CMPD POLICE LAW BULLETIN

A Police Legal Newsletter

Spring 2008 **Volume 27, Issue 1** **Page 1 of 11**

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Forward: In this issue we review three cases from the Fourth Circuit Court of Appeals. One involves the warrantless seizure of firearms from a suicidal individual threatening to harm others. The second involves an anonymous 911 call, and the third is a case of entry into private premises based on the smell of marijuana. We also review several North Carolina cases involving reasonable suspicion and the "plain feel" doctrine. There are also two significant legislative changes. One requires the electronic recording of custodial interrogations during homicide investigations. The second statute mandates the preservation of biological evidence collected during investigations and will likely require substantial changes in our procedures. We also address some recurring topics such as window tinting and CCW as well as what gestures and behavior meet the elements of Disorderly Conduct. We finish this issue with a review of the requirements for an Authorization to Act as Agent (ATAAA).

BRIEFS:

FOURTH CIRCUIT COURT OF APPEALS

Fourth Amendment/Due Process/Firearms/Search and Seizure/Exigent Circumstances: *Mora v. City of Gaithersburg, et. al.* 519 F.3d 216 (4th Cir. 2008)

Facts: Maryland police received a call from a healthcare hotline operator who stated that she had just received a call from Anthony Mora, a firefighter. Mora told her that he was suicidal, had weapons in his apartment and could understand shooting people at work and stated, "I might as well die at work." Officers immediately responded to his apartment and while en route, learned from one of his co-workers that Mora's threats should be believed. Police also learned that Mora's girlfriend had recently ended their relationship.

When officers arrived at Mora's apartment, they observed him in the parking lot loading suitcases and gym bags into a van. He was handcuffed and placed on the ground. Police then searched his luggage and the van and located one handgun round in a suitcase. Officers then took his apartment keys, entered his apartment, and located a large gun safe in the kitchen. They also found every interior door locked, including closets and bathrooms. Mora was transported to the hospital while officers were conducting the search. Ultimately, officers removed forty-one firearms, some automatic, semi-automatic or assault style and some loaded, as well as five-thousand rounds of ammunition, various gun accessories, and survivalist publications. The Gaithersburg, Maryland police seized all this property.

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No criminal charges were ever brought against Mora and he was not involuntarily committed. After the Gaithersburg, Maryland police completed their investigation, they found that Mora was a licensed gun collector and did not have a disqualifying criminal conviction that would prevent him from owning or possessing firearms.

Over the next few years, Mora sought the return of his property. The Gaithersburg police returned the gun accessories and survivalist literature but did not return the guns and ammunition. The police required Mora to complete an additional form before they could return the guns, which requested certain information concerning his mental health and his consumption of alcohol. Mora refused to complete the form and the police refused to return the firearms.

Mora sued naming the City and the Chief of police, as well as individual officers. The complaint challenged the search and seizure of his property as a violation of the Fourth Amendment. Mora also challenged the continued retention of his property as a violation of the Due Process Clause of the Fourteenth Amendment.

The federal district court found that the seizure of Mora's person was proper and that the search of his person and property was justified by exigent circumstances and was constitutionally reasonable. With regard to retaining the weapons, the district court found that the Gaithersburg form was preempted by state law, but did not constitute a due process violation. Additionally, the Chief and officers had immunity for Mora's claims for trespass to chattels and trover and conversion. Mora appealed to the Fourth Circuit.

Issue: Was the warrantless seizure of Mora and his property lawful?

Rule: Yes. "In circumstances that suggest a grave threat and true emergency, law enforcement is entitled to take whatever preventive action is needed to defuse it."

Discussion: The Fourth Circuit's analysis focused on the preventive action necessary in this case when the officers were confronted with an individual who posed the potential for mass murder. The Court referred to the doctrine of exigent circumstances and the principal that "a specially pressing or urgent law enforcement need can justify a warrantless search or seizure." The Court stated that, this process requires balancing the individual and governmental interests in light of the circumstances, with the Fourth Amendment standard of reasonableness. The Court discussed the need for police to take "effective preventive action when evidence surfaces of an individual who intends slaughter." Such preventive non-criminal searches must be constrained and objectively reasonable.

The Court concluded that based on the facts the officers were presented with, there was a credible threat that Mora could harm someone or himself. In conjunction with that threat, police could lawfully conduct searches to determine the scope of the threat. Thus, police had the authority to seize Mora without a warrant to "defuse" the threat and could also conduct warrantless searches of his surroundings. The Court further found that this public safety or preventive seizure was lawful and this rationale continued, regardless of the fact that Mora was removed from the scene. Consequently, the emergency was not concluded simply because Mora was on the way to the hospital.

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The remaining issue of whether or not the Gaithersburg, Maryland Police Department wrongly refused to return Mora's weapons was not a federal due process violation but was a state law action and should be addressed in state court.

Note: *This case does not weaken the general rule that officers should obtain a search warrant unless they have exigent circumstances. A warrantless preventative search is limited to* ***extreme*** *emergency situations where there is a grave threat and a true emergency.*

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Fourth Amendment/Anonymous 911 Call/Reasonable Suspicion: *U.S. v. Reaves*, 512 F.3d 123 (4th Cir. 2008)

Facts: In 2005, an anonymous female called 911 in Anne Arundel County, Maryland, to report someone traveling in a vehicle with a gun. The caller stated that she had been sitting in her car near a bar and saw the driver of a plum-colored S430 Mercedes engage in a transaction with a sandwich bag of items and she also observed a small gun with a black top. The caller emphasized that she wished to remain anonymous and did not want the officers to tell the driver that they had received a report that the driver had a gun. The caller twice indicated that she wished to remain anonymous and did not want further involvement in the matter.

The caller continued to follow the driver of the Mercedes and provided police with a running account of the vehicle's location until she took another direction to complete her errands. Within five minutes of the dispatcher's first message, Detective Jones observed the plum-colored Mercedes and followed it for a short distance before conducting a traffic stop based solely on the dispatch information. When the driver, Reaves, asked why he had been stopped, Detective Jones stated that they had information he had a gun. Reaves immediately made statements about having a gun. A loaded Beretta was located in the vehicle, as was $2000 in currency. Reaves was charged and convicted of being a felon in possession of a firearm. He appealed to the Fourth Circuit alleging that there was no reasonable suspicion for the stop.

Issue: Was the traffic stop based on reasonable suspicion and therefore valid under the Fourth Amendment?

Answer: No. When the police rely on an anonymous tip to support reasonable suspicion, the tip "must be accompanied by some corroborative elements that establish its reliability."

Discussion: The Court's analysis focused on the lack of corroboration to render the anonymous tip reliable in its assertion of illegality. The only other information provided to the police (other than the assertion of illegal activity) was the caller's contemporaneous observations. These observations lacked some prediction about the defendant's future movements which if corroborated would have indicated she had reliable inside information about his illegal activities. The caller's desire to remain anonymous was also a critical factor in the Court's analysis as she could not be held accountable for the information. The Court noted that a fraudulent tipster could fabricate her basis of knowledge and therefore, some corroboration of an anonymous tip is required. The Court also noted the absence of

other objective factors that the detective could have made, independent of the tip, such as a traffic violation or other suspicious activity. Additionally, the stop was not in an area of high crime, nor was the initial observation by the tipster in a high crime neighborhood.

Consequently, the Court concluded that there was not reasonable suspicion for the stop and the evidence obtained should not have been admitted at Reaves' trial. His conviction was reversed.

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Fourth Amendment/Warrantless Search/Entry Into Private Premises: *U.S. v. Mowatt*, 513 F3d 395 (4th Cir. 2008)

Facts: At approximately 9:00 p.m. on November 17, 2005, officers of the Bladensburg, Maryland Police Department were dispatched to investigate a report from a security guard that loud music and the smell of marijuana were emanating from a 10th floor apartment in a high crime area. Upon arrival, the officers knocked on the door and could hear movement within the apartment as well as the discharge of an aerosol can. The music was turned down and an occupant asked who was at the door. The officers repeatedly demanded that the door be opened and Mowatt, the occupant of the apartment, refused to open the door. Mowatt, in response to the officers continued demands, cracked the door open and asked if the officers had a warrant. They told him they did not.

During the conversation at the doorway, the officers became concerned as they could not see Mowatt's hands. Mowatt refused to show his hands and insisted the officers leave since they did not have a warrant. One officer grabbed Mowatt and a struggle ensued after the officers forced their way into the apartment. Another physical struggle between Mowatt and an officer caused the refrigerator door to open which revealed a plastic bag with several hundred pills, which appeared to be ecstasy. A brief sweep of the apartment for other persons also revealed a loaded .357 revolver, in plain view.

The officers subsequently obtained a search warrant which resulted in the recovery of a hundred ecstasy pills, two semi-automatic assault rifles, a body armor vest, marijuana, scales and $20,000 in currency. Mowatt was convicted and appealed.

Issue 1: Did the officers' command to Mowatt to open his door constitute a search under the Fourth Amendment?

Rule 1: Yes. A search occurs for purposes of the Fourth Amendment when officers gain visual or physical access to a room after an occupant opens a door in response to a police officer's order to do so.

Issue 2: Even if the initial intrusion was a warrantless search, could the search be justified by exigent circumstances based on the destruction of evidence?

Rule 2: No. Officers cannot rely on an exigency that they created to conduct a warrantless search.

Discussion: The Court found that Mowatt did not voluntarily open the door to officers but in fact, refused to open it and asked several times if the officers had a warrant. After the officers smelled

marijuana through the door, they had probable cause to seek a warrant. The Court noted that it was not necessary for Mowatt to open the door in order for officers to tell him to turn down the music and in fact, he had actually turned the music down before he ever opened the door. It was only after continued demands by officers that Mowatt opened the door. A "search" occurs for purposes of the Fourth Amendment when officers gain visual or physical access to a room after an occupant opens a door in response to the color of authority, as in this case. An actual physical entry is not required to constitute a "search."

The Court was not persuaded by the exigent circumstances argument finding that exigent circumstances did not exist to justify the officers requiring or demanding Mowatt to open his apartment door. The Court noted that officers had every right to knock on Mowatt's door to discuss the noise complaint, but without a warrant, they could not require him to open it.

The Court also rejected the government's argument that exigent circumstances existed after officers heard Mowatt spray an aerosol can, coupled with his refusal to open the door, which could cause marijuana to be destroyed. Officers were aware there was marijuana in the apartment prior to knocking on the door after smelling burning and raw marijuana from outside the apartment. Therefore, officers had the opportunity to obtain a warrant prior to knocking on Mowatt's door and alerting him to their presence. Any risk of the destruction of evidence was caused by the officers and their creation of an exigency does not justify a warrantless search. The Court also rejected the contention that the smoking of the marijuana itself was a destruction of evidence. The subsequent search warrant, based on evidence observed in the illegal entry and search of Mowatt's apartment, was not based on an independent source and was the fruit of the initial illegal search. The Fourth Circuit vacated his conviction and remanded the case to the lower court for further proceedings.

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NORTH CAROLINA COURT OF APPEALS

Fourth Amendment/Investigative Stops/Reasonable Suspicion: *State v. Hayes,* ___N.C. App. ___ 655 S.E. 2d 726 (2008)

Facts: A Raleigh police officer was on patrol in the afternoon in a area known for drug related arrests. The officer observed a vehicle with two male occupants drive past him in the opposite direction, park their car, and walk along a sidewalk. The officer did not know either man. The officer observed them walking up and down the sidewalk in the residential neighborhood. The officer then walked up to the parked vehicle and observed, through the vehicle window, the handle of a pistol protruding from under the passenger seat. The officer then drove his patrol car toward the two men, exited the vehicle with his weapon out, and ordered them to the ground. The defendant did not comply with the officer's request and fled from the officer but was quickly apprehended. After searching the vehicle, two handguns were located as well as a small bag of heroin in the defendant's jacket. The defendant was charged and convicted of being a felon in possession of a firearm and possession of heroin. He appealed.

Issue: Did reasonable suspicion exist to justify the investigative detention and the stop of the defendant and his companion?

Rule: No. An officer may detain someone "for investigation of a crime without probable cause to arrest him if the officer can point to specific and articulable facts, which with inferences from those facts create a reasonable suspicion that a person has committed a crime."

Discussion: According to the Court, the facts articulated by the officer do not constitute reasonable suspicion to warrant an investigative detention. Merely observing the defendant and his companion in an area where drug-related arrests have occurred, coupled with the observation of the unconcealed gun, does not immediately constitute reasonable suspicion that criminal activity was occurring. The officer did not know the defendant was a felon and had no reason to believe that the possession of the gun in the vehicle was a crime. (The officer also testified that he was merely going to arrest the defendant for resisting arrest.) Moreover, the resistance and flight by defendant occurred after the stop and could not be used as a "retroactive justification for the stop." Based on these reasons, the Court of Appeals reversed the trial court and found that defendant's motion to suppress the evidence from the stop should have been granted.

Editorial Comment: *The holding in this case is certainly subject to debate. It appears the Court focused on the fact that the officer knew nothing about the individual stopped and that the officer's observation of the gun was not – by itself – a crime. Another explanation may be that the officer was unable to adequately articulate other factors that led up to his decision to detain the subject. Take a look at the next case below which is a good example of an officer who was able to articulate both his experience and the reasons why he detained someone.*

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Fourth Amendment/Reasonable Suspicion/Plain Feel: *State v. Robinson*, ___ N.C. App. ___, 658. S.E.2d 501 (2008)

Facts: Corporal Coble, a 12 year veteran of the Greensboro Police Department, was conducting a bicycle patrol on public housing property as part of a special detail. Cpl. Coble was familiar with the drug related activity in this community and the area around the housing project.

On the afternoon of August 11, 2006, Cpl. Coble observed a vehicle in this neighborhood driving erratically when it drove over a curb and onto the lawn of an apartment. Cpl. Coble recognized the driver/defendant from prior arrests and knew he had felony convictions for drugs and firearms. When Cpl. Coble approached he observed the defendant talking to an occupant of an apartment. When the defendant saw Cpl. Coble, he stopped talking to the occupant and reacted in a startled manner. Cpl. Coble asked the defendant what he was doing and the defendant began to back away from him. The defendant turned away from Coble and began to put his hands in his pockets and refused to remove them. Cpl. Coble told the defendant that he was going to conduct a frisk for weapons after another officer had the defendant place his hands on the hood of the vehicle. As Cpl Coble began the frisk, he felt a cylindrical container and heard the contents rattle. Based on his prior experience, Cpl. Coble believed that the item contained crack cocaine. He removed the item, a film canister, which contained several rocks of cocaine. The defendant and his vehicle were searched incident to arrest. A set of

scales and several razor blades with cocaine residue were recovered from the vehicle. The defendant was convicted and appealed the denial of his motion to suppress.

Issue: Did Cpl. Coble have reasonable suspicion to justify an investigatory stop and frisk under *Terry* and probable cause to seize the film canister of cocaine?

Rule: Yes. An officer may detain someone "for investigation of a crime without probable cause to arrest him if the officer can point to specific and articulable facts, which with inferences from those facts create a reasonable suspicion that a person has committed a crime."

Discussion: The Court rejected the defendant's argument that the officer did not have reasonable suspicion to detain him. The Court reviewed the factors the officer observed before the detention and found them persuasive. This factors included, the officer's twelve years of experience; his experience with drug related arrests and street-level drug patterns and the manner in which drugs are packaged; his knowledge of the neighborhood as a place frequented by drug dealers; his experience that drug dealers carry firearms; his observations of the defendant's erratic driving; his knowledge of the defendant's prior drug convictions; and the defendant's behavior when confronted by the officer. The Court found that based on the totality of the circumstances, the officer had a reasonable, articulable suspicion to make the stop.

The final issue for consideration was the pat down frisk and subsequent seizure of the canister of cocaine. The Court found that the officer conducted the *Terry* frisk after a lawful detention as he had reasonable suspicion that as a drug dealer, the defendant could be in possession of a firearm. The Court rejected the defendant's contention that the seizure of the canister of cocaine exceeded the parameters of a *Terry* frisk. The Court found that under the "plain feel" doctrine in this case, there was substantial evidence that during the lawful pat down of the defendant's outer clothing, it was *immediately* apparent to the officer that the canister contained crack cocaine. Therefore, he had probable cause to seize the canister and the cocaine. Consequently, the defendant's conviction was upheld.

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NEW LEGISLATION:

1. ELECTRONIC RECORDING OF INTERROGATIONS REQUIRED

On March 1, 2008, a new law went into effect in North Carolina that requires the electronic recording of certain custodial interrogations. Specifically, G.S. § 15A-211 requires that any custodial interrogation in a homicide investigation conducted, at any place of detention, must be recorded in its entirety. The recording is to begin with the officer's advice to the person in custody of that person's rights and end when the interview has completely finished. The statute defines an electronic recording as either an audio recording or visual recording that is "authentic, accurate, and unaltered." (It is not necessary to inform the suspect that he/she is being recorded as North Carolina is a one party consent state.)

The statute provides remedies for compliance or noncompliance to include consideration by the judge in determining motions to suppress and whether the defendant's statement was unreliable or not given voluntarily.

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There are certain exemptions for statements set forth in the statute which include spontaneous statements, statements during arrest processing, statements made to officers in another state, statements obtained by federal law enforcement officers and statements given when the interrogators are unaware the person is suspected of homicide.

There is much discussion in police attorney circles as to the scope of the term "homicide" such as when an investigation involves a victim who is living but is in serious condition, a missing victim, or the discovery of bodies, to name a few possibilities. The recommendation from this office is to err on the side of caution and if you have a suspect in custody and it is likely the victim will die or it is foreseeable that the investigation will become a homicide, then recording the interview is the preferred practice.

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2. NEW LEGISLATION: PRESERVATION OF BIOLOGICAL EVIDENCE

Changes to G.S. § 15A-268, effective March 1, 2008, require government entities to preserve physical evidence collected during an investigation or prosecution that is "reasonably likely" to contain "biological evidence". (See below link). Prior to these changes, we were required to preserve only DNA samples and could dispose of the item from which we obtained the DNA sample following the property disposition rules set out in G.S. § 15-11.1. Now we are required to preserve the item that contains biological evidence.

Biological evidence is defined by the statute as any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately on a slide or swab, in a test tube, or some other similar method, or is present on clothing, ligatures, bedding, other household materials, drinking cups, cigarettes, or other evidence. There are many questions concerning exactly what must be preserved and the application of these changes to CMPD procedures. We are researching these issues and working with the District Attorney's Office to develop guidelines.

http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_15A/GS_15A-268.html

Until a procedure is in place, we recommend the following:

No change in the collection of evidence is necessary.

- Preserve and maintain any evidence that is reasonably likely to contain biological evidence, regardless of whether there is a suspect in the case. This includes not just the sample of the biological material but the physical evidence.
- The DA's office will request that we hold **all** evidence upon a conviction until additional procedures can be developed.

One issue that appears to be clear is when biological evidence can be destroyed.

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Biological evidence shall be preserved for the following periods:

(1) For conviction resulting in a sentence of death, until execution.

(2) For conviction of a violent felony (A-E), the biological evidence shall be preserved during the period of incarceration. If the conviction was obtained by a guilty plea, the evidence shall be preserved for three years from the date of conviction.

(3) For conviction of an offense requiring sex offender registration, the biological evidence must be preserved during the period of incarceration and any period of mandatory supervised release or probation.

(4) For conviction of any felony not governed by subdivisions (1), (2), or (3) for which the defendant's genetic profile may be taken by a law enforcement agency and included in the State DNA database, the evidence shall be preserved for a period of seven years from the date of conviction. If the conviction was obtained by a guilty plea, the evidence shall be preserved for three years from the date of conviction.

Under these provisions, biological evidence maintained by CMPD, may be destroyed without a court order, if the time specified in categories 1 through 4 has elapsed. It will be important to verify conviction dates and length of incarceration prior to such destruction.

We will continue to keep you informed as we work with other agencies across the state to further determine the procedures and responsibilities of CMPD to preserve evidence.

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DISORDERLY CONDUCT/WORDS & GESTURES

Recently the Police Attorneys' Office has received inquiries about what are sufficient words or actions to violate the disorderly conduct by abusive language statue, G.S.14-288.4(a)(2).

Generally, offensive gestures and profanity are insufficient to rise to the level of a criminal offense because of the protections of the First Amendment. As the United States Supreme Court recognized, the First Amendment on the whole offers broad protection for speech, be it unpleasant, disputatious, or downright offensive. *Terminiello v City of Chicago*, 337 U.S. 1, 69 S.Ct. 894 (1949).

The courts have declared that for words to amount to a criminal offense they must rise to the level of fighting words. Fighting words are defined as those that by their very utterance inflict injury or tend to incite an immediate breach of the peace. To be punishable, words must do more than bother the listener; they must be nothing less than "an invitation to exchange fisticuffs." *Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533 (1989).

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When charging an individual with disorderly conduct under G.S. 14-288.4(a)(2), an officer must place the actual words in quotes because the words are an element of the offense. If the violation was a gesture, the gesture must be described and the gesture itself should present an imminent likelihood to incite a breach of the peace.

The threshold for a criminal offense becomes even higher when the words or gestures are directed at police. The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. Speech directed at officers is often provocative and challenging, but is nevertheless protected against censorship or punishment. North Carolina courts have upheld disorderly conduct directed at officers when there is an actual threat to the officer ("get your g* d* a** out of the way before I run you over") or when the action attempts to incite others to act against the police. Criticizing an officer, calling the officer an "a**" or "son of a b*" have been held insufficient for disorderly conduct. Please be aware of these limitations and feel free to contact the Police Attorney's Office if you have any questions.

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WINDOW TINTING AND CARRYING CONCEALED WEAPONS VIOLATION

The Police Attorney's Office had received several questions lately, as to whether an illegal window tint which conceals a weapon that is otherwise visible, qualifies as a violation of CCW. The fact that the officer cannot see the weapon due to the illegal window tint, does **not** qualify as CCW, if the weapon is otherwise not concealed. The offense of CCW should **not** be charged based only on a window tint violation.

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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. 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,
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.
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.

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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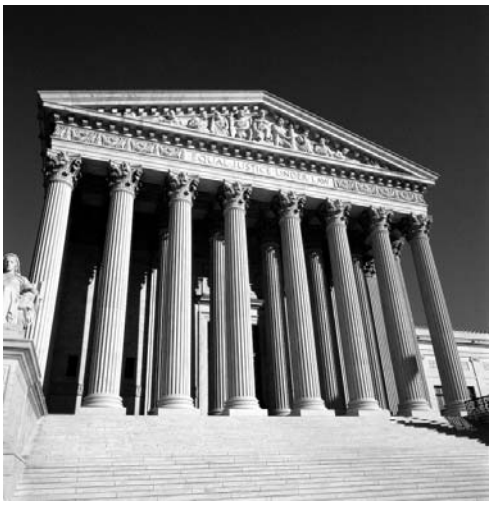

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