

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
SOUTHERN DIVISION**

**THE UNITED STATES OF AMERICA**

**v.**

**KENNETH W. BATES**

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**Criminal No. AW-99-0508**

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**DEFENDANT’S REPLY TO GOVERNMENT’S OPPOSITION TO  
DEFENDANT’S MOTIONS TO SUPPRESS EVIDENCE AND STATEMENTS**

The defendant herein, Kenneth W. Bates, through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Michael T. CitaraManis, Assistant Federal Public Defender, hereby replies to the government’s Consolidation Opposition to defendant’s Motion to Suppress Evidence and Motion to Suppress Statements, as follows:

**I. INTRODUCTION.**

Kenneth W. Bates is charged in a single-count indictment with possession of a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. §922(g)(1).

The firearm in question is a Smith & Wesson .32 caliber revolver. This revolver was found in Bates’s van parked at a gas station after Bates was arrested by a Berwyn Heights police officer who had come onto the scene and discovered that the tag on the van was reported stolen.

Defendant has moved to suppress use of the gun at trial, along with statements made by him after his arrest. The government opposes these requests. Below, undersigned defense counsel replies to each of the government’s claims regarding justification for the search of the van and admissibility of defendant’s statements.

**I. ARREST OF DEFENDANT.**

Preliminarily, and as stated in the Motion to Suppress Evidence, the defense contends that Bates was not lawfully arrested. For this reason alone, the gun and Bates's statements should be suppressed since they were the fruits of this illegal arrest. *See, Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

**II. THE SEARCH OF THE VAN CANNOT BE JUSTIFIED AS INCIDENT TO ARREST.**

The government first asserts that the search of the van was justified as a search incident to arrest under *New York v. Belton*, 453 U.S. 454 (1981), since Bates was lawfully arrested while in the van. Aside from the fact that the arrest must be lawful -- which undersigned defense counsel does not concede -- *Belton* is inapplicable as Bates was not in the van when arrested but at a pay telephone at the gas station! *Belton* clearly limits its application to where an officer makes a custodial arrest of "the occupant of an automobile . . ." (*id.* at 460), and such was not the case here.

In this case, the controlling precedent is *Chimel v. California*, 395 U.S. 752 (1969). In *Chimel*, the Supreme Court held that an officer making a custodial arrest may search the person arrested and the "area within his immediate control." *Id.* at 763.

Under the circumstances here -- where Bates was outside the van, some distance from it, had just been involved in a telephone call, and was restrained at gun-point and handcuffed when arrested -- it cannot be said that at that time, the passenger compartment of the van was "within his immediate control."

Indeed, other Courts have found under similar circumstances that *Chimel* and not *Belton* applies, and under *Chimel*, a search of the vehicle could not be justified as incident to arrest. *See, e.g., United States v. Strahan*, 984 F.2d 155 (6<sup>th</sup> Cir. 1993) (where defendant was “approximately thirty feet” from car when arrested, *Belton* inapplicable, and under *Chimel*, search of car was unlawful); *United States v. Fafowora*, 865 F. 2d 360 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 829 (1989) (despite fact federal agents had earlier pursued car, *Belton* inapplicable to search of car which had been parked and from which defendants were one car length away when arrested). Therefore, under *Chimel*, the search of the van here cannot be justified.<sup>1</sup>

**III. THE SEARCH CANNOT BE JUSTIFIED AS AN INVENTORY SEARCH, NOR WAS IT INEVITABLE THE GUN WOULD HAVE BEEN FOUND AS PART OF AN INVENTORY SEARCH.**

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The government next proffers that the van was properly impounded and the search of the van can be characterized as an inventory search, or alternatively, that it was inevitable the gun would have been discovered pursuant to an inventory search. *See* government’s Consolidated Opposition, p. 3, ¶3.

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The government, in mentioning other proffered justifications for the search, cites *United States v. Han*, 743 F.3d 537 (4<sup>th</sup> Cir.), *cert. denied*, 116 S.Ct. 1890 (1997), for the proposition that the evidence here was lawfully seized “pursuant to lawful arrest.” *See* government’s Consolidated Opposition, p. 3, ¶3. *Han* does not provide a separate basis to search the van. It was a search incident to arrest case, although involving the search of a backpack and not a vehicle as in *Belton* and here. *Han* in fact cites *Chimel* at the beginning of its discussion concerning the search there. *Id.* at 541. What *Han* stands for is that a search incident to arrest can be carried out after the person taken into custody can no longer reach the item to be searched and any danger of that person obtaining a weapon or destroying evidenced has thus been removed. For the reasons discussed above, the search here cannot be justified as a search incident to arrest under *Chimel*.

Undersigned defense counsel disputes that (1) the van was properly impounded; (2) an inventory search was permissible; and (3) it was inevitable that the gun would have been found during an inventory search.

Most importantly, however, is the fact that it appears no inventorying of the van's contents occurred! Since there was no inventory, the search cannot be characterized as an inventory search.

Moreover, if there was never an inventorying of the van's contents, it certainly cannot be said that absent a valid search incident to arrest, it was "inevitable" the gun would have been found.

Although the arresting officer informed Bates he was going to perform an inventory search of the van, undersigned defense counsel has received no inventory list or inventory report from the government or the Berwyn Heights Police Department. Considering the fact that the van was filled with personal belongings which were being moved from one home to another home, there should be a lengthy list of items as part of any inventory procedure. Any absence of such belies the fact that no inventory search was in fact done.<sup>2</sup> Thus, the search of the van cannot be characterized as an inventory search.<sup>3</sup>

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It is also curious that the van was never taken into police custody or control but was in fact left at the gas station where the arrest and search occurred. Thus, it is also questionable whether the van could be considered to have even been "impounded" in the first place.

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In this respect, the facts of this case are not unlike facts in *Florida v. Wells*, 495 U.S. 1 (1990), cited by the government with respect to the propriety of inventory searches, in which suppression of marijuana found in a bag in the trunk of a car was affirmed by the Supreme Court

Nor can it be claimed that discovery of the gun was “inevitable” as part of an inventory search. *Cf. United States v. George*, 971 F.2d 1113 (4<sup>th</sup> Cir. 1992) (cited by the government) (remanded for determination whether evidence would have been inevitably seized pursuant to standard inventory procedures upon arrest of defendant despite illegality of search warrant for truck).

Even if the search of the van could be considered an inventory search, any such search was unlawful in view of the following:

(1) Since Bates was arrested for misdemeanor offenses and was likely to be released within a short period of time after his arrest, there was no need to impound the van and inventory its contents. *See, e.g., United States v. Wilson*, 636 F.2d 1161, 1165-66 (8<sup>th</sup> Cir. 1980) (where the Court found an inventory search of a car’s trunk to be unlawful, in part, for the reason that the search “was unnecessary because the police intended to retain control of Wilson’s vehicle for only a short period of time until Wilson could post an appearance bond.”).

(2) Since the van was not parked on the street but on private property (*i.e.*, the gas station parking lot), there was no need to impound and inventory its contents. *See, e.g., United States v. Pappas*, 735 F.2d 1232, 1234 (10<sup>th</sup> Cir. 1984) (after defendant arrested for possession of loaded .357 revolver in car, impounding of car improper as the car “was parked on private property [the parking lot of a club] and there was no need for the impound and inventory search.”)

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In *Wells*, the State of Florida claimed the search at issue was an inventory search. Although not dispositive of the case, as noted by Justice Brennan in his concurring opinion, “. . . there was no evidence that an inventory was actually done in this case: [t]he State introduced neither an inventory sheet nor any testimony that the officer actually inventoried the items found in respondent’s car. . . Rather, the testimony at the suppression hearing suggests that the officer used the need to ‘inventory’ as an excuse to search for drugs.” *Id.* at 6.

(3) Since another person occupied the van, arrangements for safeguarding any items in the van could have been made by this other person so impounding the van and inventorying its contents was not necessary. *See, e.g., Pappas*, 735 F. 2d at 1234; *compare, United States v. Rodriguez-Morales*, 929 F.2d 780 (1<sup>st</sup> Cir. 1991) (where occupants' suspended licenses prevented them from taking custody of the car itself and impounding of car thus deemed reasonable).

(4) Since the vehicle was left at the gas station and never taken into police custody, there was no need for police to make an inventory of its contents for safekeeping as the police were not burdened with the responsibility for the van's contents. *See, South Dakota v. Opperman*, 428 U.S. 364 (1976) (routine inventorying is justified, in part, for "the protection of the owner's property while it remains in *police custody*, . . . ." [emphasis added]).

(5) The Berwyn Heights Police Department lacks standard and reasonable procedures regarding the impounding and inventorying of vehicles. *See, Opperman*, 428 U.S. at 376 (inventory search upheld since it was conducted pursuant to "standard police procedures" approved by the courts). In this regard, attached as **Exhibit A** are copies of all documents received pursuant to a subpoena to the Berwyn Heights Police Department for materials concerning the impounding and inventorying of vehicles. These materials appear to leave it up to the discretion of each officer to decide whether to impound a vehicle and whether to do an inventory search. This does not comport with the type of standard procedures required by *Opperman*.

(6) Finally, even if the Berwyn Heights Police Department can be said to have standard procedures for impounding and inventorying vehicles which can be considered reasonable, they lack standard procedures for the specific inspection of closed containers. *See, Colorado v.*

*Bertine*, 479 U.S. 367 (1987) (upholding the inventory of a backpack in a van where police procedures mandated opening closed containers and listing their contents); *Wells*, 495 U.S. at 4-5 (where suppression of evidence was upheld since the inventorying police agency “had no policy with respect to the opening of closed containers encountered during an inventory search”). Therefore, inspection here of a wadded up rag within which the gun in question was located was impermissible.

#### **IV. BATES’S STATEMENTS SHOULD ALSO BE SUPPRESSED.**

According to the government, Bates made three separate statements or series of statements which are incriminating: (1) after his arrest on the stolen tag charge, a statement to the arresting officer about the gun being in the van; (2) after discovery of the gun, statements concerning the gun belonging to him and not the other occupant of the van, he had the gun for protection, and he knew the federal gun laws applied to him; and (3) after arrest on the federal charge, admissions to federal agents concerning the gun.<sup>4</sup>

If this Court finds the seizure of the gun lawful, then it should still suppress for use at trial against Bates, his statements to law enforcement officers. As to all three statements or series of statements, if this Court finds the gun should not be suppressed on the ground the van was lawfully impounded and discovery of the gun was inevitable during a permissible inventory search, the statements should be suppressed due to the fact that Bates’s arrest on the stolen tag charge was nonetheless unlawful and the statements were a product of this arrest.

Further reply to the governments’ assertions in its Consolidated Opposition with regard

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Defendant disputes that he made all of the particular statements attributed to him.

to each of the aforementioned statements is separately set out below.

**A. Statement at Scene Concerning Gun in Car.**

The first statement at issue is the one Bates made after his arrest on the stolen tag charge. Specifically, Bates informed the officer of the gun in the van after the officer told Bates that he was going to do an “inventory” search of the van and the officer asked Bates whether there were any weapons or other items the officer should know about in the van.<sup>5</sup>

Bates’s statement concerning the gun in the van should be suppressed since: (1) the statement was in response to questioning by the officer while Bates was in custody without the benefit of Bates being informed of his *Miranda* rights and waiving them; and (2) the statement was in response to the officer’s false claim of authority in asserting he was going to do an inventory search of the van.

In defendant’s Motion to Suppress Statements, undersigned defense counsel expressly recognized the Fourth Circuit Court of Appeal’s ruling in *United States v. Dickerson*, 166 F.3d 667 (4<sup>th</sup> Cir. 1999) that *Miranda v. Arizona*, 384 U.S. 436 (1966) was overruled by Congress’ enactment of 18 U.S.C. §3501 and advise to suspects of their rights under *Miranda* is no longer required. However, this issue was recently argued before the Supreme Court. Therefore, it remains to be seen whether *Dickerson* will continue to be controlling precedent. Undersigned

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The defense disputes the government claim that in response to an alleged question by Bates whether he had to answer the officer’s question, the officer responded, “No.”

defense counsel submits that the requirements of *Miranda* are of a constitutional dimension and *Miranda* therefore could not be overruled by enactment of §3501.

However, whether this is the case or not, the statement was also in response to the officer's false claim of authority. Specifically, the officer claimed he was going to do an inventory search. This was false both factually -- since the officer in fact never performed an inventory search -- and legally -- since, as shown above, he had no lawful right to perform an inventory search. Since the officer made clear to Bates he was going to search the, Bates's response to the officer's question if he had any weapons in the van must be viewed as the product of this false claim.

In cases where consent to search was given in response to an express or implied false claim of authority, various courts have found the consent not voluntary. *See, e.g., Bumper v. North Carolina*, 391 U.S. 543, (1968) ("When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion -- albeit colorably lawful coercion. Where there is coercion there cannot be consent."); *Orhorhaghe v. I.N.S.*, 38 F.3d 488 (9<sup>th</sup> Cir. 1994) (defendant's consent to a search of his apartment was not valid given the agent's false "statement at the doorway that the agents did not need a warrant"). This is so even when the officer's false claim of authority is a product of innocent mistake. *See, United States v. Molt*, 589 F.2d 1247 (3<sup>rd</sup> Cir. 1978) (defendant's consent was not valid where agents innocently but falsely told defendant that a federal statute authorized them to make a warrantless inspection of defendant's business records).

Where an officer asserts a false claim of authority as here, a finding of coercion is also appropriate with respect to the defendant's response to questioning. When one considers too such factors such as Bates having just been arrested at gun-point and being in handcuffs, *see United States v. Perez*, 644 F.2d 1299 (9<sup>th</sup> Cir. 1981), his statement to the officer must be considered as having been coerced. For this reason too, the statement at the scene must be suppressed.

**B. Statements to Arresting Officer After Seizure of Gun.**

The government alleges that after the gun was located in the van, Bates made further incriminating statements: (1) telling the officer at the scene the gun belonged to him [Bates] and not the other occupant of the van and he had the gun for protection; and (2) telling the officer, in effect, while being transported, that he was in a lot of trouble due to the federal gun laws.

Even if this Court finds that the arrest of Bates on the stolen tag charge was lawful and the gun is admissible as a product of an inevitable inventory search, these statements should be suppressed nonetheless as a product of the actual search, which, as discussed above, was not a valid search incident to arrest under *Chimel*. A determination the gun eventually would have been found may allow the government to admit the gun and proceed with trial. However, separate and apart from any such determination is the fact that the search which actually uncovered the gun was unlawful as it amounted to an illegal search incident to arrest. Since the statements must be seen as a product of this search -- and not any later, eventual search -- they still must be suppressed.<sup>6</sup>

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Also, if the Court finds that any of the statements by Bates at the scene of his arrest or upon being transported afterwards by the arresting officer should be suppressed, this Court should review a transcript of the Grand Jury proceedings herein and consider dismissing the indictment due to the likely presentation by the government of unlawfully obtained evidence in obtaining the indictment.

**C. Statements to Federal Agents After Arrest on the Federal Charge.**

Finally, with regard to Bates's statements to federal agents after his arrest on the federal charge, these too need to be suppressed for the reason, as noted in defendant's Motion to Suppress Evidence, that they were taken in violation of his right to counsel under the Sixth Amendment.

More particularly, when Bates was arrested on the federal charge on February 14, 2000, the original state charge concerning the gun was still pending, and in the state case, he was represented by counsel. See as **Exhibits B and C**, attached Statement of Charges in District Court Case No. 5E00135224, reflecting the two charges of possession of handgun in vehicle and theft (or possession of stolen property, and specifically, of the tags); and a print-out of docket entries, showing an entry of appearance by counsel on November 1, 1999, and the nolle prosequere of the charges on February 29, 2000.

The government is correct when it asserts that the right to counsel under the Sixth Amendment is "charge-specific." See, *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) The government, however, is incorrect in what this means.

As the Fourth Circuit has made clear, "once a defendant has invoked his Sixth Amendment right to counsel, . . . , the government may not knowingly question him as to crimes closely related to those in which his Sixth Amendment right has attached [footnote omitted]." *United States v. Melgar*, 139 F.3d 1005 (4<sup>th</sup> Cir. 1998). Also see *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Kidd*, 12 F.3d 30, 31 (4<sup>th</sup> Cir. 1993). Accord *United States v. Doherty*, 126 F.3d 769, 776 (6<sup>th</sup> Cir. 1997) and cases cited therein.

Indeed, on similar facts as here, in *United States v. Martinez*, 972 F.2d 1100 (9<sup>th</sup> Cir.

1992), the Ninth Circuit found the defendant's Sixth Amendment right to counsel was violated when he invoked his right to counsel on a state firearms charge and thereafter, state and federal authorities "worked together in shuffling his charge from the state to the federal system" and he was interviewed by federal agents and indicted on a similar firearms charge. *Id.* at 1105; *also see Melgar*, 13 F.3d at 1014.

In the instant case, unlike *Martinez*, Bates's state case had not even yet been dismissed. It was still pending! Further, not only was Bates's prosecution moved from state court to federal court as part of a cooperative effort between state authorities and federal authorities, counsel for Bates in his state case had in fact been in touch with the United States Attorney's Office prior to Bates's arrest concerning possible federal charges.

Therefore, the federal agents clearly circumvented Bates's right to counsel when they interviewed him upon his arrest on the federal charge. For this reason, Bates's arrest to federal agents must be suppressed.

**V. CONCLUSION.**

For the foregoing reasons and those raised in his Motion to Suppress Evidence and Motion to Suppress Statements, defendant respectfully requests this Court to direct that the revolver and statements discussed above, and the fruits thereof, be suppressed for use at trial against him.

Respectfully submitted,

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for the District of Maryland

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**CERTIFICATE OF SERVICE**

\_\_\_\_\_ I HEREBY CERTIFY that on this 17th day of May 2000, a copy of the foregoing reply to Government Opposition to Defendant's Motions to Suppress Evidence and Statements was delivered to Steven Dettelbach, Assistant United States Attorney, 6500 Cherrywood Lane, Room 400, Greenbelt, Maryland 20770.

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MICHAEL T. CITARAMANIS  
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