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FBI

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William S. Sessions, Director

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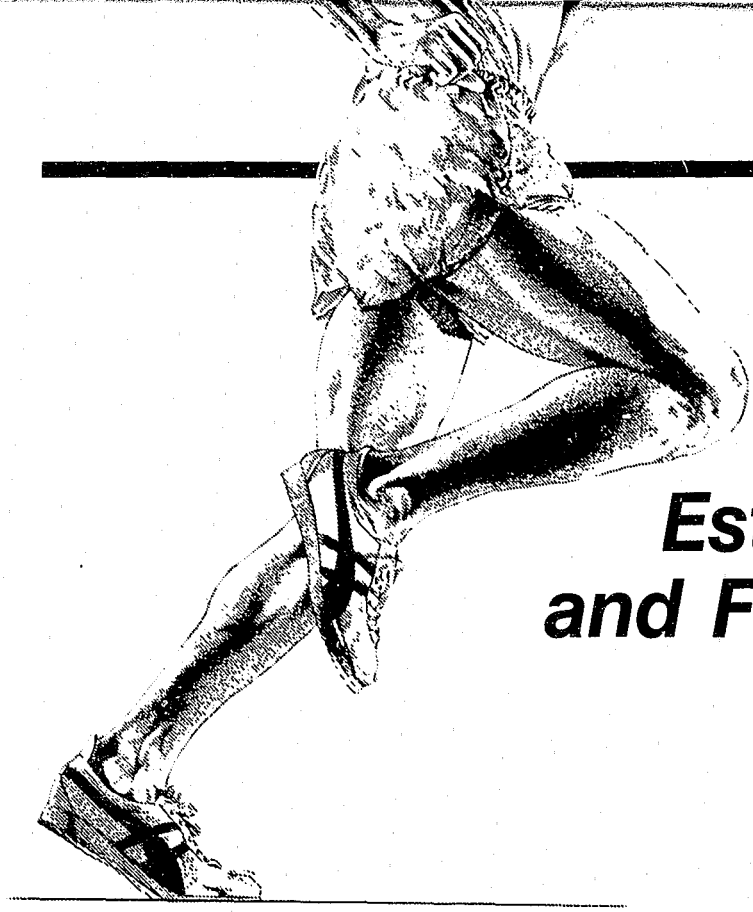

Establishing Health and Fitness Standards

Legal Considerations

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The health and fitness levels of law enforcement employees are a legitimate concern of law enforcement administrators and the American public. Law enforcement employees are expected to maintain high levels of physical fitness. However, many fitness-related problems and illnesses are brought on by lifestyle factors, such as tobacco usage, improper nutrition, and the lack of exercise. Some administrators have responded to the concern for employee fitness by developing mandatory health and fitness standards, such as nonsmoking regulations and obesity control guidelines; others attempt to ensure fitness for duty through the use of agility tests that measure a person's ability to perform specific tasks.

This article assesses the legality of various health and fitness standards under Title VII of the Civil Rights Act of 1964[1] (hereinafter title VII) and the U.S. Constitution. Court decisions suggest that law enforcement administrators have considerable latitude under the Constitution to enforce reasonable health and fitness standards that promote good health and job-related fitness in a positive manner. Conversely, title VII is violated by mandatory standards that disproportionately disadvantage women and are not properly validated as job related.

This article begins with a brief discussion of so-called "wellness" programs that establish goals for good health rather than mandatory standards. Next, the legality of various mandatory fitness standards is assessed in the context of recent court decisions involving law enforcement employment. Finally, specific recommendations are offered for the implementation and enforcement of health and fitness standards.

A "WELLNESS" APPROACH TO EMPLOYEE FITNESS

A first and essential step in promoting the health and fitness of law enforcement employees is a department "wellness" program that encourages good health and provides various health-related benefits to employees on a voluntary basis. All law enforcement organizations should have a "wellness" program that provides employees with educational information on lifestyle issues, such as drinking, smoking, diet, and

Special Agent Schofield

> **"To be legally enforceable, all mandatory fitness standards must be reasonable."**

proper exercise. Various facilities and incentives can be offered to encourage employee participation in fitness programs. For example, the FBI's "Focus on Fitness" program provides 3 separate hours per week, on-duty time, for vigorous physical exercise programs. This commitment in finances and time is a definitive statement that as an institution, the FBI cares about the health and fitness levels of Agents and the tremendous impact those levels have on the individual's personal and professional capabilities.

"Wellness" programs that merely establish goals for healthier employees are not violative of either the Constitution or title VII because there are no mandatory fitness standards or agility tests requiring a specific level of fitness. However, employees can be required to participate in "wellness-related" activities, such as an annual physical examination, training and counseling sessions, or a periodic fitness test to measure overall health and fitness. Required participation during working hours is a reasonable condition of employment that enables law enforcement administrators to gather information relative to employee health and fitness for duty; no constitutional or title VII provisions are implicated, since there are no mandatory standards resulting in adverse personnel action except for an employee's insubordinate failure to participate.[2]

MANDATORY STANDARDS—GENERAL CONSIDERATIONS

The implementation and enforcement of mandatory health and fitness standards in a law enforcement organization raises potential legal issues under the Constitution and title VII. To be legally enforceable, all mandatory fitness standards must be reasonable. The Constitution only permits the enforcement of mandatory standards that have a "rational basis" and are fairly implemented.[3] However, the legality under title VII of a particular standard often depends on its impact. Title VII requires that mandatory standards with a disparate impact on women be justified by proof of job relatedness, which is considerably more burdensome for the government than the "rational basis" test.[4] The following discussion of court decisions illustrates the differing levels of governmental justification that are necessary to establish the legality of various mandatory standards.

"Rational Basis" Required If No Disparate Impact

Mandatory health and fitness standards with no disparate impact under title VII are constitutional if rationally related to a legitimate governmental interest. Under this "rational basis" analysis, courts adopt a deferential posture that initially assumes the validity of the fitness standard. For example, in *Grusendorf* v. *City of Oklahoma*,[5] the U. S. Court of Appeals for the 10th Circuit upheld a nonsmoking rule because it had a rational relationship to the legitimate State purpose of promoting employee health and safety. Mr. Grusendorf had taken three puffs from a cigarette while on a lunch break from his job as a firefighter trainee with the Oklahoma City Fire Department and was fired for violating the terms of an agreement he signed as a precondition of employment that he would not smoke a cigarette, either on or off duty, for a period of 1 year from the time he began to work.

The court began its analysis of the constitutionality of this nonsmoking requirement by noting that the government has a heightened interest in regulating the activities of government employees when those regulations are rationally related to employee fitness for duty.[6] The court found a rational connection between the nonsmoking regulation and the promotion of the health and safety of the firefighter trainees on

grounds that good health and physical conditioning are essential requirements for firefighters and the Surgeon General's warning on the side of every box of cigarettes notes that smoking is hazardous to health.[7]

Courts also uphold reasonable visual acuity requirements for police that are rationally related to legitimate law enforcement interests.[8] For example, in *Padilla* v. *City of Topeka*,[9] the Supreme Court of Kansas employed a "rational basis" analysis and upheld a physical standard for hiring police with uncorrected visual acuity not less than 20/50 for each eye—correctable to 20/20 in each eye. Noting that visual acuity of police officers is a reasonable concern, the court found the standard constitutional, even though the acuity standard was relatively new to the department and a number of officers on the force could not meet it. The court concluded that "[I]t would be poor public policy to hold that a police department cannot upgrade its officers by imposing standards without terminating all existing officers who could not meet the new standards."[10] Judicial recognition of the need for reasonable health and fitness requirements is also evident in a Federal district court decision, which found a rational basis to support the denial of employment for the position of reserve police officer on the grounds that the applicant suffered from sensitivity to high temperatures.[11]

The courts have also upheld reasonable mandatory fitness standards despite claims of handicap discrimination under the Rehabilitation Act of 1973.[12] For example, the court in *Padilla* ruled that the city's refusal to hire the applicant as a police officer because of his myopic vision was not a violation of the Rehabilitation Act of 1973, which prohibits discrimination against "otherwise qualified handicapped" individuals and requires proof of a "physical or mental impairment which substantially limits one or more of such person's major life activities."[13] The court ruled that characteristics such as average height or strength that render an individual incapable of performing particular jobs are not "impairments" under the terms of the statute.[14]

In *Tydyman* v. *United Airlines*,[15] a Federal district court ruled that an applicant rejected on a weight guideline was not a "handicapped individual" within the meaning of the Rehabilitation Act because he had no physical impairment and was not substantially limited in a major life activity. Finally, in *Davis* v. *Meese*,[16] a Federal district court ruled that the FBI's exclusion of all insulin-dependent diabetics from applying for positions as Special Agents or investigative specialists does not violate the Rehabilitation Act of 1973, since they run the risk, although the likelihood may be small, of suffering severe hypoglycemic occurrence while on duty that would present danger of serious harm to themselves, co-workers, and uninvolved third parties.[17]

Standards With Disparate Impact Must Be Job Related

Fitness standards, such as agility tests that measure strength and speed, may have the effect of disqualifying a larger percentage of women than men, thus resulting in disparate impact under title VII. Agility tests with a disparate impact on women have been successfully challenged as being discriminatory under title VII.[18] However, the U.S. Supreme Court recently discussed the burdens of proof in these title VII disparate impact cases and defined the employer's burden of showing job relatedness in terms that may facilitate the defense of job-related agility tests in future litigation.

SUPREME COURT DEFINES EMPLOYER BURDENS OF PROOF

In *Watson* v. *Fort Worth Bank and Trust*,[19] the Supreme Court reaffirmed the basic principle that an equally applied employment standard may violate title VII, even in the absence of a demonstrated discriminatory intent, because it may, in operation, be functionally equivalent to intentional discrimination.[20] In litigating these disparate impact claims under title VII, plaintiffs must identify the specific standard that is responsible for a statistical disparity and show how that standard disadvantaged them because of

> ***"... law enforcement administrators have considerable latitude under the Constitution to enforce reasonable health and fitness standards...."***

their membership in a protected group. Disparate impact will not ordinarily be inferred, unless the members of a particular race, sex, or ethnic group are selected at a rate that is less than four-fifths of the rate at which the group with the highest rate is selected.[21]

> ***"All law enforcement organizations should have a 'wellness' program that provides employees with educational information on lifestyle issues...."***

The Court in *Watson* formulates a revised burden allocation scheme that should help employers establish the job relatedness of a reasonable fitness standard that has a disparate impact. The Court begins by noting that while an employer has the burden of showing that a particular standard has a manifest relationship to the employment in question, "... the ultimate burden of proving that discrimination against a protected group has been caused by that standard remains with the plaintiff at all times."[22] The Court then states that employers are not required, even when defending standardized requirements, to introduce formal "validation studies" showing that those particular standards predict actual on-the-job performance.[23]

The Court found precedential support for these assertions regarding the employer's burden of proving job relatedness in two earlier decisions involving law enforcement employment. In the first case, *New York City Transit Authority* v. *Beazer,*[24] the Court ruled that legitimate employment goals of safety and efficiency permitted the exclusion of methadone users from employment with the New York City Transit Authority; the "manifest relationship" test was satisfied even with respect to nonsafety-sensitive jobs because these legitimate goals were *significantly served* by the methadone exclusion.[25] In the second case, *Washington* v. *Davis,*[26] the Court held that the "job-relatedness" requirement was satisfied when the employer demonstrated that a written test was related to success at a police training academy "... wholly aside from [the test's] possible relationship to actual performance as a police officer."[27]

The holding in *Watson* represents a significant doctrinal shift for the Court. The scope of this apparent shift is reflected in the concurring opinion of three Justices who argue that the Court's discussion of the allocation of burdens of proof and production is "... flatly contradicted by our cases."[28] In a similar vein, Justice Stevens argued that it was "... unwise to announce a *fresh* interpretation of our prior cases applying disparate impact analysis to objective employment criteria."[29] Despite these statements, it is difficult to predict how the opinion in *Watson* will influence future lower court litigation concerning the legality under title VII of mandatory fitness standards for law enforcement.[30]

LOWER COURT DECISIONS INVOLVING LAW ENFORCEMENT AGILITY TESTS

Lower courts are divided over the legality under title VII of agility tests with a disparate impact on women. Courts differ in much the same way as the Supreme Court did in *Watson* over the quantum of proof of job relatedness that is required.[31] The two decisions discussed below reach different conclusions and illustrate the difficulties inherent in predicting whether a particular fitness standard will be upheld as a necessary and valid predictor of successful job performance.

Physical Agility Test Upheld

In a case decided prior to the Supreme Court's ruling in *Watson,* a Federal district court upheld two physical tests with a disparate impact on women by adopting a standard for measuring job relatedness that closely resembles the Court's formulation in *Watson.* In *United States* v. *Wichita Falls,*[32] the court ruled that an applicant's successful completion of the Wichita Falls Police Department's physical assessment and physical ability test was "... necessary to be an effective police officer in Wichita Falls, Texas."[33] The physical assessment test was used to screen applicants for entry into the police training academy. Applicants who successfully completed that test were subsequently required to pass a more strenuous physical agility test after they had

undergone some training in the police academy.

The physical assessment test operated as a screening mechanism for entry into the police academy by analyzing the general fitness of an individual instead of an applicant's ability to perform certain tasks. The test measured fitness in the following categories: (1) Cardiovascular function, (2) body composition, (3) flexibility, and (4) dynamic and absolute strength. In order to pass the test, an applicant needed to score "fair" for a person of his or her own sex who is 40 to 49 years of age.[34]

The court offered three reasons to support its conclusion that this physical assessment test did not discriminate against women. First, although women and men take the same test, the standards against which they are compared are not the same, since women are compared against women and men are compared against men. Second, the test is a nationally accepted and popular test for determining the general fitness of an individual and has "construct validity" because it accurately identifies physical characteristics necessary to perform as a police officer.[35] Third, the "fair" condition standard adopted by the department "... is the absolute minimum physical condition for an effective police officer. Officers are daily confronted with situations where they must exert physical force, move rapidly, and stress their cardiovascular system. They must be in at least 'fair' condition for a person between the ages of 40 and 49 to withstand these physical challenges."[36]

The physical agility test was given to applicants after they had passed the physical assessment test and undergone some training in the police academy. The physical agility test attempted to measure specific strengths and motor abilities directly related to the accomplishment of police functions. The department reasoned that since motor skills can be taught to a person who is in good general health as determined by the physical assessment test, the motor skills necessary for a police trainee entering the training academy need not be at the same level as that of a police officer. The department also believed that the additional strength and increased motor ability necessary for the performance of police duties and successful execution of the physical agility test could be acquired during the 16-week training period.

> ***"... employees can be required to participate in 'wellness-related' activities...."***

The physical agility test consisted of an obstacle course (composed of a low obstacle, short wall (2′), medium wall (4′), high wall (5′), serpentine tunnel, balance beam, balance bar and horizontal ladder, transporting a 150-pound dummy 75 feet, a stairway run, and a quarter-mile run. Since police officers and expert witnesses testified that police officers must be able to perform all of the tasks in the physical agility test to be an effective officer, the court concluded that the "... various aspects of the test are *operational necessities* for a Wichita Falls police officer."[37] The court declared the agility test to be a valid predictor of job performance and "content valid" based on evidence presented at trial that the test accurately reflects the qualities needed to perform as a police officer, and evidence that the tasks performed in the physical agility test accurately simulate tasks performed by police officers.[38]

The precedential value of the court's holding in *Wichita Falls* is enhanced by the Supreme Court's subsequent holding in *Watson*. Even though the court offered no case authority to support its conclusion that a formal validation study was not required,[39] it is important to note that the Supreme Court reached a similar conclusion in *Watson*.[40]

Agility Test Invalidated

Other courts have invalidated agility tests with a disparate impact on women on grounds they are not based on an adequate job analysis and are not correlated to actual job performance. For example, in *Thomas* v. *City of Evanston*,[41] a title VII class action suit was brought by women who alleged that the city's use of a physical agility test to screen job applicants for the police department was illegal. The physical agility test which had a disparate impact on females contained several events, such as a stair climb, a quarter-mile run, and obstacle course. Applicants would receive an integer score ranging from one through five for each event, depending on their performance as compared to a table of norms. The agility test was based on a job analysis consisting of survey responses of three police chiefs and 30 hours of observation of

actual police activities by a graduate student riding along with police officers.

The court ruled the city had the burden of showing the test had content validity and that it could satisfy the following attributes of job relatedness:

> "First, the test-makers must have done a proper 'job analysis,' that is, a study of important work behaviors required for successful performance and their relative importance. Second, the test must be related to and representative of the content of the job. In other words, the test must measure ability to perform competently on the specific job. Third, the test must be scored so that it properly discriminates between those who can and cannot perform the job well."[42]

In that regard, the court ruled that the job analysis conducted by the city was plainly inadequate and that the agility test could not be analyzed to determine whether it was related to and representative of the job.[43] The court then offered the following advice concerning the development of physical agility standards for law enforcement employment:

> "It is well within the police executive's authority to devise a physical agility test which would be justifiable as a device to screen police applicants. Certainly the job demands some minimum level of coordination and strength. However, Title VII requires that a test that is discriminatory be necessary to the job and carefully validated. Too often tests which on the surface appear objective and scientific turn out to be based on ingrained stereotypes and speculative assumptions about what is "necessary" to the job. Thus, tests which discriminate against protected groups must be thoroughly documented and validated in order to minimize the risk of unwarranted discrimination against groups which have been traditionally frozen out of the work force."[44]

"Mandatory health and fitness standards with no disparate impact under title VII are constitutional if rationally related to a legitimate governmental interest."

CONCLUSION

Court decisions discussed in this article suggest that law enforcement administrators have considerable latitude to develop and enforce reasonable health and fitness standards for law enforcement employment. Health and fitness standards are constitutionally valid if fairly implemented and rationally related to legitimate law enforcement interests. However, if a particular standard has a disparate impact on women, title VII requires that it be justified by a showing of job relatedness. Judicial disagreement over the appropriate burden of proof to establish job relatedness makes it difficult to predict whether a particular fitness standard with disparate impact will be upheld.

Accordingly, three recommendations are offered for the orderly development of law enforcement health and fitness standards. First, all law enforcement organizations should have a "wellness" program that promotes good health and fitness in a positive and non-punitive manner. Second, the impact of any mandatory standard should be carefully monitored and periodically reviewed to ensure that no person is unnecessarily disadvantaged; the enforcement of any mandatory standard with disparate impact on women should be avoided until there is clear and convincing evidence of its job relatedness. Third, prior to the enforcement of any mandatory standard, law enforcement administrators should consult with health and fitness experts and competent legal counsel to ensure that the standard is reasonable and legally defensible. FBI

Footnotes

[1]42 U.S.C. §2000e *et seq.*

[2]For a general discussion of constitutionally based employment rights, *see* Schofield, "Public Employment and the U.S. Constitution," *FBI Law Enforcement Bulletin*, vol. 47, Nos. 7 & 8, July and August, 1978.

[3]In *Kelley* v. *Johnson*, 96 S.Ct. at 1444, the Supreme Court discusses the "rational basis" test and emphasizes that "... state and federal governments, as employers, have interests sufficient to justify comprehensive and substantial restrictions upon the freedoms of their employees that go beyond the restrictions they might impose on the rest of the citizenry."

[4]For a general discussion of title VII requirements and a definition of disparate impact, *see* Schofield, "Title VII of the Civil Rights Act of 1964," *FBI Law Enforcement Bulletin*, vol 48, Nos. 4 & 5, April and May, 1979.

[5]816 F.2d 539 (10th Cir. 1987).

[6]*Id.* at 542.

[7]*Id.* at 543.

[8]*See, In re Gargano* v. *North Washington Fire Protection District*, 754 P.2d 393 (Colo. App. 1987). The court held that it is not unreasonable in the interest of public safety to upgrade forces by imposing higher physical standards for new employees without terminating all currently employed persons who do not meet the new standards; reduced visual acuity and weakened knee were not handicaps and were lawful reasons to reject applicants.

[9]708 P.2d 543 (Kan. 1985).

[10]*Id.* at 548.

[11]*See, Lowes* v. *Sayad*, 614 F.Supp. 1206 (D.C. Mo. 1985). In *Zigarelli* v. *NYSP*, 510 N.Y.S.2d 740 (N.Y. App. Div. 1987), the court held that loss of hearing in one ear disqualified officer from transferring to State police; police function requires a high standard of fitness.

[12]29 U.S.C. §701 *et seq.*

[13]29 U.S.C. §706(7)(B)(i).

[14]708 P.2d at 549.

[15]608 F.Supp. 739 (D.C. Calif. 1984).

[16]692 F.Supp. 505 (E.D. Pa. 1988).

[17]*Id.* at 520.

[18]*See Harless* v. *Duck*, 619 F.2d 611, 616–17 (6th Cir. 1980), *cert. denied*, 449 U.S. 872 (1980); *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1381–83 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *Burney* v. *City of Pawtucket*, 559 F.Supp. 1089 (D.R.I. 1983), *appeal dismissed*, 728 F.2d 547 (1st Cir. 1984); *Officers for Justice* v. *Civil Service Commission of San Francisco*, 395 F.Supp. 378, 381–86 (N.D. Cal. 1975); *generally* Annot. 53 A.L.R. Fed. 31 (1981).

[19]108 S.Ct. 2777 (1988).

[20]*Id.* at 2785.

[21]*See* EEOC "Uniform Guidelines on Employee Selection Procedures," 29 CFR §1607.4(D) (1988).

[22]108 S.Ct. at 2790.

[23]*Id.*

[24]440 U.S. 568 (1979).

[25]*Id.* at 587, n. 31.

[26]426 U.S. 229 (1976).

[27]*Id.* at 250.

[28]108 S.Ct. at 2792 (Blackmun concurring).

[29]*Id.* at 2797 (Stevens concurring).

[30]It is important to note that only a four member plurality in *Watson* agreed that the employer in a disparate impact case does not have the burden of proof to establish job relatedness and a direct correlation between the standard in question and actual job performance.

[31]Compare the contrasting rulings in: *Brunet* v. *City of Columbus*, 642 F.Supp. 1214 (S.D. Ohio 1986), appeal dismissed, 826 F.2d 1062 (6th Cir. 1987), *cert. denied*, 108 S.Ct 1593 (1988) (Under title VII, a lower quantum of proof of job relatedness for physical test that has adverse impact on women is not justified on ground that job implicates public safety; correlation of test scores and training academy scores was not sufficient to validate test; to be valid, physical test must be based on job analysis and correlated to actual job performance); and *Davis* v. *City of Dallas*, 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1972 (1986) (The public interest in safety and responsibilities of a police officer justify the use of a lighter standard of job relatedness under title VII).

[32]47 FEP Cases 1629 (N.D. Tex. 1988).

[33]*Id.* at 1635.

[34]A person was classified in "fair" physical condition if that person scores equal to or better than 50 percent of the people tested of his or her own sex; the age bracket 40–49 was used because the oldest age for an applicant to the police academy was 44.

[35]*Id.* at 1634.

[36]*Id.* at 1634–35.

[37]*Id.* at 1633.

[38]*Id.* at 1633–34.

[39]*Id.* at 1634.

[40]In *Berkman* v. *New York City*, 812 F.2d 52 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 146 (1987), the court also held that title VII is not violated by a physical test of the ability to perform simulated job tasks without a specific measurement of stamina.

[41]610 F.Supp. 422 (D.C. Ill. 1985).

[42]*Id.* at 429.

[43]*Id.* at 430.

[44]*Id.* at 432.

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Wanted by the FBI

Photographs taken 1985

Armando Garcia,

also known as Aramando Gracia, "Scarface."

W; born 1-20-62 (not supported by birth records); Cuba; 5'9"; 180 lbs; muscular bld; brn hair; brn eyes; med comp; occ- former police officer.

Wanted by FBI for CONSPIRACY TO COMMIT RACKETEERING; RACKETEERING INFLUENCE AND CORRUPT ORGANIZATIONS; CIVIL RIGHTS VIOLATION TO DEPRIVE OF LIFE; CONSPIRACY TO DISTRIBUTE NARCOTICS AND POSSESSION WITH INTENT TO DISTRIBUTE NARCOTICS

NCIC Classification:

07010907030901041002

Fingerprint Classification:

7 S 1 U III 3 Ref: T U T 1
S 1 U III T T U 5

I.O. 5057

Social Security Number Used: 359-52-4397

FBI No. 856 615 EA8

Caution

Garcia is being sought in connection with two thefts of 400 kilos of cocaine each from two boats docked at marinas on the Miami River. Garcia along with several other individuals have plotted to kill Government witnesses scheduled to testify against him. In attempting to execute this plot, he has been armed with an automatic weapon and silencer. Consider armed and extremely dangerous.

Left thumb print