

## **THE SURVEILLANT: INVESTIGATION CASE STUDY**

### **“You Call This the Right Evidence?”**

**By Alex Toia, CCLA, LPI**

**February 1, 2010**

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The names and places of this case have been changed. The assignment was a criminal defense investigation pertaining to defendant, elementary school teacher, Ernie Green's arrest of March 9, 2008 for assault with a deadly weapon, terroristic threats, and threat to kill. According to police, the defendant approached the victim, Francisco Orogano, on the street outside a Peruvian restaurant and verbally threatened him, while exposing a black handled gun inside his waistband. He told Orogano, “If you cross to the right side of the street, you will be safe and live because that is the Spanish side. If you cross to the left, you will die because that is the Black side; that is my side.”

After making these threats, Green allegedly followed the victim into the restaurant. When Orogano sat down at a table, and Green sat next to him. Orogano said he was terrified and feared for his life. After a few tense minutes, Green stood up, patted Orogano on the shoulder and said, “Remember, this side is yours, the other side is mine. I know you will do the right thing.” Then Green walked out, crossed a side street, and entered a Mexican tavern. Orogano never lost sight of his assailant until Green had fully entered the bar. The victim immediately notified restaurant management, who called police.

A police officer arrived within a minute and spoke to Orogano in Spanish. He cautioned, “This is a very serious charge you have made. Make sure you are telling me the truth, or you will be arrested for making a false report.” The victim was adamant this was what happened. He had been threatened with a gun and the criminal was in the bar next door!

The police arrived in minutes without sirens or lights. The Mexican bar owner later explained, “We could easily see outside because I have large picture windows overlooking the neighborhood. Police came with pistols drawn, shotguns, rifles and S.W.A.T Team. It looked like they were filming a Bruce Willis movie!”

If the owner could see out his windows, so could all his patrons, who, according to him, are not in this country legally. They thought it was an I.C.E. raid. Everyone scrambled, running through the establishment, trying to go nowhere since the entire building had been surrounded. Police officers herded them back inside. When the owner conferred with a plain clothed detective, his customers were told to file out the front door one at a time. As Ernie Green walked out, the victim identified him, at which time he was forced to the ground, searched, cuffed, and arrested. No weapon was found on him, and a subsequent search of the bar uncovered a black handled folding knife located behind a toilet tank in the men's room. The Grand Jury indicted Green for threats with the knife, not a gun.

#### Initial Meeting with the Client and His Wife

Ernie Green vehemently denied owning a knife or gun. He thought the charges were ridiculous. How could the victim say he saw a gun and then change it to a knife after one was found, not on him, but behind a toilet tank? He could not recall a conversation with anyone on his walk home, although he did remember stopping at the Mexican bar for one last drink before taking the last quarter mile to his house.

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He and his wife had walked three miles into town to watch the St. Patrick’s Day parade. They had planned to visit every bar along the way. Pictures were taken on their cell phones with many of the people they met. Due to the crowds, Green became separated from his wife, who eventually walked home by herself. He tried calling her cell, but quickly learned he was holding it for her in his jacket pocket. He had pictures of local firefighters that he had met at the bars. I planned to use those photographs to identify and interview these people during the investigation.

Green admitted he became very drunk and walked home alone, passing no one he knew along the way. When he was a short distance from his house, he stopped at the Mexican bar for a final beer. He could not recall speaking to the victim at any time. He was insistent he would not behave in that manner or commit a crime. His life’s ambition was to teach elementary school children, and now, because of this arrest, not a conviction, he had been fired from that dream job.

#### Investigation / Canvass

The pictures my client had of the firefighters were not difficult to identify, provided I showed proper credentials and explained the case to a superior officer. Unfortunately, while everyone remembered Green - he was easily identified by a yellow and green baseball cap - no one was with him at the time of the alleged attack. They had separated several hours earlier in the day. Green had no alibi.

#### Investigation at the Peruvian Restaurant

After Orogano watched Green enter the Mexican bar, he reported what happened to the owner of the restaurant. Her son-in-law called police. The waitress had overheard the conversation, but she had returned to her native South America seven months earlier. No one else, other than the victim, had heard the second threat. The owner’s son-in-law accompanied the victim to police headquarters where he acted as his interpreter. The police interviewed him and the question of the gun handle turned folding knife became an issue. The victim was certain it was a gun, but it seems the police convinced him it was a knife because one was found behind a toilet tank in the restroom when police searched the bar afterwards. It was a key piece of evidence that needed to be identified as quickly as possible.

#### Interview with the Mexican bar Owner

Antonio Vilestra, tavern owner, watched from behind the bar as Green entered his establishment. Green exhibited no signs of aggressive behavior at any time. Only five minutes passed before the police arrived. Believing this was a raid, the “illegal” Mexican customers scrambled, but had no way out. “People were running back and forth all over the place.” But our client never moved from his seat. He remained there placidly sipping his beer, swaying to the loud Latin music, oblivious to the chaos around him. Right until the time the owner lowered the music and turned on the lights, Green had no idea police had set up a perimeter. When he was told to file outside with everyone else, he told the owner to leave his beer on the bar; he would be back. The owner never lost sight of him. Green was the fifteenth person out and immediately arrested. All the others

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running around the bar, anyone of them could have placed that knife behind the toilet tank to avoid possession.

### Interview of Victim, Francisco Orogano

An unexpected visit to the victim's home brought about an interesting signal. I brought a trusted certified court interpreter because of potential dialect issues, especially if Orogano had trouble with English. He did, which proved to be one of the downfalls of the prosecutor's case at trial.

When I introduced myself, the victim never asked who I represented, so I did not feel it was necessary to volunteer I worked for the defendant. I introduced my interpreter, but the victim assured me he had no trouble speaking or understanding English. The conversation proved he was highly limited.

He could not grasp the content of the questions. He needed help from my interpreter, who translated. Orogano answered calmly at first, but due to the depth of the interview, soon became upset. He felt he was being targeted; the police had already questioned him. He had been to the Grand Jury. Why did he need to talk to me? As my conversation was translated for him, his facial colors changes rapidly.

My demeanor in an interview is low key, so I knew his comfort level was deteriorating, which was good to see. I made a mental note for defense counsel. I explained I was merely trying to fully understand every step of what took place. However, the more questions I asked, the more wound up he became until he was rapidly firing back answers in Spanish. I was surprised my interpreter could keep up with him, but that, of course is why I brought him. The victim was very angry, and I attempted to slow him and speak casually, but that did not work. He became so upset that I could see the veins popping in his neck, and he ended the interview because he had to get to work. It was a benefit to report to counsel how to handle this guy on the stand.

At trial, the victim did just that – self destruct. A person who claimed he spoke good English would not testify without an interpreter, and refused to speak English when asked. Defense counsel took full advantage. It was interesting how deftly the attorney questioned him to the point where he had to differentiate between gun and knife. He couldn't do it.

### The Weapon

This folding knife, not a black handled gun, could have easily been stashed behind the toilet tank in the restroom by any illegal alien in the place. Having obtained a photograph of it without receiving permission to inspect it from the prosecutor's office, I attempted to locate and buy a replica in order to conduct my own tests. Searching for a folding knife is not an easy task, as there are masses of manufacturers that produce cheap weapons.

I consulted with a knife expert who guessed it was a \$10-\$15 knock-off that anyone could pick up in a Wal-Mart or sporting goods store. Chances of finding a duplicate were nearly impossible, especially since the measurements in the picture were unknown. I had to see the evidence in order

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to identify the manufacturer and find one like it, and that information is engraved in the blade. The picture had the knife closed. Since the police reports did not have written chain of custody, I was depending on my own tests to answer basic questions. Did it fit behind the tank? How could it be attached or wedged in quickly? Having inspected and taken pictures of the men's room, walls, and tank, I wanted to know if my tests matched the written custody reports from the authorities, once I was given permission to view them.

Pictures below show the men's room and tank:



Note the smooth-faced tile completely surrounding the porcelain toilet behind the tank. Painted sheetrock starts above the tile. According to the police report, the knife was found behind the tank and sheetrock wall.

The next picture shows an aerial view above the tank and tile wall. Other photos not included show the tile and measurement from the wall to the tank. In the center behind the tank is one-half inch of space, and towards the edges, because the rear of the tank is somewhat rounded, the space widens to one inch and then at the rounded edges to two inches.

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### Prosecutor's Office for Inspection of Knife

It took a good while and a good deal of persistence to get permission from the prosecutor for me to personally inspect the knife. The supervising case attorney made scheduled arrangements, but the attorney handling the file was out ill the day of my appointment. I had been very specific when I explained to the supervising prosecutor how I wanted to inspect and photograph the knife. My intent was to identify the manufacturer and buy a similar model to use for comparison purposes during the investigation. I wanted to see if it fit behind the porcelain tank and the wall, which was actually smooth colored tile, not sheetrock as the police report stated.

The knife had been transported from police headquarters, and I was given a desk to sit at inside a cubicle and take pictures and measurements. I was not permitted to remove the knife from the plastic bag, but I could handle it. Here's the focal point of the case, the knife had been in evidence for seven months and not yet dusted for prints. There was no written report of custody, how the weapon was found, pictures of it, how procured and preserved – nothing. Now they were breaking the chain of custody by allowing me to handle this knife in an unsupervised cubicle, just not removed from the bag. What were they planning to do, wait until trial to find out our client had no connection to this knife?

When I questioned the procedures from initial finding to connection to our client, no one had any answers.

- Were pictures taken of where the knife was found?
- Was a diagram drawn to show its exact position and location?
- In which of the two men's rooms was the knife located?
- How was the knife removed?
- How was it preserved for prints?
- Who witnessed the procurement of the weapon?

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- How many officers handled the weapon?
- How is it that it was initially identified as a gun, but then became a knife?
- What did the officer do to transport it to headquarters?
- Why wasn't it dusted for prints immediately upon confiscation?
- Why had it not been fingerprinted when I examined it so many months from the date of arrest?

No one could answer these questions, nor would they allow me to speak to the arresting officer(s). I had to remind them that my request to inspect the weapon had gone through proper channels and had been approved two weeks in advance. As a result of my insistence (in a pleasant manner although they were trying my patience), the ill assistant prosecutor was called at home. She could not answer any of my questions, nor would she allow anyone to open the bag so that I could at least determine the manufacturer of the knife. I was beginning to envision the Keystone Kops at the scene of this “crime.”

### The Trial

The prosecutor was stubborn and would not go for a reduced plea deal unless the defendant agreed to relinquish his teaching license. That was the entire reason our client went to court, to clear his name, and get back *into* the classroom. Neither side was budging, but I knew the prosecutor had a weak case. When the victim proved he could not speak or understand English - when he became unraveled on the witness stand and proved unreliable - when the knife, not a gun, was found in the men's room - when the defendant was arrested unarmed - when the chain of custody was questioned for its security and had no written entries or sign-offs - when the Mexican bar owner testified our client never left his seat in the few minutes he was in the bar - when anyone in that establishment could have stashed that inexpensive, cheap, unidentified knife - when the chain of custody was incomplete - the prosecutor saw his case disappear. Our attorney, a former police officer, destroyed what little evidence the prosecutor believed it had. There were too many questions and not enough proof to connect Ernie Green to the weapon.

The only way for the prosecutor to save face was to offer our client a deal he could not refuse. They would accept a fourth degree, disorderly persons for a plea of guilty, which would not be a roadblock to his return to education. He grabbed it for two main reasons. First, there were several more witnesses that had to be examined, which would have taken days. Second, he wanted to avoid continued costs of trial.

Ernie Green wanted this experience out of his life as quickly as possible. He had to look at the economics of the situation and made the decision to end it. Any way you look at this, it was a major win for our side and an unfortunate loss for law enforcement because of an improperly handled case. Having been educated in the field of Criminal Justice, as well as conducting investigations for the courts, I am always saddened when the authorities do a less than professional job. And this county agency has had more than its share of bungled jobs throughout my career as a licensed professional investigator.