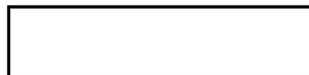


LEGAL ISSUES RELATED TO THE
USE OF PSI

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DIA GENERAL COUNSEL OFFICE

THIS PAPER MAY BE
OF SOME USE TO
YOU

BRIAN BUZBY

ARMY review(s) completed.

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*-Stanley L. Schall
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LEGAL ISSUES RELATED TO THE USE OF PSI

During the past several years, there has been an increase in the reported use of psychics in national security matters as well as in assisting federal and local law enforcement. The psychics provide nonconventional clues. These clues added to the success of solving major crimes. Note: psychics do not solve crimes. The cases are put together by regular investigators. But, when used appropriately, psychics become an adjunct tool similar to any other legal investigative technique. This paper is an overview raising questions about legal and ethical issues involved in the use of psi by local law enforcement and the judicial process. Psi is defined as a term to designate collectively paranormal events and/or faculties, including ESP, clairvoyance, psychokinesis, and survival phenomena.

From the preliminary investigation through incarceration, including the judicial procedures, psi has proven it can enhance the ability of many investigators to reduce case management time and to increase the apprehension rate. This is particularly true in difficult cases. However, the possibility of violating a defendant's rights may also be present. Because there is insufficient case law to provide necessary guidelines, our four years of study show a need to establish a dialogue of the issues and ethics regarding the use of psi within the criminal justice system.

There are two tracks on which we will focus: (a) the use of persons who have psi abilities and are not members of a law enforcement agency, and (b) those persons with psi abilities who are sworn personnel of an agency.

Psi contributors are treated as informants. They must establish their credibility with a high degree of "hits," or verifiable observations, which are then corroborated by an investigator. Once the psi input is independently

substantiated, it and the resulting evidence may be introduced into court. But this must occur within the framework of the justice system. Search and arrest warrants and the rules of evidence must be meticulously adhered to in order to avoid compromising a defendant's rights. An otherwise diligently prepared case can be lost at perhaps the pre-trial motion phase—for example in discovery—or somewhere down the process during the appeal stage if the rules of evidence prove to have been violated.

To protect the psychic informant who may or may not qualify as an expert witness, a judge may interview the informant in the presence of the prosecuting attorney and the investigating officer in an "in camera" hearing. Neither the defense counsel nor the defendant are present during this session. If the judge determines that an informant's data does not have a direct bearing on either the guilt or innocence of the defendant, the psychic informant need not be identified in court or be subject to examination. This is contingent on the investigator corroborating the data and developing independent leads which result in the arrest.

If a psychic is a consultant for an agency, he/she then becomes an instrument of the agency and is subject to the same legal requirements in the collection of evidence as is required of sworn members of the agency. This can pose a problem, for example, when a consultant uses remote viewing abilities to enter a location mentally, without consent of the owner/renter of the property, or without a search warrant.

Does such action constitute a legal search?

So, as we begin to explore some ramifications of the use of psi, we begin to identify many areas of concern. To reduce

the problems, we recommend an agency involved with psychics develop a specific policy on how to handle psychics and screen each informant/consultant as carefully as they would their own personnel. Such steps should preclude the compromise of an investigation or embarrassment to the agency.

It is our opinion that to reduce or minimize problems when using persons outside an agency as an adjunct, investigators should learn to develop their own psi abilities. Such education and training should enhance the legal process and reduce the potential for errors in case preparation. However, we must not overlook the possibility of an investigator who might zealously sacrifice agency ethics and thus violate a defendant's rights to obtain a conviction.

The United States Supreme Court is currently reviewing the Exclusionary Rule which requires evidence be obtained in compliance with the Fourth Amendment to the U.S. Constitution. The courts cannot accept evidence obtained in an unreasonable search and seizure regardless of how relevant the evidence is to the case. (Weeks v. United States, 232 U.S.383, 34 S.Ct. 341, 58 L.Ed.652 (1914).) Since that case, the courts have adopted guidelines to assure law enforcement that, by adhering to proscribed procedures, its search and seizure would be considered reasonable. The general guidelines permit a search to be justified when any of these apply: (1) consent is given; (2) a search warrant has been issued; (3) an emergency exists; (4) there is probable cause; or (5) a limited search may be conducted when incidental to arrest.

The United States Supreme Court may relax the Exclusionary Rule to include a statement called "good faith on the part of law enforcement when conducting a search." This means that

if an error is made in the search and seizure of evidence, the case may still go forward, provided the error was made without prejudice toward the defendant.

One critical concern in the Fourth Amendment is the Reasonable Expectation of Privacy (REP). This guarantees everyone the right to be free from unreasonable intrusion. This right is personal to every citizen. It can exist almost any time and any place as long as: (a) the individual has indicated that he personally expects privacy, and (b) his expectation of privacy is objectively reasonable under the circumstances. When a person is in custody, whether in a police car or in jail, he can expect what he says may be recorded. This also relates to someone in his own home being interviewed by law enforcement. The probability of what he says being recorded is a distinct legal possibility. Therefore, a serious issue is: will someone's rights be violated if, after they have been given a Miranda warning, they elect to remain silent and subsequently a psychic, either in or outside the interrogating rooms, uses ESP to provide the police officers with incriminating evidence.

Would this violate a defendant's rights?

Let's look at another example. The psychic is present during interrogation of a burglary suspect who may also have been responsible for a brutal rape/murder of a seven-year-old. The suspect is told the psychic is present, that no matter how he tries to evade questions, the psychic will be able to read his mind. The suspect waives his rights and admits to the burglary but not to the other crimes, and the psychic confirms the suspect's statements.

Is this a form of intimidation by law enforcement? Does it thereby make the statement of admission illegal?

Another example of the use of psychics is in the area of psychometry (the ability to obtain facts about the history of an object, including persons and events connected with it, usually by touching or holding the object). An investigator provides photos, bloody clothing and a ring worn by a murder victim. He wants to know who the suspect is. The psychic provides details of the crime scene and other pertinent information known by the investigator. Thus, information provided by the psychic is immediately corroborated or disproved. The psychic then describes in detail, circumstances surrounding the death, perhaps including a description of the suspect and his car as well as the location of additional evidence such as the murder weapon.

Does such information violate any law or rules of evidence if the investigator corroborates the data and obtains a search warrant listing the psychic/informant in the affidavit supporting the request for the warrant?

One last example before we present specific concerns: Narcotic investigators have received hearsay information from an anonymous informant about several attorneys who have provided large sums of money to finance the purchase of cocaine for distribution. They have also set up dummy corporations to hide their profits. The investigation has taken several months without sufficient evidence being developed to determine if, in fact, a crime has been committed. The investigators are aware of a meeting of the alleged conspirators in a high-rise building which has a great deal of electronic security to prevent listening devices from being used. They contact a person who has demonstrated remote viewing abilities. This person is successful and provides data to open the investigation. He obtains the points of distribution, dates and times of delivery of the cocaine and the names of the dummy corporations.

Was the information obtained by remote viewing, and subsequently corroborated by law enforcement, a violation of the Fourth Amendment?

The reader should not consider the above examples as fantasies. In fact, they occurred almost as written, with the exception of the last case. The cases were slightly modified to preclude violating the confidential information. With these circumstances in mind, let us now approach the specific issues and ethics of the use of psi in local law enforcement.

Let's review the case of People v. Egan, 141 Cal.App.3d 798 (1983). "Binocular-aided observations of marijuana growing in open fields, made from an airplane, are legal as long as the plane is at a lawful altitude (at least 500 feet above ground level). This is so even though the marijuana cannot "truly" be identified without the use of the binoculars. A defendant simply has no reasonable expectation of privacy as to the viewing of his crops by aerial surveillance." However, in the case of People v. Cook, Sup.Ct.No.CRN-7500 (Cal.Ct.App.4th filed February 16, 1984) (4 Crim.No.15349), it was stated that aerial flyovers of property where precaution was taken to hide the contraband violates REP. Cook's residence was in a semi-rural area and he was growing marijuana in his back yard. He took precautions to protect his illegal activity by hiding the evidence from general observation. The flyover was designed to locate the contraband from the air. The court stated that since law enforcement did not routinely fly over Cook's house as a normal patrol procedure, they violated his REP. The court further stated that "the Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion."

There are other cases that state evidence obtained by a person using one or more of the five senses in observing

something coming from an open apartment house window while standing outside on public property does not violate the defendant's REP.

Now let's take a look at the psychic investigator who uses remote viewing to obtain evidence of a tax fraud taking place in a major gambling casino. The suspects are talking at a public roof-top restaurant and exchange papers regarding a skimmming operation and the washing of money through a bank in another state. The investigator, through his natural abilities, projects his mind to their table and is able to listen in on their conversation as if he were present. There apparently is no case law to preclude this kind of search and seizure of information since the suspects' meeting took place in the open without taking steps to safeguard their conversation. In this case the "aerial flyover" is the investigator's mind and the only enhancement is his or her own natural abilities.

The California Peace Officers Legal Handbook of 1983, defines probable cause to arrest as "a set of facts which would cause a person of ordinary care and prudence to honestly believe and strongly suspect that the person to be arrested is guilty of a crime." In other words, to make a valid arrest without a warrant, enough factual information is needed to make an average, reasonable person—who has the same training and experience—believe or strongly suspect that an individual is guilty of a crime. People v. Price, 137 Cal.App.3d 90 (1982).

A psychic informant who has freely and voluntarily provided quality information in the past states that she was reading someone's mind at a supermarket and that the person was buying groceries to store for the kidnapping of the chief executive officer of a multi-national corporation. She

followed the person to his car and obtained the license number and description of the vehicle. There is a passenger in the vehicle. The psychic again uses ESP. She believes the passenger is also involved in the kidnapping plot. Her information along with the suspects' descriptions is turned over to law enforcement. In this case, one of the suspects threw away the store receipt which the psychic retrieved. However, the crime lab was unable to obtain fingerprints.

Law enforcement subsequently learns that the kidnapping has not yet taken place, but the car is rented to a known felon. The store receipt is given to the psychic who uses psychometry and provides a series of leads. The leads are confirmed by the law enforcement unit. Sufficient information is then obtained through conventional police methods to arrest the suspects as they drive to carry out their plan.

Is the original evidence provided by the psychic grounds to develop probable cause? Will it hold up in court?

California Evidence Code § 1042(b) states that where a search is made pursuant to a warrant valid on its face, the defense is not entitled to disclosure of the informant in order to attack the legality of the search or the admissibility of the evidence obtained. Section 1042(b) uses as a standard for disclosure whether the informant is a material witness on the issue of guilt and whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. This is set forth in case law: People v. Williams, 51 Cal.2d 355, 359 (1958); People v. Garcia, 67 Cal.2d 830, 839 (1967).

If the psychic informant believes that a known child molester has just taken a seven-year-old girl to his mountain cabin where he contemplates rape and eventually murder,

and identifies the suspect's van and the first three digits of the license number, it would be considered an emergency circumstance. The investigator would determine if a child had been reported missing and then run their sex offenders through the files of the Division of Motor Vehicles to ascertain if he owns a van with the reported first three digits. If this information is verified and county real estate records confirm the ownership of the property by the suspect, the officers could either obtain a search warrant for the child or use the exigent circumstances to prevent the crimes of rape and murder. It appears that events in this scenario would require identifying the informant. Once the psychic/informant took the stand for eventual cross-examination by defense counsel, the prosecution would first have to establish the credibility of his informant which may be difficult. To prove this, there should be statistics to show that the psychic's statements are far beyond the degree of probability of guessing and that the psychic has been used successfully in the past to assist in providing nonconventional clues to solve major crimes.

A psychic is driving by a residence and sees a male about 25 years old standing behind an unlocked chain link fence. The psychic uses his ESP and believes the male is thinking about selling 15 kilos of cocaine and the receiving of more than \$600,000 in cash from a transaction that will take place in 48 hours. The psychic, who has established himself over the past several years as a reliable informant, is now a consultant for a police agency. He contacts the agency about the narcotics. Since the consultant is presently acting as an agent for the police department, he must follow all of the rules of evidence regarding search and seizure.

In the case of People v. Mendoza, 122 Cal.App.3d Supp.12

(1981) the court ruled that a police officer had the right to enter the unlocked front gate and talk to Mendoza who was approximately 75 feet from the front of the fence. The officer wanted to talk to him about his dealing in heroin. The officer observed Mendoza as being under the influence of drugs. The court stated in a 2 to 1 decision that they "viewed the fence as being more for 'discouraging dogs, children, handbill deliverymen and others from walking across the front lawn and flower beds' than for the purpose of excluding the public. Therefore, Mendoza had no reasonable expectation of privacy in his front yard and it was proper for the officer to enter the unlocked gate and approach him."

In our scenario, instead of the psychic/consultant walking through the gate, he used his mind to obtain the information from his vehicle which was across the street from the suspect's residence. We now must decide what is REP as it relates to the thought process of an individual in open view but on his own property. I have not yet found any case law to cover this.

Fate Magazine reported in its November 1979 issue "that the South Gate, California Police Department used a psychic who gave a police artist a description of a suspect in the disappearance of a seven-year-old that occurred October 22, 1978. The officers recognized the suspect, who was known by the missing boy's family, and arrested him. The suspect confessed to murdering the boy as well as two others. Judge William E. McGinley of the Los Angeles Superior Court ruled 'that the use of the psychic in the case was merely an investigative tool and cannot be relied upon by the officer in connection with justifying the arrest. However, it may be used to follow up additional leads.' It was evaluated as

a legal arrest."

During the five years that we have been conducting our research, we have met with municipal court, superior court and appellate court jurists who provided informal guidance. Each stated, independent of one another as none knew we had interviewed the others, that as long as law enforcement personnel corroborated information provided by a psychic prior to asking for arrest and search warrants, the evidence could be introduced into court.

High technology has influenced our courts in their decisions in reference to wire taps. The following was reported in the Los Angeles Times on March 25, 1984: "Police can record cordless telephone conversations heard over an FM radio and use the recordings as evidence," the Kansas Supreme Court ruled. The court overturned a lower court ruling suppressing taped conversations of Timothy and Rosemarie Howard of Hutchinson, Kansas, charged with possession of cocaine and conspiracy to sell marijuana. The high court said conversations picked up by one of Howard's neighbors on a ham radio are oral communications and are not covered by federal wire-tapping laws. Testimony indicated the cordless telephone owner's manual states "transmissions can be picked up on FM radio." Such communications eliminate reasonable expectation of privacy (REP).

What about the person who uses a public phone booth that does not have an enclosure and a psychic "hears" about a major crime through ESP or remote viewing abilities? Would the high courts rule in favor of introducing such evidence?

We are rapidly approaching the use of another aspect of high technology, the expanding intuitive functions. It is only a

matter of time until these new techniques will be used on a daily basis as an adjunct tool for law enforcement. Society and the courts will soon be judging these new techniques. Those with knowledge in this expanding field must openly discuss the pros and cons of these techniques and develop effective guidelines to assure individual rights are not violated for the sake of a conviction.

Movies such as "Blue Thunder" suggested that sophisticated technology presents some disturbing possibilities of aerial police surveillance. The reference here is when the helicopter hovered outside a window of a very tall building and used an electronic monitoring device to listen in on a conversation behind a wall. Thus, the potential for abusing reasonable expectation of privacy is very real. Today's appellate and supreme courts are dealing with simply aerial flyovers and the federal-state marijuana eradication program.

Let's go one step further and state that we now have a cadre of law enforcement personnel who have successfully demonstrated the use of psi and remote viewing abilities to arrest and convict cocaine and heroin distributors as well as international terrorists.

It has been alleged that certain foreign intelligence agencies are utilizing such concepts to collect classified information. If our courts are just now dealing with aerial flyovers, how will they cope with the expanding functions of the mind and the legal issues of using psi and remote viewing in apprehending criminals?

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