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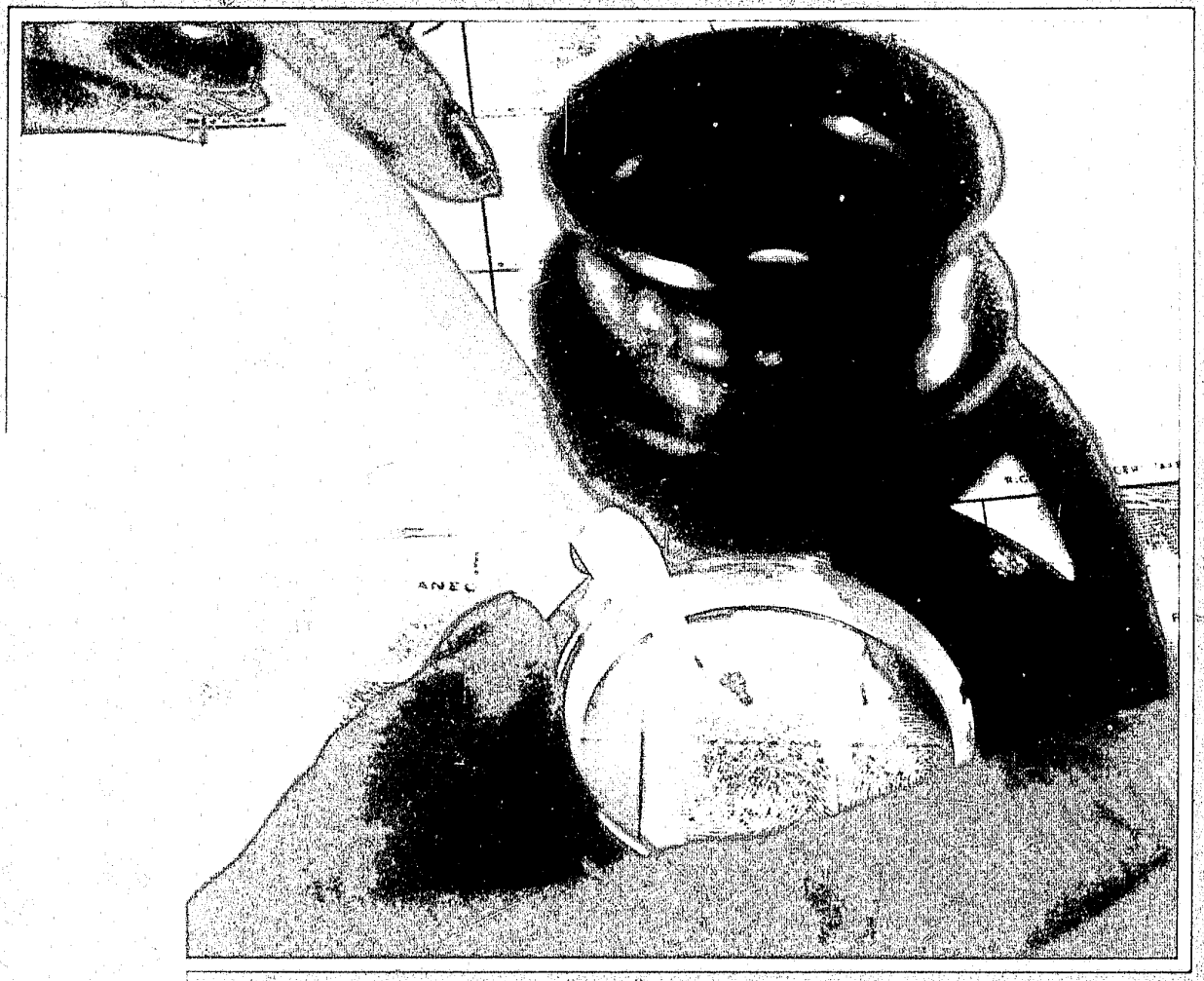

Fingerprint Automation

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Interrogation

Post Miranda *Refinements*

(Conclusion)

"...interrogation can just as easily be done by conduct as words, and caution should be the guiding principle employed to insure the confession obtained will be admissible in court."

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

Part I of this article outlined the legal importance of "interrogation" by reviewing the rules governing custodial interrogation. It also began an analysis of categories of cases concerning what is and is not "interrogation" following the Supreme Court's definition of that term in *Rhode Island* v. *Innis* as either express questioning or its functional equivalent.[60] Part I concluded that general on-the-scene questioning was not deemed to be interrogation, nor was questioning normally attendant to arrest and custody.

This part of the article will complete the discussion of the meaning of interrogation and then discuss the Supreme Court's recent decision involving a public safety exception to the *Miranda* rule which governs custodial interrogations.

Inculpatory Statements in Response to Police Comments

Many defendants have provided incriminating statements which appear to have been made in response to something a police officer has said. In those cases, the police statements were not in the form of direct questions, but rather, can be subdivided into the following categories: 1) Furnishing the accused *Miranda* warnings, 2) comments reflecting an opinion of the officer concerning the defendant or the defendant's guilt, 3) a reference to some investigative step which the police have employed or will employ, or 4) a general, nonspecific conversation with the defendant. In response to each, the defendant has provided an incriminating statement or admission and later argued that the police officer's comments were the equivalent of interrogation, rendering the admission or statement inadmissible. Each of these categories will be discussed in turn.

Occasionally, a defendant will make an incriminating statement during or immediately following the advice of *Miranda* rights. Then, in an attempt to prevent that statement from being used against him, the defendant claims that *Miranda* warnings alone constitute interrogation. Such arguments have been unsuccessful. For example, in *United States* v. *Johnson*,[61] the defendant was arrested following his sale of a substance thought to be cocaine to an undercover officer. In fact, the substance was not cocaine but a substituted

Special Agent Higginbotham

white powder. After his arrest, the defendant was taken to the police station and advised of his *Miranda* rights. Immediately thereafter, he asked why he was being arrested, since the substance he had sold to the undercover officer was not a controlled substance. That statement was subsequently offered into evidence in the resulting criminal fraud trial over the defendant's objection that *Miranda* warnings themselves constitute interrogation. The court overruled the objection, holding that the *Miranda* warnings are not a form of interrogation.

Just as *Miranda* warnings alone do not constitute interrogation, neither does an officer's inquiry as to whether a defendant understands and is willing to waive those rights. Thus, a defendant's response that he understood his *Miranda* rights may be admissible to show that he was thinking clearly immediately after the commission of the crime, and therefore, was not insane. "It borders on absurd to characterize an inquiry into whether a defendant understands his *Miranda* rights as an 'interrogation' justifying exclusion," since there is no way the officer could reasonably have known the defendant's response would undermine an insanity defense.[62]

A more difficult question is raised when a police officer provides his own opinion of the defendant or the defendant's guilt. Are such comments interrogation? Should the officer reasonably anticipate such personal comments will elicit an incriminating response? The cases deciding this issue do not provide a uniform answer.

Two cases illustrate the contrary results reached where officers offered a personal opinion of the defendant. In *United States* v. *King*,[63] a defendant was arrested and lawfully interrogated concerning his involvement with counterfeit credit cards. Later, he was interrogated again by detectives regarding a murder. During that second interrogation, one detective referred to the defendant as "stupid." Following the interrogation, while the defendant was being transported to the jail, the same detective again occasionally referred to the defendant as "stupid." Objecting to being called "stupid," the defendant turned to the other detective and said, "Tell him that I am not a bad guy, I am not into violence. I am not a violent person. You know me, I am into plastic and credit cards, but I am not into any violence. I never hurt anyone in my life."[64] The court permitted that statement to be used in evidence against the defendant, since "[t]his name-calling is not 'interrogation' within the meaning of *Innis*."[65]

In contrast, a court found similar name-calling to be the equivalent of interrogation in *United States* v. *Brown*.[66] There, the defendant contested the admission into evidence of the statements he had made to a police officer concerning his activities involving the sale of narcotics. The defendant was successful in doing so when he convinced the court that the police officer had taunted him with being a "pimp and doper" who "sells dope to little black children."[67] The court concluded that the police officer's name-calling "conduct was designed and reasonably likely to evoke response in kind, damaging . . . and quickly recorded . . . for later use."[68] It was interrogation.

Different results have also been reached in cases where the officer's opinion is directed at the defendant's guilt. For example, in *U.S. ex rel. Abubake* v. *Redman*,[69] a police officer, who had not yet obtained a valid

"... police officers should be careful if they engage in a conversation with a defendant who has not yet waived his* Miranda *rights or who has invoked one of his* Miranda *protections."

waiver of the defendant's *Miranda* rights, outlined the case which he had built against the defendant to let him know that he would not "be telling [the officer] anything new."[70] Thereafter, the defendant made a series of incriminating statements which he subsequently sought to exclude at trial. The court granted his motion to suppress, holding that persuading a defendant to confess by positing his guilt amounts to interrogation, impermissible here since no waiver had been obtained.

When confronted with a similar situation, another court, however, concluded no interrogation had taken place. In *United States* v. *Guido*,[71] a defendant was arrested, advised of his *Miranda* rights, and invoked his right to consult with an attorney. On the way to the courthouse, the defendant asked the agents why he had been arrested. The defendant was told that the arrest was based on an investigation which proved he was dealing in illegal narcotics and that he should consider cooperating instead of contesting the charges. Later, he was further told that the investigation had shown the defendant to have sold narcotics at a particular location—a candy store. The defendant replied, "Oh, ... Okay. I knew that one was trouble."[72] In declining to find that the agent's comments concerning the investigation and cooperation constituted interrogation, the court stated:

> "We do not accept the proposition that a discussion of cooperation is inherently a form of questioning for purposes of *Miranda*.... There is no indication that the agent's conduct was 'designed to elicit an incriminating response' ... or that [the defendant] was 'peculiarly susceptible' to an appeal to cooperate...."[73]

Because of the dissimilar results reached by courts trying to determine if personal opinions of officers or opinions as to guilt constitute interrogation, an officer would be well-advised to avoid making such comments, unless he is certain that interrogation is lawfully permitted.

In contrast to cases where personal opinions of an officer have been held to be interrogation, merely describing to the defendant potential investigative steps which will follow has been held not to be interrogation. In *United States* v. *Thierman*,[74] a defendant was arrested at his residence, given *Miranda* warnings, and invoked his right to consult a lawyer. Arresting officers commented to him that they would have to talk with the defendant's girlfriend, family, and other friends as part of their continuing investigation to recover stolen postal checks. When he heard that, the defendant made several damaging admissions which he later moved to suppress. In denying his motion to suppress, the trial court concluded that the officer's comments " 'merely reiterated the obvious' and did not amount to any interrogation, and were even less evocative than those in *Innis*."[75]

Illustrative of the last group of cases involving general, nonspecific conversations between an officer and a defendant is *United States* v. *Voice*.[76] Voice appealed his conviction for murder, challenging three admissions he had made to various law enforcement officers while in custody. The first such admission occurred when an officer who was transporting Voice to jail observed that he was nervous and attempted to calm Voice by telling him everything would be okay. In response, Voice said, "Leave me alone or I'll kill you too."[77] On another occasion in a police car, Voice heard a radio news report concerning a food stamp fraud and offered, "... they ask me why I did what I did. Abernathy has been ripping them off for years."[78] Lastly, an officer asked Voice a question concerning his epilepsy medicine, and Voice replied that his medicine caused his accidents, such as when "I killed Scottie."[79]

The court ruled that none of the comments to Voice was interrogation. All of the comments to Voice were in the context of general conversation. Voice's incriminating statements were spontaneous remarks. As such they were not obtained in violation of the *Miranda* rule. In fact, *Miranda* itself recognized that "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."[80]

In summary, police officers should be careful if they engage in a conversation with a defendant who has not yet waived his *Miranda* rights or has invoked one of his *Miranda* protections. While some courts have concluded that such conversations do not constitute interrogation, there is not a sufficiently clear common thread among those cases which would provide reliable guidance to officers upon which they could govern their conduct. Accordingly, the best advice is to refrain from all but general, nonspecific conversations unrelated to the offense for which the person in custody was arrested.[81]

Nonverbal Interrogation

The final category of cases addressing interrogation focuses on the last portion of the Supreme Court's definition of that term in *Rhode Island*

"As long as an officer acts in accordance with normal arrest and booking procedures, that conduct will not be deemed the equivalent of interrogation."

v. *Innis*.[82] That definition included as interrogation "... actions on the part of police ... that the police should know are reasonably likely to elicit an incriminating response."[83] In these cases, the issue is not a question asked by the police or even a spoken word. Rather, some type of police conduct which causes a defendant to utter an incriminating response is at issue. This category can be subdivided into two areas—conduct which is routine police practice and conduct which is contrived by police outside of normal police procedures.

Illustrative of cases in which defendants have incriminated themselves in response to routine police practices is *United States* v. *Sullivan*.[84] There, the defendant had been arrested for his involvement in a drug trafficking operation using commercial courier services. After the defendant invoked his right to silence, he was taken to jail for processing. In his presence, a search and inventory of his personal belongings located a receipt from the commercial courier. As it was being noted on the inventory, the defendant said, "You found what you're looking for. That's all you need."[85] In denying the defendant's motion to suppress that incriminating statement, the court ruled that the inventory practice did not constitute interrogation and that the defendant's remarks were volunteered and spontaneous.

A similar result was reached in *United States* v. *Carroll*.[86] *Carroll* also shows the extreme arguments which a defendant will raise to prevent the admission into evidence of a confession. Here, the defendant was arrested for attempting to enter a federally insured bank with the intent to commit a felony therein. After his arrest, he was taken to be fingerprinted. The officer who took the prints smiled broadly at the defendant after examining the rolled fingerprints. This apparently unnerved the defendant who asked why the officer was smiling. Although the officer first resisted any further conversation, when the defendant persisted, the officer told him that certain fingerprints had been found at the bank. At that point, the defendant made a damaging admission concerning his presence at the bank.

In *Carroll*, the defendant argued that the officer's act of smiling during the fingerprinting process constituted interrogation. The court disagreed and stated:

> "That [the officer] smiled when he looked at Carroll's prints does not make [his] 'words or actions' the 'functional equivalent of interrogation' under *Miranda* v. *Arizona*."[87]

A contrary result was reached in a recent State case, however. In *State* v. *Quinn*,[88] the court ruled that showing a robbery suspect a copy of the Application for Statement of Charges which declared that several co-defendants had implicated the defendant as the instigator of the robbery was impermissible. Since the defendant had already invoked his right to counsel, the issue was whether that conduct, done without spoken words, constituted interrogation. In finding that interrogation had occurred, the court reasoned that though the Application for Statement of Charges was a routine, standard procedure, handing it to the defendant to read was an impermissible attempt to elicit an incriminating response. Accordingly, the statement given by the defendant after reading the document was properly suppressed.

The *Quinn* case is distinguishable from *Sullivan* and *Carroll*, since the officer in *Quinn* went beyond normal police practices, while the actions complained of in *Sullivan* and *Carroll* were entirely consistent with normal operating procedures. As long as an officer acts in accordance with normal arrest and booking procedures, that conduct will not be deemed the equivalent of interrogation.[89]

As to the second subcategory of cases, two Federal cases reflect the hazard of contriving some action in the hope that an incriminating response will follow. In *United States* v. *McCain*,[90] the defendant was stopped upon her entry into the United States on suspicion of being an internal drug smuggler. Prior to any *Miranda* warnings, she was given a booklet of newspaper clippings describing a number of tragedies suffered by those who chose to swallow containers of drugs in an attempt to smuggle the drugs into the country. The defendant's response to reviewing the newspaper clippings was to blurt out, "Yes, I do have narcotics in my body"[91] The court spent little time in deciding that the booklet was the equivalent of interrogation, saying:

> "The psychological intent of this collection of news stories, although consistent with the duties of customs officers, is obvious. Interrogation can take many forms. This is one of the most effective."[92]

In the second case, *U.S. ex rel. Church* v. *DeRobertis*,[93] the defendant, Mike Church, was arrested along with his brother Casey Church. Their oldest brother Kelly, an escapee from prison, was soon recaptured and lodged at the same jail. The Church parents became worried about Casey, the youngest and the only one who had never before been in jail. The parents encouraged Kelly to aid his younger brother. Kelly spoke to Casey,

then asked the jailers to place Kelly in the same cell with Mike. While sharing the cell with Mike, who twice earlier had invoked his rights to silence and counsel in interviews with police, Kelly convinced Mike to make a full confession and exculpate brother Casey. Mike agreed and requested the police to return and ultimately provided them with a written confession. Mike later challenged the admissibility of the confession, claiming that the simple act of placing Kelly in the same cell with Mike was contrived by the police for the purpose of obtaining a confession and was, in fact, a form of interrogation.

The seventh circuit court of appeals rejected that argument. The court recognized that police conduct, as well as words, can be interrogation but "not everything leading a suspect to change his mind amounts to interrogation."[94] The court concluded that the controlling fact was that the police merely accommodated Kelly's request to share the cell with Mike and the confession given by Mike was, therefore, "a spontaneous, altruistic confession. It was the work of the Church family, not of 'custodial interrogation' within the meaning of *Miranda*."[95] The court made clear that had the police contrived the idea to put Kelly into Mike's cell to influence Mike to confess, the result may have been different. But here, the absence of any "potential trickery or overbearing by the police"[96] meant that no interrogation had taken place.

The potential for action or conduct equating to nonverbal interrogation is bounded only by the imagination of law enforcement. No easy rule can be adopted to guide what action is permitted and what action is not, since the facts of each case may cause different decisions in seemingly similar cases. It is important only to remember that interrogation can just as easily be done by conduct as words, and caution should be the guiding principle employed to insure the confession obtained will be admissible in court.

An Exception to the Interrogation Rule

The holding of *Miranda* v. *Arizona* was very clear that no custodial interrogation could take place unless preceded by specific warnings and a waiver. That rule, announced in 1966 was, in fact, stated in absolute terms: "As with the warnings of the right to remain silent and that anything stated can be used as evidence against him, this warning [of the right to consult with a lawyer and to have the lawyer present during questioning] is an absolute prerequisite to interrogation."[97] That barrier to interrogation stood unmoved until 1984 when the Supreme Court announced the first exception to the *Miranda* rule.

In *New York* v. *Quarles*,[98] the Supreme Court departed from its rigid rule and allowed into evidence a statement and evidence derived from that statement which was secured by interrogation prior to any *Miranda* warnings or a waiver. In *Quarles*, a women reported to police that she had just been raped by a man carrying a gun. She provided a physical description of her assailant and told the police that she had seen the man enter a nearby supermarket. Police drove to the store and observed the man inside at about the same time the man saw the officers. The man ran toward the rear of the store, pursued by an officer who had drawn his gun. When the officer found the defendant, he immediately ordered him to stop and put his hands over his head. The officer then frisked the defendant and discovered that the defendant was wearing a shoulder holster which was empty. After handcuffing the defendant, the officer asked where the gun was. The defendant nodded in the direction of some empty cartons and responded, "The gun is over there." Only after the gun, a loaded .38-caliber revolver, was recovered was the defendant advised of his *Miranda* rights.

The defendant was subsequently charged with criminal possession of a weapon, but the trial court refused to admit the statement concerning the location of the gun into evidence. The trial court ruled that defendant Quarles had been subjected to custodial interrogation without first being warned of his *Miranda* protections and refused to recognize an emergency exception to the *Miranda* requirements. On appeal, the Supreme Court reversed that decision and carved an exception to *Miranda* for questions reasonably prompted by a concern for public safety.[99]

This newly created public safety exception to *Miranda* arose from a balancing of interests test. The Supreme Court in *Quarles* first analyzed the reasoning of the *Miranda* Court. That Court had recognized that while fewer people would respond to police questions after being warned of their right to silence, the cost to society of not convicting some guilty suspects must be borne to uphold the fifth amendment privilege against self-incrimination. However, the *Quarles* Court found that in emergency situations in which protection of the public from immediate threats to safety is at stake, the balancing of interests weighs differently. "So long as the gun

"... 'doctrinal underpinnings of* Miranda *[do not] require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for public safety.' "

was concealed somewhere in the supermarket, with its actual whereabouts unknown, it posed more than one danger to the public safety...."[100] Because of this immediate threat to public safety, as opposed to a potential threat that a guilty man may be acquitted, the need for the prophylactic rule of *Miranda* must give way to the greater need to protect public safety. Thus, the "doctrinal underpinnings of *Miranda* [do not] require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for public safety."[101] Accordingly, even assuming the question concerning the location of the gun constituted interrogation, *Miranda* is inapplicable.

Conclusion

It is important for law enforcement officials to understand both the legal implications of "interrogation" and the meaning given this term by *Innis* and its progeny. Since 1966, law enforcement officials have been working under a rule which prohibits interrogation in custodial situations until a package of warnings designed to safeguard the privilege against self-incrimination has been administered and a valid waiver of those warnings obtained. Even after those warnings have been given and a waiver obtained, interrogation may still not be permitted if at some point the suspect elects to remain silent or to consult with an attorney.

Interrogation is a vital law enforcement technique. It may take the form of direct questioning to uncover a suspect's guilt, or it may be words or actions by police that are the functional equivalent of direct questioning, also aimed at detecting a suspect's guilt. Understanding this principle will enable the law enforcement officer to avoid impermissible interrogation and ensure the admissibility of confessions in a court of law. FBI

Footnotes

[60]446 U.S. 291, 300-01 (1980).
[61]516 F.Supp. 696 (E.D. Penn. 1981), *aff'd* 688 F.2d 826 (3d Cir. 1982).
[62]*United States* v. *Emery*, 682 F.2d 493 (5th Cir.), *cert. denied*, 459 U.S. 1044 (1982).
[63]564 F.Supp. 25 (S.D.N.Y. 1982), *aff'd* 742 F.2d 1445 (2d Cir. 1984).
[64]*Id.* at 27.
[65]*Id*
[66]720 F.2d 1059 (9th Cir. 1983).
[67]*Id.* at 1068.
[68]*Id.*
[69]521 F.Supp. 963 (D. Delaware 1981), vacated on other grounds, 696 F.2d 980 (3d Cir. 1982); *aff'd* on remand in *United States ex rel.* Ahmad v. *Redman*, 599 F.Supp. 802 (D. Delaware 1984). *See also, Toliver* v. *Gathright*, 501 F.Supp. 148 (E.D. Va. 1980).
[70]521 F. Supp. at 973. *See also, Henry* v. *Dees*, 658 F.2d 406 (5th Cir. 1981) (statement that the defendant had failed a polygraph test and a challenge to the defendant to "tell the truth" constitutes interrogation).
[71]704 F.2d 675 (2d Cir. 1983).
[72]*Id.* at 676.
[73]704 F.2d at 677. *See also, United States* v. *Gazzara*, 587 F.Supp. 311, 325 (S.D.N.Y. 1984).
[74]678 F.2d 1331 (9th Cir. 1982).
[75]*Id.* at 1334.
[76]627 F.2d 138 (8th Cir. 1980).
[77]*Id.* at 144.
[78]*Id.*
[79]*Id.*
[80]384 U.S. 436, 478 (1966).
[81]It should be noted, however, that the Supreme Court in *Oregon* v. *Elstad*, 105 S.Ct. 1285 (1985), held that interrogation which takes place prior to effective *Miranda* warnings and a waiver is not an absolute bar to the admission of a subsequent voluntary confession obtained following a proper warning and waiver. However, that rule should not be used by police interrogators as a general practice.
[82]*Supra* note 21.
[83]Supra note 27.
[84]544 F.Supp. 701 (D. Maine 1982), *aff'd* on other grounds 711 F.2d 1 (1st Cir. 1983).
[85]*Id.* at 706.
[86]710 F.2d 164 (4th Cir.), *cert. denied*, 104 S.Ct. 526 (1983).
[87]*Id.*at 168.
[88]498 A.2d 676 (Md. Ct. Spec. App. 1985). *See also, Kreijanovsky* v. *State*, 706 P.2d 541 (Okla. Ct. Crim. App. 1985).
[89]*See, United States* v. *Glen Archila*, 677 F.2d 809 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982).
[90]556 F.2d 253 (5th Cir. 1977).
[91]*Id.* at 254.
[92]556 F.2d at 254, n. 2.
[93]771 F.2d 1015 (7th Cir. 1985).
[94]*Id.* at 1019.
[95]771 F.2d at 1020.
[96]*Supra* note 94.
[97]384 U.S. 436, 471 (1966).
[98]104 S.Ct. 2626 (1984).
[99]*Id.* at 2632.
[100]*Id.*
[101]*Id. See also, United States* v. *Udey*, 748 F.2d 1231, 1240, n. 4 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 3477 (1985); *United States* v. *Webb*, 755 F.2d 382, 392, n. 14 (5th Cir. 1985); *People* v. *Cole*, 211 Cal. Rptr. 242 (Cal. App. 1st Dist. 1985).