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SECOND DIVISION

[A.C. No. 5108. May 26, 2005]

ROSA F. MERCADO, *complainant, vs.* **ATTY. JULITO D. VITRIOLO,** *respondent.*

SYLLABUS

1. **ADMINISTRATIVE LAW; ADMINISTRATIVE CASES; WITHDRAWAL OF THE COMPLAINT OR DESISTANCE BY THE COMPLAINANT, NOT BINDING.**— At the outset, we stress that we shall not inquire into the merits of the various criminal and administrative cases filed against respondent. It is the duty of the tribunals where these cases are pending to determine the guilt or innocence of the respondent. We also emphasize that the Court is not bound by any withdrawal of the complaint or desistance by the complainant. The letter of complainant to the Chief Justice imparting forgiveness upon respondent is inconsequential in disbarment proceedings.

2. **LEGAL ETHICS; ATTORNEYS; CLIENT-ATTORNEY RELATIONSHIP; DUTY OF THE LAWYER TO PRESERVE HIS CLIENT'S SECRETS AND CONFIDENCE OUTLASTS THE TERMINATION OF THE ATTORNEY-CLIENT RELATIONSHIP AND CONTINUES EVEN AFTER THE CLIENT'S DEATH.**— In engaging the services of an attorney, the client reposes on him special powers of trust and confidence. Their relationship is strictly personal and highly confidential and fiduciary. The relation is of such delicate, exacting and confidential nature that is required by necessity and public interest. Only by such confidentiality and protection will a person be encouraged to repose his confidence in an attorney. The hypothesis is that abstinence from seeking legal advice in a good cause is an evil which is fatal to the administration of justice. Thus, the preservation and protection of that relation will encourage a client to entrust his legal problems to an attorney, which is of paramount importance to the administration of justice. One rule adopted to serve this purpose is the attorney-client privilege: an attorney is to keep inviolate his client's secrets or confidence and not to abuse them. Thus, the duty of a lawyer to preserve his client's secrets and confidence outlasts the termination of the attorney-client relationship, and continues even after the client's death. It is the glory of the

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legal profession that its fidelity to its client can be depended on, and that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with absolute assurance that the lawyer's tongue is tied from ever disclosing it. With full disclosure of the facts of the case by the client to his attorney, adequate legal representation will result in the ascertainment and enforcement of rights or the prosecution or defense of the client's cause.

3. **ID.; ID.; ID.; ATTORNEY-CLIENT PRIVILEGE; FACTORS ESSENTIAL TO ESTABLISH EXISTENCE THEREOF.**—Now, we go to the rule on attorney-client privilege. Dean Wigmore cites the factors essential to establish the existence of the privilege, *viz*: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

4. **ID.; ID.; ID.; ID.; MATTERS DISCLOSED BY A PROSPECTIVE CLIENT TO A LAWYER ARE PROTECTED BY THE RULE ON PRIVILEGED COMMUNICATION EVEN IF THE PROSPECTIVE CLIENT DOES NOT THEREAFTER RETAIN THE LAWYER OR THE LATTER DECLINES THE EMPLOYMENT.**— Matters disclosed by a prospective client to a lawyer are protected by the rule on privileged communication even if the prospective client does not thereafter retain the lawyer or the latter declines the employment. The reason for this is to make the prospective client free to discuss whatever he wishes with the lawyer without fear that what he tells the lawyer will be divulged or used against him, and for the lawyer to be equally free to obtain information from the prospective client.

5. **ID.; ID.; ID.; ID.; A COMMUNICATION FROM A PROSPECTIVE CLIENT TO A LAWYER FOR SOME PURPOSE OTHER THAN ON ACCOUNT OF THE PROSPECTIVE ATTORNEY-CLIENT RELATION IS NOT PRIVILEGED.**— On the other hand, a communication from a (prospective) client to a lawyer for some purpose other than on account of the (prospective) attorney-client relation is not privileged. Instructive is the case of *Pfleider v. Palanca,* where the client and his wife leased to their attorney

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a 1,328-hectare agricultural land for a period of ten years. In their contract, the parties agreed, among others, that a specified portion of the lease rentals would be paid to the client-lessors, and the remainder would be delivered by counsel-lessee to client's listed creditors. The client alleged that the list of creditors which he had "confidentially" supplied counsel for the purpose of carrying out the terms of payment contained in the lease contract was disclosed by counsel, in violation of their lawyer-client relation, to parties whose interests are adverse to those of the client. As the client himself, however, states, in the execution of the terms of the aforesaid lease contract between the parties, he furnished counsel with the "confidential" list of his creditors. We ruled that this indicates that client delivered the list of his creditors to counsel not because of the professional relation then existing between them, but on account of the lease agreement. We then held that a violation of the confidence that accompanied the delivery of that list would partake more of a private and civil wrong than of a breach of the fidelity owing from a lawyer to his client.

6. **ID.; ID.; ID.; ID.; MERE RELATION OF ATTORNEY AND CLIENT DOES NOT RAISE A PRESUMPTION OF CONFIDENTIALITY; A DOCUMENT GIVEN BY A CLIENT TO HIS COUNSEL NOT IN HIS PROFESSIONAL CAPACITY IS NOT PRIVILEGED COMMUNICATION.**— The mere relation of attorney and client does not raise a presumption of confidentiality. The client must intend the communication to be confidential. A confidential communication refers to information transmitted by voluntary act of disclosure between attorney and client in confidence and by means which, so far as the client is aware, discloses the information to no third person other than one reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it was given. Our jurisprudence on the matter rests on quiescent ground. Thus, a compromise agreement prepared by a lawyer pursuant to the instruction of his client and delivered to the opposing party, an offer and counter-offer for settlement, or a document given by a client to his counsel not in his professional capacity, are not privileged communications, the element of confidentiality not being present.

7. **ID.; ID.; ID.; ID.; DOES NOT ATTACH WHERE THE COMMUNICATION MADE BY THE CLIENT TO HIS**

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ATTORNEY IS INTENDED FOR MERE INFORMATION AND NOT FOR THE PURPOSE OF SEEKING LEGAL ADVICE.— The communication made by a client to his attorney must not be intended for mere information, but for the purpose of seeking legal advice from his attorney as to his rights or obligations. The communication must have been transmitted by a client to his attorney for the purpose of seeking legal advice. If the client seeks an accounting service, or business or personal assistance, and not legal advice, the privilege does not attach to a communication disclosed for such purpose.

8. **ID.; ID.; ID.; BURDEN OF PROVING THAT THE PRIVILEGE APPLIES IS ON THE PARTY ASSERTING THE PRIVILEGE; MERE ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE WILL NOT SUFFICE; CASE AT BAR.**— Applying all these rules to the case at bar, we hold that the evidence on record fails to substantiate complainant's allegations. We note that complainant did not even specify the alleged communication in confidence disclosed by respondent. All her claims were couched in general terms and lacked specificity. She contends that respondent violated the rule on privileged communication when he instituted a criminal action against her for falsification of public documents because the criminal complaint disclosed facts relating to the civil case for annulment then handled by respondent. She did not, however, spell out these facts which will determine the merit of her complaint. The Court cannot be involved in a guessing game as to the existence of facts which the complainant must prove. Indeed, complainant failed to attend the hearings at the IBP. Without any testimony from the complainant as to the specific confidential information allegedly divulged by respondent without her consent, it is difficult, if not impossible to determine if there was any violation of the rule on privileged communication. Such confidential information is a crucial link in establishing a breach of the rule on privileged communication between attorney and client. It is not enough to merely assert the attorney-client privilege. The burden of proving that the privilege applies is placed upon the party asserting the privilege.

APPEARANCES OF COUNSEL

Pablito A. Carpio for respondent.

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DECISION

PUNO, *J.*:

Rosa F. Mercado filed the instant administrative complaint against Atty. Julito D. Vitriolo, seeking his disbarment from the practice of law. The complainant alleged that respondent maliciously instituted a criminal case for falsification of public document against her, a former client, based on confidential information gained from their attorney-client relationship.

Let us first hearken to the facts.

Complainant is a Senior Education Program Specialist of the Standards Development Division, Office of Programs and Standards while respondent is a Deputy Executive Director IV of the Commission on Higher Education (CHED).[1]

Complainant's husband filed Civil Case No. 40537 entitled "*Ruben G. Mercado v. Rosa C. Francisco,*" for annulment of their marriage with the Regional Trial Court (RTC) of Pasig City. This annulment case had been dismissed by the trial court, and the dismissal became final and executory on July 15, 1992.[2]

In August 1992, Atty. Anastacio P. de Leon, counsel of complainant, died. On February 7, 1994, respondent entered his appearance before the trial court as collaborating counsel for complainant.[3]

On March 16, 1994, respondent filed his Notice of Substitution of Counsel,[4] informing the RTC of Pasig City that he has been appointed as counsel for the complainant, in substitution of Atty. de Leon.

It also appears that on April 13, 1999, respondent filed a criminal action against complainant before the Office of the

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[1] *Rollo*, p. 1.

[2] *Id.* at 12.

[3] *Id.* at 10.

[4] *Id.* at 11.

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City Prosecutor, Pasig City, entitled *"Atty. Julito Vitriolo, et al. v. Rose Dela Cruz F. Mercado,"* and docketed as I.S. No. PSG 99-9823, for violation of Articles 171 and 172 (falsification of public document) of the Revised Penal Code.[5] Respondent alleged that complainant made false entries in the Certificates of Live Birth of her children, Angelica and Katelyn Anne. More specifically, complainant allegedly indicated in said Certificates of Live Birth that she is married to a certain Ferdinand Fernandez, and that their marriage was solemnized on April 11, 1979, when in truth, she is legally married to Ruben G. Mercado and their marriage took place on April 11, 1978.

Complainant denied the accusations of respondent against her. She denied using any other name than "Rosa F. Mercado." She also insisted that she has gotten married only once, on April 11, 1978, to Ruben G. Mercado.

In addition, complainant Mercado cited other charges against respondent that are pending before or decided upon by other tribunals — (1) libel suit before the Office of the City Prosecutor, Pasig City;[6] (2) administrative case for dishonesty, grave misconduct, conduct prejudicial to the best interest of the service, pursuit of private business, vocation or profession without the permission required by Civil Service rules and regulations, and violations of the "Anti-Graft and Corrupt Practices Act," before the then Presidential Commission Against Graft and Corruption;[7] (3) complaint for dishonesty, grave misconduct, and conduct prejudicial to the best interest of the service before the Office of the Ombudsman, where he was found guilty of misconduct and meted out the penalty of one month suspension without pay;[8] and, (4) the Information for violation of Section 7(b)(2) of Republic Act No. 6713, as amended, otherwise known as the Code of Conduct and Ethical Standards for Public Officials and Employees before the Sandiganbayan.[9]

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[5] *Id.* at 16-25.

[6] *Id.* at 36-39.

[7] *Id.* at 40-46.

[8] *Id.* at 152-160.

[9] *Rollo*, Vol. IV, pp. 4-5.

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Complainant Mercado alleged that said criminal complaint for falsification of public document (I.S. No. PSG 99-9823) disclosed confidential facts and information relating to the civil case for annulment, then handled by respondent Vitriolo as her counsel. This prompted complainant Mercado to bring this action against respondent. She claims that, in filing the criminal case for falsification, respondent is guilty of breaching their privileged and confidential lawyer-client relationship, and should be disbarred.

Respondent filed his Comment/Motion to Dismiss on November 3, 1999 where he alleged that the complaint for disbarment was all hearsay, misleading and irrelevant because all the allegations leveled against him are subject of separate fact-finding bodies. Respondent claimed that the pending cases against him are not grounds for disbarment, and that he is presumed to be innocent until proven otherwise.[10] He also states that the decision of the Ombudsman finding him guilty of misconduct and imposing upon him the penalty of suspension for one month without pay is on appeal with the Court of Appeals. He adds that he was found guilty, only of simple misconduct, which he committed in good faith.[11]

In addition, respondent maintains that his filing of the criminal complaint for falsification of public documents against complainant does not violate the rule on privileged communication between attorney and client because the bases of the falsification case are two certificates of live birth which are public documents and in no way connected with the confidence taken during the engagement of respondent as counsel. According to respondent, the complainant confided to him as then counsel only matters of facts relating to the annulment case. Nothing was said about the alleged falsification of the entries in the birth certificates of her two daughters. The birth certificates are filed in the Records Division of CHED and are accessible to anyone.[12]

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[10] *Rollo*, p. 90.

[11] *Rollo*, Vol. III, p. 1.

[12] *Rollo*, pp. 91-92.

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In a Resolution dated February 9, 2000, this Court referred the administrative case to the Integrated Bar of the Philippines (IBP) for investigation, report and recommendation.[13]

The IBP Commission on Bar Discipline set two dates for hearing but complainant failed to appear in both. Investigating Commissioner Rosalina R. Datiles thus granted respondent's motion to file his memorandum, and the case was submitted for resolution based on the pleadings submitted by the parties.[14]

On June 21, 2003, the IBP Board of Governors approved the report of investigating commissioner Datiles, finding the respondent guilty of violating the rule on privileged communication between attorney and client, and recommending his suspension from the practice of law for one (1) year.

On August 6, 2003, complainant, upon receiving a copy of the IBP report and recommendation, wrote Chief Justice Hilario Davide, Jr., a letter of desistance. She stated that after the passage of so many years, she has now found forgiveness for those who have wronged her.

At the outset, we stress that we shall not inquire into the merits of the various criminal and administrative cases filed against respondent. It is the duty of the tribunals where these cases are pending to determine the guilt or innocence of the respondent.

We also emphasize that the Court is not bound by any withdrawal of the complaint or desistance by the complainant. The letter of complainant to the Chief Justice imparting forgiveness upon respondent is inconsequential in disbarment proceedings.

We now resolve whether respondent violated the rule on privileged communication between attorney and client when he filed a criminal case for falsification of public document against his former client.

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[13] *Id.* at 61.

[14] *Rollo*, Vol. IV, p. 21.

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A brief discussion of the nature of the relationship between attorney and client and the rule on attorney-client privilege that is designed to protect such relation is in order.

In engaging the services of an attorney, the client reposes on him special powers of trust and confidence. Their relationship is strictly personal and highly confidential and fiduciary. The relation is of such delicate, exacting and confidential nature that is required by necessity and public interest.[15] Only by such confidentiality and protection will a person be encouraged to repose his confidence in an attorney. The hypothesis is that abstinence from seeking legal advice in a good cause is an evil which is fatal to the administration of justice.[16] Thus, the preservation and protection of that relation will encourage a client to entrust his legal problems to an attorney, which is of paramount importance to the administration of justice.[17] One rule adopted to serve this purpose is the attorney-client privilege: an attorney is to keep inviolate his client's secrets or confidence and not to abuse them.[18] Thus, the duty of a lawyer to preserve his client's secrets and confidence outlasts the termination of the attorney-client relationship,[19] and continues even after the client's death.[20] It is the glory of the legal profession that its fidelity to its client can be depended on, and that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with absolute assurance that the lawyer's tongue is tied from ever disclosing it.[21] With full disclosure of the facts of the case by the client to his attorney,

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[15] *Regala v. Sandiganbayan*, G.R. No. 105938, September 20, 1996, 262 SCRA 122, 138, citing Agpalo, Ruben, *Legal Ethics*, 1992 ed., p. 136.

[16] *Hilado v. David*, 84 Phil. 569, 578 (1949), citing J. Wigmore's *Evidence* §§ 2285, 2290, 2291 (1923).

[17] *Hilado v. David*, 84 Phil. 569, 579 (1949).

[18] Agpalo, *Ruben, Legal and Judicial Ethics*, 2002 ed., pp. 177-178.

[19] Canon 21, Code of Professional Responsibility.

[20] Canon 37 of the Canons of Professional Ethics; *In re Miller*, 357 N.C. 316 (2003), citing *Glover v. Patten*, 165 U.S. 394, 407-408 (1897).

[21] *In re Williams*, 57 Ill.2d 63 (1974), citing *People v. Gerold*, 265 Ill 448 (1914).

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adequate legal representation will result in the ascertainment and enforcement of rights or the prosecution or defense of the client's cause.

Now, we go to the rule on attorney-client privilege. Dean Wigmore cites the factors essential to establish the existence of the privilege, *viz*:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.[22]

In fine, the factors are as follows:

(1) There exists an attorney-client relationship, or a prospective attorney-client relationship, and it is by reason of this relationship that the client made the communication.

Matters disclosed by a prospective client to a lawyer are protected by the rule on privileged communication even if the prospective client does not thereafter retain the lawyer or the latter declines the employment.[23] The reason for this is to make the prospective client free to discuss whatever he wishes with the lawyer without fear that what he tells the lawyer will be divulged or used against him, and for the lawyer to be equally free to obtain information from the prospective client.[24]

On the other hand, a communication from a (prospective) client to a lawyer for some purpose other than on account of the (prospective) attorney-client relation is not privileged. Instructive is the case of *Pfleider v. Palanca*,[25] where the

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[22] 8 J.Wigmore, *Evidence* §2292 (McNaughton rev. 1961).

[23] Rule 15.02, *Code of Professional Responsibility* — A lawyer shall be bound by the rule on privileged communication in respect of matters disclosed to him by a prospective client.

[24] Agpalo, *Legal and Judicial Ethics,* 2002 ed., pp. 186-187, citing Comments of IBP Committee that drafted the Code, p. 81.

[25] Adm. Case No. 927, September 28, 1970, 35 SCRA 75.

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client and his wife leased to their attorney a 1,328-hectare agricultural land for a period of ten years. In their contract, the parties agreed, among others, that a specified portion of the lease rentals would be paid to the client-lessors, and the remainder would be delivered by counsel-lessee to client's listed creditors. The client alleged that the list of creditors which he had "confidentially" supplied counsel for the purpose of carrying out the terms of payment contained in the lease contract was disclosed by counsel, in violation of their lawyer-client relation, to parties whose interests are adverse to those of the client. As the client himself, however, states, in the execution of the terms of the aforesaid lease contract between the parties, he furnished counsel with the "confidential" list of his creditors. We ruled that this indicates that client delivered the list of his creditors to counsel not because of the professional relation then existing between them, but on account of the lease agreement. We then held that a violation of the confidence that accompanied the delivery of that list would partake more of a private and civil wrong than of a breach of the fidelity owing from a lawyer to his client.

(2) The client made the communication in confidence.

The mere relation of attorney and client does not raise a presumption of confidentiality.[26] The client must intend the communication to be confidential.[27]

A confidential communication refers to information transmitted by voluntary act of disclosure between attorney and client in confidence and by means which, so far as the client is aware, discloses the information to no third person other than one reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it was given.[28]

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[26] *Hitpold v. Stern*, 82 A2d 123. 26 ALR2d 852 (1951).

[27] *Uy Chico v. Union Life Assurance Society*, 29 Phil. 163, 165 (1915); *City & County of San Francisco v. Superior Court*, 231 P2d 26 (1951).

[28] *Brown v. Saint Paul City R. Co.*, 62 NW2d 688, 44 ALR 535 (1954).

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Our jurisprudence on the matter rests on quiescent ground. Thus, a compromise agreement prepared by a lawyer pursuant to the instruction of his client and delivered to the opposing party,[29] an offer and counter-offer for settlement,[30] or a document given by a client to his counsel not in his professional capacity,[31] are not privileged communications, the element of confidentiality not being present.[32]

(3) The legal advice must be sought from the attorney in his professional capacity.[33]

The communication made by a client to his attorney must not be intended for mere information, but for the purpose of seeking legal advice from his attorney as to his rights or obligations. The communication must have been transmitted by a client to his attorney for the purpose of seeking legal advice.[34]

If the client seeks an accounting service,[35] or business or personal assistance,[36] and not legal advice, the privilege does not attach to a communication disclosed for such purpose.

Applying all these rules to the case at bar, we hold that the evidence on record fails to substantiate complainant's allegations. We note that complainant did not even specify the alleged communication in confidence disclosed by respondent. All her claims were couched in general terms and lacked specificity. She contends that respondent violated the rule on privileged communication when he instituted a criminal action against her

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[29] *Uy Chico v. Union Life Assurance Society*, 29 Phil. 163 (1915).

[30] *Hiltold v. Stern*, 82 A2d 123, 26 ALR2d 852 (1951).

[31] *Pfleider v. Palanca*, Adm. Case No. 927, September 28, 1970, 35 SCRA 75.

[32] Agpalo, *Legal and Judicial Ethics*, 2002 ed., p. 267.

[33] *Olender v. U.S.*, 210 F2d 795, 42 ALR2d 736 (1954).

[34] Agpalo, *Ruben, Legal and Judicial Ethics*, 2002 ed., pp. 260-261.

[35] *U.S. v. Kovel*, 296 F2d 918 (1961).

[36] *Radiant Burners, Inc. v. American Gas Association*, 320 F2d 314 (1963).

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for falsification of public documents because the criminal complaint disclosed facts relating to the civil case for annulment then handled by respondent. She did not, however, spell out these facts which will determine the merit of her complaint. The Court cannot be involved in a guessing game as to the existence of facts which the complainant must prove.

Indeed, complainant failed to attend the hearings at the IBP. Without any testimony from the complainant as to the specific confidential information allegedly divulged by respondent without her consent, it is difficult, if not impossible to determine if there was any violation of the rule on privileged communication. Such confidential information is a crucial link in establishing a breach of the rule on privileged communication between attorney and client. It is not enough to merely assert the attorney-client privilege.[37] The burden of proving that the privilege applies is placed upon the party asserting the privilege.[38]

IN VIEW WHEREOF, the complaint against respondent Atty. Julito D. Vitriolo is hereby *DISMISSED* for lack of merit.

SO ORDERED.

Austria-Martinez, Callejo, Sr., and *Chico-Nazario, JJ.,* concur.

Tinga, J., out of the country.

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[37] *Regala v. Sandiganbayan, First Division, Dissent by Justice R.S. Puno,* G.R. No. 105938, September 20, 1996, 262 SCRA 122, 184, citing *Hoffman v. U.S.*, 341 US 479 (1951) also cited in *Arredondo v. Ortiz*, 365 F.3d 778 (2004).

[38] *U.S. v. Landof*, 591 F.2d 36, 38 (1978).