

---

# THE -QUARTERLY REVIEW-

## LEGAL COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

---

October 2003 Vol. 5, Ed. 1

### EDITOR'S COMMENTS

Welcome to the first installment of Volume 5 of *The Quarterly Review* (QR). The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. The QR is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding the QR can be directed to Robert Cauthen at (912) 267-2179 or [Robert.Cauthen@dhs.gov](mailto:Robert.Cauthen@dhs.gov). Should you wish to join the QR Mailing List and have the QR delivered directly to you via electronic mail attachment, please provide your current e-mail address to Mr. Cauthen. Copies of the current and past issues of the QR can be viewed by visiting the Legal Division web page at: [http://www.fletc.gov/legal/legal\\_home.htm](http://www.fletc.gov/legal/legal_home.htm). This volume of the QR may be cited as "5 QUART. REV. ed.1 (2003)".

---

#### Table of Contents

By clicking on the page number for the article or case name, you will be taken directly to the beginning of the article or case brief. Clicking on your computer's "Back" button will return you to the Table of Contents.

#### Footnotes

By placing your cursor on the footnote number in the article, a textbox will appear with the reference. By clicking the footnote number, you will be taken directly to the footnote reference.

Special thanks go to the following members of the Legal Division  
who voluntarily contributed to *The Quarterly Review*.

Bobby Louis Jeff Fluck Keith Hodges Bob Duncan Gary Ainley  
Dean Hawkins Kenny Anderson Margaret Wright

## Table of Contents

<b>DOJ GUIDANCE ON LEGAL ETHICS FOR INVESTIGATORS</b> .....	3
<b>CASE BRIEFS</b> .....	8
<b><u>2<sup>nd</sup> CIRCUIT</u></b> .....	8
<i>U.S. v. Gayle</i> .....	8
<b><u>3<sup>rd</sup> CIRCUIT</u></b> .....	9
<i>U.S. v. Small</i> .....	9
<b><u>4<sup>th</sup> CIRCUIT</u></b> .....	11
<i>U.S. v. Jarrett</i> .....	11
<b><u>5<sup>th</sup> CIRCUIT</u></b> .....	14
<i>U.S. v. Grant</i> .....	14
<b><u>6<sup>th</sup> CIRCUIT</u></b> .....	15
<i>U.S. v. Lopez-Arias and Egues</i> .....	15
<b><u>7<sup>th</sup> CIRCUIT</u></b> .....	18
<i>U.S. v. BDO Seidman</i> .....	18
<b><u>8<sup>th</sup> CIRCUIT</u></b> .....	20
<i>U.S. v. Johnson</i> .....	20
<b><u>9<sup>th</sup> CIRCUIT</u></b> .....	22
<i>U.S. v. Kincade</i> .....	22
<b><u>10<sup>th</sup> CIRCUIT</u></b> .....	22
<i>U.S. v. Lackey</i> .....	22
<b><u>11<sup>th</sup> CIRCUIT</u></b> .....	24
<i>U.S. v. Clark</i> .....	24

# **LEGAL ETHICS FOR INVESTIGATIVE AGENTS?**

**U.S. Department of Justice  
Professional Responsibility Advisory Office  
May 2003**

There are many circumstances in which attorney conduct rules will or may have implications for investigative agents. The rules themselves are written by and for lawyers and are used to regulate the practice of law, although they require that lawyers take steps to ensure that agents and other non-lawyers with whom they are working also abide by the rules. Therefore, investigators should familiarize themselves with the requirements of these rules for two good reasons: 1) to make sure evidence is not excluded; and 2) to protect the reputations of your agencies. This memorandum is intended to give you some familiarity with those rules of professional conduct that most often come into play during investigations and to aid you in avoiding pitfalls in your investigative work.

## **I. What Are the Rules of Professional Conduct Anyway?**

In order to practice law, a lawyer must be a member of a state bar. Each bar has adopted a set of rules that lawyers must follow. The American Bar Association is a voluntary organization of lawyers that drafts model rules, which the various state bar organizations often adopt, in whole or in part. The rules in each jurisdiction are therefore unique, although there are general principles that apply in every jurisdiction. Failure to follow those rules can result in sanctions to the lawyer, including revocation of the lawyer's license to practice law.

## **II. How Is It That Lawyer's Rules Apply to Investigative Agents?**

There are two general rules of professional conduct that can make a lawyer responsible for the conduct of an investigative agent with whom the lawyer is working. One rule (Rule 8.4(a)) states that it is professional misconduct for a lawyer to violate the rules of professional conduct through the acts of another. The second rule (Rule 5.3(c)) states that a lawyer is responsible for the conduct of a non-lawyer, if the lawyer supervised or ordered the conduct or "ratifies" the conduct or could have prevented or mitigated the effects of the conduct. While the government lawyers with whom you work do not directly supervise you, some judges may still hold them accountable for your conduct on account of the rules.<sup>1</sup> Oftentimes, the government lawyer will urge that, if a court finds a rule violation, any sanction be against the lawyer, not the case; but the court has discretion and sometimes does prohibit the lawyer from using evidence obtained by an agent in violation of the rules. In addition, the cases differ about when a lawyer "ratifies" the conduct of an agent or other non-lawyer. This issue comes up at trial when a defendant moves to have evidence excluded on the ground that the use of the evidence obtained by an agent in violation of a rule constitutes a ratification. The courts and legal authorities disagree on the answer to the question, but it is important for you to recognize it as an issue.

---

<sup>1</sup> Rule 5.3(b) states that a lawyer having direct supervisory power over a nonlawyer has to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

There is also a more specific rule that requires that prosecutors take special precautions to make sure that investigative agents do not make pre-trial, out-of-court statements that would have a substantial likelihood of materially prejudicing a proceeding or that would have a substantial likelihood of heightening public condemnation of the accused (Rule 3.8(f)).

When investigative agents learn about all the different requirements of the attorney conduct rules, they sometimes argue that investigators should conduct their investigations totally independently of the lawyer and in this way avoid the constraints of the attorney conduct rules. As a practical matter, given the necessary involvement of attorneys in issuing grand jury subpoenas, seeking wiretap orders, and in other techniques used in investigating complex federal crimes, it may be impossible for an attorney not to be involved at the investigative stage. Moreover, you should be aware that, no matter how independently the agents may try to operate, courts may still apply the attorney conduct rules, either when a lawyer is consulted on a legal issue, such as constitutional questions implicated in interviewing a suspect, or not, as when the lawyer simply tries to use the evidence.

### **III. What Exactly Do The Most Important and Relevant Rules Provide?**

For each of the following issues, you first should determine which rules of professional conduct apply and then examine the particular rule in question. You can do this by consulting an attorney in the governmental office who will handle the case.

#### **A. Contacts with Represented Persons.**

Every jurisdiction has a provision providing generally that a lawyer may not communicate with a person the lawyer knows to be represented about the subject matter of the representation (ABA Model Rule is 4.2). There are exceptions to this rule. The rule in every jurisdiction permits such a communication with the consent of the person's lawyer. The rule in every jurisdiction but two (Florida and Puerto Rico) contains language creating an exception for communications "authorized by law." The rule on its own, or read in conjunction with other rules (such as Rule 8.4(a) and 5.3(c) discussed earlier), would prohibit an agent working on a case with a lawyer from engaging in a communication when the lawyer could not.

This rule raises many questions, and there are numerous cases deciding issues relating to it. The answers to the questions differ, depending on the applicable rule and the case law in the relevant jurisdiction.

\* How are you supposed to *know* when an individual is represented by a lawyer?

You have to pay attention to what the individual says on this issue. Also, where the individual has a lawyer on one case, for example, a state investigation of health care fraud, you probably should "know" that the individual is represented in your federal investigation of the same matter, unless there are good reasons not to think so, e.g., when a lawyer tells you he does not represent the individual in your investigation.

- \* What if the individual has been represented in the past by a lawyer?

This fact alone would not be enough to know that the individual is or is not represented. However, if the lawyer continues to work for the individual, then that is a fact to be considered.

- \* If the “individual” is a corporation that employs a general counsel, does the general counsel necessarily represent that corporation *on the matter* you are investigating?

Generally speaking, the fact that a corporation has a general counsel does not mean that the corporation is represented with respect to your investigation of a particular incident or practice.

- \* Which *persons* in the corporation does the corporation’s attorney represent?

The answer to this question is going to depend on where the case is or will be tried, or where the lawyers are members of the bar. The states vary, and in some jurisdictions, such as D.C., only employees who have the power to bind the corporation with respect to the representation itself are covered by the rule’s prohibition. In other states, however, even some low-level employees are considered to be represented by the corporation’s attorney.

- \* Is a *former employee* considered to be represented by corporation’s attorney?

In many jurisdictions, but not all, a former employee is not considered to be represented by the corporation’s attorney. That means that you are free to communicate with former employees about most things but not about “privileged matters.”

- \* Is it necessary to ask every individual if he or she is represented?

It usually is not necessary to ask every individual; that answer would change if you have reason to believe that someone is represented. In that case, you should inquire.

- \* If a corporate employee has his own counsel who would permit you to communicate with the individual, do you also have to get the consent of the corporation’s attorney?

In many jurisdictions, but not all, if a corporate employee has separate counsel, then you may properly communicate with the individual if you have the consent of that person’s separate counsel.

- \* Can the individual consent to the communication or does the lawyer have to consent?

No. Only the lawyer can consent.

\* Since the rule only prohibits communications about the subject matter of the representation, are you permitted to talk with the individual about a different but related subject?

That depends on the relationship between the two.

\* What is considered a “communication”? (Is a letter a communication? Can you just listen?)

Listening and writing or receiving a letter are communications.

\* Does the rule even apply before an individual is charged with a crime or a law suit is filed?

The answer to this question varies, depending on which state’s rules apply and on the stage of the investigation.

\* When are you “authorized by law” to communicate with a represented person?

This phrase has been interpreted to mean that you may communicate with a represented individual if a specific law, a court order, or a previous decision of the court in that jurisdiction would permit it.

\* If the rule applies to post-indictment communications with represented persons, and the rules applies to agents who are working with lawyers, is it permissible for agents who arrest an indicted defendant to give Miranda warnings and get a statement from him?

This is a difficult question, not susceptible to a short answer and included here so that you think about it. A few states’ rules specifically permit post-arrest Mirandized communications with represented individuals; on the other hand, at least one federal case suggests that it is impermissible.

**B. You Must Not Use a Method of Obtaining Evidence That Violates the Rights of Another Person.**

Most jurisdictions have a rule or a number of rules that, read together, prohibit a lawyer and an agent working with a lawyer from obtaining evidence by violating the “legal rights” of another person (ABA Model Rule 4.4(a)). The “legal rights” of a third person include constitutional and statutory rights and rights recognized by case law, including privileges. For example, this rule has been used to prevent a lawyer from reviewing and copying psychiatric records of a litigant. It would prohibit you from asking questions if the answer would be privileged and the person you are asking does not have the power to waive the privilege. The most common way in which this rule would come into play is if, in the course of an investigation, you lawfully obtain information that is “privileged.” You may not always be able to determine in advance whether a document was intended to be privileged (and was inadvertently disclosed or was released by unauthorized persons), but there are some indicia that should put you on notice to ask some questions about the document. For example, if a document is on a lawyer’s stationery, is addressed to a client of the lawyer, and contains a notice such as “Confidential Attorney-Client Privileged Document” then you have some idea that there might be a claim that it is privileged. Before you read that document and before you integrate it into the file, it would be smart to find out how the document came

into your possession. If the client waived the privilege (as, for example, a corporation may agree to do during an investigation), there is no reason not to read it. However, if the client did not waive the privilege, there are jurisdictions that would require you to return the document and also to refrain from using it. If you have not separated out such a document and it is later found to be privileged, you then would be hard pressed to establish that the information in it did not affect other parts of the investigation. Not every jurisdiction has such a rule, and so it is important to know what the applicable jurisdiction requires.

### **C. Trial Publicity Rules**

Every jurisdiction has a rule (either a rule of professional conduct or a court rule) that provides that a lawyer should not make a statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or should know that the statement will have a substantial likelihood of prejudicing an adjudicative proceeding (ABA Model Rule 3.6). Here, again, the rule applies to agents working with lawyers. There is another rule applicable to prosecutors (ABA Model Rule 3.8) that specifically requires the prosecutor to make efforts to prevent investigators and other law enforcement personnel from making statements outside the courtroom that the lawyer could not make. This second rule explains that prosecutors and agents properly may make statements that inform the public about the investigation if those statements serve a legitimate law enforcement purpose but should refrain from making statements outside the courtroom that “have a substantial likelihood of heightening public condemnation of the accused.” You should be aware that, in some jurisdictions, the rules do not permit an attorney (or an agent working with the attorney) to identify or display the items seized at the time of arrest or in connection with a search warrant.

Since the publicity rules are designed to assure fair proceedings, it is not surprising that the penalty for a violation of the rules can result in reversal of a conviction.

### **D. You Must Always Be Honest With the Court.**

Every court requires those who appear before it to be honest (ABA Model Rule 3.3). Honesty means more than simply telling the truth. It may require you to make a statement, rather than leave the court with an erroneous impression. It may require you to correct the record in the court, even sometimes after a case has been closed. While you may know that the legal authorities hold sacrosanct the attorney-client relationship -- that is in part the reason for prohibiting a lawyer from disclosing the confidences of a client -- you may not know that in many jurisdictions a duty of candor to the court trumps even the a duty of confidentiality to a client. This rule is particularly exacting when the government lawyer is the only one presenting evidence to the court, that is, when involved in an *ex parte* proceeding.

You may be surprised to learn that the candor rule applies whenever the government lawyer, through you, supplies information to the court, such as when you prepare an affidavit that is filed with the court. If the affidavit does not tell the whole story, then the case could suffer consequences. Candor issues arise in many different circumstances. Here are some examples:

– where a confidential informant identifies herself while on the stand and under oath with a name supplied by your agency but that is not her real name.

- where an affidavit in support of a wiretap does not contain a complete picture of previous methods tried and failed and alternative options for the government to obtain the information without the wiretap.
- where, after testifying in a deposition, a government witness discovers that the information provided in the deposition was incorrect.

In each of these circumstances, both your cases and your reputation can suffer from the potential consequences of such non-disclosures.

### **E. Practice of Law and Negotiation of Agreements**

Every jurisdiction has its own definition of what constitutes the practice of law and provides that only those properly authorized may practice in that jurisdiction; some jurisdictions have criminal statutes prohibiting the unauthorized practice of law. We refer to such rules here because investigative agents who give advice to persons about possible violations of various laws, who assist in the preparation or interpretation of legal documents, or who “negotiate” criminal penalties may be engaged in the unauthorized practice of law. Only government lawyers may properly negotiate pleas of guilty, cases of civil settlement, or the granting of immunity. Agents who attempt to negotiate on behalf of the government not only may subject themselves to penalties, but they also may undermine the cases they are attempting to resolve.

*Reprinted with special permission of the DOJ Professional Responsibility Advisory Office, Claudia Flynn, Director.*

---

## **CASE BRIEFS UNITED STATES SUPREME COURT and CIRCUIT COURT UPDATES**

### **2<sup>nd</sup> CIRCUIT**

*U.S. v. Gayle*  
*342 F.3d 89*  
*August 27, 2003*

**SUMMARY: A conviction in a foreign (non-U.S. Federal or State) court may not be the basis for a felon-in-possession charge under 18 USC 922.**

**FACTS:** The defendant was arrested upon suspicion that he had illegally entered the United States from Canada. Soon after his arrest, authorities discovered a large quantity of firearms stored in boxes in his hotel room. The defendant was subsequently charged in a superseding indictment with, among other offenses, being a felon in possession of a firearm, in violation of 18 USC 922(g)(1). The predicate felony

was the defendant's conviction in Canada for using a firearm in the commission of an indictable offense. The defense moved to dismiss the felon-in-possession count, maintaining that because his prior felony conviction did not occur in the United States, the defendant was not a felon within the meaning of the statute.

ISSUE: Does a foreign (non-U.S.) court felony conviction satisfy the predicate offense requirement for a felon-in-possession count under 18 USC 922(g)(1)?

HELD: No.

DISCUSSION: 18 USC 922(g)(1) provides "It shall be unlawful for any person who has been convicted *in any court* of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. (Emphasis added.) The Court looked to the legislative history of the Gun Control Act and decided that the language "in any court" did not include foreign courts. The Court reversed the conviction on the felon-in-possession count.

This case recognized there is disagreement among the Circuits whether foreign convictions can be the requisite, predicate offense for a felon-in-possession count. The 3<sup>rd</sup>, 4<sup>th</sup>, and 6<sup>th</sup> Circuits, along with two district courts (Maine and the Northern District of California), have concluded that "in any court" does include foreign courts. Conversely, the 10<sup>th</sup> Circuit has concluded that Section 922(g)(1)'s "in any court" language is sufficiently ambiguous that foreign convictions cannot serve as predicate offenses for sentencing enhancements under 18 USC 924(e). The 2<sup>nd</sup> Circuit now holds that foreign convictions cannot satisfy the felon-in-possession, predicate felony requirement.

Note that there are other offenses in the Gun Control Act that use the language "in any court" to define what is a predicate felony conviction. Those Gun Control Act provisions may also be affected by this case.

**But see 3<sup>rd</sup> Circuit, *U.S. v. Small***

\*\*\*\*\*

### **3<sup>rd</sup> CIRCUIT**

*U.S. v. Small*  
333 F.3d 425  
June 23, 2003

**SUMMARY: Prior to using a foreign conviction as a Section 922 predicate offense, a court must satisfy itself that the foreign conviction comports with our notions of fundamental fairness as required by the Due Process Clause.**

FACTS: On April 14, 1994, the Naha District Court, in Naha, Japan, convicted Gary Sherwood Small for violations of the Japanese Act controlling the Possession of Firearms and Swords, and the Customs Act, all which were offenses punishable by a term of imprisonment exceeding one year. On August 30, 2000, a federal grand jury in the Western District of Pennsylvania returned an indictment against Small, charging

him with possessing a firearm in violation of 18 U.S.C. §922(g)(1). Small filed a motion to dismiss the indictment, which the district court denied. Small was sentenced to eight months imprisonment followed by three years supervised release.

Section 922(g)(1) generally provides that “it shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” Small was convicted of crimes punishable by imprisonment for a term exceeding one year in Japan. Subsequently, he purchased a firearm in the United States.

ISSUE: Did the district court correctly recognized the judgment of the Japanese court for the purpose of Small’s Section 922(g)(1) conviction?

HELD: Yes.

DISCUSSION: The district court correctly held that prior to using the foreign conviction as a Section 922 predicate offense, the court must satisfy itself that the foreign conviction comports with our notions of fundamental fairness as required by the Due Process Clause. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); Restatement (Third) of Foreign Relations Law of the United States §482 cmt. b (1987) (providing, in part, that “a court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the decision was rendered”).

In order to ensure that the use of foreign convictions as predicate offenses for Section 922(g)(1) convictions comports with our notions of fundamental fairness required by the Constitution, some procedural safeguards are necessary. The 3<sup>rd</sup> Circuit adopted the approach of the Restatement (Third) of Foreign Relations Law of the United States §482, which provides two mandatory and six discretionary grounds for non-recognition of foreign judgments:

- (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
  - (a) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
  - (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in Restatement (Third) of Foreign Relations Law of the United States §421.
- (2) A court in the United States need not recognize a judgment of the court of a foreign state if:
  - (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
  - (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

- (c) the judgment was obtained by fraud;
- (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States, or the State where recognition is sought;
- (e) the judgment conflicts with another final judgment that is entitled to recognition; or
- (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

Restatement (Third) of Foreign Relations Law of the United States §482.

The 3<sup>rd</sup> Circuit noted that the district court explicitly determined that the Japanese conviction comported with our concepts of fundamental fairness by examining the Japanese trial record and transcript. The 3<sup>rd</sup> Circuit was satisfied with the district court's analysis that, applying the standards adopted above, there were no grounds for non-recognition of the Japanese conviction as the predicate offense to Small's Section 922(g)(1) conviction.

**But see 2<sup>nd</sup> Circuit, *U.S. v. Gayle***

\*\*\*\*\*

#### **4<sup>th</sup> CIRCUIT**

*U.S. v. Jarrett*  
338 F.3d 339  
July 29, 2003

**SUMMARY: The Fourth Amendment protects against unreasonable searches and seizures by Government officials and those private individuals acting as “instruments or agents” of the Government. Whether the requisite agency relationship exists necessarily turns on the degree of the Government’s participation in the private party’s activities. The defendant must show that the Government both knew of and acquiesced in the private person’s search. But, more than mere knowledge and passive acquiescence is required before finding that an agency relationship exists. There must be some evidence of Government participation in or affirmative encouragement of the private search. The Government must affirmatively encourage, initiate or instigate the private action.**

FACTS: “Unknownuser” is a computer hacker who lives in Turkey. He obtained evidence of possession of child pornography against two defendants, William A. Jarrett (the defendant in this appeal) and Dr. Bradley Steiger (the defendant in an earlier case).

Unknownuser posted pornographic pictures to “a news group frequented by pornography enthusiasts.” Attached to the pictures was a “Trojan Horse program.” When individuals downloaded one of these pictures to their computers, this attached program allowed Unknownuser to access and examine their computers surreptitiously.

The case against Dr. Bradley Steiger, 318 F.3<sup>rd</sup> 1039 (11<sup>th</sup> Cir. 2003), cert. denied, 123 S.Ct. 2120 (2003), started when Unknownuser e-mailed the Montgomery, Alabama, Police Department about a disturbing series of pictures he had found on Steiger's computer. The police contacted the FBI for help.

December 2000. Agent Duffy, an FBI agent assigned in Turkey, was never able to identify or interview Unknownuser in person, but exchanged e-mails with him. In one of these e-mails, Unknownuser stated that his "trap" had caught at least 2,000 child pornography collectors, but that only 3 (including Steiger) appeared in the pictures with the children. Unknownuser absolutely refused to identify himself. On December 4, 2000, Agent Duffy closed this initial e-mail exchange with Unknownuser by thanking him and stating, "If you want to bring other information forward, I am available."

May, 2001. In May, 2001, Agent Duffy sent Unknownuser an e-mail to let him know that Steiger's trial had been postponed. Duffy thanked him again for his help and "assur[ed] him that he would not be prosecuted for his actions should he decide to serve as a witness in the Steiger trial." Unknownuser responded that he would not be a witness and would not reveal his identity.

Steiger was later convicted and sentenced to 210 months in prison and 3 years of supervised release.

December 2001. On December 3, 2001, the Montgomery, Alabama, Police Department got another e-mail from Unknownuser. He said he "had found another child molester... from Richmond, VA." This was Jarrett. Unknownuser also asked how he could contact the FBI. He was given contact information, and the next day he sent the FBI a series of ten e-mails with 45 pornographic attachments he said he had found on Jarrett's computer. The FBI obtained a search warrant on December 13, promptly executed the search warrant and arrested Jarrett on December 13 or 14, 2001.

After Jarrett was arrested, another series of e-mail exchanges between Unknownuser and a third FBI agent began on December 19, 2001. In the first e-mail, the third agent thanked Unknownuser for his help in the Jarrett case and then engaged in what the court called "the proverbial 'wink and a nod'":

"I can not ask you to search out cases such as the ones you have sent us. That would make you an agent of the Federal Government and make how you obtain your information illegal and we could not use it against the men in the pictures you send. But if you should happen across such pictures as the ones you have sent to us and wish us to look into the matter, please feel free to send them to us...."

The Government did not disclose this post-arrest series of e-mails to defense counsel until after the trial court had denied Jarrett's motion to suppress the evidence found during the search and had accepted his conditional plea of guilty. After learning of this failure to disclose, the trial court reversed its earlier decisions, finding that the post-arrest series of e-mails "expressed [the Government's and Unknownuser's] consent to their agency relationship." Without this evidence, the Government had no case. Accordingly, the Government appealed this reversal.

ISSUES: 1. Did Agent Duffy's December 2000 suggestion that he was "available" if Unknownuser found more evidence induce Unknownuser to conduct searches as a Government agent?

2. Did Agent Duffy's May 2001 update on the Steiger case and his assurance of the Government's lack of interest in prosecuting Unknownuser induce Unknownuser to conduct searches as a Government agent?
3. Did the third FBI agent's "proverbial 'wink and a nod'" in December 2001 induce Unknownuser to search Jarrett's computer?

HELD: 1. No.

2. No.

3. No.

DISCUSSION: 1. The standard. The Fourth Amendment protects against unreasonable searches and seizures by Government officials and those private individuals acting as "instruments or agents" of the Government. It does not provide protection against searches by private individuals acting in a private capacity. Whether the requisite agency relationship exists "necessarily turns on the degree of the Government's participation in the private party's activities." The Fourth Circuit reaffirmed the standard it has applied in such cases: "The defendant must show that the Government both knew of and acquiesced in the private person's search.... More than mere knowledge and passive acquiescence is required before finding that an agency relationship exists.... [S]imple acquiescence by the Government does not suffice to transform a private search into a Government search. Rather, there must be some evidence of Government participation in or affirmative encouragement of the private search before a court will hold it unconstitutional. Passive acceptance by the Government is not enough.... The Government must also affirmatively encourage, initiate or instigate the private action."

a. December 2000 and May 2001. Agent Duffy's "brief exchanges" did not cross this line. They were brief and occurred seven to twelve months before the Jarrett search. The court characterized them as "perfunctory expressions of gratitude... and a vague offer of availability to receive more information in the future." As the court observed, finding that these remarks turned Unknownuser into a Government agent would make it risky for the Government to ever thank an individual for their efforts on behalf of law enforcement.

b. December 2001. These e-mail remarks, as quoted above, were more problematic. In fact, as the Government conceded on appeal, they were likely the kind of remarks that do amount to "active Government participation sufficient to create an agency relationship." Crucially, they were not sent to Unknownuser until after he had already searched Jarrett's computer and sent the evidence to the Government. In short, such remarks are a bad idea.

2. The lesson. Although the Government prevailed, its margin of victory was narrow. In no sense did the court endorse the Government's behavior. Quite the opposite. At one point, the appeal notes, "[T]he Government operated close to the line in this case." Later, the opinion notes "[T]he Government's behavior in this case is discomfoting." Clearly, the third agent's "wink and a nod" quoted above is to be avoided. What about the December 2000 and May 2001 remarks? The court said that these remarks likely would have crossed the line also had "the Government made more explicit representations and assurances... that it was interested in furthering its relationship with Unknownuser and availing itself of

the fruits of any information that Unknownuser had obtained.” The court ended its discussion by noting that more explicit assurances and signals would have crossed the line even if the Government did not have a specific target in mind.

**See also 8<sup>th</sup> Circuit, *U.S. v. Johnson***

\*\*\*\*\*

## **5<sup>th</sup> CIRCUIT**

*U.S. v. Grant*  
2003 U.S. App. Lexis 17899  
August 26, 2003

**SUMMARY: The Fourth Amendment right against unreasonable search and seizure was not violated by a police officer’s temporary investigative detention extending beyond the time allowed to check the defendants criminal history when, during that time, the officer was able to develop reasonable suspicion that the defendant was in possession of illegal narcotics.**

FACTS: Officer Buchholtz, a 7 year member of a drug task force, made a traffic stop for failure to signal a lane change and cutting off another driver. As he approached the car, he noticed the passenger fumbling around with something under the seat. He asked the passenger, Grant to get out of the car and conducted a pat down and found nothing. He noticed that there was a crumpled up Doritos bag lying on the floor where Grant had been sitting. The officer ran a records inquiry on the driver, Bruton, and while waiting for the results, asked the passenger Grant for his identification. Grant said he had no identification but provided the officer his name and date of birth. Both Bruton and Grant appeared to be nervous. The Officer questioned them separately about where they had been. Both said they were coming from Houston where they had spent the weekend but gave different stories on what they had done in Houston. Based on the above, Officer Buchholtz requested consent to search the car. Bruton asked him why he wanted to search the car. The officer asked for consent to search several times and each time, Bruton asked why he wanted to search. Buchholtz took this as a refusal to consent and told them he was requesting a drug dog and had them both sit on the side of the road. Bruton’s records check came back with no wants or warrants and a valid driver’s license, but Bruton had a previous conviction for a narcotics violation. Buchholtz requested dispatch to send the narcotics dog and requested a criminal history check on Grant. He asked Bruton if there was any marijuana in the car and Bruton said he and Grant had smoked a joint in the car and there may be some ashes. Buchholtz conducted a visual search of the car and thought he detected a slight smell of marijuana. The dispatcher then advised that there was nothing on Grant in Louisiana, but he was checking the surrounding states. Nine minutes had elapsed from the initial stop until this point. Six minutes later, while they were still waiting for the drug dog, Bruton suddenly got up, ran to his car and sped off while Grant lay down in front of the police car to prevent Buchholtz from pursuing. Other officers had arrived at the location and took custody of Grant while Buchholtz pursued and caught Bruton thirteen minutes later. During the search of the car, he noticed that the Doritos bag was missing, and requested another officer to trace the pursuit route and look for the bag. The Doritos bag was found and in it was a quantity of crack cocaine. Grant subsequently pled guilty to possession of the crack cocaine, preserving his right to challenge the constitutionality of the detention and subsequent search which led to the discovery of the crack cocaine.

Grant was sentenced to 151 months in prison.

ISSUE: Did Officer Buchholtz illegally seize Grant, a passenger in an automobile, by detaining him longer than permitted for the purposes of a valid “Terry stop,” making the crack cocaine inadmissible?

HELD: No.

DISCUSSION: While Grant has no privacy interest in the car, by virtue of his being a passenger, he was also seized during the traffic stop. Therefore, his fourth amendments rights apply, since traffic stops (Terry stops) are considered seizures. The Terry stop inquiry is two-tiered: 1) was the officer’s action justified at the inception, and 2) was the seizure reasonably related in scope to the circumstances that justified the stop in the first place. Grant did not dispute the first factor, but argued that once the records checks had come back Buchholtz was required to release them. The court held that while this was true, under a totality of the circumstances analysis, the facts that developed during the legitimate Terry stop were sufficient to give an officer with Buchholtz’s training and experience reasonable suspicion to believe there was narcotics activity so as to justify their continued detention until the drug dog arrived. All of these facts were developed prior to the first notification by dispatch that Grant had no criminal history in Louisiana, i.e. within the period allowed during the legitimate initial inquiry related to the traffic violation. The court held that Officer Buchholtz developed reasonable suspicion that the two were involved in narcotics during the legitimate traffic stop. This justified their further detention while he waited for the drug dog. There was no Fourth Amendment violation.

\*\*\*\*\*

## **6<sup>th</sup> CIRCUIT**

*U.S. v. Lopez-Arias and Egues*  
2003 U.S. App. LEXIS 19425  
September 19, 2003

**SUMMARY:** A law enforcement officer who lacks probable cause to justify an arrest may nevertheless briefly detain an individual without violating the Fourth Amendment if the officer possesses a reasonable and articulable suspicion that the individual has committed a crime. The scope of this brief investigative detention, however, must be limited to “the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” To determine whether an investigative detention has crossed the line and become an arrest, the court considers factors such as the transportation of the detainee to another location, significant restraints on the detainee’s freedom of movement involving physical confinement or other coercion preventing the detainee from leaving police custody, the use of weapons or bodily force, and the reading of *Miranda* rights.

If a consent to search is given after an illegal seizure, evidence obtained pursuant to the consent must be suppressed, unless the consent is sufficiently attenuated from the illegal seizure such that it is the product of an intervening act of free will. To determine whether a consent to search was sufficiently attenuated from an illegal seizure, courts must consider factors such as the length of time

**between the illegal seizure and the consent, the presence of intervening circumstances, the purpose and flagrancy of the official misconduct, and whether the officers read the suspect his *Miranda* rights before he consented. No single factor is dispositive, and the burden of persuasion is on the government.**

FACTS: Law enforcement officials in Louisville, Kentucky, received a tip from a confidential informant, whose reliability had not yet been tested, that two Hispanic men from Las Vegas were traveling to Louisville to distribute cocaine, they intended to stay at the Collier Motel in Louisville and that a man named Jose intended to deliver the proceeds of a drug sale to these two men at the motel. According to the informant, Jose would be driving a white Toyota with a certain license plate number which the officers confirmed was registered to Jose Barrera Santiesteban. DEA began surveillance of the Collier Motel. Defendants Lopez-Arias and Egues exited Room 17 and departed. The undercover DEA agents followed defendants as they visited several locations, including an office supply store, where they purchased a set of digital scales of the type often used to weigh drugs. Defendants then returned to the motel.

Later that evening, Santiesteban arrived at the motel driving the white Toyota described by the informant. Santiesteban, carrying a yellow plastic bag, went into Room 17 with Lopez-Arias. Santiesteban stayed in Room 17 for about forty-five minutes before leaving in his white Toyota. DEA agents followed Santiesteban out of the vicinity of the motel and then stopped him. A drug-sniffing dog alerted on the Toyota, but the DEA agents did not find any drugs.

Defendants departed from the motel shortly after Santiesteban and were followed by DEA agents. Once the drug-sniffing dog alerted on Santiesteban's Toyota, a DEA agent on the scene with Santiesteban ordered the DEA agents following defendants to stop them. Four DEA agents in four unmarked DEA vehicles activated their sirens and emergency lights and stopped the defendants. The four DEA agents, with weapons drawn, ordered defendants to exit the car. The DEA agents then handcuffed defendants and placed them into separate DEA vehicles. The DEA agents drove the defendants from the scene of the stop on the street to an adjacent convenience store parking lot, where they were removed from the DEA vehicles, read their *Miranda* rights, and questioned separately.

The DEA agent asked Egues for consent to search the motel room and presented him with a written consent form, which Egues signed within ten to fifteen minutes from the time the DEA agents stopped them. A little more than twenty minutes from the time the DEA agents stopped them, Lopez-Arias gave the DEA agent questioning him verbal consent to search the motel room. After receiving consent from both defendants, DEA agents searched Room 17 of the Collier Motel and found a yellow plastic bag containing twenty-five individually wrapped packages of cocaine, a black notebook containing \$4,100 in cash, clear plastic wrappers containing cocaine residue, and two sets of digital scales. DEA agents then formally arrested defendants and reread them their *Miranda* rights.

The government did not argue that the DEA agents had probable cause to arrest defendants at the time defendants granted their consent to search the motel room. The government instead argued that defendants gave their consent to search the motel room during a permissible investigatory detention that had not yet risen to the level of an arrest.

The district court found that the stop had risen to the level of an arrest by the time defendants gave their consent to search the motel room, that no probable cause existed to support the arrest, and that the consent

was therefore tainted by the illegal arrest.

ISSUES: 1. Did the seizure of the defendants amount to an unlawful arrest without probable cause?

2. Was the evidence seized in the motel room admissible as the result of a valid consent search?

HELD: 1. Yes.

2. No.

DISCUSSION: 1. A law enforcement officer who lacks probable cause to justify an arrest may nevertheless briefly detain an individual without violating the Fourth Amendment if the officer possesses a reasonable and articulable suspicion that the individual has committed a crime. The scope of this brief investigative detention, however, must be limited to “the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” Although “[t]he scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case,” in no event may law enforcement officers “seek to verify their suspicions by means that approach the conditions of arrest.”

There is no bright line that distinguishes an investigative detention from an arrest. To determine whether an investigative detention has crossed the line and become an arrest, the court considers factors such as the transportation of the detainee to another location, significant restraints on the detainee’s freedom of movement involving physical confinement or other coercion preventing the detainee from leaving police custody, the use of weapons or bodily force, and the reading of *Miranda* rights.

In the present case, before defendants gave their consent to search the motel room, they were (1) stopped by four DEA agents brandishing firearms, (2) handcuffed, (3) placed into the backseats of separate DEA vehicles, (4) transported from the scene of the stop, (5) read their *Miranda* rights, and (6) questioned. The DEA agents had arrested defendants by the time defendants consented to the search of the motel room. Because the DEA agents lacked probable cause, the arrest was unlawful.

2. The Fourth Amendment test for a valid consent to search is that the consent be voluntary. But the Supreme Court has made perfectly clear that the exclusionary rule may operate to exclude evidence obtained as the result of a valid, voluntary consent to search. In order to deter unlawful seizures, the Supreme Court has mandated that courts must generally suppress otherwise admissible evidence obtained as a result of an illegal seizure. Thus, the Court has held that “statements given during a period of illegal detention are inadmissible *even though voluntarily given* if they are the product of the illegal detention and not the result of an independent act of free will.”

If a consent to search is given after an illegal seizure, evidence obtained pursuant to the consent to search must be suppressed, unless the consent is sufficiently attenuated from the illegal seizure such that the consent is the product of an intervening act of free will. To determine whether a consent to search was sufficiently attenuated from an illegal seizure, courts must consider factors such as the length of time between the illegal seizure and the consent, the presence of intervening circumstances, the purpose and flagrancy of the official misconduct, and whether the officers read the suspect his *Miranda* rights before he

consented. No single factor is dispositive, and the burden of persuasion regarding this issue is on the government.

Defendants granted their consent to search within half an hour from the initial stop and during the illegal arrest. There was no intervening time or event between the illegal arrest and defendants' consent. Although the DEA agents read defendants their *Miranda* rights, this alone was insufficient to break the causal chain between the illegal arrest and defendants' consent. The giving of *Miranda* warnings alone is insufficient to purge the primary taint of the unlawful seizure.

\*\*\*\*\*

## 7<sup>th</sup> CIRCUIT

*U.S. v. BDO Seidman*  
337 F.3d 802  
July 23, 2003

**SUMMARY: The tax shelter registration and listing requirements set forth in 26 USC 6111 and 6112 preclude any “expectation of confidentiality” in communications between a taxpayer and a federally authorized tax practitioner. The Section 6112 list, revealing the identities of investors, is not protected by the confidentiality provisions of 26 USC 7525 and is, therefore, the proper subject of a summons.**

FACTS: In September, 2000, the Internal Revenue Service received information that a firm by the name of BDO Seidman was promoting potentially abusive tax shelters without complying with Section 6111, which requires promoters and organizers of tax shelters to register each tax shelter with the IRS. Any tax shelter so registered is deemed to have the potential of tax avoidance or evasion, and is considered to be “potentially abusive.” Accordingly, Section 6112 requires the promoters and organizers of tax shelters to keep a list identifying each person to whom is sold an interest in a tax shelter. Failure to do so can result in the imposition of penalties.

The IRS served BDO Seidman with several summonses (Administrative Forms 2039) commanding them to produce documents and records relative to twenty different tax shelters in which BDO's clients had invested. Among the documents requested were: (1) all tax shelter registrations filed; (2) records of clients who had invested in the identified shelters, to include, documents identifying the names of the investors, and the date they made a purchase; and, (3) investor lists prepared and maintained relative to those transactions.

BDO Seidman failed to provide the summoned records, and in July 2002, the IRS petitioned the district court for enforcement. BDO opposed enforcement stating, among other objections, that a portion of the summoned information was protected from disclosure by the attorney-client privilege, the work product doctrine, and the confidentiality privilege of 26 U.S.C 7525 (Internal Revenue Code).

In October, 2002, the district court ruled that the IRS had served the summonses in good faith and ruled that BDO had failed to show that enforcement of the summonses would constitute an abuse of power. The district court ordered BDO to produce the summoned records to the IRS on or before November 4, 2002.

This order excluded those records that BDO had already listed on “privilege” logs and submitted to the court for an in camera review.

Among the documents not previously provided to the court for the in camera review were records that revealed the identities of the BDO clients who invested in the suspected abusive tax shelters. BDO informed its clients of its intent to submit these documents to the IRS. In response, two sets of unidentified clients, John and Jane DOE and Richard and Mary ROE (hereinafter referred to as “THE DOES”) timely filed emergency motions with the district court to intervene in the enforcement. In their motions THE DOES asserted that as BDO clients they (1) sought certain “confidential” advice regarding tax matters, (2) therefore, documents revealing their identities were privileged under 26 USC 7525, and (3) that BDO Seidman was not adequately representing their interests in keeping that information confidential.

THE DOES conceded that aside from providing their identities as tax shelter investors, the documents themselves did not contain any otherwise privileged communication. Subsequent to a hearing, the district court concluded that providing the client’s identity falls outside of the scope of Section 7525, and denied THE DOES’ motion for a stay of its enforcement order.

THE DOES filed a timely notice of appeal from the denial of the motions to intervene, and requested that the 7<sup>th</sup> Circuit Court stay the production of the documents to which they had asserted the privilege in the district court. The 7<sup>th</sup> Circuit granted a temporary stay and remanded the case to the district court to enter more extensive findings relative to THE DOES’ alleged privilege. Upon remand, the district court, in essence, found no colorable claim of privilege in the documents provided by BDO Seidman.

Also in their appeal THE DOES contended that the district court erred when it denied their motions to intervene in the on the grounds that they lacked a colorable claim under Section 7525. This is the main issue which the 7<sup>th</sup> Circuit addressed in this opinion.

ISSUE: Are the identities of THE DOES protected from disclosure under 26 USC 7525?

HELD: No.

DISCUSSION: In its discussion the 7<sup>th</sup> Circuit considered the regulatory context upon which THE DOES claim of privilege rests. The court first addressed the statutory right of the Internal Revenue Service to require promoters and sellers of potentially abusive tax shelters to register them and to maintain lists of investors. These requirements, set forth in the statutory language of 26 USC 6111 and 6112, were enacted by Congress for the express purpose of providing the IRS with the tools to monitor and regulate abusive tax shelters that were adversely affecting the public revenues during the 1980s. These statutes, the court reasoned, enable the IRS to examine every purchaser of potentially abusive tax shelters, and to treat those taxpayers in a more uniform manner.

The court stated that this ability to monitor such tax shelters is enhanced by the ability of the Service to issue administrative summonses for records:

Congress, by granting the IRS broad power to issue summonses to investigate violations of the Tax Code (26 USC 7602)...further provides the IRS with great latitude to verify compliance with these tax shelter registration and list-keeping provisions....

However, this summons authority is not absolute, and summonses can be challenged by the recipient (or some other party of “interest”) in a summary hearing before a U. S. District Court. If the court finds that the summons is issued legally, it will then issue an order enforcing the summons.

In this case THE DOES sought to intervene and quash the summons because they contend that the documents summoned, including those revealing their identities were “privileged” under 26 USC 7525. This statute, enacted on July 22, 1988, created a confidentially privilege for communications between a taxpayer and a tax practitioner. It provides:

With respect to tax advice, the same common law protections of confidentiality which apply to communications between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

In its analysis, the court reasoned that in order for THE DOES to prevail, they must prove all of the essential elements of the common law (attorney-client) privilege, which are: (1) the communication be made to the attorney in confidence, (2) the confidences constitute information that is not intended to be disclosed by the attorney, and (3) that the attorney-client communication was made for the purpose of obtaining legal advice, or, more precisely in the case of the Section 7525, tax advice.

The court held that an expectation of confidentiality is an essential element of the attorney-client privilege, and, therefore, an essential element of the Section 7525 privilege. The court reasoned that THE DOES participation in a potentially abusive tax shelter is information which is already subject to full disclosure under 26 USC 6111 and 6112. The court reiterated the fact that Congress has determined that tax shelters are subject to special scrutiny by the IRS. Anyone who sells or promotes these shelters is required to register these shelters, and maintain a list of all the investors in these shelters. THE DOES knew, or should have known, about this list keeping requirement of BDO Seidman when they purchased their interests in the tax shelters. This list keeping provision of Section 6112 precludes THE DOES from establishing Section 7525 “expectation of confidentiality” in their communications with BDO Seidman.

\*\*\*\*\*

## 8<sup>th</sup> CIRCUIT

*U.S. v. Johnson*  
*338 F.3d 918*  
*July 31, 2003*

**SUMMARY: An informant becomes a “government agent” subject to the restrictions of the defendant’s Sixth Amendment’s right to counsel only when the informant has been instructed by the police to get information about the particular defendant.**

FACTS: Angela Johnson was indicted for aiding and abetting the murder of five witnesses, soliciting the murder of witnesses, and conspiring to interfere with witnesses. She was in custody in a county jail.

McNeese was also in custody in the same jail. He had a history of trading information he gathered in prison for favorable treatment. McNeese established contact with Johnson with whom he communicated openly. A law enforcement officer, having heard of these contacts, ordered McNeese to stop communicating with Johnson.

McNeese continued to meet with Johnson and obtained some incrimination admissions. He reported this to law enforcement on September 11 2002, whereupon he received “listen post” instructions.

Two weeks later, McNeese disclosed to the government the information that he had extracted from Ms. Johnson while they had been in jail together.

Ms. Johnson moved to suppress the statements, pointing out that she was under indictment at the time of her conversations with McNeese. Accordingly, her right to counsel under the Sixth Amendment had attached. She asserted, moreover, that McNeese was a government agent at the time of all of his conversations with her, and that he had deliberately elicited from her the information that the government sought to introduce.

ISSUE: Was McNeese a government agent when he got the incriminating statements from Johnson?

HELD: No.

DISCUSSION: In Massiah v. United States, 377 U.S. 201 (1964), the Supreme Court held that the Sixth Amendment rights of a defendant are violated “when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.”

The court held that an informant becomes a government agent for purposes of Massiah only when the informant has been instructed by the police to get information about the particular defendant. Applying this holding to this case, Johnson’s position cannot prevail. “Mr. McNeese was not, at any time before September 11, 2000, instructed, either in express words or by implication, to get information about Ms. Johnson. Mr. McNeese had been helpful to the government in the past. He had proved himself an expert interrogator and informant. We may assume that the government, when Mr. McNeese was placed in the same institution with Ms. Johnson, hoped that Mr. McNeese might come up with something helpful, especially as, at that time, the bodies of the murder victims had not been found. All of these facts, however, when taken together, do not amount to an instruction to Mr. McNeese to get information about Ms. Johnson in particular.”

**See also 4<sup>th</sup> Circuit, *U.S. v. Jarrett***

\*\*\*\*\*

## 9<sup>th</sup> CIRCUIT

*U.S. v. Kincade*  
*No. 02-50380, 2003 U.S. App. Lexis 20123*  
*October 2, 2003*

**SUMMARY: Mandatory DNA testing is unconstitutional in that it does not require any individualized suspicion that the person being tested has committed an offense.**

For some time, Federal law has required that those convicted of specified offenses be required to submit to the taking of their blood to be entered into a database. This database, in turn, is available to law enforcement to assist in identifying those who commit future crimes.

The USA PATRIOT Act expanded the types of federal crimes which qualify for mandatory DNA samples. Essentially, any Federal felony offense that involves violence requires the extraction of blood. Failure to comply with this provision is itself a crime or may be used to revoke parole or supervised release.

The 9th Circuit has ruled that this mandatory DNA testing is unconstitutional in that it does not require any individualized suspicion that the person being tested has committed an offense. It relied, in part, on the following analysis:

- \* The testing has a law enforcement purpose.
- \* The testing does not meet the "special needs" test that would allow suspicion less intrusions.
- \* The recent Supreme Court case of *U.S. v. Knights*, 122 S. Ct. 587 (2001) requires that at least reasonable suspicion exist before probation officers may conduct searches of the homes of parolees.
- \* The extraction of blood is a search under the 4th Amendment.
- \* Reasonable suspicion is required before the government can require the DNA extraction.
- \* A quote from Pudd'nhead Wilson (by Mark Twain.)

\*\*\*\*\*

## 10<sup>th</sup> CIRCUIT

*U.S. v. Lackey*  
*334 F.3d 1224*  
*July 11, 2003*

**SUMMARY: Under the public-safety exception to the *Miranda* requirement, when law enforcement officers arrest a suspect they may ask that suspect about the presence of guns or sharp objects on his person without having to first inform him of his *Miranda* rights.**

FACTS: In May 2001, the Colorado Springs Police Department obtained a felony arrest warrant for Rodgerick Lackey for illegal discharge of a firearm, menacing with a handgun, and possession of a weapon by a convicted felon. An agent from the Bureau of Alcohol, Tobacco and Firearms and two Colorado Springs Police Department officers went to the parking lot of an apartment building where Lackey was

believed to be living, hoping to arrest him as he arrived at or left the building. A short time later the three officers saw a man matching the description of the defendant approach a car matching the description of the defendant's car. The man opened the car's hatchback and spent about a minute moving things around inside the car. The officers approached the man and identified themselves. The man stepped away from the hatchback, and when asked his name identified himself as Rodgerick Lackey. An officer told Lackey that he was under arrest on an outstanding warrant. Once Lackey was handcuffed, but before he was patted down an officer asked him, "Do you have any guns or sharp objects on you?" Lackey replied, "No, I don't have anything on me, but there was a gun in the car." The officers looked into the car's open hatchback and saw a gun and its magazine clip. An officer asked Lackey whether the car was his and he responded that it belonged to him and his wife. The officers retrieved the gun from the car after Lackey gave them consent to search it. The officers transported Lackey to the ATF office where he received *Miranda* warnings for the first time. Lackey signed a written waiver of his rights and gave a written statement in which he denied any involvement in the original crimes for which he was charged.

The government later charged Lackey with possession of a firearm by a restricted person in violation of 18 U.S.C. § 922 (g)(1). Lackey filed motions to suppress the gun, and the statements he made to the officers when he was arrested. The district court denied these motions finding that the officer's question about whether Lackey had weapons or sharp objects on him was within the public-safety exception to the *Miranda* requirement. Lackey proceeded to trial and he was found guilty.

ISSUE: Did the officers violate Lackey's constitutional rights by asking him about the presence of guns or sharp objects on his person after he was in custody but before he was informed of his *Miranda* rights.

HELD: No.

DISCUSSION: In affirming Lackey's conviction the 10<sup>th</sup> Circuit followed the other circuit courts that have addressed this issue, holding that the officer's question was proper under the public-safety exception to *Miranda* set forth in *New York v. Quarles*, 467 U.S. 649 (1984).

In *Quarles* a woman told two police officers that she had just been raped at gunpoint and that her assailant had run into a grocery store. The officers entered the store where they saw a man matching the suspect's description. When the suspect saw the officers he ran away from them but was apprehended in the store after a brief chase. An officer frisked the suspect and found that he was wearing an empty shoulder holster. The officer handcuffed the suspect and asked him where the gun was. The suspect nodded to some cartons and said, "the gun is over there." After finding a gun behind the cartons, the officer formally placed the suspect under arrest, and advised him of his *Miranda* rights. The state trial court suppressed the suspect's statement that "the gun is over there," ruling that it was obtained as the result of a question that was asked before the suspect was informed of his *Miranda* rights. The state appellate court affirmed the trial court and in doing so declined to recognize an exigency exception to the usual requirements of *Miranda*.

The United States Supreme Court reversed holding that "on these facts there is a public safety exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence." The court ruled that the need for answers in situations that pose a threat to the public safety outweigh the need for the prophylactic rule protecting an individual's Fifth Amendment privilege against

self incrimination. Although the Court realized that the public-safety exception could, in theory, diminish the clarity of *Miranda*, it felt that police officers “can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public, and questions designed solely to elicit testimonial evidence from a suspect.”

The 10<sup>th</sup> Circuit held that the court’s reasoning in the *Quarles* case applied to the circumstances in the present case. The purpose of the officer’s question was to assess the degree of risk Lackey posed to the officers, and not to obtain incriminating evidence from him. The officers had the right to search Lackey incident to arrest, and would have done so even if they had not asked the question regarding guns or sharp objects. The question to Lackey was asked solely to protect the officers and Lackey from physical injury. If Lackey had a gun or sharp object in his possession he could have used it against the officers, or more likely, someone could have been seriously injured when Lackey, who was already under arrest, was searched incident to arrest.

The court held that it was irrelevant that the danger in this case was the risk of injury to the officers, or Lackey himself, rather than ordinary members of the public. Citing *Quarles* the court stated “the public-safety doctrine extends beyond safety to civilians, and includes officers’ questions that are necessary to secure their own safety.”

Finally, the court found that the public-safety exception to *Miranda* was justified because a responsive answer to the officer’s question would not have automatically incriminated Lackey. The officer asked Lackey, “Do you have any guns or sharp objects on you?” A simple answer of “yes,” would not have incriminated Lackey since the officer had the right to, and would have searched Lackey incident to arrest anyway. The purpose of the question was not to obtain incriminating evidence against Lackey, but to protect the officers and Lackey from physical injury.

The Court reasoned that in such a situation, the risk that a suspect will incriminate himself only occurs when the suspect’s answer is non-responsive to the question asked by the officer. Instead of answering the officer’s question “yes” or “no,” Lackey volunteered the information about a gun being in the car. Where the suspect provides more information than asked for by the officer, that additional information, while incriminating, will not be afforded protection under *Miranda*.

\*\*\*\*\*

## **11<sup>th</sup> CIRCUIT**

*U.S. v. Clark*  
337 F.3d 1282  
July 16, 2003

**SUMMARY: A law enforcement officer may briefly detain and order a passenger to reenter an automobile to protect the officer’s safety while the officer investigates a crime committed in his presence by associates of the passenger.**

**FACTS:** On April 12, 2000 Officer Franklin Huff was patrolling alone in a marked Atlanta Police Department vehicle at around 9:30 p.m. He was wearing a police uniform. In front of the MARTA train

station on Ashly Street, he observed two men fighting or wrestling in the middle of the street. A car was stopped on the wrong side of the street with its lights on and with one door open. The engine was running. Officer Huff had patrolled that area for about four years.

Officer Huff turned on his patrol car's blue lights, got out of his car and ordered the two men to stop fighting. Officer Huff saw Clark standing on the sidewalk watching the fight. Clark testified at the suppression hearing that he had been a passenger in the car observed by Officer Huff. Clark said that he got out of the car "because the other two individuals that were in the car were wrestling, and he was trying to stop them from fighting." Officer Huff asked the three men if the car belonged to one of them. One of the combatants replied that it was his car. Officer Huff asked the other two men whether they had been passengers in the car. Clark admitted that he had been a passenger.

Officer Huff ordered all three men to reenter the car, and he told them to sit where they had previously been sitting and to keep their hands where he could see them. The three men complied with the request and did not resist. Clark seated himself in the front passenger seat. Officer Huff testified that he ordered the three men to get into the car to gain control of the situation for his own safety because he was by himself, confronted by three men, at night, in an area of the city where he had responded to a "lot of calls involving violence." Officer Huff testified that he ordered Clark to reenter the car because he was "part of the scene."

In order to investigate and determine why the two men had been fighting, Officer Huff ordered the driver to get out of the car. Officer Huff handcuffed the driver and told him to sit on the curb. He next asked the passenger in the backseat to get out of the car. At this time Officer Bilak of Atlanta Police Department arrived as backup. Bilak testified that he saw Mr. Clark "fumbling around under the seat." Bilak ordered Clark to put his hands back on the dashboard. When Officer Huff opened the passenger door to remove Clark from the car, an Uzi .40 caliber semi-automatic assault weapon fell onto the street. One of the officers seized the weapon. Clark was arrested. In searching the inside of the car, the officers found a weapon under the front seat and another in the back seat area. Clark was indicted and charged with being a felon in possession of a firearm in violation of 18 U.S.C. section 922 (g) and (v). The District court granted the motion to suppress. The U.S. government appealed.

**ISSUE:** May a law enforcement officer briefly detain and order a passenger to reenter a car to protect the officer's safety while the officer investigates a crime committed in his presence by two associates of the passenger.

**HELD:** Yes.

**DISCUSSION:** An individual's proximity to illegal activity may be considered when determining whether there were reasonable grounds to justify a detention. Street encounters put officers in danger. Although Clark had exited the car in which he had been a passenger before Officer Huff arrived on the scene, his admitted relationship to the parties, whom Officer Huff was investigating, made him "every bit as great a danger as the combatants." An officer may control persons not suspected of wrongdoing if they are near a street encounter with persons reasonably suspected of criminal activity. The need for an officer to take command and control persons during a criminal investigation is "particularly true where the officer is alone and feels threatened." Under the circumstances of this case, Clark's liberty interest was outweighed by the necessity for Officer Huff to control the movement of the three associates and to detain them briefly

to ensure his safety while he conducted a criminal investigation. Officer Huff did not violate the Fourth Amendment in briefly detaining Clark after learning that he was not a mere bystander but, instead and notably, had been a passenger in the car and an associate of two people being investigated for criminal activities. The brief detention of Clark was a reasonable response to the officer's justifiable concern for his own safety. The order granting the motion to suppress was vacated and the case was remanded.