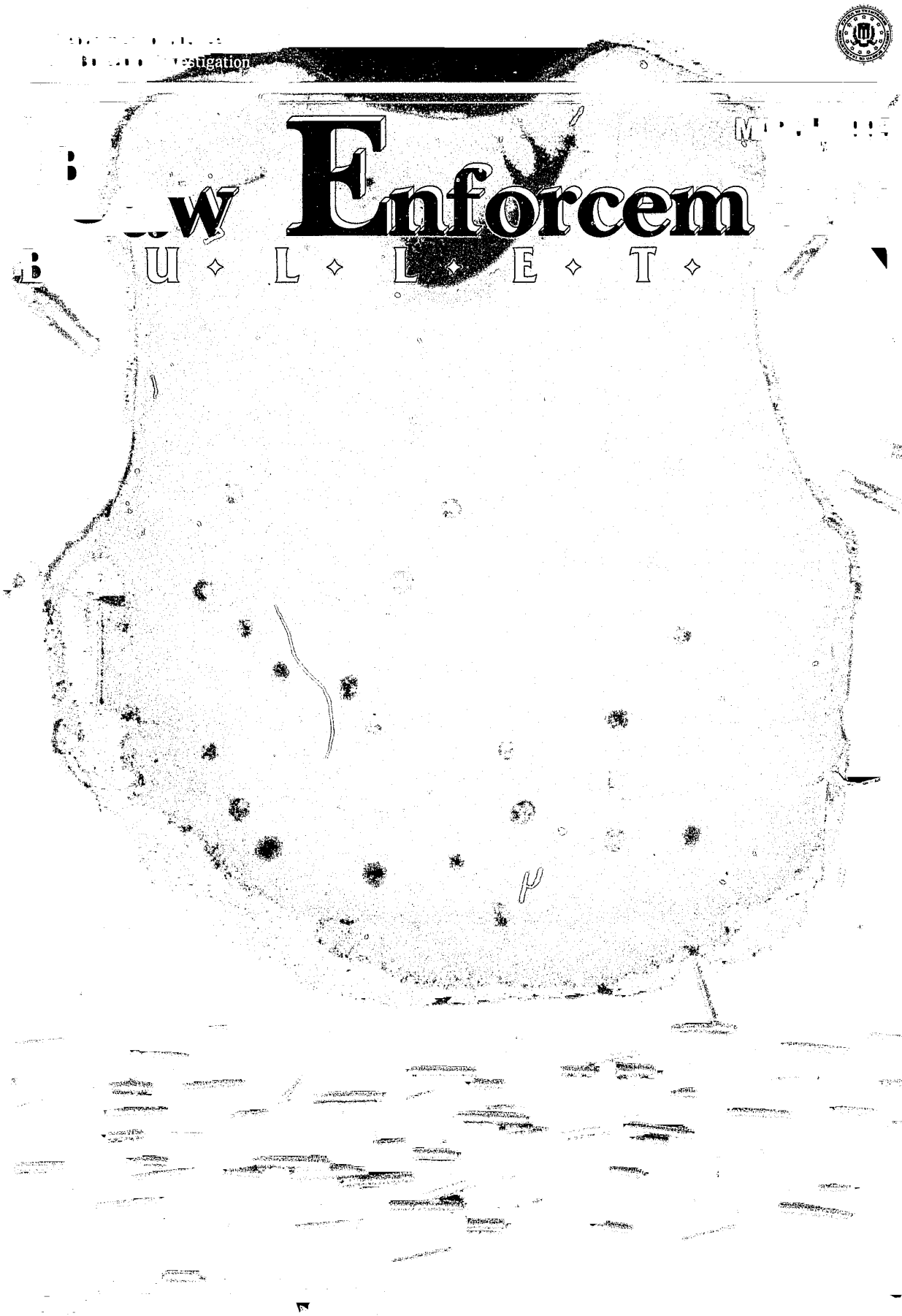

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Soft Body Armor
The Legal Issues

By
Terry D. Edwards, J.D.

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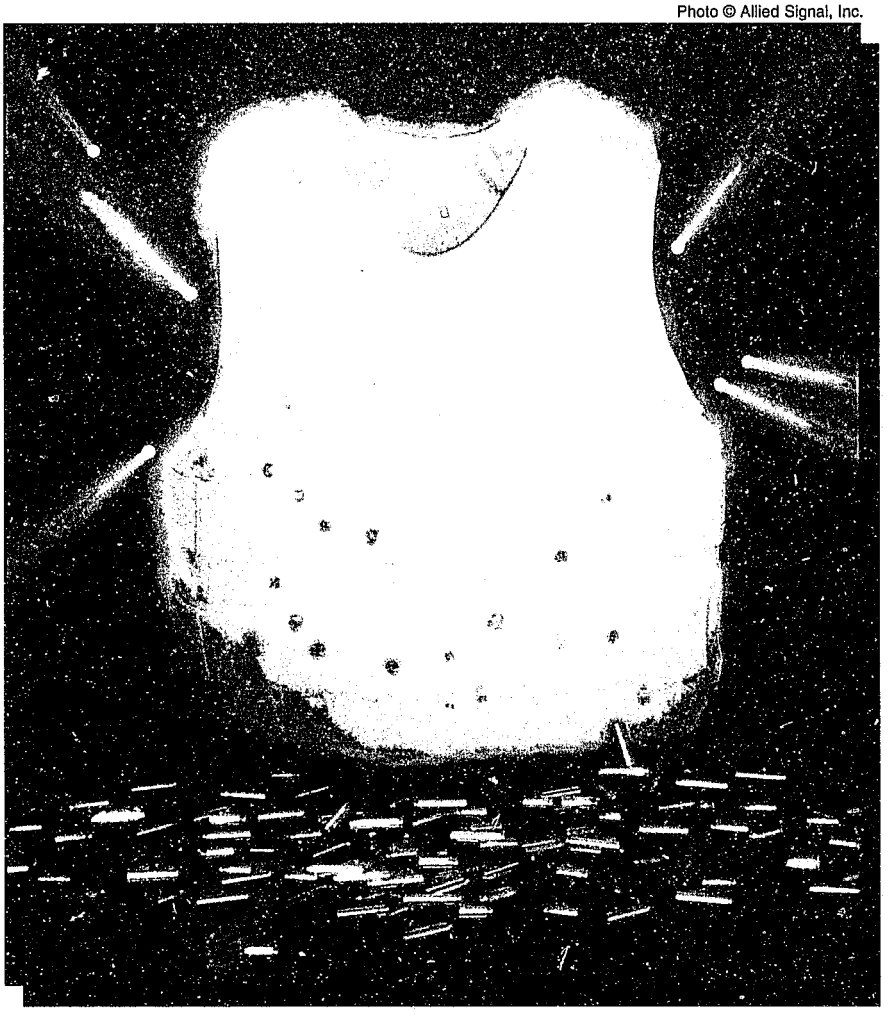

Throughout the ages, individuals threatened with weapons sought to protect themselves from injury through some form of protective garment. Early warriors relied on brine-soaked leather. Later, Roman armies wore fairly sophisticated metal breastplates. In the Middle Ages, knights relied on full suits of heavy armor and chain-like metal for protection. But, as science and technology enhanced defensive capabilities, the offensive capabilities of weapons also improved. Unfortunately, weapons' capabilities continued to outstrip the defensive protection offered by protective clothing.

During World War II, however, rapidly advancing technology provided some hope with the development of flak jackets by the military. The early models were bulky, heavy, and offered protection primarily from fragments and slower projectiles, not from high-powered military rifles. The military made advancements during the next two decades, although little thought was given, or research dedicated, to providing the law enforcement community with any type of protective clothing. To some degree, this inattention could be attributed to the lack of a perceived threat against police officers.

This perception changed in the 1970s as violence erupted in virtually every U.S. city. Law enforcement in the United States witnessed an onslaught of protests—from Vietnam War demonstrations to large-scale, civil rights riots. During this same time period, the number of officers killed by firearms more than doubled—from 55 in 1966 to 127 in 1975.[1]

With this sudden and dramatic increase in both the nature and the degree of violence against the police, law enforcement agencies seriously considered the defensive options available to officers. The law enforcement community direly

needed some form of defensive protection against what was rapidly becoming a losing battle against assaults committed with firearms.

In 1975, the National Institute of Justice distributed 5,000 bullet-resistant vests to volunteer officers in 15 cities.[2] This began a 20-year effort to offer police officers some form of protection from firearms. Since then, great strides have been made to produce modern, reliable body armor for law enforcement.

Unfortunately, as body armor became more effective for law enforcement, the criminal element also learned of its value. With the increasing acceptance and routine use of body armor by criminals, the law enforcement community again finds itself slowly falling behind the "technological power curve." The question then becomes: What can be done legally when criminals wear body armor?

This article addresses the legal issues related to incidents where individuals wear, use, or possess body armor when committing criminal offenses. It focuses on the criminal statutes enacted by some States to criminalize such actions outright. It also examines those jurisdictions where specific criminal statutes have not been enacted but where police and prosecutors have employed various investigative and prosecutorial practices that have resulted in the introduction of body armor as evidence in criminal trials. Finally, the article offers suggestions to investigators and prosecutors on how to address this issue in the future.

MODERN BODY ARMOR

Modern body armor consists of a woven, mesh-like fabric, often assembled in layers, that reduces the penetration capabilities of firearm projectiles.[3] Because of its design, structure, and composition, the fabric disperses the energy and neutralizes the projectile. Body armor is manufactured in various strengths and is relatively lightweight and easily concealable.[4]

The criminal statutes discussed in this article[5] use a variety of terms to describe body armor; however, all statutes refer to garments specifically manufactured for the unique purpose of stopping firearm projectiles. The statutes of eight States use the term "body armor," while references to this type of protective clothing in other State statutes include "body vest," "bulletproof vest," and "bullet proof garment."[6]

The criminal statutes of some States actually define the type of body armor to which the statute refers. For example, the statutes of Florida and New York use very specific and technical definitions. Florida's statute also includes the National Institute of Justice's rating of the threat level. Conversely, the Illinois statute includes four very broad categories and offers very general definitions within each of the four categories.

"...the possession, use, and wearing of body armor by defendants have found their way as evidence into criminal trials...."

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CRIMINAL STATUTES

The State statutes creating criminal offenses that prohibit the wearing, use, or possession of body armor can be divided into two broad categories: 1) Statutes creating substantive offenses and 2) statutes enhancing sentencing. Most of the statutes fall into the first category; that is, these statutes create separate criminal offenses for which defendants can be charged, convicted, and sentenced. However, two States (California and Wisconsin) opted not to create separate substantive offenses, but rather, adopted enhancing statutes that impose an additional sentence when an

individual is convicted of committing a crime while wearing body armor.

Statutes Creating Substantive Offenses

Criminal statutes that create substantive offenses involving body armor require a defendant to possess a guilty mind (mens rea) while simultaneously committing a wrongful deed (actus reus). The actus reus is the physical aspect of the crime, whereas the mens rea involves the intent factor.[7]

The vast majority of body armor criminal statutes are general intent crimes. This means that no specific mental purpose is required by the statute itself. Only Illinois requires that the defendant "knowingly" wear the body armor.

Additional Conditions

The statutes of 10 States criminalize only the wearing of body armor, whereas 3 States adopted statutes that criminalize both the wearing and use of body armor. Most State statutes, however, stipulate that an additional act is necessary.

For example, in Oklahoma, Massachusetts, and Wisconsin, a defendant must be committing or attempting to commit a felony while wearing body armor, although the Massachusetts statute also criminalizes the use of body armor, not just the wearing of it. A defendant in Michigan violates the body armor statute while committing violent acts or threatening to commit violent acts, even if the offenses are not felonies.

California's statute requires the defendant to be wearing body armor while committing or attempting to commit a violent offense, as defined in the California Penal Code. The body armor statutes in Florida, Louisiana, and New Jersey list specific offenses that a suspect must have committed or be attempting to commit while wearing body armor to violate the statute. Conversely, New Hampshire employs a sweeping provision that prohibits the use or wearing of body armor and expands the required additional act to include the commission of any misdemeanor or felony.

> ***"...all statutes refer to garments specifically manufactured for the unique purpose of stopping firearm projectiles."***

Three States require that a defendant, in addition to wearing or using body armor, possess a weapon before a violation of the body armor statute can occur. The Illinois statute requires that an offender knowingly wear body armor, possess a dangerous weapon, and commit or attempt to commit any offense. New York's statute stipulates that a person is guilty of unlawful wearing of body armor while committing a violent felony *and* possessing a firearm. In Virginia, the defendant must be in possession of either a firearm or a knife while wearing body armor *and* be committing a crime of violence to violate the statute.

Penalties

Just as the additional conditions required by the statutes vary, so do the penalties. In Illinois, the penalty is a misdemeanor for the first offense and a felony for subsequent offenses. Delaware's statute defines the offense of wearing body armor as a felony, imposes a minimum sentence of 3 years, and mandates that violators over the age of 16 be tried as adults. Some States designate the offense as a felony of a specific degree, e.g., third degree in Florida, class B in New Hampshire, class E in New Jersey, and class 4 in Virginia.

Three States specify the punishment without specifically characterizing the offense as a felony. For example, Louisiana's statute calls for a fine of not more than $2,000 or imprisonment with or without hard labor for no more than 2 years. In Massachusetts, the sentence is a minimum of 30 months and a maximum of 5 years in a State prison, *or* imprisonment of no less than 12 months and no more than 30 months in a jail or house of correction. Oklahoma requires imprisonment in a penitentiary for no more than 10 years for the first offense and not more than 20 years for subsequent offenses.

Probation and Parole

Two States even addressed parole and probation in their substantive criminal statutes. Delaware not only imposes a minimum sentence of 3 years but also mandates that "no person convicted for a violation of this section shall be eligible for parole or probation during such 3 years." New Hampshire prohibits any part of the sentence for violating

the body armor criminal statute from being served concurrently with any other prison term.

Statutes Enhancing Sentencing

California and Wisconsin approached the issue from a different perspective. The statutes in these States do not create a separate substantive criminal offense. Rather, they impose additional or enhanced sentences on defendants convicted of committing or attempting to commit other substantive crimes while wearing body armor.

California's statute prescribes an additional sentence "upon conviction of that [underlying] felony" to a term of either 1, 2, or 3 years. The statute requires that a 2-year term be imposed, unless the court finds aggravating or mitigating factors, and that the additional sentence run consecutively to the sentence for the underlying felony.

In Wisconsin, the statute authorizes, but interestingly does not require, a sentence of an additional 5 years. No mention is made, however, as to whether the sentence should run concurrently or consecutively.

OTHER EVIDENTIARY USES

Even in jurisdictions without substantive offenses or sentence-enhancing provisions, the possession, use, and wearing of body armor by defendants have found their way as evidence into criminal trials, mostly in cases involving drugs and weapons. In drug cases, the defendant usually has been charged with distribution of drugs or possession with intent to distribute, rather than with simple use or possession. Weapons cases, for the most part, involve defendants who are felons charged with possession of a firearm.

Stop and Frisk

For over 25 years, the law enforcement community has operated under the "stop and frisk" theory first outlined in *Terry* v. *Ohio*.[8] As a result of the *Terry* decision, to justify a stop, officers must be able to "clearly articulate" the facts that led them to conclude that "criminal activity is afoot."

Based on their training, experience, and education, officers who encounter individuals suspected of wearing, using, or possessing body armor should have little difficulty convincing a court of the suspect's criminal intent. After all, other than law enforcement, what occupation routinely requires body armor to be worn in the normal course of a work day? Once an officer reasonably determines some form of body armor is, in fact, being worn, while taking into consideration the time of day, location, and action of the defendant, that officer reasonably can conclude that a *Terry* "stop and frisk" situation has arisen.

> ***"A police officer's observation of a defendant's wearing, using, or possessing body armor can be critical in justifying a Terry stop and frisk."***

A police officer's observation of a defendant's wearing, using, or possessing body armor can be critical in justifying a *Terry* stop and frisk. In *United States* v. *Whitfield*,[9] officers observed a driver disregard a traffic signal. They initiated a traffic stop and arrested the driver for not having an operator's license. The defendant, who was a passenger, then stepped out of the vehicle. When the officers saw that he was wearing body armor, they conducted a *Terry* frisk and discovered a bulge in his clothing, which turned out to be a weapon.

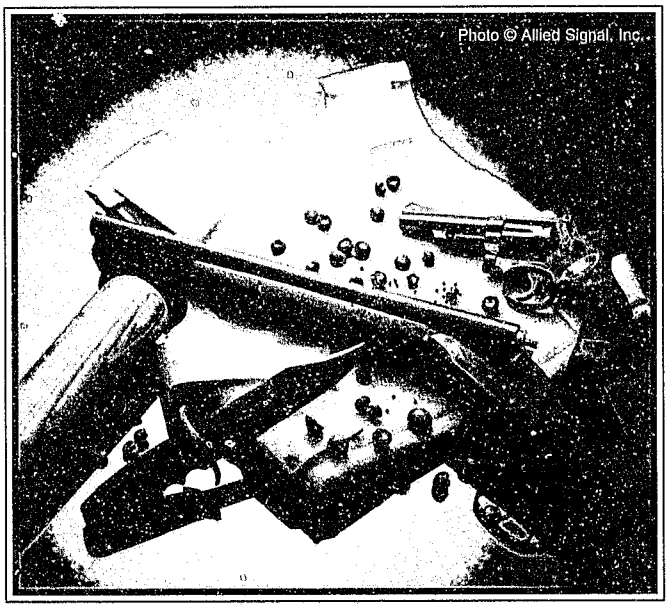
At trial, the defendant argued that the officers lacked reasonable suspicion to conduct the frisk, and therefore, the search was illegal. The court, specifically noting that the officers observed the defendant wearing body armor, ruled that the officers acted reasonably under the criteria outlined in *Terry*. The issue was raised again on appeal, but the appellate court in *Whitfield* ruled against the defendant.

Probable Cause to Arrest

Officers also can use the wearing, use, or possession of body armor as a clearly articulable fact in establishing probable cause to arrest. In *United States* v. *Rickus*,[10] officers observed a vehicle being driven very slowly through a neighborhood plagued by a rash of burglaries. They stopped the vehicle and saw a variety of tools, believed to be tools used by burglars, in plain view. One officer also saw a portion of body armor protruding from the defendant's jacket. The officer then removed the jacket to confirm that the defendant was wearing body armor. Based on the

suspicious vehicle, the presence of tools usually used by burglars, and the defendant's wearing body armor, the officers placed the defendant under arrest.

At trial, the defendant unsuccessfully argued that the officers lacked reasonable suspicion to remove the jacket or probable cause to effect an arrest. Specifically addressing the testimony regarding the presence of body armor in its ruling, the court held that the officers' observing body armor was a reliable factor in their rationally concluding that criminal activity was afoot and ruled that the frisk was valid. The court also concluded that the officers properly considered the presence of body armor as part of their probable cause to arrest the defendant for burglary.



Evidence of Knowledge or Intent

Many criminal statutes require that the defendant knowingly or intentionally commit a criminal act. The defense often rests its entire case solely on the fact that the prosecution failed to prove the defendant's knowledge or intent beyond a reasonable doubt. At times, the prosecution fails to introduce any tangible evidence that will refute the defendant's testimony. More and more, however, courts are allowing a defendant's wearing, using, or possessing body armor to be admitted as relevant circumstantial evidence to show that the defendant did possess the requisite knowledge or intent to establish guilt.

Most cases that allow body armor as relevant circumstantial evidence to show knowledge or intent involve drugs and weapons. Typical is *United States* v. *Petty*.[11] In *Petty*, officers executed a search warrant for a residence that the defendant did not own, but where he frequently stayed. There, they discovered a cache of firearms, "war manuals," body armor, and a variety of packaging materials, in addition to large quantities of drugs.

The defendant, whom the officers charged with possession of firearms and possession of cocaine with intent to distribute, objected to the introduction of the war manuals and body armor. The trial court, however, agreed with the prosecution that both the war manuals and the body armor were relevant and probative on the issues of whether the defendant knew that weapons were present and whether the defendant intended to distribute the cocaine.

A similar conclusion was reached by the court in *United States* v. *Gutierrez*,[12] where officers found body armor in a vehicle. Subsequently, the defendant, a passenger in the vehicle, was charged with possession of a firearm by a felon. The appellate court specifically addressed the issue of prejudice that the body armor might have on the defendant's case, but noted that the trial judge properly concluded that the body armor was relevant to the issue of knowledge and that the probative value of the body armor outweighed any prejudice to the defendant.

In another case, *United States* v. *Johnson*,[13] an officer stopped the defendant and saw that he was wearing body armor. Following a records inquiry and a search of the vehicle, which revealed a weapon, the officer charged the defendant with possession of a firearm by a felon. The appellate court upheld the trial judge's decision to admit testimony regarding body armor into evidence and noted that the trial judge correctly balanced probativeness against prejudice.

Typically, in such cases, the defense argues against the introduction of body armor as evidence, or testimony regarding a defendant's use or proximity to body armor, as

being improper to show bad character on the part of the defendant. Prosecutors argue, and some courts agree, that the presence of body armor is evidence of, and relevant to, intent, not character.

In *United States* v. *McDowell*,[14] a warrant search of an area frequented by the defendant revealed not only drugs but also body armor and large sums of money. The defendant was charged with possession of drugs with intent to distribute.

At trial, the defendant specifically objected, under the Federal Rules of Evidence,[15] to the introduction of testimony regarding body armor as being evidence of his "bad" character. The court disagreed with the defendant's characterization and noted, "The vest was logically part of the specific equipment [the defendant] might use in selling the drug, and thus tended to show that [he] actually intended to make such sales."[16]

Impeachment and Rebuttal

Officers and prosecutors also should be prepared to employ the use, possession, or wearing of body armor as outstanding and extremely damaging evidence for impeachment or rebuttal. Given the propensity of defendants to deny knowledge or intent, prosecutors who elicit testimony regarding the presence of body armor through cross-examination or rebuttal set evidentiary "traps" for the unwary defendant.

Sentencing

Even if prosecutors are unable or fail to introduce body armor as evidence, all is not lost. Investigative reports that properly note body armor can, and should, be forwarded to the appropriate agency to be included in the sentencing report.

Two courts have allowed the mention of body armor in sentencing documents. In *United States* v. *Taylor*,[17] officers conducted a vehicle stop and found several weapons in the vehicle and the defendants wearing body armor. As part of the sentencing under U.S. Sentencing Guidelines,[18] the issue arose as to whether the defendants' sentences could be reduced because they had accepted responsibility for their actions. When commenting on their decision to wear body armor, the defendants stated during a pre-sentence interview that "it's a jungle out there" and indicated that they merely were testing the weapons for self-defense.

> ***"Officers also can use the wearing, use, or possession of body armor as a clearly articulable fact in establishing probable cause to arrest."***

The trial court ruled, and the appellate court agreed, that the defendants' wearing of body armor could be used properly in the sentencing report to rebut their claims. The court went on to hold that the presence of body armor clearly refuted other statements by the defendants regarding innocent circumstances. In short, the appellate court agreed with the trial judge's ruling that given the presence of body armor, the defendants' presentencing statements were less than credible and certainly did not warrant a finding of remorse or acceptance of responsibility.[19]

Procedural Issues

The defense can object to the introduction of body armor as evidence, even if relevant, on the grounds that it tends to portray defendants as individuals who will commit crimes in the future and that the prejudice outweighs any probative value the evidence might have.[20] Accordingly, care should be taken not to introduce evidence of the presence of body armor to paint a picture of guilt by association. A court will sustain properly an objection and rule such evidence violated the Federal Rules of Evidence regarding bad character.[21]

Still, in cases where erroneous testimony is presented, courts have held such testimony to be harmless error.[22] Finally, even when testimony is presented and the bench overrules the defense counsel's objections at trial, courts are reluctant to reverse convictions.[23]

CONCLUSION

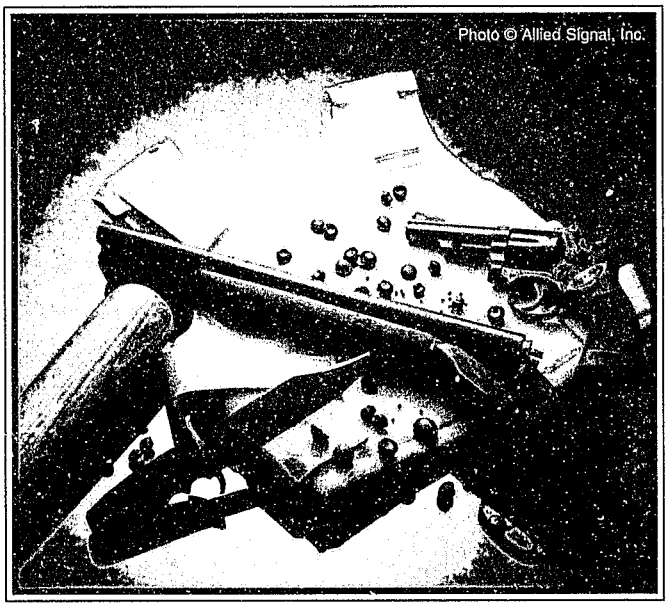
Today, criminals frequently have access to technology far exceeding that of the law enforcement community. The technological superiority of criminals is nowhere

more obvious than when it comes to firepower and the use of body armor as protective equipment. As a result, police officers must arm themselves with every available tool if they are to survive, much less succeed.

The diligent investigation and prosecution of those wearing body armor is one such tool. Many States have enacted legislation permitting law enforcement to investigate and charge defendants wearing, using, or possessing body armor with substantive criminal offenses. In these jurisdictions, every effort should be made to make officers aware of existing statutes and to train them in the proper investigative techniques to obtain the evidence necessary to convict under these statutes. Even in States without specific statutes, the possession, use, and wearing of body armor can play a significant evidentiary role.

Body armor can serve as evidence in criminal cases involving knowledge and/or intent. Additionally, testimony regarding body armor is useful as evidence for impeachment or rebuttal. If nothing else, prosecutors should include the use, possession, and wearing of body armor in sentencing reports.

Offenders will go to extreme measures to protect themselves while perpetrating their crimes. Without question, their ability to protect themselves must be abated. Statutes prohibiting the wearing, use, or possession of body armor by offenders can be an effective measure to accomplish this goal.✦



Endnotes

[1] Federal Bureau of Investigation, Uniform Crime Reporting Program, *Killed in the Line of Duty*, 1967 and 1976.

[2] Daniel E. Frank and Lester D. Shubin, *Selection and Application Guide to Police Body Armor*, Technology Assessment Program, NIJ Guide 100-87 (Washington, DC: National Institute of Justice, February 1989).

[3] Various terms, such as bulletproof vest, bullet resistant vest, body vest, and body armor, describe a garment specifically designed to protect the wearer from firearm projectiles. For the purpose of this article the term "body armor" will be used to refer to this type of protective garment.

[4] *See, generally*, Frank and Shubin, supra note 2; *Police Armor Consumer Product List*, 6th ed. National Institute of Justice, August 1990; *Model Body Armor Procurement Package*, National Institute of Justice, January 1989.

[5] Cal. Penal Code sec. 12022.2 (West 1992 & Supp. 1994); Del. Code Ann, tit. 11, sec. 1449 (1987 & Supp. 1992); Fla. Stat. Ann. sec, 775.0845 (West 1976 & Supp. 1994); Ill. Ann. Stat. ch.33F (Smith-Hurd 1993); La. Rev. Stat. Ann. sec. 14:95.3 (West 1982 & Supp. 1994); Mass. Gen. L. ch. 269, sec. 10 (1992); Mich. Comp. Laws sec. 750.227f (West 1991 & Supp. 1993-94); N.H. Rev. Stat. Ann. sec. 650-B (1986 & Supp. 1993); N.J. Stat. Ann. sec. 2C:39-13 (West 1982 & Supp. 1994); N.Y. Penal Law sec. 270.29 (McKinney 1989 & Supp. 1994); Okla. Stat. Ann. tit. 21, sec. 1289.26 (West 1983 & Supp. 1994); Va. Code Ann. sec, 18.2-287.2 (Michie 1988 & Supp. 1994); Wis. Stat. Ann. sec. 939.64 (West 1982 & Supp. 1993).

[6] Delaware, Illinois, Louisiana, Massachusetts, Michigan, New Hampshire, Oklahoma, and Virginia use the term "body armor" in their statutes; California, New Jersey, and New York refer to the protective clothing as a body vest; the Florida statute uses bulletproof vest; and the Wisconsin statute refers to the garmet as a bullet proof garment.

[7] *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), 36 and 985.

[8] *Terry* v. *Ohio*, 392 U.S. 1 (1968).

[9] *United States* v. *Whitfield*, 907 F.2d 798 (8th Cir. 1990).

[10] *United States* v. *Rickus*, 566 F.Supp. 96 (E.D. Pa. 1983).

[11] *United States* v. *Petty*, 798 F.2d 1157 (8th Cir. 1986), *rev'd on other grounds*, 828 F.2d 2 (8th Cir. 1987).

[12] *United States* v. *Gutierrez*, 995 F.2d 169 (9th Cir. 1993).

[13] *United States* v. *Johnson*, 857 F.2d 500 (8th Cir. 1988).

[14] *United States* v. *McDowell*, 762 F.2d 1072 (D.C. Cir. 1985).

[15] Fed. R. Evid. 404(a).

[16] Supra note 14, at 1075.

[17] *United States* v. *Taylor*. 937 F.2d 676 (D.C. Cir. 1991).

[18] U.S. Sentencing Guidelines, sec. 3E1.1.

[19] *See also, United States* v. *Reaves*, 811 F.Supp. 1106 (E.D. Pa. 1993).

[20] *See, generally, United States* v. *Hans*, 738 F.2d 88 (3d Cir. 1984).

[21] Supra note 14.

[22] *See State* v. *Lucas*, 794 P.2d 1353 (Ariz. App. 1990).

[23] *Jackson* v. *State*, 522 So.2d 802 (Fla. 1988).