



## A DISTRICT COURT HOLDS THAT A SUSPECT'S WHISPERS ARE PRIVATE AND PROTECTED BY THE FOURTH AMENDMENT



April 2017

For duplication & redistribution of this article, please contact Public Agency Training Council by phone at 1.800.365.0119.  
PATC 5235 Decatur Blvd Indianapolis, IN 46241

Article Source : [http://www.patc.com/weeklyarticles/2017\\_us\\_v\\_llufrio\\_chapman.shtml](http://www.patc.com/weeklyarticles/2017_us_v_llufrio_chapman.shtml)

©2017 [Jim Chapman](#), Attorney, Public Agency Training Council

In *United States v. Llufrío*, 2017 WL 604009 (N.D. Ill. Feb. 15, 2017), the United States District Court for the Northern District of Illinois held that FBI agents violated the Fourth Amendment when they secretly recorded a suspect, Jorge Llufrío, who was alone in an interview room and was whispering to himself.

In *Llufrío*, the Government charged Llufrío with conspiring with co-defendant Sergio Fuente and with cooperating witness Ismael Bustamante to possess and to distribute narcotics. Specifically, the Government alleged that Bustamante procured approximately 10 kilograms of cocaine and heroin, planned with Fuentes to transport the drugs, and recruited Llufrío to be their driver and that Llufrío and other defendants then possessed the drugs. Bustamante and Fuentes allegedly hid the drugs in the cab of a semi-truck tractor, and while Llufrío was driving the truck to Chicago, the authorities stopped and arrested Llufrío.

After Llufrío's arrest, the FBI took him to their Chicago office, and Llufrío found himself sitting alone in a FBI interview room which secretly could record both video and audio. There was no sign that warned that there were cameras in the interview room, and FBI agents never told Llufrío whether they were recording him. After FBI agents placed Llufrío alone in the interview room, they began recording him at 5:24 p.m., and Llufrío began talking to himself one minute later.

Llufrío was already sitting in the interview room when the FBI began recording. Shortly after the FBI agents left the interview room, Llufrío began mumbling to himself and encouraging himself that things were going to work out. Through unintelligible speech and mumbling, Llufrío provided himself with self-encouragement. After approximately ten minutes, Llufrío looked up, saw something, pointed, and exclaimed, "that's a f\*\*\*ing camera for recording." Nevertheless, Llufrío continued mumbling, whispering, and looked up at what he thought was the camera at least once more.

At approximately 6:00 p.m., two FBI agents entered the room, introduced themselves, and engaged Llufrío in a conversation about whether he wanted an attorney. After both agents departed the room following Llufrío's request for an attorney, Llufrío resumed faintly speaking to himself. The FBI agents, then, re-entered the room and spoke to Llufrío about inventoried items that they believed belonged to

©2017 Online Article: 800.365.0119

Link to article online: [http://www.patc.com/weeklyarticles/2017\\_us\\_v\\_llufrio\\_chapman.shtml](http://www.patc.com/weeklyarticles/2017_us_v_llufrio_chapman.shtml)  
<http://www.patc.com>

him. This conversation lasted until, at approximately 6:13 p.m., and then, the FBI agents released Llufrío from the room.

After the indictment was returned charging Llufrío, the Government provided the relevant audio and video recordings in the case and produced a certified Spanish translation of Llufrío's statements to Llufrío. However, the Government produced no warrant approving the recording. Prior to the scheduled start of Llufrío's trial, the Government moved the District Court for permission to use, at trial, the statements that Llufrío had made to himself while he was in the FBI interview room. Llufrío objected to the Government's motion and argued that the District Court should preclude the Government from using his statements because he had a reasonable expectation of privacy in the comments that he made to himself that were protected by the Fourth Amendment.

The District Court began its consideration of the Government's motion and Llufrío's objection thereto by reiterating that the Fourth Amendment guards against unreasonable searches and seizures and that electronic recordings can constitute searches under the Fourth Amendment. Searches conducted without a warrant are per se unreasonable under the Fourth Amendment subject to only a few specific, well-established exceptions. In order to show a Fourth Amendment violation, the defendant must show that he had a reasonable expectation of privacy, and a reasonable expectation of privacy exists when the defendant manifested a subjective expectation of privacy and where society recognizes that expectation to be reasonable. *United States v. Webster*, 775 F.3d 897, 903 (7th Cir. 2015).

After considering all of the facts, the District Court held that Llufrío had both a subjective and an objective expectation of privacy in the statements that he made to himself while being held in the FBI interview room. As for his subjective expectation of privacy, the District Court explained that an individual claiming a subjective expectation of privacy must exhibit that expectation. In other words, the person must not have manifested by his conduct a voluntary consent to the alleged invasive actions because what a person knowingly exposes to the public is not subject to the Fourth Amendment's protections. Conversely what the person seeks to preserve as private may be constitutionally protected by the Fourth Amendment.

The District Court rejected the Government's argument that Llufrío did not have a subjective expectation of privacy because he looked at what he thought was a camera and recognized that he was being recorded but continued to speak to himself. Instead, the District Court found that Llufrío assumed that he was being watched, but the District Court found that there was no evidence that Llufrío knew that he was being recorded by audio means. The District Court explained that Llufrío was alone in a locked room and spoke only to himself in a manner very similar to a hushed prayer. In fact, Llufrío whispered softly enough to render a large portion of his statements inaudible. Accordingly, the District Court held that the Government could use the video images of Llufrío while he was in the FBI interview room but not the recorded audio statement that Llufrío made while talking to himself because Llufrío had a subjective expectation of privacy in his whispers to himself.

Likewise, the District Court held that Llufrío had an objectively reasonable expectation of privacy in his whispers. Initially, the District Court noted that the United States Court of Appeals for the Seventh Circuit has not addressed whether there is an objective expectation of privacy in a law enforcement building's room (such as the FBI's interview room in this case) but also noted that other courts have come to varying conclusions about whether society would accept such an expectation of privacy.

Moreover, the District Court opined that determining whether an expectation of privacy is legitimate or reasonable necessarily entails a balancing of the interests and not just a declaration that a suspect is in police custody. Therefore, while the District Court understood that a video camera might be necessary to monitor Llufrío safety and to ensure that he did not try to escape, the District Court found that the Government had offered no reason why it would need to record the sounds from the room other than for incriminating purposes while Llufrío sat alone in the FBI interview room.

Accordingly, the District Court held that Llufrío had an objective expectation of privacy and summed up its holding as follows:

If the police truly believe that no reasonable person would have an expectation of privacy in such a room, the recording equipment should not need to be disguised. Indeed, luring arrestees into a false sense of security in a locked room with no law enforcement officers and with no visible working audio-recording device—but with a concealed recording device—suggests that, in such a room, there is a reasonable expectation of privacy. There were no signs that indicated the FBI was recording Llufrío's statements with a hidden recorder. Instead, agents left him alone in a room with the door shut. The FBI agents closed the door to the interview room and then began recording. The Court finds that society would recognize an expectation of privacy in the police interview room under these circumstances.

Llufrío, 2017 WL 604009, at \* 9 (internal quotations and citations omitted). Therefore, the District Court found that Llufrío had met his burden of showing that he had both a subjective and an objective expectation of privacy in the statements that he whispered to himself while he was held in the FBI's interview room, and the District Court denied the Government's motion to admit those statements as evidence at trial.

---

**Note:** Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.