



# CMPD POLICE LAW BULLETIN

## A Police Legal Newsletter

May-June 2003

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**Forward:** In this issue we review the case of *Kaupp v. Texas* in which the U.S. Supreme Court affirmed that a confession obtained during an unlawful arrest cannot be used against the suspect at trial. We also review *Lawrence v. Texas*, and discuss its effect on charges related to Crimes Against Nature. Finally we look at the rights of foreign nationals or “Consular Notification”, discuss Authorizations to Act as Agents and a new court cost for seat belt violators.

### UNITED STATES SUPREME COURT

**Fourth Amendment/Unlawful Detention/Confession:** *Kaupp v. Texas*, \_\_\_ U.S. \_\_\_, 123 S.Ct. 1843 (2003)

**Highlight:** In *Kaupp v. Texas* 123 S.Ct. 1843 (2003) the Supreme Court revisited and affirmed the Fourth Amendment rule that a confession obtained by exploitation of an illegal arrest may not be used against a criminal defendant.

**Facts:** Kaupp, a seventeen year old male was a suspect in the disappearance of a 14 year old girl. After interviewing the girl’s half brother, Deputies believed that Kaupp was involved with her disappearance. Based on the interview of the half brother, the officers tried, but failed to obtain, a warrant. Nevertheless, two deputies and three detectives went to Kaupp’s house at 3:00 a.m. in the morning and after Kaupp’s father let them in, went to his room, awakened him with a flashlight and said “we need to talk”. Kaupp said “okay” and was then handcuffed and taken to a patrol car shoeless and dressed in boxer shorts and a t-shirt. Kaupp was not advised that he was free to leave at any time. They took him to where the body had just been located and then transported him to an interview room, removed his handcuffs where he was read his Miranda warnings. At first, Kaupp denied that he was involved but within 15 minutes recanted and admitted that he had participated in the crime but did not cause the fatal injury.

**Issue #1;** Was Kaupp seized for purposes of the Fourth Amendment when officers entered his home and told him “we need to talk”?

**Rule:** Yes, A seizure occurs when “taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”

**Discussion:** Examples of circumstances that indicate a seizure has occurred even where the person has not attempted to leave include “the



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threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officers request might be compelled." In this case the court found that a 17-year old boy awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk" and then led to a patrol car in handcuffs wearing only his underwear, rose to the level of a seizure.

**Issue #2:** Does the 4<sup>th</sup> Amendment require officers to have probable cause before they involuntarily remove someone from his or her home and transport him to a police station for investigative purposes?

**Rule:** Yes, absent consent, the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes requires probable cause or judicial authorization.

**Discussion:** It is true that police may temporarily detain someone on less than probable cause if they have reasonable suspicion to believe someone has committed a crime under *Terry v. Ohio*. "The police can stop and briefly detain a person for investigation purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot' even if the officer lacks probable cause. However, an "involuntary transport to the police station for questioning is 'sufficiently like an arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause. Based on the above circumstances the court found that Kaupp was arrested, however, since officers lacked probable cause, the arrest was illegal. The fact that Kaupp said "okay" did not turn this contact into a consensual encounter as Kaupp's answer was a "mere submission to a claim of lawful authority" and, as such, could not reasonably be interpreted to be a voluntary consent.

**Issue #3:** Was the confession admissible?

**Rule:** No, a confession obtained after an illegal arrest is not admissible unless it is an act of free will sufficient to purge the primary taint of the unlawful invasion."

**Discussion:** In order to separate the confession from the illegal arrest, the Court looks to the lapse of time between the confession and the illegal arrest, the presence of intervening circumstances and the "flagrancy" of the officer misconduct. Here, the officers did read Kaupp his Miranda warnings. Although Miranda warnings are an important factor "they are standing alone insufficient. . . there is no indication from the record that any substantial time passed between Kaupp's removal from his home in handcuffs and his confession after only 10 to 15 minutes of interrogation." In the interim, he remained in his partially clothed state in the physical custody of officers, some of whom were at least conscious that they lacked probable cause to arrest .

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## A FOREIGN NATIONAL'S RIGHT TO CONSULAR NOTIFICATION

Law enforcement officials have recently been reminded by the United States Department of State that International law requires officers to advise a foreign national of their right to have their consular



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officials notified when the foreign national is arrested or detained. The source of this right is derived from treaties with other foreign sovereign nations which have been consolidated under the Vienna Conference Consular Relations. Although consular notification is not a constitutional requirement it is a requirement that should be followed. This Department is currently drafting a Directive to assist officers in complying with this requirement and special consideration is being given to stream line the Directive to ensure it is not overly burdensome on our officers. In this article we discuss consular notification requirement along with FAQ's by law enforcement officers. The following information is provided by the U.S. Department of State

### Summary of Requirements Pertaining to Foreign Nationals

- When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified.
- In some cases, the nearest consular officials *must* be notified of the arrest or detention of a foreign national, **regardless of the national's wishes.**
- Consular officials are entitled to access to their nationals in detention, and are entitled to provide consular assistance.
- When a government official becomes aware of the death of a foreign national, consular officials must be notified.
- When a guardianship or trusteeship is being considered with respect to a foreign national who is a minor or incompetent, consular officials must be notified.
- When a foreign ship or aircraft wrecks or crashes, consular officials must be notified.

### Frequently Asked Questions About Foreign Nationals

**Q.** Who is a "foreign national?"

**A.** For the purposes of consular notification, a "foreign national" is any person who is not a U.S. citizen.

**Q.** Is a foreign national the same as an "alien?"

**A.** Yes. The terms "foreign national" and "alien" are used interchangeably.

**Q.** Is a person with a U.S. "green card" considered a foreign national?

**A.** Yes. Lawful permanent resident aliens, who have a resident alien registration card (BCIS Form I-551), commonly known as a "green card," retain their foreign nationality and must be considered "foreign nationals" for the purposes of consular notification.

**Q.** Do I have to ask everyone I arrest or detain whether he or she is a foreign national?

**A.** No, although some law enforcement entities do routinely ask persons taken into detention whether they are U.S. Citizens. If a detainee claims to be a U.S. citizen in response to such a question, you generally can rely on that assertion and assume that consular notification requirements are not relevant. If you have reason to question whether the person you are arresting or detaining is a U.S.



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citizen, however, you should inquire further about nationality so as to determine whether any consular notification obligations apply.

**Q.** Short of asking all detainees about their nationality, how might I know that someone is a foreign national?

**A.** A foreign national may present a foreign passport or an alien registration document as identification. If they present a document that indicates birth outside the United States, or claim to have been born outside the United States, they may be a foreign national. (Most, but not all, persons born in the United States are U.S. citizens; most, but not all, persons born outside the United States are not.) Unfamiliarity with English may also indicate foreign nationality. Such indicators could be a basis for asking the person whether he/she is a foreign national.

**Q.** What about undocumented and "illegal" aliens?

**A.** All foreign nationals are entitled to consular notification and access, regardless of their visa or immigration status in the United States. Thus "illegal" aliens have the same rights to consular assistance as do "legal" aliens. There is no reason, for purposes of consular notification, to inquire into a person's legal status in the United States.

**Q.** What about dual nationals?

**A.** A person who is a national/citizen of two or more countries other than the United States should be treated in accordance with the rules applicable to each of those countries. A person who is a citizen of the United States and another country may be treated exclusively as a U.S. citizen when in the United States. In other words, consular notification is not required if the detainee is a U.S. citizen. This is true even if the detainee's other country of citizenship is a mandatory notification country.

### Questions About Who Is Responsible for Consular Notification

**Q.** Who is actually responsible for notification?

**A.** The responsibility for consular notification, whether in the case of an arrest and detention, a death, or the appointment of a guardian for a foreign national, lies with what are generally called "competent authorities." This term is understood to mean those officials, whether federal, state, or local, who are responsible for legal action affecting the foreign national and who are competent, within their legal authorities, to give the notification required. This interpretation makes sense as a practical matter: compliance with the notification requirements works best when it is assumed by those government officials closest to the foreign national's situation and with direct responsibility for it.

**Q.** Who is responsible for notification of arrests and detentions?

**A.** The law enforcement officers who actually make the arrest or who assume responsibility for the alien's detention ordinarily should make the notification.

**Q.** What is the responsibility of judicial officials and prosecutors for notification of arrests and detentions?

**A.** Because they do not hold foreign nationals in custody, judicial officials and prosecutors are not



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responsible for notification. The Department of State nevertheless encourages judicial officials who preside over arraignments or other initial appearances of aliens in court to inquire at that time whether the alien has been provided with consular notification as required by the VCCR and/or any bilateral agreement providing for mandatory notification. The Department also encourages prosecutors to make similar inquiries. Inquiries such as these will help promote compliance with the consular notification procedures and facilitate the provision of consular assistance by foreign governments to their nationals.

**Q.** Who is responsible for notification of deaths and of sea and air wrecks?

**A.** Notification should be made by the appropriate state or local authority, be it a coroner or a probate court official. In cases of serious injury, wrecks, accidents, or major disasters (such as an airline crash), the competent authority may vary, but government officials responsible for such situations should ensure that notification is given when required.

**Q.** Who is responsible for notification of appointments of guardians?

**A.** Notification should be made by probate court officials or by representatives of the state or local equivalent of an attorney general, or by any other appropriate official involved in the guardianship process.

**Q.** Why are state and local government officials expected to provide such notification?

**A.** State and local governments must comply with the consular notification and access obligations because these obligations are embodied in treaties that are the law of the land under the Supremacy Clause of the United States Constitution. The federal government, however, would be responsible for a dispute with a foreign government concerning obligations under the relevant treaties.

### Questions About When Consular Notification Should Be Given

**Q.** What kinds of detentions are covered by this obligation?

**A.** International law provides for informing the foreign national of the right to consular notification and access if the national is "arrested or committed to prison or to custody pending trial or is detained in any other manner." While there is no explicit exception for short detentions, the Department of State does not consider it necessary to follow consular notification procedures when an alien is detained only momentarily, e.g., during a traffic stop. On the other hand, requiring a foreign national to accompany a law enforcement officer to a place of detention may trigger the consular notification requirements, particularly if the detention lasts for a number of hours or overnight. The longer a detention continues, the more likely it is that a reasonable person would conclude that the notification is triggered. Currently, CMPD is installing a fax machine in the booking area. Next to the fax machine will be a Consulate Directory listing the fax numbers for the nearest consulate office. It is important for the officer to determine if the foreign national's country is on the mandatory contact list. In such a case, the consulate must be contacted even if the foreign national does not so request. In addition, the Department is also looking at the feasibility of contacting a consulate via e-mail. Additional contact books will be distributed to FIB and one to each Service Area. Once the process is in place, an e-mail will be sent out to CMPD everyone. If you have any questions concerning the consular notification, please do not hesitate to contact our office at (704) 336-2406.

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### AUTHORIZATION TO ACT AS AGENT

An Authorization to Act as Agent (“ATAAA”) gives the CMPD the authority to order a person to leave the premises of another during times when no one is allowed on the property. The person may be arrested for trespass if he/she does not leave or returns to the property after having been forbidden to do so. An ATAAA is not a Power of Attorney and should not be referred to as such.

In determining whether an ATAAA is appropriate for a particular property, officers should keep the following factors in mind:

1. The property must be non-residential unless it is vacant. For example, the common areas of an apartment complex do not qualify. However, the pool area of an apartment complex can qualify if: it is enclosed by a fence, “No Trespassing” signs are posted, and the ATAAA is in effect during times when no one, including residents, is allowed in the pool area. Other types of residential property, such as single family homes, duplexes, and triplexes, do not qualify unless they are completely vacant.
2. A shopping center or business complex does not qualify for an ATAAA unless all of the businesses/offices are closed and all of the tenants agree on certain hours when no one, including the owners and employees, is allowed on the property.
3. Commercial property that is open to the public 24-hours a day does not qualify (including locations with public telephones, ATM’s, etc.).
4. The property must be clearly posted with “No Trespassing” signs. In addition to providing notice that no one is allowed on the property, the sign fulfills an element of the second degree trespass charge. For larger properties (properties with acreage, wooded lots, etc.), signs should be posted at commonly used entrances or pathways to the property. In addition, a reasonable number of signs should be posted (depending on the size of the property) to provide notice that trespassing is forbidden. If an officer encounters an individual who claims not to have seen a sign, the officer should direct that person to the nearest sign, inform him/her as to what area is covered, and make it clear that he/she is not allowed on the property.
5. Police authority may be exercised only during the hours that the ATAAA is in effect.
6. The property owner or other authorized person must appear in court on the trespass case to testify about the defendant’s unauthorized presence on the property.

Officers should not advise property owners to obtain an ATAAA if their property does not qualify under the above guidelines. If an officer has a question as to the suitability of a particular property for an ATAAA, he/she should contact the Police Attorney’s Office.



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ATAAA forms must be completed fully and accurately. Both day and night telephone numbers for the owner/authorized person must be included. In addition to a street address, a description of the property should also be included (vacant house, vacant lot, company name, etc.). Finally, the form must be signed by the owner/authorized person in the presence of a notary public.

ATAAA's must be approved (signed) by a police attorney and are effective for one year, unless terminated earlier. A new form must be completed if ownership of the property changes and/or to renew the ATAAA. The original of each ATAAA is maintained in a notebook in the Police Attorney's Office and a copy should be kept in the appropriate district office. A master list (divided by districts) of all of the current ATAAA's is also kept in the Police Attorney's Office. If a representative from a district would like to receive this list by e-mail (including updates), he/she should contact the Police Attorney's Office at (704) 336-2406.

Copies of the form and the cover letter are available in the Police Attorney's Office and may also be printed from the "Police Law Bulletins" section of the Directives folder and/or from the Police Attorney's folder.

The list of ATAAA's is also provided to Communications. Each location (except those without a specific street address) is flagged in the CAD system and the fact that an ATAAA is in effect is included when an officer is dispatched on a call for service.

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### SEAT BELT VIOLATIONS – COSTS OF COURT (\$50.00)

There is now a charge for court costs in connection with seat belt violations (G.S. 20-135.2A). However, the costs of court for those violations is **\$50.00**, instead of the regular \$100.00. In addition to the court costs, there is a \$25.00 fine (for a total of \$75.00).

If there is a seat belt charge along with another offense, you should use the **highest** fine and court costs:

Example: You charge someone with speeding 65 mph in a 55 mph zone. The correct fine would be \$25.00 (for the seatbelt violation) and the court costs would be \$100.00 (for the speeding charge).

The \$50.00 court costs also apply to operating a motorcycle or moped without the operator and all passengers wearing safety helmets and to operating a motorcycle or moped when the number of persons on the vehicle exceeds the number of persons the vehicle was designed to carry (G.S. 20-140.4). Those violations also carry a \$25.00 fine.

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### SOLICITATION TO COMMIT A CRIME AGAINST NATURE (SOLCAN)

As many of you are aware, the Supreme Court recently handed down a decision in *Lawrence v. Texas*, declaring a Texas statute unconstitutional as applied. The statute in question made it a crime for a person to engage in deviate sexual intercourse with another individual of the same sex. Deviate sexual intercourse as defined under Texas law means "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals of the anus of another person with an object." In this case, officers received a call to a private residence about a weapons disturbance. Upon entering the residence they observed two males engaging in what is defined under Texas state law as deviate sexual intercourse. The two men were arrested.

Upon appeal, the Supreme Court held that the right to liberty under the Due Process Clause under the Fourteenth Amendment protects two consenting adults of the same sex who are engaged in sexual behavior. Consequently, the Texas statute as applied to the above facts is unconstitutional.

The case draws into question the constitutionality of N.C.G.S. §14-177, Crime Against Nature. Clearly, the holding in *Lawrence* prohibits charging two consenting adults who are engaging in a crime against nature within a private residence with the above charge. However, the case did not directly address the solicitation of a crime against nature (SOLCAN).

For the time being and until a court tells us otherwise, we are of the following opinion: 1.) a SOLCAN charge wherein a subject offers to commit a crime against nature for money in either a private or public place is a valid charge; 2.) a SOLCAN charge wherein the subject offers to commit a crime against nature for no money in public or at an unspecified location is a valid charge; and 3.) a SOLCAN charge wherein the subject offers to commit a crime against nature for no money or consideration at a private place is no longer a valid charge.

We have spoken with the D.A.'s office who has agreed to continue to accept these charges; however, in the event a judge dismisses these cases based on a different interpretation, we may have to discontinue filing some or all SOLCAN charges.

Officers should still charge individuals with felony crime against nature if they are observed engaging in anal or oral sex in a public place, such as a park or a restroom.

In the event you are planning on conducting any sting operations, please contact our office at (704) 336-2406 to review protocol to ensure compliance with this recent decision.

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