the employer.

Thus, a supervisor who is faced with a decision regarding discipline for speech including social network postings must first consider whether the speech is on a matter of public concern.

It the speech is not on a matter of public concern, it is not protected by the First Amendment.

If the speech is a matter of public concern, the department may still restrict the speech or bring discipline if it can be articulated that the speech, including social networking posts, impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties, or interferes with the regular operation of the enterprise.

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RENTAL CARS, UNAUTHORIZED DRIVERS AND THE 4TH AMENDMENT

By Brian S. Batterton, J.D.

On March 16, 2011, the Third Circuit Court of Appeals decided *United States v. Kennedy*,[i] which addressed the issue of whether a person who is not listed on a car rental agreement and is therefore an unauthorized driver possesses a reasonable expectation of privacy in the car such that they can object to a search of the car. The facts of *Kennedy*, taken directly from the case are as follows:

> Following the arrest of two minors in connection with stolen firearms, Detective Quinn of the Coatesville City Police Department received information indicating that some of those firearms had been sold for money and drugs at a home on First Avenue to a man known as "Tex" and later identified as defendant Kennedy. Police subsequently obtained a warrant and searched the home on First Avenue, where they found guns, drugs, and personal effects belonging to Kennedy. A federal warrant was issued for Kennedy's arrest on January 18, 2006.
>
> Six days earlier, on January 12, 2006, Kennedy's girlfriend Courtney Fields had rented a silver Toyota Camry from Kulp Car Rental and given the key to Kennedy, who used the car until January 18, 2006. Kennedy's name was not listed on the rental agreement.
>
> On January 18, a police informant who knew Kennedy notified Detective Chris McEvoy that earlier in the day he had seen Kennedy driving a silver Toyota Camry, the car Fields had rented, on Chestnut Street between 7th and 8th Streets. McEvoy then passed this information on to the day and evening shifts of the Coatesville Police Department. Later that evening, at approximately 9:00 p.m., Officer John Regan, Corporal Sean Knapp, and Sergeant Martin Brice encountered Kennedy—wearing black gloves and carrying in his right hand a rental key inscribed with the Kulp Car Rental insignia and listing the car it belonged to as a silver Toyota Camry—walking diagonally across Chester Avenue and down the hill toward East Lincoln Highway. The officers placed Kennedy under arrest pursuant to the warrant. They then searched Kennedy and found on his person $2,692 in United States currency, a set of keys, and four cell phones. The District Court later determined that Kennedy was a validly licensed driver.
>
> After Kennedy was taken to the police station, Officer Regan asked him where he lived. Kennedy said he lived at 714 East Lincoln Highway, a house less than a block from the location of the arrest. Officer Regan went to that location and soon found a silver Camry on Chester Street with a Kulp Car Rental bracket around its license plate. In the meantime, Sergeant Brice spoke with Kulp Car Rental's owner, who requested that the police tow the car to the police station. While Officer Regan waited for a tow truck, three people approached the car from East Lincoln Highway, at which time Officer Regan instructed them to move away from the vehicle. The man and two women continued up the street to a house where they watched Officer Regan and the car from the front porch and window. One of the three was Courtney Fields, Kennedy's girlfriend and the person who had rented the car and given Kennedy the key.
>
> Following the car's impoundment, Detective Martin Quinn directed Corporal Scott Neuhaus to conduct an inventory search of the car pursuant to

> Department policy so that the vehicle could then be picked up by someone from Kulp. Corporal Neuhaus began the inventory search with the trunk, where he found a partially opened duffle bag containing a disassembled rifle in three pieces. He immediately stopped the search and spoke with Detective Quinn, who then sought a search warrant for the entire vehicle. That same day, at her request, Fields' attorney informed the police that there could be drugs in the car.
>
> On January 20, 2006, Detective McEvoy and Detective Sean Murrin received a federal search warrant for the vehicle. Inside, the detectives found a cell phone charger plugged into the dashboard cigarette lighter, and a second cell phone charger in the passenger compartment, each of which fit one of the four phones found on Kennedy at the time of arrest. The detectives then opened the locked glove compartment and found a semi-automatic handgun, a magazine containing around 30 rounds of ammunition, and a plastic bag containing smaller bags with an off-white chunky substance later confirmed to be 202 grams of cocaine base.[ii]

Kennedy was subsequently indicted on federal drug and gun charges. He filed a motion to suppress the search of the rental car. The district court denied his motion and held that the search was initially conducted as part of a lawful impoundment and inventory of the vehicle under department policy. He was later convicted of the charges' and he appealed the denial of his motion to suppress to the Third Circuit Court of Appeals.

Thus the issue before the court was *whether a person who borrows a rental car but is not an authorized driver under the rental agreement has standing to challenge a search of the rental car (in other words, has a reasonable expectation of privacy in the car under the Fourth Amendment).*

In support of his contention that he should have standing and a reasonable expectation of privacy, Kennedy points to the *United States v. Baker,*[iii] in which the Third Circuit held

> [T]o determin[e] whether someone who borrowed a car had a reasonable expectation of privacy in it, a court must conduct a fact-bound inquiry assessing the strength of the driver's interest in the car and the nature of his control over it.[iv] [internal quotations omitted]

In *Baker*, the defendant borrowed his friend's car. Thus, the defendant in *Baker* was driving the car with the permission of the owner. As such, the court made a "fact bound inquiry" and determined that Baker did possess a reasonable expectation of privacy in the car he borrowed from his friend.

As to the applicability of *Baker* to the facts of Kennedy's case, the court of appeals stated

> [Baker] does not speak to the distinct factual scenario presented here: whether someone who has been given permission to drive a vehicle by its renter, without the knowledge of its owner and in contravention of the rental agreement, nevertheless has standing to challenge a search of that vehicle. Accordingly, we disagree with Kennedy that *Baker* augurs in favor of any particular outcome here.[v]

As such, the court of appeals examined cases from other federal courts of appeal, noting that the Fourth, Fifth, Sixth, and Tenth Circuits have held that in a scenario such as Kennedy's, the unauthorized driver did not possess a reasonable expectation of privacy in the rental car. The court of appeals stated

> [R]ecognizing that the inquiry must remain "fact-bound," we concur with the majority of circuits that have considered this factual scenario and conclude that, as a general rule, the driver of a rental car who has been lent the car by the renter, but who is not listed on the rental agreement as

> an authorized driver, lacks a legitimate expectation of privacy in the car unless there exist extraordinary circumstances suggesting an expectation of privacy. See, e.g., *United States v. Seeley, 331 F.3d 471, 472 n.1 (5th Cir. 2003)* (per curiam) (finding that driver of rental car lacked standing where he was not the renter or authorized driver); *United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994)* (holding that unauthorized driver of rental car who had been given permission to drive by co-defendant, an authorized driver, lacked standing); *United States v. Roper, 918 F.2d 885, 887-88 (10th Cir. 1990)* (defendant lacked standing where car he was driving was rented by co-defendant's common law wife and he was not listed as additional driver in rental contract); cf. *United States v. Smith, 263 F.3d 571, 586 (6th Cir. 2001)* (noting that "as a general rule, an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle" but nevertheless finding that the defendant had standing in light of the "truly unique" facts of that case).[vi]

On the other hand, the Third Circuit, noted that the Eighth and Ninth Circuits have held that the unauthorized driver of a rental car has standing when the renter gives the driver permission to use the vehicle.[vii] The Third Circuit then examined the facts of the Ninth Circuit case, the *United States v. Thomas*. In *Thomas,* a known associate of Thomas' rented a car, only listed himself as the driver, and then lent the car to Thomas. The Ninth Circuit, in holding that Thomas had standing to challenge the search, analogized his case with various cases that have held a person who rented a car or a motel room, who keeps possession of the car or motel room, after the lease or rental agreement expires, still retains a reasonable expectation of privacy and standing to challenge a search.[viii]

The Third Circuit, in examining the Ninth Circuits reasoning in *Thomas*, stated

> [The Ninth Circuit] concludes that the two types of breach should be treated the same for purposes of determining whether there is a reasonable expectation of privacy. The persuasiveness of the analogy breaks down, however, when one considers the different risks that each type of breach creates for the property owner, the different precautions that owners take to protect against each breach, and the corresponding differences with which society is likely to view those breaches. The risk of additional harm to or loss of leased property is likely to be small and easily quantifiable where the lessee merely maintains possession of the property past the expiration of the lease agreement. Indeed, because normally the expected loss will merely increase in proportion to the amount of time that the property is being used, the owner can easily seek compensation for this breach of the lease by charging an additional pro rata fee based on the amount of additional time that the property is used.[ix]

Further, the court noted that the United States Supreme Court has generally afforded a greater expectation of privacy in homes or living quarters than in automobiles.[x] The Third Circuit then stated that they believe society considers a person who validly rented a car but returned the car late quite different from a person who is not authorized by the rental car company to possess or drive the car. The court then stated

> [W]e join the majority of circuits in concluding that the lack of a cognizable property interest in the rental vehicle and the accompanying right to exclude makes it generally unreasonable for an unauthorized driver to expect privacy in the vehicle. **We therefore hold that society generally does not share or recognize an expectation of privacy for those who have gained possession and control over a rental vehicle they have borrowed without**

the permission of the rental company.[xi] [emphasis added]

As such, Kennedy lacked a reasonable expectation of privacy in the rental car and therefore did not have standing to challenge the search. Further, the court of appeals, like the district court, also held the search was lawful as a valid impound and inventory.

The court did find it important to note that there is a possible exception to the general ruled noted above. As an example of this exception, the court examined the *United States v. Smith,*[xii] from the Sixth Circuit. In *Smith*, the defendant reserved a rental car in his name and used his credit card to do so. The defendant's wife then picked up the vehicle and was the only authorized driver listed on the rental agreement. The defendant then drove the vehicle which was searched and evidence was obtained. The Sixth Circuit upheld the suppression of the evidence finding that the defendant had a reasonable expectation of privacy in the vehicle; they reasoned that, although he was not listed on the rental agreement, the defendant had a sufficient business relationship with the rental company and an intimate relationship with the authorized driver (his wife). However, the court noted that Smith did not help Kennedy in the facts of his case.

As such, the decision of the district court was affirmed.

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.

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[i] 638 F.3d 159 (3rd Cir. 2011)

[ii] *Id.* at 161-162

[iii] 221 F.3d 438 (3rd Cir. 2000)

[iv] *Id*. at 162 (quoting Baker, 221 F.3d at 442)

[v] *Id.* at 164-165

[vi] *Id.* at 165

[vii] *Id.* at 166 (citing *United States v. Thomas*, 447 F.3d 1191, 1198-99 (9th Cir. 2006); *United States v. Best*, 135 F.3d 1223, 1225 (8th Cir. 1998); *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995))

[viii] *Id*. (citing citing *United States v. Henderson*, 241 F.3d 638, 647 (9th Cir. 2000), as amended Mar. 5, 2001 (lessee of rental car has reasonable expectation of privacy even after expiration of agreement, as long as he maintains possession and control of the car); *United States v. Dorais*, 241 F.3d 1124, 1129 (9th Cir. 2001) (expiration of motel room rental period, in absence of affirmative acts by lessor to repossess, does not automatically terminate lessee's expectation of privacy); *United States v. Cooper*, 133 F.3d 1394, 1398-1402 (11th Cir. 1998) (renter has reasonable expectation of privacy even after rental car lease has expired); *United States v. Owens*, 782 F.2d 146, 150 (10th Cir. 1986) (motel guest maintains a reasonable expectation of privacy in motel room even after check-out time)).

[ix] *Id*. at 166-167

[x] *Id.* at 167

[xi] *Id.* at 167-168

[xii] 263 F.3d 571 (6th Cir. 2001)

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COURT RULES THAT TEXT MESSAGE CONTENT CAN'T BE USED IN COURT UNTIL SENDER IS VERIFIED

Commonwealth v. Koch, 2011 PA Super 201 (2011)
Chuck Washburn, J.D, National Instructor

The Superior Court of Pennsylvania decided on September 16, 2011, that text messages on a defendant's cellular telephone must be authenticated before they can be used as evidence against a defendant in trial.

The defendant Amy Koch was convicted of possession with intent to deliver marijuana and sentenced to 23 months probation. During a trial, evidence was presented that the defendant was residing with her brother Norman Koch and her paramour Dallas Conrad in North Middleton Township, Pennsylvania. A confidential informant notified police that Norman Koch was selling cocaine out of the residence in which he lived with his sister, Amy Koch and Dallas Conrad. The police conducted two trash pulls at the residence and found paraphernalia consistent with drug trafficking and applied for a search warrant for the residence. On March 25, 2009, members of the Cumberland County drug task force executed the warrant on the defendant's residence. The defendant, her brother Norman, and paramour Dallas Conrad were all present at the residence.

An officer assigned to the task force testified that he was involved in the search of the master bedroom and found two individual baggies of marijuana and seven hundred dollars in a dresser drawer containing male clothing. In addition, scales containing marijuana residue and some additional marijuana were found within the house. The officers also seized two cell phones, one of which the defendant identified as hers. The cell phone belonging to the defendant was examined and revealed numerous text messages which were transcribed by a police officer for the purpose of introduction at trial. At trial the Commonwealth attorney offered what was described as thirteen drug-related text messages, over the objections of defense counsel to the authenticity of the text messages and hearsay. During the trial, Commonwealth witnesses conceded that another person at times would use the defendant's cell phone. Further, the detective who transcribed the text messages conceded that the author of the drug-related text messages could not be ascertained and acknowledged that some of the text messages referenced the defendant in the third person and were clearly not written by the defendant.

On appeal the defendant alleged that the trial Court erred in admitting text messages into evidence that were not properly authenticated. Pennsylvania Rules of Evidence provide that authentication is required prior to admission of evidence. This may be done by a witness with personal knowledge or circumstantial evidence that is sufficient enough to support a finding that the writing is genuine and authored by a specific person.

The question of what is necessary to authenticate a text message was one of first impression in Pennsylvania. This Court reviewed many cases that involved the authenticity for electronic communications and found that in every case authentication involved more than just confirming that a number belonged to a specific person. It also must include independent evidence that the text messages contain factual information or references that are unique to the parties involved so that the sender or receiver of those text messages could be authenticated. The Court went on to say that text messages are no different than non-electronic documents and thus subject to the same requirements of authenticity, such as a witness who saw the author send the text, acknowledgment of execution by the individual texting, admission of authenticity by an adverse party, or circumstantial evidence.

This Court acknowledged the difficulty that arises in establishing authorship in email and text message cases. Courts have consistently found that the mere fact an email bears a particular email address is inadequate to authenticate the identity of the author. It is not uncommon for more than one person to use an email address and accounts can be accessed without permission. Therefore, additional evidence is needed to authenticate the author. The Court wrote "text messages are somewhat different in that they are intrinsic to the cell

phones in which they are stored. While emails and instant messages can be sent and received from any computer or smart phone, text messages are sent from the cellular phone associated with the number to which they are transmitted. The identifying information is contained in the text message on the cellular telephone." The issue is not the ability to establish for the purposes of authenticity who the account holder is and what particular phone a text message came from, but rather who was in possession of that particular phone when the text message was sent, "as with email accounts, cellular telephones are not always exclusively used by the person to whom the phone number is assigned." Like documents, electronic communications require more than a confirmation that the number belonged to a particular person, circumstantial evidence which corroborates the identity of the sender is required.

In this particular case, the Court ruled that the Commonwealth failed to present any evidence that tended to substantiate the defendant wrote the drug-related texts. The defendant's mere proximity to her phone was insufficient to determine she authored text messages days and weeks before the warrant was executed. The Court further determined that since the Commonwealth was unable to authenticate the text messages with the defendant as the author, then all text message content presented at trial was inadmissible hearsay because it was offered for the truth of the matter asserted and not an admission of the defendant.

Many Courts around the country are struggling with evidentiary issues that deal with the constantly changing forms of technology in our society. This particular ruling by the Pennsylvania Superior Court seems to be the latest of many across the country that make the use of technological evidence conform with the already established legal principles that have existed for some time. Although this ruling will make it more difficult to present text message content at trial, it is consistent with the established rules of evidence on authenticity of writings. Most Courts around the country agree with the ruling in Pennsylvania; and if your state has not yet addressed this issue, it soon will. It is safe to assume that your state will likely rule the same as Pennsylvania. So what does this mean for law enforcement? When conducting investigations that you know will involve text message, content on a potential defendant's phone don't just stop at retrieving the text messages, establish a nexus between the defendant and the text messages. Remember circumstantial evidence works! Although you may not have a witness that actually viewed the defendant type the text, there are many other key pieces of circumstantial evidence that could be very important in establishing authenticity. Also use all the information that can be provided to you by retrieving the cellular records of the defendant. If you can place the defendant's phone in the same place as the defendant by looking at the tower the signal came from when the text was sent or received you are one step closer toward the circumstantial evidence you need to establish he or she was the author of the text in question. This ruling just makes your job a little more difficult by requiring you to get evidence of authenticity, but in the long run it is only going to make your case stronger!

PRACTICAL PERSPECTIVE ON VIDEOTAPING POLICE

by: John Sofis Scheft, Esq.
Law Enforcement Dimensions, Inc www.ledimensions.com

Many officers become perturbed when citizens attempt to videotape them performing their official duties. While most states do not allow citizens to secretly record officers, they are certainly within their rights to openly document officers in public

Rather than react, officers must remain calm and carry out their functions in the same professional manner were the cameras not rolling. Otherwise, they risk liability for themselves and their department.

Consider *Glik v. Cunniffe,* 655 F.3d 78 (1st Cir. 2011): Simon Glik, an attorney, was arrested for using his cell phone camera to film several police officers arresting a young man on the Boston Common.

Concerned that officers might be using excessive force, Glik stopped roughly ten feet away and began recording. After placing the suspect in handcuffs, an officer said: "I think you've taken enough pictures." Glik replied: "I am recording this. I saw you punch him." Another officer then asked whether Glik's phone recorded audio. When Glik confirmed this, he was arrested, brought to the station, and booked (with his phone and flash drive held as evidence).

The charges related to the incident -- "secret recording" under G.L. c. 272, § 99 and "disturbing the peace" -- were subsequently dismissed in the Boston Municipal Court. Glik then successfully sued for "false arrest" in federal court.[1]

- **First Amendment allows documentation of police work.** The right of free speech gives citizens the opportunity to criticize the government (especially law enforcement) and to document its activities. In *Glik*, the federal court insisted that police officers should know that citizens have a First Amendment right to film their activities. If peacefully done, officers lack the authority to stop them. In the words of the court: "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."

- **Videotaping is not "secret" just because officers are unaware they are being filmed.** The citizen's open display of the recording device is the important factor, not the point at which officers become aware. Moreover, the court rejected the argument that, because a cell phone has many other functions (e.g., email, texting, calling), its removal and display did not alert the officers that they were being recorded. From now on, once a typical recording device is held in "plain view," officers are "on notice" that they are being recorded.[2]

- **Two limits on videotaping.** The *Glik* decision acknowledged that "the right to film is not without limitations."

  1. ***Interference.*** Officers may impose *reasonable* time, place, and manner limitations. *Glik* noted that the situation here -- a citizen in an open park -- might be viewed differently in another context, such as a traffic stop. If a citizen's recording activity is interfering with the police operation, I recommend:

     - Do not order a citizen to turn off his camera.

     - Instead, tell him what he must do to stop interfering with police business. Here are examples of verbal direction:
       - "Sir, you're too close. Go over to the sidewalk and stand there."

       - "Excuse me, you cannot interfere with my interview. You must be no closer than the red car over there."

     - Since recording is legal, focusing on the improper behavior – not the act of recording itself – is easier to justify in court.

  2. ***Evidence.*** Sometimes officers may need to confiscate a recording device as evidence. But the police have to be careful. The following principles apply:

     - Seizing a video camera or phone that contains footage about a crime is lawful,

[1] Technically, the Appeals Court determined that the officers did not have immunity for their behavior because it was so blatant. The court did not assess damages, which can only occur after trial or settlement. Practically speaking, however, once an immunity claim is denied, the plaintiff will often recover.

[2] This case is in marked contrast to *Comm. v. Hyde*, 434 Mass. 594 (2001), where the defendant turned on a recorder that was concealed in his pocket. The SJC upheld his felony conviction for the illegal secret recording.

and may be done without a warrant based on exigent circumstances. [3]

- Once seized, officers should explain to the citizen that he may consent to having the phone sent to a computer laboratory, where *only* the video of the incident will be extracted and preserved as evidence. The phone will be returned to the citizen as promptly as possible. If the citizen agrees, the officer should provide a receipt for the device, call a supervisor to the scene, and turn it over in the presence of the citizen.[4] A forensic computer laboratory may then extract the footage and return the phone with the video still on it, documenting the process.

- If the citizen refuses to consent – and the video evidence is deemed important to the criminal investigation – then officers should apply for a search warrant to retain and process the recording device.

- **Big caution:** In most cases -- particularly if the police arrest was problematic -- there will be an allegation that the recording device is being seized as part of a cover-up. This means, to put it bluntly, that officers who seize video evidence will often invite far more scrutiny and trouble than the evidence is worth. That is why obtaining supervisory input is so important. A decision to hold a citizen's recording device as evidence should be made in "good faith" -- not as a "pretext" to suppress that citizen's First Amendment activity.

[3] The *Glik* case did not discuss the propriety of seizing a phone as evidence.

[4] Simply taking the phone and dropping it into the evidence room until the trial is over – absent consent or a warrant – will probably be viewed by a court as unconstitutional and punitive to the citizen.

U.S. SUPREME COURT HOW EYEWITNESS IDENTIFICATION WILL BE REVIEWED WHEN THERE IS NO IMPROPER CONDUCT BY LAW ENFORCEMENT©

by: Jack Ryan, Attorney

In *Perry v. New Hampshire*[i], the United States Supreme Court reviewed an eyewitness identification that led to an arrest in Nashua, New Hampshire. The arrest of Barrion Perry was the result of a radio call at 3:00 a.m. on August 15, 2008. Officers responded to an apartment building after receiving a report that a black male subject was trying to break into vehicles. Officer Nicole Clay was the first to arrive on the scene. Upon her arrival, Officer Clay heard something metal clang to the ground and observed Berrion Perry carrying two car stereo amplifiers. She noted a metal bat on the ground behind Perry. When Officer Clay asked Perry where he got the stereo equipment, he responded that he had found them on the ground. Officer Clay asked Perry to remain at the scene while officers investigated further.

While officers were responding, Nubia Blandon, a witness to the event went to her neighbor's apartment and woke him with the news that someone was breaking into his vehicle. The neighbor Alex Clavijo went to the parking lot and found that his vehicle had been broken into, and the stereo equipment as well as his bat was taken. He reported this to Officer Clay, who at this point was on the scene.

Officer Clay, accompanied by the victim, Clavijo then went to the 4th Floor of the apartment building where Officer Clay interviewed Nubia Blandon. Blandon reported that she was looking out her kitchen window at about 2:30 a.m. when she saw a tall black male subject roaming the parking lot and looking into cars. She watched as he broke into Clavijo's car and took the items out. Officer Clay asked Blandon if she could provide a more detailed description of the subject. Blandon responded by pointing to her kitchen window and indicating that the subject (Perry) standing in the

parking lot next to the police officer was the subject responsible. It is this identification process that Perry challenged to the United States Supreme Court.

Through a series of eyewitness identification cases, the United States Supreme Court has determined that where there is a challenge to a pretrial identification based on Due Process grounds, the trial court utilizes a two-stage inquiry to determine whether or not the pretrial identification violated the defendant's right to due process.

The trial court first asks: was there "unnecessarily suggestive conduct by law enforcement?" If the answer is "no", then the defendant cannot establish a Due Process violation at all. If the answer is "yes" there was unnecessarily suggestive conduct by law enforcement that does not mean that the in-court identification of the defendant by witnesses and victims is excluded: instead it means the court must do a further inquiry to determine if the unnecessarily suggestive identification process has tainted the in-court identification. In other words, is the witness making their in-court identification based on their memory from the crime or are they making their identification from their memory of the subject from the overly suggestive identification process. That is why courts look at things like the witness' ability to see the subject at the crime scene, the duration of the viewing, the detailing of the original description by the witness, the lighting, and any other factors which would indicate that the identification was reliable notwithstanding the unnecessarily overly suggestive conduct by law enforcement.

The New Hampshire trial court determined that there was no unnecessarily suggestive conduct by Officer Clay and therefore never reached the second part of the analysis. In fact, the court found that the witness, Blandon, spontaneously identified Perry without any "inducement" by the police. Blandon and Clay testified at Perry's trial with respect to the out of court identification made by Blandon.

The issue before the United States Court is whether Perry could challenge on Due Process grounds the reliability of Blandon's identification where there was no unnecessarily suggestive conduct by the police. The Court framed the questions as follows: "…whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police." The trial court had ruled that even though there were some questions with respect to the reliability of Blandon's identification: the parking lot was dark in some locations; Perry was the only black male in the parking lot and standing next to a police officer; and Blandon was unable to pick Perry out of a subsequent photo-array the police conducted, this credibility of the identification could be challenged at trial before the the jury and not on a Due Process challenge.

In the Supreme Court, Perry acknowledged that the identification was not due to conduct by the police but argued that he should be able to challenge the reliability of the witness'identification pretrial to the judge in accord with his Due Process rights.

In refusing to accept Perry's argument, the Court asserted that the judicial screening of eyewitness identification's reliability only comes into play when the defendant has established improper police conduct. The Court noted that most identifications have some degree of suggestiveness to them albeit not suggestiveness created by law enforcement. The Court also noted the criticisms to the reliability of eyewitness identification. Notwithstanding these arguments, the Court held: "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a Due Process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Thus, if the defendant cannot establish improper law enforcement conduct which created an unnecessarily suggestive identification, then there is no Due Process right to have the judge screen the reliability of the identification. The defendant can still cross-examine the eye witness at trial and challenge their identification so that the jury can access the credibility of the witness. The Court also noted other safeguards including rules of evidence and jury instructions

on eyewitness identification as providing sufficient safeguards against unreliable identifications.

Bottom-Line: If the defendant cannot establish improper conduct by law enforcement which created an unnecessarily suggestive identification, the defendant is not entitled by the Constitution to a judicial pretrial screening of the reliability of the eyewitness identification.

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[i] *Perry v. New Hampshire*, 2012 U.S. LEXIS 579 (January 11, 2012)

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by: Cory Myers, Envisage Technologies
Bloomington, Indidana

Envisage Technologies announced that it has been selected by the West Virginia Department of Justice and Community Services (WV DJCS) to implement the Acadis Readiness Suite to manage all aspects of its law enforcement training and certification processes. Acadis will serve as the central repository for West Virginia law enforcement agencies and officers.

Acadis Online, the Cloud-based version of the Acadis Readiness Suite, provides WV DJCS a cost-effective, state-of-the-art solution without the need to purchase expensive hardware, operating systems, or database software. Envisage will provide servers and IT services as part of the Software as a Service (SaaS) contract.

"We sought to upgrade our training and certification system at a reasonable cost. We chose the Acadis Readiness Suite to automate our Academy training processes and provide a secure, distributed framework to collect training information from agencies throughout the state of West Virginia," stated Chuck Sadler, Law Enforcement Professional Standards Coordinator. "Acadis Online will provide the functionality we need without having to manage servers and connectivity, while ensuring our officers maintain compliance with state policy."

"We are pleased to add WV DJCS to our list of premier law enforcement clients. With the ongoing impact of decreasing state budgets, Acadis Online is a very cost-effective solution for high liability training organizations to continue to provide and track training information to meet certification requirements," stated Cory Myers, VP Homeland Security Solutions.

About ENVISAGE: Envisage is a high tech software company founded in 2001 to automate complex training operations for high liability industries. We create solutions that make our world a safer place. Our clients include military commands, federal law enforcement academies including the U.S. Department of Homeland Security (DHS), and many state law enforcement and public safety organizations.

About the Acadis Readiness Suite: The Acadis Readiness Suite addresses the unique challenges faced by organizations tracking high liability training, certification, and compliance records. The Suite is designed to make certain that our law enforcement, emergency responders, and military are trained, equipped, and ready. Acadis increases organization readiness by automating the management of complex training and logistics environments. The modular system architecture allows organizations to optimize the entire compliance lifecycle for personnel, providers, facilities, and resources.

Learn more by visiting www.envisagenow.com or calling 888-313-8324.