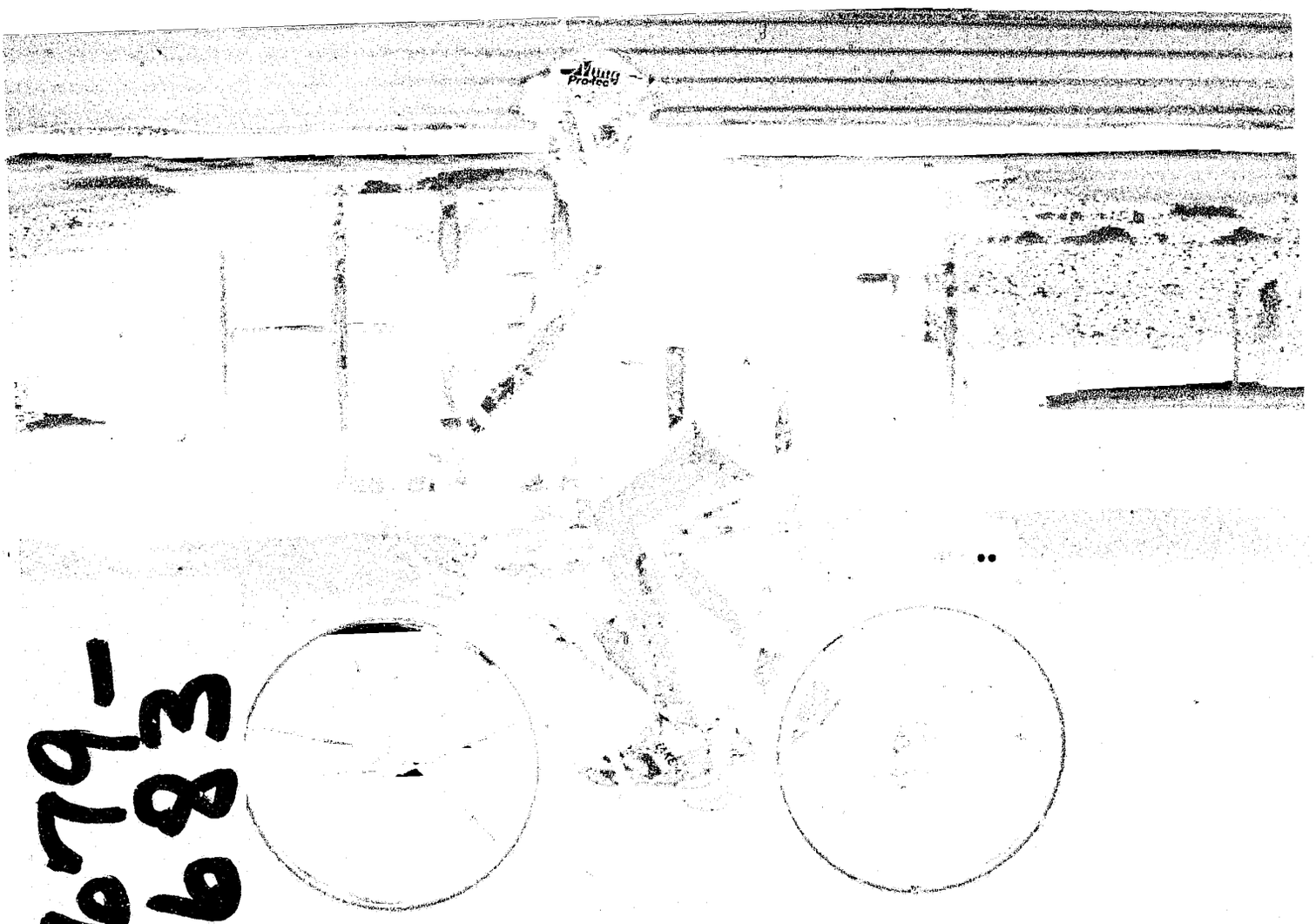

September 1993
Volume 62
Number 9

**United States
Department of Justice
Federal Bureau of
Investigation
Washington, DC 20535**

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, Washington, D.C. 20535.

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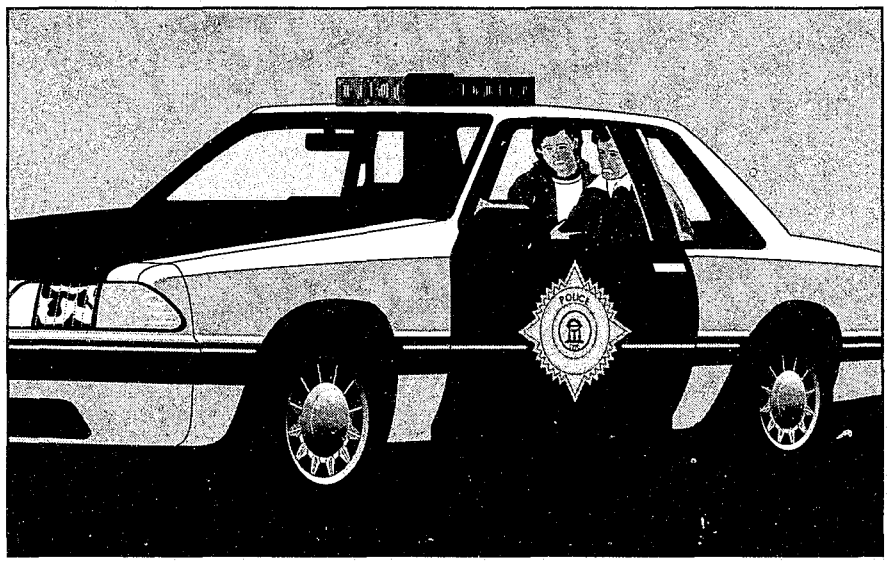
144683

Surreptitious Recording of Suspects' Conversations

By
KIMBERLY A.
CRAWFORD, J.D.

"Talkative people say many things in company which they deplore when alone."[1]
—Antonio de Guevara



Whether in a prison cell, interrogation room, or the back seat of a police car, suspects left seemingly unattended with a co-conspirator, friend, or total stranger often seize the opportunity to discuss or lament their current predicament. Very often, incriminating statements are made. Law enforcement officers who put themselves in a position to hear and record suspects' conversations, either by planting a listening device or by posing as a co-conspirator, friend, or stranger, are apt to obtain very valuable incriminating evidence.

Of course, in any subsequent prosecution, the government is likely to be confronted with a vehement constitutional and statutory attack to the admissibility of such damaging evidence. Specifically, the defense is likely to argue that the surreptitious recording of the suspects' conversations violated rights guaranteed by the fourth, fifth, and sixth amendments to the U.S. Constitution, as well as certain protections afforded individuals under Title III of the Omnibus Crime Control and Safe Streets Act[2] (hereinafter title III).

This article discusses the validity of these constitutional and statutory challenges. It then provides a review of court decisions that have dealt with the admissibility of such

surreptitiously recorded conversations and related issues.

FIFTH AMENDMENT—SELF-INCRIMINATION CLAUSE CHALLENGE

To be successful, a challenge to the admissibility of surreptitiously recorded conversations based on the fifth amendment self-incrimination clause would have to establish that the conversations in question were the product of unlawful custodial interrogation. Because statements made to individuals not known to the defendant as government actors do not normally amount to interrogation for purposes of the fifth amendment, this challenge is destined to fail.

The fifth amendment to the U.S. Constitution provides in part that "no person...shall be compelled in any criminal case to be a witness against himself...."[3] Over 2 decades ago, the U.S. Supreme Court in *Miranda* v. *Arizona*[4] held that custodial interrogation of an individual creates a psychologically compelling atmosphere that works against this fifth amendment protection.[5] In other words, the Court in *Miranda* believed that an individual in custody undergoing police interrogation would feel compelled to respond to police questioning. This compulsion, which is a byproduct of most custodial interrogation, directly conflicts with every individual's fifth amendment protection against self-incrimination.

Accordingly, the Court developed the now-familiar *Miranda* warnings as a means to reduce the compulsion attendant in custodial interrogation. The *Miranda* rule requires that these warnings be given to individuals in custody prior to the initiation of interrogation. This rule, however, is not absolute.[6]

> ***"...a challenge to the admissibility of surreptitiously recorded conversations...would have to establish that the conversations in question were the product of unlawful custodial interrogation."***

Special Agent Crawford is a legal instructor at the FBI Academy.

Stanley v. *Wainwright*[7] is one of the original cases to deal with a fifth amendment challenge to the admissibility of surreptitiously recorded suspect conversations. In *Stanley*, two robbery suspects were arrested and placed in the back seat of a police car. Unbeknownst to the suspects, one of the arresting officers had activated a tape recorder on the front seat of the car before leaving the suspects unattended for a short period of time. During that time, the suspects engaged in a conversation that later proved to be extremely incriminating.

On appeal, the defense argued that the recording violated the rule in *Miranda,* because the suspects were in custody at the time the recording was made and placing of the suspects alone in the vehicle with the activated recorder was interrogation for purposes of *Miranda.* The Court of Appeals for the Fifth Circuit, however, summarily dismissed this argument and found that the statements were spontaneously made and not the product of interrogation.

The Supreme Court later validated the rationale in *Stanley* with its decision in *Illinois* v. *Perkins.*[8] Although *Perkins* did not deal specifically with the issue of surreptitious recordings, the Court's analysis of *Miranda* is applicable to situations in which suspects' conversations with either private individuals or undercover government actors are recorded.

In *Perkins*, police placed an informant and an undercover officer in a cell block with Lloyd Perkins, a suspected murderer incarcerated on an unrelated charge of aggravated assault. While planning a prison break, the undercover officer asked Perkins whether he had ever "done" anyone. In response, Perkins described at length the details of a murder-for-hire he had committed.

When Perkins was subsequently charged with the murder, he argued successfully to have the

statements that he made in prison suppressed, because no *Miranda* warnings had been given prior to his conversation with the informant and undercover officer. On review, however, the Supreme Court reversed the order of suppression.

Rejecting Perkins' argument, the Supreme Court recognized that there are limitations to the rule announced in *Miranda*. The Court expressly declined to accept the notion that "*Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent."[9] Rather, the Court concluded that not every custodial interrogation creates the psychologically compelling atmosphere that *Miranda* was designed to protect against. When the compulsion is lacking, so is the need for *Miranda* warnings.

The Court in *Perkins* found the facts at issue to be a clear example of a custodial interrogation that created no compulsion. Pointing out that compulsion is "determined from the perspective of the suspect,"[10] the Court noted that Perkins had no reason to believe that either the informant or the undercover officer had any official power over him, and therefore, he had no reason to feel any compulsion. On the contrary, Perkins bragged about his role in the murder in an effort to impress those he believed to be his fellow inmates. *Miranda* was not designed to protect individuals from themselves.

Applying this rationale to the surreptitious recording of suspects' conversations while they are in the back seat of a police car, a prison cell, or an interrogation room, it is clear that *Miranda* warnings are unnecessary if the suspect is conversing with someone who either is, or is presumed by the suspect to be, a private individual. Because suspects in this situation would have no reason to believe that the person to whom they are speaking has any official power over them, they have no reason to feel the compulsion that *Miranda* was designed to protect against.

SIXTH AMENDMENT—RIGHT-TO-COUNSEL CHALLENGE

Because of its limited application, a successful challenge to the admissibility of surreptitiously recorded suspect conversations based on the sixth amendment right to counsel will require the convergence of certain factors. Specifically, the defense must be able to establish that the suspect's right to counsel had attached and that the government took deliberate steps to elicit information from the suspect about a crime with which the suspect had been previously charged.

Right to Counsel Attaches at Critical Stage

The sixth amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defense."[11] The U.S. Supreme Court has interpreted the sixth amendment as guaranteeing not merely the right to counsel but, more importantly, the right to the *effective assistance* of counsel.[12] To be effective, an attorney must be permitted to form a relationship with the accused some time prior to trial,[13] and the government cannot needlessly interfere with that relationship.[14]

Although the right to counsel would be meaningless if the suspect and attorney were not permitted to form a relationship some time prior to trial, the Supreme Court has held that it is not necessary to allow this relationship to form simply because the individual becomes a suspect in a case.[15] Instead, the Court has found that the sixth amendment guarantee of the effective assistance of counsel is satisfied if the attorney and suspect are permitted to form their relationship once the prosecution has reached a critical stage.[16] The Court has defined the critical stage as the filing of formal charges (i.e., an indictment or information) or the initiation of adversarial judicial proceedings.[17]

Thus, a necessary first step in a successful sixth amendment challenge to the admissibility of a surreptitiously recorded conversation is to establish that the right to counsel had attached at the time of the

recording. If the suspect was neither formally charged nor subjected to adversarial judicial proceedings at the time the recorded conversation took place, the sixth amendment challenge will fail.

Deliberate Elicitation by the Government

If successful in establishing that the suspect's right to counsel had attached at the time a surreptitious recording took place, the defense will also have to prove that the conversation in question was the result of deliberate elicitation on the part of the government. The Supreme Court has determined that simply placing suspects in situations where they are likely to incriminate themselves does not, in and of itself, constitute a sixth amendment violation.[18] Rather, there must be some deliberate attempt on the part of the government to elicit information from the suspect.[19] It is the act of deliberate elicitation that creates the sixth amendment violation.

In *Kuhlmann* v. *Wilson*,[20] the Supreme Court held that placing an informant in a cell with a formally charged suspect in an effort to gain incriminating statements did not amount to deliberate elicitation on the part of the government. In doing so, the Court made the following statement:

> " 'Since the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached,' a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, *beyond merely listening*, that was designed deliberately to elicit incriminating remarks."[21] (emphasis added)

As a result of the Supreme Court's decision in *Kuhlmann*, the mere placing of a recorder in a prison cell, interrogation room, or police vehicle will not constitute deliberate elicitation by the government. Instead, to raise a successful sixth amendment challenge, the defense has to show that someone acting on behalf of the government went beyond the role of a mere passive listener (often referred to by the courts as a "listening post") and actively pursued incriminating statements from the suspect.

> ***"...not every custodial interrogation creates the psychologically compelling atmosphere that* Miranda *was designed to protect against."***

Right to Counsel is Crime-Specific

Even if it can be established that the government deliberately elicited and recorded incriminating conversations from a suspect after the right to counsel had attached, a sixth amendment challenge to the admissibility of those recordings will not succeed if the conversations in question pertained to crimes with which the suspect had not yet been charged at the time of the recording. Because the sixth amendment is crime-specific, a suspect only has the right to the assistance of counsel with respect to the crimes formally charged against him.[22] Consequently, the surreptitious recording of a conversation with a formally charged suspect that pertains to some unrelated, uncharged offense, will not violate the sixth amendment, regardless of whether there is deliberate elicitation on the part of the government.

FOURTH AMENDMENT—RIGHT-TO-PRIVACY CHALLENGE

Another constitutional attack waged against the admissibility of surreptitiously recorded conversations is the claim that monitoring and recording these conversations violates the suspects' fourth amendment right of privacy. However, if the recorded conversations take place in government space, whether it be a prison cell, interrogation room, or back seat of a police car, the fourth amendment challenge is bound to fail unless law enforcement officers give suspects specific assurances that their conversations will be private.

The fourth amendment to the U.S. Constitution guarantees the right of the people to be secure from unreasonable searches and seizures.[23] As it is used in the fourth amendment, the term "search" includes any governmental action that

intrudes into an area where there is an expectation of privacy that is both subjectively and objectively reasonable.[24] To be objectively reasonable, an expectation of privacy must be one that society as a whole is willing to recognize and protect.[25]

Thus, to be successful, a fourth amendment challenge to the surreptitious recording of suspects' conversations would have to establish that the suspects expected their conversations to be private and that society as a whole recognizes those expectations as reasonable. Although sometimes willing to accept suspects' assertions that they believed their conversations were private,[26] courts generally reject the notion that the suspects' beliefs were objectively reasonable.

For example, in *Ahmad A.* v. *Superior Court*,[27] the California Court of Appeals confronted a fourth amendment challenge to the admissibility of a surreptitiously recorded conversation between the defendant and his mother. The defendant, a juvenile arrested for murder, asked to speak with his mother when advised of his constitutional rights. The defendant and his mother were thereafter permitted to converse in an interrogation room with the door closed. During the surreptitiously recorded conversation that ensued, defendant admitted his part in the murder.

Reviewing the defendant's subsequent fourth amendment challenge, the California court noted that at the time the mother and her son were permitted to meet in the interrogation room, "no representations or inquiries were made as to privacy or confidentiality."[28] Finding the age-old truism "Walls have ears" to be applicable, the court held that any subjective expectation that the defendant had regarding the privacy of his conversation was not objectively reasonable.

Several Federal and State courts have adhered to the rationale announced in *Ahmad A.* and have concluded that any expectation of privacy a suspect may foster in a conversation occurring in government space is objectively unreasonable.[29] While some courts predicate their conclusion on an arrest having taken place, thereby reducing the suspects' expectations of privacy,[30] other courts have taken the position that the lack of an expectation of privacy in government space is not dependent on an arrest.[31]

> ***"...the sixth amendment guarantee...is satisfied if the attorney and suspect are permitted to form their relationship once the prosecution has reached a critical stage."***

This latter position is demonstrated by the holding of the U.S. Court of Appeals for the 11th Circuit in *United States* v. *McKinnon*.[32] In *McKinnon*, law enforcement officers stopped the vehicle in which the defendant was riding for failing to abide traffic laws. Once stopped, the driver of the vehicle was asked to submit to a sobriety test. After successfully completing the test, officers asked the driver whether they could search his vehicle for drugs. Upon receiving consent, the officers invited the driver and defendant to sit in the back seat of the police car until the search was completed.

Accepting the officers' invitation, defendant and the driver sat in the police car and engaged in an incriminating conversation that was surreptitiously recorded. Cocaine was found during the search of the vehicle, and both the defendant and driver were subsequently arrested. Following their arrest, the defendant and driver were again placed, seemingly unattended, in the back seat of the police car, where they once again engaged in an incriminating conversation.

Conceding the admissibility of the post-arrest statements, the defendant argued that prior to arrest, he had an expectation of privacy in his conversation that was violated by the surreptitious recording. The court, however, found "no persuasive distinction between pre-arrest and post-arrest situation"[33] and refused to suppress the recordings. In support of its decision, the court in *McKinnon* cited several cases in which surreptitious recordings of conversations were found to be admissible against visitors and guests of arrestees and other individuals not under formal arrest at the time of the recorded conversations.[34]

Specific Assurances

Although courts generally find no reasonable expectation of privacy in suspects' conversations occurring in government space, specific assurances offered by officers that

such conversations will be private may generate a valid fourth amendment claim. As previously noted, in the case of *Ahmad A.*, the court was particularly impressed by the fact that "no representations or inquiries were made as to privacy or confidentiality."[35]

A reasonable inference to be drawn from this case is that the resulting expectations would have been reasonable, had there been some representations or inquiries regarding privacy that were met with assurances. This inference is supported by the case of *People* v. *Hammons*,[36] in which a California court found that law enforcement officers' actions had fostered the suspects' expectations of privacy, and therefore, the expectations were reasonable.[37]

Consequently, when placing suspects together with co-conspirators, friends, or strangers for the purpose of surreptitiously recording a conversation, law enforcement officers should be careful not to give the suspects any specific assurances that their conversations will be private. To do so would likely create a reasonable expectation of privacy in their subsequent conversations that would be protected by the fourth amendment.

TITLE III—STATUTORY CHALLENGE

The only statutory attack based on Federal law likely to be raised regarding the surreptitious recording of suspects' conversations is that the recording violates Title III of the Omnibus Crime Control and Safe Streets Act.[38] Because title III protects only oral conversations in which there is a reasonable expectation of privacy, such challenges are resolved by reference to fourth amendment analysis.

To be protected under title III, oral communications must be "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[39] In other words, the statute only affords protection to

oral conversations uttered under conditions indicating that there was a reasonable expectation of privacy. Consequently, the warrantless surreptitious recording of suspects' oral conversations does not violate title III where the suspects lack a fourth amendment expectation of privacy in those conversations.[40]

CONCLUSION

The surreptitious recording of suspects' conversations is an effective investigative technique that, if done properly, can withstand both constitutional and statutory challenges. Law enforcement officers contemplating the use of this technique should keep the following points in mind:

1) Because the technique does not amount to "interrogation" for purposes of *Miranda*, it is not necessary to advise suspects of their constitutional rights and obtain a waiver prior to using this technique.

2) To avoid a sixth amendment problem, this technique should not be used following the filing of formal charges or the initial appearance in court, unless the conversation does not involve a government actor, the conversation involves a government actor who has assumed the role of a "listening post, or the conversation pertains to a crime other than the one with which the suspect has been charged.

3) To avoid both fourth amendment and title III concerns, suspects should not be given any specific assurances that their conversations are private.

In addition, State and local law enforcement officers should consult with their legal advisors prior to using this investigative technique. This will ensure compliance with State statutes or local policies that may be more restrictive than the Federal law discussed in this article. ✦

Endnotes

[1] Antonio de Guevara: *Marco Aurielio y Faustina II.*

[2] 18 U.S.C. §§ 2510 *et seq.* Defendants may also claim that the surreptitious recording of their conversations violated State eavesdropping

statutes. Although many State eavesdropping statutes closely follow title III, law enforcement officers should consult their State statute before using this technique, because some State laws are more restrictive than title III.

[3] U.S. Const. amend. V.

[4] 394 U.S. 436 (1966).

[5] *Id.* at 467.

[6] *See, e.g., Berkemer* v. *McCarty*, 468 U.S. 420 (1984), wherein the Supreme Court held *Miranda* inapplicable to traffic stops. *See also, New York* v. *Quarles*, 467 U.S. 649 (1984), which recognizes a public safety exception to *Miranda.*

[7] 604 F.2d 379 (5th Cir. 1979), *cert. denied,* 100 S.Ct. 3019.

[8] 110 S.Ct. 2394 (1990).

[9] *Id.* at 2397.

[10] *Id.* In *Perkins*, the Supreme Court used the words coercion and compulsion interchangeably.

[11] U.S. Const. amend. VI.

[12] *Cuyler* v. *Sullivan*, 100 S.Ct. 1708 (1980).

[13] *United States* v. *Wade*, 338 U.S. 218 (1967).

[14] In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), the Supreme Court held that some interference with the right to counsel may be justified.

[15] *United States* v. *Gouveia*, 104 S.Ct. 2292 (1984).

[16] *Massiah* v. *United States*, 377 U.S. 201 (1964).

[17] *Id.*

[18] *Kuhlmann* v. *Wilson*, 106 S.Ct. 2616 (1986).

[19] *Id.*

[20] *Id.*

[21] *Id.* at 2630.

[22] *Hoffa* v. *United States*, 377 U.S. 201 (1964).

[23] U.S. Const. amend. IV.

[24] *Katz* v. *United States*, 389 U.S. 347 (1967).

[25] *Oliver* v. *United States*, 104 S.Ct. 1735 (1984).

[26] Most courts reject this notion as well. In *United States* v. *Harrelson*, 754 F.2d 1153 (5th Cir. 1985), *cert. denied,* 106 S.Ct. 277 (1985), the Court found that "one who expects privacy under the circumstances of a prison visit is, if not actually foolish, exceptionally naive." *Id.* at 1169.

[27] 263 Cal. Rptr. 747 (Cal.App. 2 Dist. 1989), *cert. denied,* 11 S.Ct. 102 (1991).

[28] *Id.* at 751.

[29] *See, e.g., United States* v. *McKinnon*, 985 F.2d 525 (11th Cir. 1993) *cert. pending,* (filed 1/7/93 No. 92-8963); *United States* v. *Harrelson,* 754 F.2d 1153 (5th Cir. 1985), *cert. denied,* 106 S.Ct. 277 (1985); *United States* v. *Sallee,* (unreported)(1991 WL 352613 N.D. Ill. 1991); *State* v. *McAdams*, 559 So.2d 601 (Fla.App. 5th Dist. 1990); *People* v. *Marland*, 355 N.W. 2d 378 (Mich. App. 1984).

[30] *See, e.g., Brown* v. *State*, 349 So.2d 1196 (Fla.App. 4th Dist. 1977), *cert. denied*, 98 S.Ct. 1271 (1978).

[31] *See, e.g., United States* v. *McKinnon*, 985 F.2d 525 (11th Cir. 1993), *cert. pending*, (filed 1/7/93 No. 92-8963); and *State* v. *Hussey*, 469 So.2d 346 (La.Ct.App. 2d Cir. 1985) reconsideration denied 477 So.2d 700 (La. 1985).

[32] 985 F.2d 525 (11th Cir. 1993).

[33] *Id.* at 528.

[34] *Id.*

[35] 263 Cal Rptr. 747 (Cal.App. 2 Dist. 1989), *cert. denied,* 111 S.Ct. 102 (1991).

[36] 5 Cal.Rptr.2d 317 (Cal.App. 1st Dist. 1991).

[37] *See also, State* v. *Calhoun*, 479 So.2d 241 (Fla.App. 4th Dist. 1985).

[38] 18 U.S.C. §§ 2510 *et seq.*

[39] 18 U.S.C. § 2510(2).

[40] *See, e.g., United States* v. *Harrelson*, 754 F.2d 1153 (1985), *cert. denied,* 106 S.Ct. 277 (1986).

Law enforcement officers of other than Federal jurisdiction who are interested 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.