

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
NO. SJC-11893

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COMMONWEALTH  
Appellee

v.

JOHN C. DEPIERO  
Defendant-Appellant

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ON APPEAL FROM A JUDGMENT OF  
THE CAMBRIDGE DISTRICT COURT

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BRIEF OF AMICUS CURIAE FILED BY THE  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
IN SUPPORT OF DEFENDANT-APPELLANT

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Respectfully submitted,

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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**INTEREST OF THE AMICUS CURIAE**

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 40,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights.

The issue presented before the Court in the above-captioned matter concerns the importance of extending the *Aguilar-Spinelli Test* to an individual's protection from insufficiently corroborated anonymous 911 calls resulting in motor vehicle stops by Massachusetts law enforcement alleging reasonable suspicion.

### ISSUE PRESENTED

Whether, and if so how, the Supreme Court's decision in *Navarette v. California*, 134 S.Ct. 1684 (2014) - that an anonymous tipster's "use of the 911 system is . . . one of the relevant circumstances that, taken together . . . [can justify an] officer's reliance on the information reported in the 911 call" - will apply in Massachusetts, where, under the Federal Constitution, the reliability of a tip is measured by the totality of circumstances test, whereas Massachusetts employs the more stringent *Aguilar-Spinelli Test*.

### SUMMARY OF THE ARGUMENT

The Massachusetts Declaration of Rights provides more substantive protection to defendants than the Fourth Amendment to the United States Constitution when determining whether reasonable suspicion exists to stop a motor vehicle, and therefore, anonymous 911 telephonic tips to law enforcement should not be found *per se* reliable as a matter of law when applying the legal standards of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), known as the "Aguilar-Spinelli Test."

## ARGUMENT

### I. **When The Basis For A Motor Vehicle Stop Is A Stand-Alone Anonymous 911 Telephone Call The Aguilar-Spinelli Test Should Apply To The Reasonable Suspicion Determination.**

The instant case concerns an investigatory automobile stop, which according to this Court, requires "reasonable suspicion" that the occupants have "...committed, are committing, or are about to commit a crime." See Commonwealth v. Wren, 391 Mass. 705, 707, 463 N.E.2d 344 (1984). The Massachusetts Appeals Court in this matter noted that in *Navarette v. California*, 134 S. Ct. 1683, 1686, 188 L. Ed. 2d 680 (2014), the United States Supreme Court concluded that while 911 calls are not per se reliable, a "caller's use of the 911 system is ... one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." See Commonwealth v. Depiero, supra, 87 Mass. App. Ct. 105, 110 (2015).

The threshold issue, however, is whether an anonymous 911 call--like the one received by police in the instant matter--is enough to trigger reasonable suspicion. The following text extracted from the Massachusetts Appeals Court opinion in the present matter is particularly significant:

**...We now turn to the veracity test. The question whether the police had an adequate basis for concluding the caller was reliable is a close one.** Although the initial 911

call was recorded, the Commonwealth presented no evidence to establish that the caller was identifiable. There was no evidence that the telephone number used by the caller could be identified or that the caller otherwise knew the number could be traced. As the defendant points out, the absence of evidence demonstrating that the caller's anonymity was at risk has resulted in a finding of unreliability in a number of cases. **(emphasis added.)** See *Commonwealth v. Depiero*, supra, 87 Mass. App. at 110-11 (2015).

*...Here, although Trooper Dwyer's observations of the defendant's vehicle did corroborate some of the information provided by the 911 caller, he did not observe any suspicious behavior. However, even without sufficient corroboration, we conclude that the Commonwealth met its burden because it can be inferred that the 911 call was made contemporaneously with the caller's observation of apparent criminal activity, namely driving while intoxicated, and therefore, the caller was under the stress or excitement of a "startling or shocking event." Commonwealth v. Depina, 456 Mass. 238, 244, 922 N.E.2d 778 (2010). (emphasis added.) See Commonwealth v. Depiero, 87 Mass. App. Ct. at 111-12 (2015).*

The *Aguilar-Spinelli* Test provides that police may rely on informant's tips (or hearsay) when submitting an affidavit in support of a search warrant application so long as the magistrate issuing the warrant is provided "some of the underlying circumstances" from which the informant derived the information in the affidavit; and that "some of the underlying circumstances from which the officer concluded that the



informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.'" See *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723 (1964).

In the present matter, the Massachusetts Appeals Court concluded it could "infer" that the anonymous call was made contemporaneously with "apparent criminal activity." See *Commonwealth v. Depiero*, 87 Mass. App. Ct. at 111-12 (2015). This may be the case when applying the "Totality of the Circumstances Test" under *Illinois v. Gates*; however, the application of *Aguilar-Spinelli* Test does not reach the same conclusion.

If an informant's tip alone is insufficiently reliable under the *Aguilar* test, then additional independent allegations contained in the affidavit corroborating a tip should be considered. See *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 27 L.Ed.2d 637 (1969). Therefore, as the Massachusetts Appeals Court held in the instant matter from which this Court granted review, in order "[t]o establish the reliability of the information under art. 14 . . . the Commonwealth must show the basis of knowledge of the source of the information (the basis of knowledge test) and the underlying circumstances demonstrating that the source of the information was credible or the information reliable (the veracity test)."

See *Commonwealth v. Depiero*, 87 Mass. App. Ct. 105, 109-10, 25 N.E.3d 896, 900 review granted, 35 N.E.3d 720 (Mass. 2015).

Alternatively, in *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317, 2329, 76 L.Ed.2d 527 (1983), the United States Supreme Court abandoned that *Aguilar-Spinelli Test* for one based on a "totality of the circumstances." Under the Totality of the Circumstances Test, a deficiency in one of the prongs in the *Aguilar-Spinelli Test* may be compensated for when assessing the reliability of an anonymous tip. See 14A Mass. Prac., Summary Of Basic Law § 7.54 (4th ed.)

The Massachusetts Appeals Court, respectfully, misapplied *Navarette* to the instant case. *Navarette v. California*, 134 S. Ct. 1683, 1686, 188 L. Ed. 2d 680 (2014). This Court has previously held that "[t]he Federal [totality of the circumstances] test lacks the precision that we believe can and should be articulated in stating a test for determining probable cause...The 'totality of the circumstances' test ... has been applied where no more definite, universal standard could reasonably be developed." *Commonwealth v. Upton*, 394 Mass. 363, 373, 476 N.E.2d 548 (1985). This Court further stated in *Upton* that it would "...likewise see no reason to use that test in evaluating reasonable suspicion." See *Commonwealth v. Lyons*, 409 Mass. 16, 18, 564 N.E.2d 390, 392 (1990) citing *Commonwealth v. Upton*, 394 Mass. 363, 373, 476 N.E.2d 548 (1985). It is

crucial that an anonymous tip resulting in a motor vehicle stop based on reasonable suspicion be analyzed under *Aguilar-Spinelli* just as it would if the question was one of probable cause.

Amicus respectfully submits this Court should adhere to the *Aguilar-Spinelli Test* to determine whether an anonymous 911 call amounts to reasonable suspicion—which in the instant case—did not. Notably, *Navarette v. California*, 134 S. Ct. 1683, 1686, 188 L. Ed. 2d 680 (2014), is distinguishable from the instant case inasmuch as the anonymous caller reported the startling event of having been run off the road.

This Court has held that “[i]nformation related by a reliable person can be sufficient to establish a reasonable suspicion.” See *Commonwealth v. Wren*, 391 Mass. 705, 707, 463 N.E.2d 344, 345 (1984). To meet the “reasonable suspicion” standard in this Commonwealth, police action must be “based on specific, articulable facts and reasonable inferences therefrom” rather than on a “hunch.” *Commonwealth v. Lyons*, *supra*, 409 Mass. at 19 (1990).

An anonymous 911 call should not provide *per se* “reasonable suspicion” without corroborating reliable articulable facts warranting an investigatory motor vehicle stop. See *Commonwealth v. Alvarado*, 423 Mass. 266, 268, 667 N.E.2d 856, 858 (1996) (investigatory stop is justified if the Commonwealth can prove a reasonable suspicion, based on specific, articulable

facts and reasonable inferences therefrom, that an occupant had committed, was committing, or was about to commit a crime.) This court held in *Commonwealth v. Couture*, 407 Mass. 178, 183, 552 N.E.2d 538, cert. denied, 498 U.S. 951, 111 S.Ct. 372, 112 L.Ed.2d 334 (1990), that, under the Fourth Amendment, "[t]he mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun." An anonymous tip that a person is carrying a gun, standing alone, does not give rise to reasonable suspicion. See *Commonwealth v. Alvarado*, 423 Mass. 266, 268, 667 N.E.2d 856, 858 (1996) citing *Commonwealth v. Toole*, 389 Mass. 159, 163-164, 448 N.E.2d 1264 (1983) ("carrying a .45 caliber revolver is not necessarily a crime" and thus there was no probable cause to search vehicle).

This Court has held that "[U]nder art. 14, the legality of the stop, that is, the existence of reasonable suspicion, is not determined by the imprecise Federal totality of the circumstances standard but rather by application of the principles stated in determining the existence of probable cause in *Commonwealth v. Upton*, 394 Mass. 363, 373-375, 476 N.E.2d 548 (1985) (reliability of informant and basis of his or her knowledge)." *Commonwealth v. Alvarado*, 423 Mass. 266, 268, 667 N.E.2d 856, 858-59 (1996).

Operating a motor vehicle after consuming alcohol is not a crime, but rather doing so with a diminished ability to drive as a result of alcohol consumption is unlawful. See M.G.L. c. 90 s. 24; *Commonwealth v. Connolly*, 394 Mass. 169, 173 (1985). Notably, law enforcement officials in Massachusetts receive formal training for detecting whether an individual is operating under the influence of alcohol (or other substance). See *DWI Detection and Standardized Field Sobriety Testing (March 2013 Edition)* (<http://www.mass.gov/eopss/images/msp/crimelab/oat/sfst-train-manuals/2013-manual.pdf>).

Police officers are professionally trained to detect impaired motor vehicle operation. See *Id.* Given this fact, and that a motor vehicle stop must be based on reliable, articulable facts, Amicus respectfully submits that this Court should conclude that an anonymous allegation that one may be driving erratically, in and of itself, should not be deemed *per se* reasonable suspicion of criminal activity under the heightened protection of Article 14 of the Massachusetts Declaration of Rights given this Court's adoption of the *Aguilar-Spinelli Test*.

**II. Anonymous 911 Calls Are Not Inherently Self-Verifying And Evolving Technology Requires The Modernization of How The Reliability of Anonymous Calls Is Determined.**

In the instant matter, the Massachusetts Appeals Court concluded that although the police observations of the

defendant's vehicle did corroborate some of the information provided by the 911 caller, the police did not observe any suspicious behavior. *Commonwealth v. Depiero*, 87 Mass. App. At 111-12 (2015). The Appeals Court further stated that "...even without sufficient corroboration, we conclude that the Commonwealth met its burden because it can be inferred that the 911 call was made contemporaneously with the caller's observation of apparent criminal activity, namely driving while intoxicated, and therefore, the caller was under the stress or excitement of a 'startling or shocking event.'" *Id.* However, it is also notable that the Appeals Court that an "ordinary citizen" is not necessarily more reliable than an anonymous informant. See *Id.* at 108 (2015).

Anonymous tips—such as the 911 call in the instant case—lack inherent self-verification, which is respectfully the reason why courts employ a test of reliability in the first place by looking at corroborating factors (i.e., totality of the circumstances or *Aguilar-Spinelli*). Modern technology poses a threat to the traditional concept of "reliability" given the proliferation of "swatting" emergency calls. See "Swatting away prank 911 calls irritating for cops, lawmakers," USA Today (April 29, 2015) (<http://www.usatoday.com/story/news/nation>

/2015/04/29/swatting-prank-parsippany/26582541/)<sup>1</sup>; see also National 911 Program "Public Safety Information on 'SWATTING'" (<http://www.911.gov/pdf/PublicSafetyInfo-Swatting-may2015.pdf>)<sup>2</sup>

The forgoing articles are only two examples of how 911 calls can be fabricated, and fabrication of facts can lead to an unconstitutional stop—unless the attributes of the anonymous call are independently corroborated—especially when the alleged conduct reported to the 911 Emergency system—standing alone—is not *per se* criminal. See *Commonwealth v. Alvarado*, 423 Mass. 266, 269, 667 N.E.2d 856, 859 (1996).

For the reasons set forth above, Amicus respectfully submits that the heightened protection of the *Aguilar-Spinelli Test* is even more pertinent to the reliability determination of anonymous 911 calls—particularly in light of the modernization of means to fabricate the subject matter of the call.

#### **CONCLUSION**

For the reasons set forth herein, *Amicus Curiae* respectfully request this Honorable Court hold that in the Commonwealth of Massachusetts, an anonymous 911 call should be subject to the *Aguilar-Spinelli Test* rather than the less stringent *Totality of*

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<sup>1</sup>A copy of the article from USA Today's website is attached hereto as APPENDIX A.

<sup>2</sup> A copy of the aforementioned printout from the National 911 Program's website concerning "SWATTING" is attached hereto as APPENDIX B.

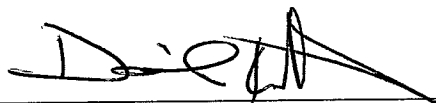
*the Circumstances Test* further adopted by the United States Supreme Court in *Navarette v. California*, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014). Therefore, Defendant-Appellant's conviction should respectfully be reversed.

Respectfully submitted,

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

*Amicus Curiae,*

BY:



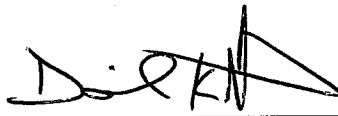
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**MASS. R. A. P. 16(K) CERTIFICATION**

The undersigned hereby certifies that the above complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6); Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20.

A handwritten signature in black ink, appearing to read 'D.K. Gelb', written over a horizontal line.

Daniel K. Gelb

**CERTIFICATE OF SERVICE**

I, Daniel K. Gelb, Esquire do hereby certify that on October 26, 2015 I served two (2) copies of the above amicus brief by U.S. Mail (copy by facsimile) on the following counsel of record for the above-captioned parties:

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**APPENDIX A**

## Swatting away prank 911 calls irritating for cops, lawmakers

PARSIPPANY, N.J. -- Police are investigating a "swatting" that drew police from two towns to respond to a phony 911 call about a man at a home with a gun.

Swatting is a prank where someone makes a hoax 911 call while disguising their phone number and its origin, drawing police and often heavily armed SWAT officers to the location of a made-up emergency.

"This is a demented, evil act that puts people at risk of significant injury or death," said Assemblyman Paul Moriarty (D-Gloucester), who introduced an anti-swatting bill in November, "not to mention that these types of activities divert police to take fake calls to incidents that don't exist."

Four Parsippany police officers plus additional officers from the Boonton Twp. Police Department responded on Sunday at 2:28 a.m. to the 911 call reporting a man with a gun.

The officers arrived at an Iroquois Avenue home, spoke to the woman who owns the home, and checked it to make sure there was no one with a gun inside or around the home, police said.

No suspects were found and the ensuing investigation revealed that this was a swatting incident, police said. The determination was made after investigators could not make contact with anyone when they called the phone number from which 911 was called.

Swatting suspects face a wide range of penalties for creating a false public alarm, depending on the situation: anywhere from 18 months in prison and a \$10,000 fine for a fourth-degree charge, to three to five years in prison and a \$15,000 fine for a third-degree charge, to five to 10 years in prison and a \$150,000 fine for a second-degree charge.

Public officials say few are held accountable because callers are out of state or even outside of the country. Those who are arrested tend to be teenagers and first-time offenders who are enrolled in pre-trial intervention and avoid trial — or a criminal record.

Nabbing the hoaxers is tough, but not impossible. Federal agents arrested Matthew Tollis, 21, of Wethersfield, Conn., in September on charges that he was part of an international ring of online gamers swatting schools in New Jersey and five other states, including St.

John Vianney High School in Holmdel.

Tollis was charged with conspiring to engage in a bomb-threat hoax, aiding and abetting a bomb threat hoax, and aiding and abetting the malicious conveying of false information about attempts to kill or harm individuals or destroy buildings, they said. Each carries up to five years in prison.

"Tracking down the suspects is often challenging, but is frequently possible by law enforcement," said Stacey Wright, manager of the Security Operations Center at the Center for Internet Security in New York, "and there have been multiple arrests of swatters, including serial swatters responsible for a large number of calls."

Swatting is an ill that surfaced from the digital revolution. Authorities and cyber security experts say it goes back to 2008, possibly before that. It became more common within the gaming community, particularly those live-streaming their games. A sore loser might resort to swatting to retaliate against another player in a game.

Tollis told authorities he got involved with the gaming ring because he was bullied online and had several unsolicited pizza deliveries to his home, according to an affidavit filed by an unnamed FBI agent.

"In the past, if you wanted to get back at someone or pull a prank, you might have ordered a dozen pizzas and had them sent to that person's house," said Wright, a cyber security expert. "Swatting is a 21st-century version of retaliation, only much more dangerous."

Assemblyman Moriarty's bill to increase penalties for swatting calls for suspects to be charged with false public alarm in the second degree, which carries five to 10 years in prison and a fine of up to \$150,000, if convicted.

But Moriarty has faced backlash. On April 11, Moriarty was "swatted" in his Washington Township, Gloucester County home. Police received a 911 call April 11 from a stranger saying he shot someone at an address matching Moriarty's and would hurt police if they showed up, Chief Rafael Muniz said.

Moriarty stepped outside and saw several officers with helmets and rifles. "That's when I knew I had been swatted," Moriarty said.

State Sen. Jennifer Beck, R-Monmouth, is drafting a bill with different penalties for

hoaxers. She considers second-degree charges, with prison time for most offenders, too severe for crimes that tend to be associated with teen pranksters who are first-time offenders.

"We're talking about younger people, gamers oftentimes, and that seems to be a very stiff penalty," Beck said.

Instead, she suggests that swatting suspects get charged with false public alarm in the third degree, but also face a mandatory minimum penalty: a 30-day jail sentence, 200 hours of community service and heavy fines — even for those eligible for pre-trial intervention.

*Contributing: Steph Solis*

**APPENDIX B**

# ***Public Safety Information on "SWATTING"***

## **What is Swatting?**

Swatting is false reporting an emergency to public safety by a person for the intent of getting a ("SWAT team") response to a location where no emergency exists. The calling party will often report they are involved or nearby as a witness to a home invasion, active shooter, or hostage situation, attempting to muster the largest response possible. Often, the law enforcement response is substantial, with police confronting the unsuspecting victims at gunpoint, only to learn that there is no real emergency.

Those who attempt to cause a swatting incident use several techniques, including: caller ID spoofing, TTY relay technologies, and social engineering. These actors will often have a reasonable scenario and will sometime include personal information. These actors have various reasons; sometimes it is for "fun" and viewed as a prank to the actor, while other times it is used as retaliation against a real or perceived issue with the victim. Several public figures and celebrities have been the victims of swatting.

These calls come from two sources:

- Direct to the PSAP—Calls from spoofed devices with the caller directly providing information to a trained call taker.
- Relayed from a third party—Call from the caller to an untrained person at a relay service such as Telecommunications Relay Service, or even an innocent "Good Samaritan" using social media.

## **What do you do if you get a call?**

Initially these calls cannot be differentiated from real incidents. The PSAP must process these calls as a normal call, following existing standard operating procedures (SOPs). Document all details about the call and caller.

As these are often in-progress calls, if the call taker is able to keep the caller on the line during the response, additional information can be gathered about the incident and caller. Asking specific questions and compare response to previously-supplied information may be useful.

Should the incident be identified as a possible swatting incident, local law enforcement will begin an investigation. PSAP staff should be ready to provide pertinent information on the call, including:

- Call recording (if a voice call)
- Call detail information from the 9-1-1 and telephone systems providers. Note: some system logs are purged after a short period and notifying these providers early may help to preserve evidence. Request info from each provider and work back through the path of call origination. This info may not be provided to the PSAP, but notifying the provider to capture the log information will assist the investigation.
- Gather info from call taker and any notes
- Cooperate in the investigation

## **What can you do to prepare?**

Coordinate with your responding agencies. Understand the SOPs and on scene actions of the responders to the various types of calls, discuss the incidents where a major incident is reported with a single person reporting it. Discuss and determine the roles of each agency in the event of this type of incident.

Coordinate with your investigative agencies. Determine and document jurisdictions and roles and responsibilities of each agency. These can involve multiple agencies (incident site, PSAP, and caller jurisdictions, which may be out of state or even international).



Review PSAP and responder policies and procedures. Look for changes that may be needed to cover this type of incident. Include information on gathering and protecting evidence such as call taker notes and documents. Review roles, responsibilities, and/or SOPs for reporting and investigating swatting incidents.

Update and keep current your 9-1-1 and telephone service provider exigent circumstance contact info. This should include your current providers, but also consider access to the NENA Company Identifier program list. This list includes 24x7 contact numbers for all registered providers.

Update training to include information on Swatting. Include information on what swatting is, additional questioning techniques and how to handle the actions after the call.

## Resources

Local Law Enforcement

Local telephone providers  
Exigent circumstance procedures and contacts

NENA Company Identifier Program  
<http://www.nena.org/?page=CID2014>

Federal Bureau of Investigation (FBI)  
Local FBI Office  
Cyber-Crimes Division  
Swatting info – <http://www.fbi.gov/news/stories/2008/february/swatting020408>  
InfraGard – <https://www.infragard.org/>

The Internet Crime Complaint Center (IC3)  
<http://www.ic3.gov/default.aspx>

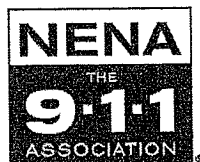
U.S. Secret Service Electronic Crimes Task Forces (ECTFs).  
<http://www.secretservice.gov/ectf.shtml>

Federal Communications Commission (FCC)  
Public Safety and Homeland Security Bureau  
FCC 24/7 Operations Center  
phone: 202-418-1122  
email: [FCCOPCenter@fcc.gov](mailto:FCCOPCenter@fcc.gov)

FCC Report "Caller Identification Information in Successor or Replacement Technologies"  
[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-1089A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1089A1.pdf)

Dispatch Monthly - SWATing 911 Calls  
<http://www.911dispatch.com/swating-911-calls/>

9-1-1 Magazine – *Telephone Swatting: A New Look at an Old Problem*  
<http://www.9-1-1magazine.com/Telephone-Swatting-A-New-Look-at-an-Old-Problem/>



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