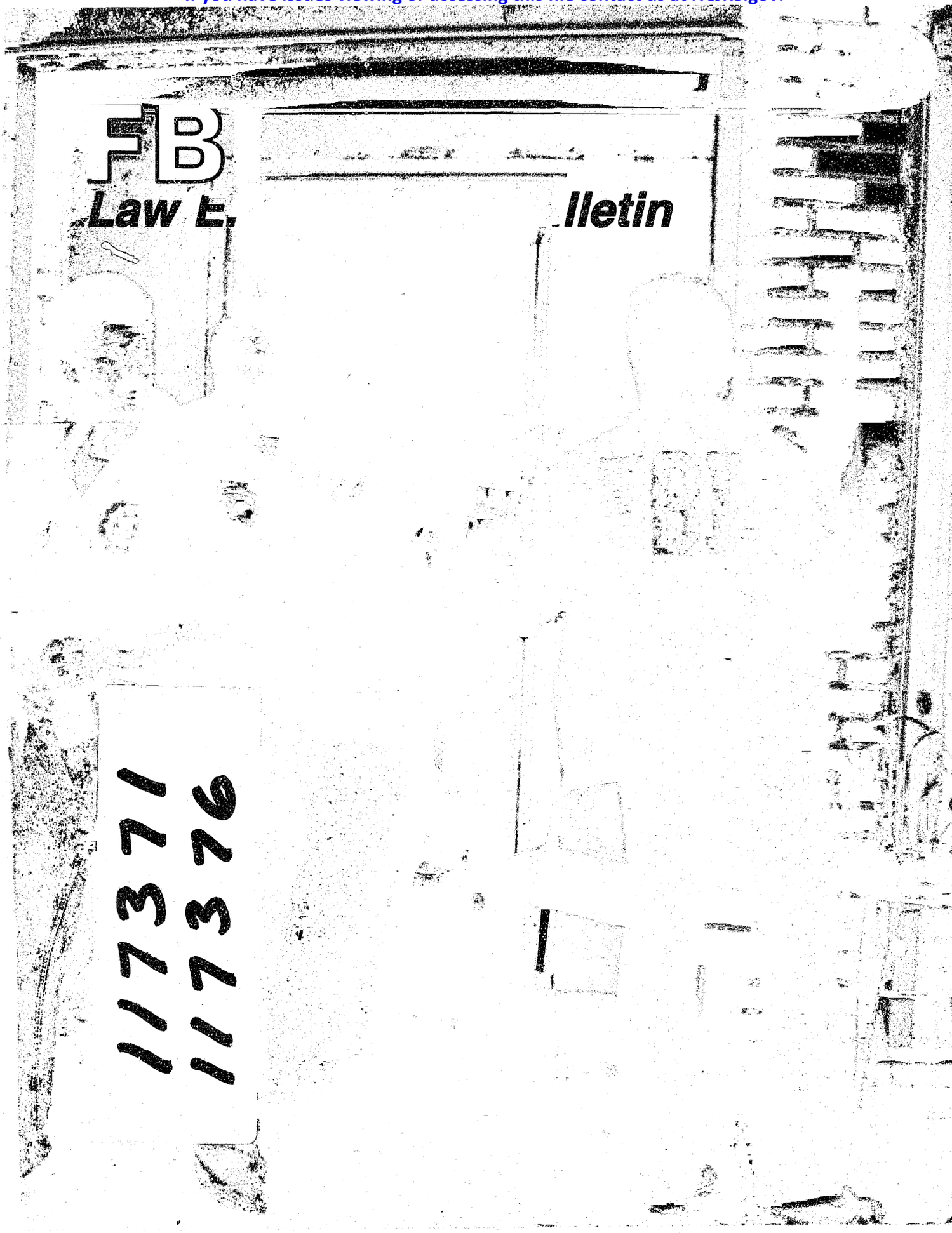

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The Admissibility of Evidence Located in Searches by Private Persons

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On March 23, 1920, several private detectives retained by the City Services Oil Company, the employer of one J.C. McDowell, unlawfully entered McDowell's private office, forced open his desk, and blew the door off his safe. Papers linking McDowell to a mail fraud scheme were located in the search of his office and volunteered to Joseph A. Burdeau, a Federal prosecutor who presented the papers to a grand jury in order to indict McDowell. Associate Justice Louis D. Brandeis, in his dissenting opinion in the U.S. Supreme Court case entitled *Burdeau* v. *McDowell,*[1] framed the issue succinctly:

> "Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law office of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so"?[2]

Despite the edge of moral indignation in Justice Brandeis' words, the majority of the Court held that the fourth amendment of the U.S. Constitution is not applicable to searches by private parties, even when those searches are clearly illegal. The Court reasoned that the drafters of the Constitution never intended to restrain the activities of individuals who are not employed by the government.[3]

Although the fourth amendment does not contain language mandating the exclusion from trial of evidence improperly seized by government agents, the Supreme Court had ruled, prior to the *Burdeau* decision, that evidence obtained by an unlawful search and seizure by Federal agents could not be admitted in Federal criminal trials.[4] Noting that McDowell had other legal remedies giving him an "unquestionable right of redress against the private party wrongdoers,"[5] the Court in *Burdeau* indicated that exclusion of illegally obtained evidence in a criminal proceeding is not among these remedies. Even when the Supreme Court expanded the applicability of the exclusionary rule to include non-Federal, as well as Federal, law enforcement officials,[6] private party searches retained an immunity from exclusion.[7] Inasmuch as the exclusionary rule was intended to deter the illegal searches of overzealous police officers, it follows that this rule would have no impact on the

> ***"... the fourth amendment .... is not applicable to searches by private persons, even when those searches are clearly illegal."***

Special Agent Andersen

private individual whose search is motivated by personal reasons. It is probably this rationalization that has enabled the *Burdeau* rule to remain a valid legal precedent after nearly 70 years.

In order for law enforcement officials to make the most effective use of this rule, however, it is necessary to consider its scope and limitations. Certain questions arise. Must the private party personally deliver the evidence to the police? What types of government involvement in a private search will affect the admissibility in court of the evidence located? Can employees of the government who are not law enforcement officers qualify as private parties? Can a search motivated by personal reasons be a private search, even when conducted by a law enforcement officer, such as an off-duty policeman employed as a security guard? Can a telephone conversation illegally monitored by a private party be admissible in court?

These questions imply that in practice, the application of the *Burdeau* rule can become complicated by varying fact situations. This article analyzes the limitations on admissibility of evidence obtained from searches conducted by private individuals.

The Mechanics of Delivery

It is possible to receive evidence from a private party search in many ways. In *Burdeau,* the private party conducting the illegal search delivered the evidence directly to the prosecutor. However, had the private party not come forward, the *Burdeau* Court suggested that the government had an alternative means of obtaining the evidence by use of a subpoena.[8]

> ***"... the burden of proof is on the defendant to present evidence that indicates collusion...."***

In *Torres* v. *State,*[9] the Supreme Court of Indiana considered the case of a burglar who broke into an apartment and located photographs depicting Torres and his girlfriend engaging in sexual activity with a 3-year-old child. Subsequently, the photographs, along with a card identifying the individuals pictured, were sent anonymously to the sheriff's department. Despite the fact that the ensuing investigation never uncovered the identity of the burglar, the photographs were ruled admissible as the fruits of a private search. It is important to note that prior to the receipt of the pictures, Torres was not the subject of any pending investigation nor was there any evidence of bad faith on the part of any member of the sheriff's department. The anonymity of the citizen informant makes the defendant's task of demonstrating that the police and the party conducting the search acted in concert very difficult. In that regard, one court recently held that the burden of proof is on the defendant to present evidence that indicates collusion between the anonymous citizen informant and the police.[10]

It is not always necessary that a private searcher hand deliver the evidence to the police. When the item is lawfully within his custody and control, such as in the case of a package consigned to a common carrier, the private searcher may call the police to retrieve the evidence:

> "When common carriers discover contraband in packages entrusted to their care, it is routine for them to notify appropriate authorities. The arrival of police on the scene to confirm the presence of contraband and to determine what to do with it does not convert the private search by the carrier into a government search subject to the Fourth Amendment."[11]

But when the private search is conducted after a trespass, it is clear that the fourth amendment prevents a police officer from making a warrantless entry into an area where there is a reasonable expectation of privacy to obtain such evidence. In a recent Illinois case,[12] a hotel maid, who mistakenly believed that the defendant had checked out, entered his room and opened a suitcase containing cocaine. The hotel manager called the police, who returned to the room and searched the suitcase. The court found that the defendant clearly had an expectation of privacy in his room against police intrusion that was not frustrated by the earlier private search. Had the maid brought the cocaine out of the motel room and delivered it to

the police, the evidence would be admissible. But before the police can lawfully enter the motel room where the defendant has a reasonable expectation of privacy, they must comply with the fourth amendment.

However, in a case where the owner of a barn, which the defendant used as his residence, entered the barn and removed weapons which had been used in a murder, the court approved the retrieval of the weapons by the police from an adjacent driveway.[13] In a Michigan case,[14] a landlord entered a mobile home leased to the defendant and removed a large box filled with what he thought were meat scraps used for dog food. When the box was opened just outside the trailer door, it was found to contain the badly decomposed body of the defendant's husband. The police were summoned and took custody of the body from the curtilage area of the home. Noting that a search requires a government intrusion into an area where there is a reasonable expectation of privacy, the court found there was no intrusion into such an area in this case.

Whether the police can come to the location of the private search to accept delivery of the evidence depends on the location of the evidence and whether the defendant retains a privacy interest in that location. It is clear that no such interest remains in packages entrusted to the custody of another party. It is equally clear that absent some recognized exception to the warrant requirement, the police cannot enter an area such as a residence to retrieve evidence discovered there by a private person. However, this limitation does not apply when the private searcher has lawful access to the area and invites the police to enter. In *Coolidge* v. *New Hampshire*,[15] the U.S. Supreme Court considered a case in which the police were invited into the defendant's home by his wife who, during routine questioning, was asked if her husband owned any guns. She responded by producing four weapons from the Coolidge residence. The Court held not only that Mrs. Coolidge was not directly requested to locate the guns, and was therefore not an agent of the government, but also that her consent to enter the premises allowed the police to retrieve the evidence inside the defendant's residence.

Government Involvement in a Private Party Search

Government involvement in private searches can consist of a wide variety of activity. A police officer may order an informant to conduct an illegal search, participate in the search, stand by passively while the search is conducted, or expand the antecedent private search into remaining privacy interests through additional searching or testing. As will be seen, some types of involvement will convert a private search into a governmental one, thereby making it illegal unless performed in conformity with fourth amendment standards.

> ***When the item is lawfully within his custody and control ... the private searcher may call the police to retrieve the evidence....***

Instigation and Participation

It is clear that when a government officer orders or requests an informant or a private citizen to conduct a search, the search is not private as the searcher becomes the agent of the government.[16] An officer cannot demand, for example, that a landlord conduct a search that would be illegal if performed by the officer; such a search, even though the landlord would have broken no law had he conducted it independently, is equivalent to a search by the requesting officer.[17] Similarly, a police officer who participates in a search legitimately instituted by a private party makes that conduct governmental from the time the officer joins in.[18]

Instigation by police of private searches must be explicit in order to make the search governmental. In *Gold* v. *United States*,[19] FBI Agents indicated to an airline employee that a certain carton was probably mislabeled as to contents and address. When the Agents left, the employee, concerned about inaccurate shipping documents, opened the package and found obscene material. The court considered the search private because the agents had not specifically requested that the carton be opened and because the employee had an independent motive for learning more about the shipment. Government directives to the private sector requiring searches can

make these intrusions governmental if they are not only mandatory but also done because of the regulation rather than for any private reason. For example, Federal Aviation Administration regulations requiring the search of carry-on baggage by airline employees as part of an antihijacking program was considered a governmental search by the Ninth Circuit Court of Appeals.[20]

Passive Standby

When an officer neither requests nor participates in an *unlawful* search, such as the breaking and entering of a residence, he cannot passively stand by and do nothing; his knowledge of and failure to stop the illegal activity will make the search subject to the fourth amendment and the exclusionary rule.[21] In addition, failure to take action in such a situation could subject the officer to criminal prosecution, administrative action, or civil liability. Police may, however, observe a *lawful* search by a private party who has not been ordered or requested to make the intrusion. If a common carrier's security officer must, as part of his normal duties, open unclaimed baggage, the "passive presence" of the law enforcement officer who merely observes does not transform the legal, private-party intrusion into a search by the government.[22]

> ***"... when a government officer orders or requests an informant or private citizen to conduct a search ... the searcher becomes the agent of the government."***

In passive standby cases, it is important to show not only that the search was not conducted at the request of the police but also that the motivation for the search originated with the private party, who would have conducted the search whether the police were present or not. In a recent Sixth Circuit Court of Appeals case,[23] the defendant was found unconscious on an airplane and was taken to the hospital by the police. In an attempt to find identification or medication, an emergency room nurse instructed a police officer to search the defendant's purse, which contained cocaine, crack, and drug paraphernalia. Later, while the defendant was still unconscious, a physician conducted a thorough physical examination, including the defendant's body cavities, and located additional drugs, which were given to a police officer posted nearby. The defendant claimed both searches were governmental. The court reasoned that the search of the handbag was done at the request of a nurse during an emergency and was tantamount to a private search. This search could also be justified as an emergency exception to the warrant requirement. The court then found the body cavity search was not government action, noting that a person will not be held to have acted as a police agent merely because of the presence of a police officer who is an interested party. Furthermore, it was noted that the physician located the drugs as part of an examination which he believed was in the patient's best interests. To prevail on her claim, the defendant would be required to show the following: (1) The police had instigated, encouraged, or participated in the search, and (2) the private party must have engaged in the search with the intent of assisting the police in the investigation.

More problematic are cases involving traditional informants who claim they have spontaneously seized evidence without any previous orders to do so by a law enforcement official. In *United States* v. *Lambert*,[24] the defendant's housekeeper approached the FBI and provided information about Lambert's drug activities. Over the course of the following year, the housekeeper contacted the FBI approximately 25 times concerning Lambert and was, on occasion, provided expense money. She was never asked to retrieve any items from Lambert's house. In fact, when she offered to search Lambert's locked safe, she was specifically forbidden to do so. Nonetheless, she went into a closet belonging to the defendant, located a thermos which contained drugs, and brought it to the FBI office. The court found that the antecedent discussions between the housekeeper and the FBI did not make her an agent of the government for purposes of this search. It was noted that although she acted with the "requisite agent intent,"[25] that is, an intent to assist in the investigation against Lambert, the FBI did not instigate, encourage, or participate in her searches, which were ruled private.[26]

Expanding Private Searches to Explore Remaining Privacy Interests

Another group of cases deals with police who were not passive but instead ventured beyond the scope of the initial private search. These cases involve government scrutiny of evidence obtained after the conclusion of a search by a private party. This post-search scrutiny — whether it is a simple re-inspection or a sophisticated laboratory analysis — raises the question of whether there is a reasonable expectation of privacy which remains in some aspect of an item recovered by the police from a private party.

In *Katz* v. *United States*,[27] the Supreme Court defined a search as a government intrusion into an area where there is a reasonable expectation of privacy. To be protected, however, the privacy must meet a two-part test: First, the defendant must actually expect privacy (the subjective test), and second, this expectation must be one that is reasonable, based on the court's interpretation of what society is prepared to recognize as reasonable (the objective test).[28] It is this second, or objective test, which often leads courts to draw different conclusions about privacy interests remaining in evidence obtained after a search by a private party.

In *Walter* v. *United States*,[29] a shipment of eight-millimeter films depicting homosexual activities was addressed to Leggs, Inc., Atlanta, GA, but was mistakenly delivered by a private carrier to a company named L'Eggs Products, Inc., in the same city. An employee of L'Eggs Products, Inc., a hosiery distributor, opened the package and examined the individual boxes of film, which were labeled with explicit descriptions of the contents. One employee opened some of the boxes but was unable to view the film, even when it was held up to the light. The FBI was summoned, and without obtaining a warrant or communicating with the consignor, Agents viewed the films with a projector. In a plurality opinion, the Supreme Court found that the FBI Agents were lawfully in possession of the film but could not view the contents on a projector without a search warrant. The government has the right to re-examine the materials to the same extent as was done in the private search; it cannot, however, exceed the boundaries of that search when the item retains remaining interests in privacy.

> ***Instigation by police of private searches must be explicit in order to make the search governmental.***

In a later case involving drugs rather than film, the Supreme Court allowed some expansion by Federal agents of an earlier private search. In *United States* v. *Jacobsen*,[30] employees of Federal Express, a private commercial carrier, opened a damaged package consisting of a paper-wrapped cardboard box containing 6½ ounces of a white powdery substance in the innermost of a series of four plastic bags concealed inside a tube made of silver duct tape. After examining the contents of the package, the office manager notified the Drug Enforcement Administration (DEA). Before the first DEA agent arrived, however, the package was completely reassembled by a Federal Express employee. In order to locate the white powder, the agents had to reopen the package, layer by layer. To determine if the powder was a controlled substance, they performed a field test, which proved to be positive. Upon learning that the package contained cocaine, the agents obtained a warrant to search the residence to which the package was addressed. In determining whether the cocaine seized at the Federal Express office was obtained illegally, the Court was faced with two issues: 1) Can a package which has been previously searched privately but closed prior to delivery to the government be re-opened to expose its contents? and 2) Can government agents exceed the scope of the private search by conducting an on-the-spot field test to detect the presence of controlled substances?

The Court responded in the affirmative to both questions. The fourth amendment was found not to apply to the search by the Federal Express employee because of the *Burdeau* rule. In addition, the opening of the package by the private individual is not a government intrusion, and therefore, lacks one of the two essential elements of a search as defined by *Katz*. The reopening of the package by DEA agents was a govern-

ment intrusion, but it did not violate the defendant's reasonable expectation of privacy, which was already undermined by the antecedent search. As long as the reexamination of the item covered no new ground, reasoned the Court, there had been no exploitation by the police of remaining privacy interests. Finally, the Court found that a field test that merely discloses whether a particular substance is cocaine does not constitute an expectation of privacy that society is prepared to recognize as reasonable.[31] The *Walter* case can be distinguished from *Jacobsen* because the viewing of film entails the full disclosure of the contents, some of which may be protected by the first amendment. The field test, on the other hand, serves only to identify the presence of illegal substances.

The *Walter* and *Jacobsen* cases establish that police may cover the same territory previously searched by a private party, but they must exercise care to avoid exceeding the scope of the initial search by intruding upon remaining legitimate privacy interests. For example, in a Ninth Circuit Court of Appeals case,[32] airline employees located a clear plastic bag containing white powder when they opened a piece of luggage damaged on a conveyer belt. The bag, which was punctured and spilling forth its contents, was reported to the airport police, who summoned a DEA agent. The agent conducted a field test on the powder, but the test result was negative. After squeezing and bending the bag, the Agent poked his finger into the puncture hole, which he then enlarged in order to locate an opaque fiberglass container concealed in the powder. Noting a chloride odor that he associated with cocaine, the agent opened the container and field-tested the contents, which tested positive. The court found that the intrusion into the inner container was an impermissible expansion of the airline employee's private search.

Although *Jacobsen* establishes the constitutionality of on-the-spot field tests of substances obtained from a private party search, the right to conduct more sophisticated tests is less clear. In *United States* v. *Mulder,*[33] a hotel security officer entered the defendant's hotel room after check-out time and removed a locked bag and other personal articles. The next day, the employee broke the lock on the bag and located several clear plastic bags containing over 10,000 tablets inscribed with the lettering, "LEMMON 7/14." A DEA agent was given custody of the tablets and sent them to a government laboratory, where they were tested using mass spectrometry, infrared spectroscopy, and gas chromatography and found to contain methaqualone. The court approved of the receipt of the tablets from the hotel employee but held that a search warrant was required before highly sophisticated laboratory analyses could be performed on the seized substance. This case was distinguished from *Jacobsen,* where the field test only revealed whether the substance was cocaine. The toxicology tests used in *Mulder* not only detected a particular drug but also revealed through molecular structure the exact identity of every ingredient in the compound. In these additional "private facts," according to the *Mulder* court, there is a reasonable expectation of privacy requiring fourth amendment protection.

A Federal district court in Maine[34] upheld subsequent laboratory testing that merely confirmed an earlier field test. The police, after receiving a package suspected of containing cocaine from a private search, first conducted a field test and then sent the evidence to a laboratory for further testing. In assessing the remaining privacy interests in the substance, the court used a balancing test in which the nature and quality of the individual's fourth amendment interests are weighed against the importance of the governmental interests alleged to justify the intrusion. In this case, unlike *Mulder,* a field test was conducted which revealed that the substance was cocaine. The subsequent chemical tests were performed to verify what was already known to a virtual certainty, and therefore, the privacy interest was considered minimal.

> ***... a person will not be held to have acted as a police agent merely because of the presence of a police officer who is an interested party.***

In a case considered by the Supreme Court of Tennessee,[35] police received a rifle obtained from a private party who had searched the defendant's premises. Ballistics testing was conducted to show that cartridges found near a murder scene had been fired from the seized weapon. The defendant argued that a warrant was required before such testing because it constituted a significant expansion of the scope of the original search. The Tennessee court disagreed and found that the subsequent testing of the rifle did not compromise any remaining interest in privacy and was, therefore, not a search under the fourth amendment.

The balancing tests which the courts in the preceding cases performed in order to evaluate remaining privacy interests apply *only* when police receive evidence from a search conducted by a private party. An officer who lawfully seizes items pursuant to a search warrant or a recognized exception to the warrant requirement can conduct additional laboratory tests without obtaining another search warrant. Thus, the Ninth Circuit Court of Appeals, in refusing to require a search warrant to perform chemical tests on blood samples lawfully obtained by the police, stated that the "evidence tested in *Mulder* was seized pursuant to a 'private search,' and its reasoning and holding are limited to that context."[36]

Part II of this article will further examine the scope of the *Burdeau* rule by discussing the following issues: (1) Searches by government employees who are not police, (2) the definition of a "private" party, and (3) the interception of communications by private parties.

(Continued next month)

Footnotes

[1]256 U.S. 465 (1921).
[2]*Id.* at 476.
[3]*Id.* at 475.
[4]*Weeks* v. *United States*, 232 U.S. 383 (1914).
[5]*Burdeau*, 256 U.S. at 475.
[6]*Mapp* v. *Ohio*, 367 U.S. 64 (1961).

> **"... failure to stop the illegal activity will make the search subject to the fourth amendment and the exclusionary rule."**

[7]*See* John J. Burke, "Searches by Private Persons," *FBI Law Enforcement Bulletin*, October 1972, pp. 22-26, for discussion of the *Weeks* and *Mapp* cases and the inapplicability of the exclusionary rule to private party searches.
[8]*Burdeau*, 256 U.S. at 476.
[9]442 N.E.2d 1021 (Ind. 1982).
[10]*State* v. *Dold*, 722 P.2d 1353, 1356 (Wash. App. 1986).
[11]*Illinois* v. *Andreas*, 463 U.S. 765, 769 (1983).
[12]*People* v. *Vought*, 528 N.E.2d 1095 (Ill. App. 2 Dist. 1988).
[13]*State* v. *Zagorski*, 701 S.W.2d 808 (Tenn. 1985).
[14]*People* v. *Nash*, 341 N.W. 439 (Mich. 1983).
[15]403 U.S. 443 (1971).
[16]*See e.g.*, *United States* v. *Walther*, 652 F.2d 788 (9th Cir. 1981).
[17]*See e.g.*, *People* v. *Fierro*, 46 Cal. Rptr. 132 (1965).
[18]*See e.g.*, *State* v. *Cox*, 674 P.2d 1127, 1129 (N.M. App. 1983).
[19]378 F.2d 588 (9th Cir. 1967).
[20]*United States* v. *Davis*, 482 F.2d 893 (9th Cir. 1973).
[21]*See e.g.*, *Stapleton* v. *Superior Court*, 447 P.2d 967 (Calif. 1968).
[22]*See e.g.*, *Moody* v. *United States*, 163 A.2d 337 (D.C. App. 1960); *United States* v. *Jennings*, 653 F.2d 107 (4th Cir. 1981); *United States* v. *Entriger*, 532 F.2d 634 (8th Cir. 1976); *United States* v. *Walsh*, 791 F.2d 811 (10th Cir. 1986).
[23]*United States* v. *Black*, 860 F.2d 1080 (6th Cir. 1988).
[24]771 F.2d 83 (5th Cir. 1985).
[25]*Id.* at 89.
[26]*See State* v. *Thetford*, 745 P.2d 496 (Wash. 1987) for a similar ruling by the Supreme Court of Washington concerning an independently motivated search by a criminal informant. *See also Hooper* v. *Sacks*, 823 F.2d 597 (4th Cir. 1987) in which the court finds that the plaintiff in a civil suit against the defendant is not a government agent after bringing to law enforcement authorities evidence of medical fraud obtained from civil discovery. Important to this holding was the finding that there was no direction or encouragement of the informant by the government to use the civil deposition as a method of collecting evidence in a criminal case.
[27]389 U.S. 347 (1967).
[28]*Id.* at 361; for a discussion of *Katz* and an overview of U.S. Supreme Court rulings concerning areas which lack a reasonable expectation of privacy, see Kimberly A. Kingston, "Reasonable Expectation of Privacy Cases Revive Traditional Investigative Techniques," *FBI Law Enforcement Bulletin*, November 1988, pp. 22-29.
[29]100 S.Ct. 2395 (1980).
[30]104 S.Ct. 1652 (1984).
[31]*Id.* at 1662-1663.
[32]*United States* v. *Miller*, 769 F.2d 554 (9th Cir. 1985).
[33]808 F.2d 1346 (9th Cir. 1987).
[34]*United States* v. *Clark*, 695 F.Supp. 1257 (D. Me. 1988).
[35]*State* v. *Zagorski*, 701 S.W.2d 808 (Tenn. 1985).
[36]*United States* v. *Snyder*, 852 F.2d 471 (9th Cir. 1988). *See also State* v. *Moretti*, 521 A.2d 1003 (1987), for a similar holding.

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