Consent Searches

Let's go search my apartment. You can search the shit out of it. I'll even help you.[1]

That was a major league bluff. And soon after suspected murderer Eugene Wheeler made his bold offer in an LAPD interview room, he must have realized he had blundered. That's because the detectives gracefully accepted his offer, then diligently searched his apartment and found the murder weapon hidden behind a wall-mounted music speaker. So, thanks in part to his hubris, Wheeler was convicted of first degree murder.

Why did he take such a chance? Actually, there are several logical reasons.[2] As the Court of Appeal pointed out, a suspect "may wish to appear cooperative in order to throw the police off the scent or at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile."[3]

But whatever a suspect's motivation, the thing to remember for officers is that, when it comes to consent searches, there's no harm in asking. In fact, the Supreme Court has described them as a "wholly legitimate aspect of effective police activity" which is often "the only means of obtaining important and reliable evidence."[4] Of course, such evidence is worthless unless it is admissible in court, and that is why we are devoting this edition of *Point of View* to the rules that govern consent searches.

As we will explain, there are four basic requirements:

(1) **Consent was given**: The suspect must have expressly or impliedly consented.
(2) **Consent was voluntary**: The consent must have been given voluntarily.
(3) **Scope of consent**: Officers must have searched only those places and things that the suspect expressly or impliedly authorized them to search.
(4) **Intensity of search**: The search must not have been unduly intrusive.

In addition to these requirements, we will discuss two issues that frequently arise: mid-search withdrawal of consent and consent obtained by means of trickery. Then in the accompanying article, "Third Party Consent," we will explain the rules for obtaining consent to search a suspect's property from someone other than the suspect, such as his spouse, roommate, or accomplice.

Did he consent?

The most basic requirement is that the suspect must have consented—either expressly or impliedly.

EXPRESS CONSENT: Express consent results when the suspect responds in the affirmative to an officer's request for permission. There are, however, no "magic words" that the suspect must utter.[5] Instead, express consent may be given by means of any words or gestures that reasonably indicate the suspect was consenting. Express consent will also result if, like Mr. Wheeler, the suspect suggested it.

IMPLIED CONSENT TO SEARCH: Consent will be implied if the suspect said or did something that officers reasonably interpreted as authorization to search.[6] As the Court of Appeal explained, "Specific words of

[1] *People v. Wheeler* (1971) 23 Cal.App.3d 290, 302 [overturned on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258].
[2] *People v. Meredith* (1992) 11 Cal.App.4th 1548, 1562.
[3] *People v. James* (1977) 19 Cal.3d 99, 144.
[4] *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227-28. Also see *United States v. Drayton* (2002) 536 U.S. 194, 207 ["Police officers act in full accord with the law when they ask citizens for consent."].
[5] See *People v. James* (1977) 19 Cal.3d 99, 113 ["[T]here is no talismanic phrase which must be uttered by a suspect in order to authorize a search."]; *U.S. v. Carter* (6th Cir. 2004) 378 F.3d 584, 589 ["trumpets need not herald an invitation [to search]"].
[6] See *Illinois v. Rodriguez* (1990) 497 U.S. 177, 185; *U.S. v. Guerrero* (10th Cir. 2007) 472 F.3d 784, 789-90.

consent are not necessary; actions alone may be sufficient."[7] For example, consent to search a home or vehicle has been implied when the suspect responded to the officer's request to search by handing him the keys;[8] and when an officer told the suspect what he was looking for and when the suspect responded by telling them where it was located.[9] However, a failure to object to a search does not constitute consent.[10]

Voluntary Consent

In addition to proving that the suspect expressly or impliedly consented, officers must prove that his consent had been given voluntarily.[11] This simply means the consent must not have been the result of threats, promises, intimidation, demands, or any other method of pressuring the suspect to consent.[12] "Where there is coercion," said the Supreme Court, "there cannot be consent."[13]

It has been argued (usually out of desperation) that any consent search that results in the discovery of incriminating evidence must have been involuntary because no lucid criminal would voluntarily do something that would likely land him in jail. But, as the Court of Appeal observed, these arguments have "never been dispositive of the issue of consent."[14] For example, the Sixth Circuit observed in *U.S. v. Carter*[15] that, while the defendant's decision to consent "may have been rash and ill-considered, that does not make it invalid."

Furthermore, if the suspect consented, it is immaterial that he was not joyful or enthusiastic about it.[16] This is because "[n]o person, even the most innocent, will welcome with glee and enthusiasm the search of his home by law enforcement agents."[17] For example, consent to search has been found when, upon being asked for consent, the suspect responded "Yeah," "I don't care," "No problem," "Do what you gotta do," and "Be my guest."[18]

As we will now discuss, the circumstances that are relevant in determining whether consent was voluntary can be divided into four categories: (1) direct evidence of coercion, (2) circumstantial evidence of coercion, (3) circumstantial evidence of voluntariness, and (4) circumstantial evidence bearing on the suspect's state of mind.

Direct evidence of coercion

Apart from physical violence, the most obvious forms of coercion are threats and demands—either of which will likely render consent involuntary.

THREATS: An officer's threat to arrest or take punitive action against the suspect if he refused to consent will render the consent involuntary. For example, the courts have ruled that consent was involuntary when it resulted from an officer's threat to arrest the suspect,[19] terminate her welfare benefits,[20] or remove her children from the home.[21]

DEMANDING CONSENT: Consent is also involuntary if officers said or suggested that, although they were

[7] *Nerell v. Superior Court* (1971) 20 Cal.App.3d 593, 599 [edited].
[8] See *People v. Carvajal* (1988) 202 Cal.App.3d 487, 497; *U.S. v. Zapata* (1st Cir. 1994) 18 F.3d 971, 977. Also see *People v. Quinn* (1961) 194 Cal.App.2d 172, 175; *People v. Panah* (2005) 35 Cal.4th 395, 467.
[9] See *People v. Superior Court (Henry)* (1974) 41 Cal.App.3d 636, 639; *U.S. v. Reynolds* (1st Cir. 2011) 646 F.3d 63, 73.
[10] See *People v. Nelson* (1985) 166 Cal.App.3d 1209, 1215; *People v. Timms* (1986) 179 Cal.App.3d 86, 90.
[11] *Florida v. Royer* (1983) 460 U.S. 491, 497.
[12] See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228; *Florida v. Bostick* (1991) 501 U.S. 429, 438.
[13] *Bumper v. North Carolina* (1968) 391 U.S. 543, 550.
[14] *People v. Ibarra* (1980) 114 Cal.App.3d 60, 65.
[15] (6th Cir. en banc 2004) 378 F.3d 584, 588-89.
[16] See *Robbins v. MacKenzie* (1st Cir. 1966) 364 F.2d 45, 50 ["Bowing to events, even if one is not happy about them, is not the same thing as being coerced."]; *U.S. v. Gorman* (1st Cir. 1967) 380 F.2d 158, 165.
[17] *U.S. v. Faruolo* (2nd Cir. 1974) 506 F.2d 490, 495.
[18] See *People v. Perillo* (1969) 275 Cal.App.2d 778, 782 ["I don't care"]; *U.S. v. Canipe* (6th Cir. 2009) 569 F.3d 597, 604 [no problem]; *U.S. v. $117,920* (8th Cir. 2005) 413 F.3d 826, 828 ["I guess if you want to"]; *U.S. v. Zubia-Melendez* (10th Cir. 2001) 263 F.3d 1155, 1163 ["Yeah, no matter"]; *U.S. v. Franklin* (1st Cir. 2011) 630 F.3d 53, 60 ["do what you got to do"].
[19] See *Hayes v. Florida* (1985) 470 U.S. 811, 814-15.
[20] See *Parrish v. Civil Service Commission* (1967) 66 Cal.2d 260, 270-75.
[21] See *U.S. v. Soriano* (9th Cir. 2003) 361 F.3d 494 502. **NOTE**: The Court of Appeal has ruled that a DUI arrestee's consent to submit to a warrantless blood draw was not involuntary merely because the officer notified him of California's Implied Consent law and the consequences of refusing to consent. *People v. Harris* (2015) __ Cal.App.4th __ [2015 WL 708606].

asking for the suspect's consent, he really had no choice. As the court observed in *People v. Fields*, "There is a world of difference between requesting one to open a trunk and asking one's permission to look in a trunk."[22] Similarly, an officer's entry into a home would not be consensual if he was admitted after announcing, "Police! Open the door!"[23]

Circumstantial evidence of coercion

Even if there were no explicit threats or demands, consent is involuntary if (1) a reasonable person in the suspect's position would have viewed the officers' words or conduct as coercive, and (2) there was no overriding circumstantial evidence of voluntariness (discussed in the next section).

INTIMIDATION: Consent is involuntary if it was obtained by the use of police tactics that were reasonably likely to elicit fear if it was denied.[24] For example, in *People v. Reyes*[25] a narcotics officer induced Reyes to leave his home by claiming that Reyes' parked car had been damaged in a traffic accident. As Reyes stepped outside, he was met by five officers, three of whom were "attired in full ninja-style raid gear, including black masks and bulletproof vests emblazoned with POLICE markings." Although Reyes consented to a search his pockets (there were drugs), the court ruled the consent was involuntary because the officers had "lured him into a highly intimidating situation." Said the court, "[W]e think the police went too far." Some other examples:

- The suspect was "standing in a police spotlight, surrounded by four officers all armed with shotguns or carbines."[26]
- "Six or seven officers strode into Poole's apartment in order to 'talk' to him, without so much as a by-your-leave."[27]
- "[A] half dozen uniformed police officers" asked for consent while "moving up the [suspect's] stairs with pistols drawn."[28]

BADGERING: If the suspect initially refused to consent, an officer's badgering him into changing his mind is necessarily coercive. Officers may, however, ask the suspect to reconsider his decision so long as they are not overly persistent.[29] When does mere persistence become badgering? Although the line may be difficult to draw, it may depend a lot on the officers' attitude; e.g., hostile or accusatory versus "restrained and noncoercive."[30]

NUMBER OF OFFICERS: The presence of several officers at the scene is somewhat coercive. But unless they surrounded the suspect or were otherwise in close proximity, this circumstance is not a strong indication of coercion.[31]

ARREST, HANDCUFFS: That the suspect had been arrested or was handcuffed is relevant, but not significant.[32] As the Supreme Court observed, "[C]ustody alone has never been enough to demonstrate a coerced confession or consent to search."[33]

DRAWN WEAPONS: Consent to search given at gunpoint will usually be involuntary[34] unless the follow-

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[22] (1979) 95 Cal.App.3d 972, 976. Also see *U.S. v. Winsor* (9th Cir. en banc 1988) 846 F.2d 1569, 1573, fn.3 ["compliance with a police command is not consent"].

[23] *People v. Poole* (1986) 182 Cal.App.3d 1004, 1012.

[24] See *People v. Challoner* (1982) 136 Cal.App.3d 779, 782; *U.S. v. Robertson* (4th Cir. 2013) 736 F.3d 677, 680 [a "police-dominated atmosphere"]. But also see *People v. Ibarra* (1980) 114 Cal.App.3d 60, 65 ["Defendant claims coercion from the fact that he was surrounded by police cars when originally stopped. But again, police domination does not necessarily vitiate consent."]; *U.S. v. Chaney* (1st Cir. 2011) 647 F.3d 401, 407 [consent was given after "the excitement of the initial entry had passed"].

[25] (2000) 83 Cal.App.4th 7, 13. Also see *Estes v. Rowland* (1993) 14 Cal.App.4th 508, 527.

[26] *People v. McKelvy* (1972) 23 Cal.App.3d 1027.

[27] *People v. Poole* (1986) 182 Cal.App.3d 1004, 1012.

[28] *People v. Dickson* (1983) 144 Cal.App.3d 1046, 1051-52.

[29] See *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1067 ["Neither does it appear, as a matter of law, that the persistence of the officers constituted coercion."]; *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1109 ["not unreasonably persistent"].

[30] See *Fare v. Michael C.* (1979) 442 U.S. 707, 727; *People v. Perdomo* (2007) 147 Cal.App.4th 605, 618; *People v. Benson* (1990) 52 Cal.3d 754, 780 ["Everything totally aboveboard with the officers. No coercion, no harassment. No heavy-handedness."].

[31] See *People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 451; *People v. Weaver* (2001) 26 Cal.4th 876, 924; *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 500; *U.S. v. Price* (3rd Cir. 2009) 558 F.3d 270, 279.

[32] See *People v. Monterroso* (2004) 34 Cal.4th 743, 758; *People v. Ratliff* (1986) 41 Cal.3d 675, 686; *People v. James* (1977) 19 Cal.3d 99, 109 ["custody" is of "particular significance," but "not conclusive"].

[33] *United States v. Watson* (1976) 423 U.S. 411, 424.

[34] See *People v. Challoner* (1982) 136 Cal.App.3d 779, 782; *People v. Fields* (1979) 95 Cal.App.3d 972, 976.

ing circumstances existed: (1) the officer had good reason for drawing the weapon, (2) the weapon was reholstered before consent was sought, and (3) the circumstances were not otherwise coercive.[35]

REFERENCES TO SEARCH WARRANTS: A remark by officers as to the existence, issuance, or necessity of a search warrant may constitute evidence of coercion depending on the context:

"WE HAVE A WARRANT": Consent is involuntary if officers falsely said or implied that they possessed a warrant or that one had been issued. As the Supreme Court observed in *Bumper v. North Carolina*, "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."[36]

"WE DON'T NEED A WARRANT": Consent is involuntary if officers said or implied that, although they were asking for consent, they did not need it.[37] "[T]here can be no effective consent," said the Ninth Circuit, "if that consent follows a law enforcement officer's assertion of an independent right to engage in such conduct."[38]

"WE WILL SEEK A WARRANT": Consent is not involuntary if officers merely told the suspect they would "seek" or "apply for" a search warrant if consent was refused.[39] As the court explained in *People v. Gurtenstein*,[40] an officer's statement that "he would go down and apply for a search warrant" could not be considered coercive because he "was merely telling the defendant what he had a legal right to do." Similarly, in *U.S. v. Faruolo*[41] an FBI agent told the defendant that if he refused to consent to a search of his house the agents would secure the premises and apply for a warrant. In rejecting the argument that this comment constituted coercion, the court said that, on the contrary, it was "a fair and sensible appraisal of the realities facing the defendant Faruolo."

"WE WILL 'GET' A WARRANT": If officers told the suspect that they would "get" or "obtain" a warrant if he refused to consent (as if warrants were issued on request), his consent should not be deemed involuntary if officers did, in fact, have probable cause for a warrant.[42] As the Ninth Circuit explained, "[C]onsent is not likely to be held invalid where an officer tells a defendant that he could obtain a search warrant if the officer had probable cause upon which a warrant could issue."[43] Similarly, the Seventh Circuit observed in *U.S. v. Duran*, "Although empty threats to obtain a warrant may at times render a subsequent consent involuntary, the threat in this case was firmly grounded."[44]

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[35] See *People v. Parker* (1975) 45 Cal.App.3d 24, 31; *People v. Ratliff* (1986) 41 Cal.3d 675, 686.

[36] (1968) 391 U.S. 543, 550. Also see *People v. Baker* (1986) 187 Cal.App.3d 562, 571 ["Baker's consent cannot be disentangled from the news that a search warrant was imminent."]; *Trulock v. Freeh* (4th Cir. 2001) 275 F.3d 391, 402 [police agent told the suspect that "the FBI had a search warrant"].

[37] See *Florida v. Royer* (1983) 460 U.S. 491, 497 [consent is involuntary when it is "a mere submission to a claim of lawful authority"]; *Lo-Ji Sales v. New York* (1979) 442 U.S. 319, 329 ["Any 'consent' given in the face of colorably lawful coercion cannot validate the illegal acts shown here."]; *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 832 ["Where the circumstances indicate that a suspect consents because he believes resistance to be futile ... the search cannot stand."].

[38] *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 500.

[39] See *People v. Goldberg* (1984) 161 Cal.App.3d 170, 188 ["[C]onsent to search is not necessarily rendered involuntary by the requesting officers' advisement that they would try to get a search warrant should consent be withheld."]; *U.S. v. Rodriguez* (9th Cir. 2006) 464 F.3d 1072, 1078 ["A statement indicating that a search warrant would likely be sought and the apartment secured could not have, by itself, rendered [the] consent involuntary as a matter of law."]; *U.S. v. Alexander* (7th Cir. 2009) 573 F.3d 465, 478 ["[A]n officer's factually accurate statement that the police will take lawful investigative action in the absence of cooperation is not coercive conduct."].

[40] (1977) 69 Cal.App.3d 441, 450.

[41] (2nd Cir. 1974) 506 F.2d 490.

[42] See *People v. Rodriguez* (2014) 231 Cal.App.4th 288, 303 ["the trial court was entitled to find this was only a declaration of the officer's legal remedies"]; *People v. McClure* (1974) 39 Cal.App.3d 64, 69 [officers had probable cause when they said "they would obtain a search warrant"]; *U.S. v. Hicks* (7th Cir. 2011) 630 F.3d 1058, 1066 ["[T]he ultimate question is the genuineness of the stated intent to get a warrant."]; *Edison v. Owens* (10th Cir. 2008) 515 F.3d 1139, 1146 ["An officer's threat to obtain a warrant may invalidate the suspect's eventual consent if the officer's lack the probable cause necessary for a search warrant."].

[43] *U.S. v. Kaplan* (9th Cir. 1990) 895 F.2d 618, 622.

[44] (7th Cir. 1992) 957 F.2d 499, 502.

A REFUSAL IS A CONFESSION: Coercion is likely to be found if officers said or implied that, under the law, a refusal to consent is the same as a confession of guilt. This occurred in *Crofoot v. Superior Court* in which an officer detained a suspected burglar named Stine. Stine was carrying a "bulging" backpack and, in the course of the detention, the officer told him that he "shouldn't have any objections to my looking in the backpack if he wasn't doing anything." In ruling that Stine's subsequent consent was involuntary and that stolen property in the backpack should have been suppressed, the Court of Appeal said this: "[I]mplicit in the officer's statement is the threat that by exercising his right to refuse the search Stine would be incriminating himself or admitting participation in illegal activity."[45]

In a similar but somewhat less obvious scenario, an officer will ask a detainee if he is carrying drugs, weapons or other contraband. When the detainee says no, the officer will say or suggest that if he was telling the truth he would certainly have no objection to a search. Although this is not an unusual practice, we were unable to find any California case in which this precise subject was addressed. There are, however, at least two federal circuit cases in which the courts ruled that consent given under such circumstances may be voluntary if the officers made it clear to the detainee that he was free to reject their request.[46]

In a third variation on this theme (and probably the most common), the officer will omit asking the suspect if he is carrying contraband, and simply ask if he has "any objection" to a search. Of all three approaches, this is plainly the least objectionable. For example, in *Gorman v. United States*[47] an FBI agent asked a robbery suspect if he had "any objection" to a search of his motel room, and the suspect said "go ahead." In ruling that the agent's words did not constitute a threat, the First Circuit explained that consent is not involuntary merely because the suspect faced the following dilemma: If he consented, the evidence would likely be found. But if he refused, it "would harden the suspicion [of guilt] that he was trying to dispel."

NO SANE CRIMINAL WOULD VOLUNTARILY CONSENT: Defendants sometimes attempt to prove they did not voluntarily consent by asserting that no lucid criminal would freely agree to a search that might uncover proof of their guilt. As noted earlier, however, these arguments are routinely rejected because there are several logical reasons why a criminal would freely do so.

Circumstantial evidence of voluntariness

Even if there was some circumstantial evidence of coercion, the suspect's consent may be deemed voluntary if there was some overriding circumstantial evidence of voluntariness,[48] which often consists of one or more of the following:

"YOU CAN REFUSE": Officers are not required to notify a suspect that he has a right to refuse to consent,[49] but it is a relevant circumstance.[50] Thus in *United States v. Mendenhall* the Supreme Court observed that "the fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive."[51]

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[45] (1981) 121 Cal.App.3d 717, 725. Edited.

[46] See *U.S. v. Erwin* (6th Cir. 1998) 155 F.3d 818, 823 ["Although it was not a neutral question, it plainly sought Erwin's permission to search the vehicle; the defendant still could have refused to consent to the search."]; *U.S. v. Ledesma* (10th Cir. 2006) 447 F.3d 1307, 1315 ["Nothing about this line of questioning ... suggests coercion or intimidation."].

[47] (1st Cir. 1967) 380 F.2d 158, 165.

[48] See *United States v. Drayton* (2002) 536 U.S. 194, 207 ["[T]he Court has repeated that the totality of the circumstances must control"]; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227, 233 ["[I]t is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced."]; *U.S. v. Morning* (9th Cir. 1995) 64 F.3d 531, 533 ["Every encounter has its own facts and its own dynamics. So does every consent."].

[49] See *United States v. Drayton* (2002) 536 U.S. 194, 206 ["The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."]; *People v. Tully* (2012) 54 Cal.4th 952, 983, fn.10; *People v. Monterroso* (2004) 34 Cal.4th 743, 758.

[50] See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 249 ["the suspect's knowledge of a right to refuse is a factor to be taken into account"]; *People v. Profit* (1986) 183 Cal.App.3d 849 ["[T]he delivery of such a warning weighs heavily in favor of finding voluntariness and consent."].

[51] (1980) 446 U.S. 544, 559.

OFFICERS' MANNER: A courteous attitude toward the suspect is highly relevant because it would ordinarily communicate to him that the officers were seeking his assistance, not demanding it. Thus it would be relevant that the officers displayed a "pleasant manner and tone of voice that is not insisting,"[52] as opposed to one that was "officious and authoritative."[53]

"ASKING" IMPLIES A CHOICE: The fact that officers *asked* the suspect for consent to search is, itself, an indication that he should have known he could have refused the request. As the California Supreme Court observed, "[W]hen a person of normal intelligence is expressly asked to give his consent to a search of his premises, he will reasonably infer he has the option of withholding that consent if he chooses."[54]

SUSPECT SIGNED CONSENT FORM: It is relevant that the suspect signed a form in which he acknowledged that his consent was given voluntarily.[55] But an acknowledgment will have little or no weight if he was coerced into signing it.[56]

SUSPECT WAS COOPERATIVE: That the suspect was generally cooperating with the officers, or that he suggested the officers conduct a search of his property is a strong indication that his consent was voluntary.[57]

SUSPECT INITIALLY REFUSED: It is relevant that the suspect initially refused the officers' request or that he permitted them to search only some things, as this tends to demonstrate his awareness that he could not be compelled to consent.[58]

EXPERIENCE WITH POLICE, COURTS: Another example of circumstantial evidence of voluntariness is that the suspect had previous experience with officers and the courts. Thus, in *People v. Coffman* the California Supreme Court observed that, "given Marlow's maturity and criminal experience (he was over 30 years old and a convicted felon at the time of the interrogation) it was unlikely Marlow's will was thereby overborne."[59]

MIRANDA WAIVER: Giving the suspect a *Miranda* warning before seeking consent has a slight tendency to indicate the consent was voluntary. A *Miranda* warning, said the Court of Appeal, "was an additional factor tending to show the voluntariness of appellant's consent."[60]

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[52] *U.S. v. Ledesma* (10th Cir. 2006) 447 F.3d 1307, 1314. Also see *People v. Williams* (2007) 156 Cal.App.4th 949, 961 [the officers "went out of their way to be courteous"]; *People v. Linke* (1968) 265 Cal.App.2d 297, 302 [the officers were "polite and courteous"].

[53] *Orhorhaghe v. INS* (9th Cir. 1994) 38 F.3d 488, 495. Also see *People v. Boyer* (1989) 48 Cal.3d 247, 268 ["The manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' to accompany them suggested they did not intend to take 'no' for an answer."].

[54] *People v. James* (1977) 19 Cal.3d 99, 116. Also see *People v. Fields* (1979) 95 Cal.App.3d 972, 976; *People v. Bustamonte* (1969) 270 Cal.App.2d 648, 653 [seeking consent "carries the implication that the alternative of a refusal existed"].

[55] See *People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558; *People v. Weaver* (2001) 26 Cal.4th 876, 924; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1578; *U.S. v. Rodrigues* (9th Cir. 2006) 464 F.3d 1072, 1078.

[56] See *Haley v. Ohio* (1947) 332 U.S. 596, 601 ["Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."]; *Haynes v. Washington* (1963) 373 U.S. 503, 513 ["[I]f the authorities were successful in compelling the totally incriminating confession of guilt ... they would have little, if any, trouble securing the self-contained concession of voluntariness."].

[57] See *People v. Rupar* (1966) 244 Cal.App.2d 292, 298 [suspect "indicated a desire to fully cooperate"]; *People v. Ramos* (1972) 25 Cal.App.3d 529, 536; *People v. Wheeler* (1971) 23 Cal.App.3d 290, 304; *U.S. v. Morning* (9th Cir. 1995) 64 F.3d 531, 533; *U.S. v. Sandoval-Vasquez* (7th Cir. 2006) 435 F.3d 739, 744-45; *U.S. v. Brown* (9th Cir. 2009) 563 F.3d 410, 413.

[58] See *People v. Aguilar* (1996) 48 Cal.App.4th 632, 640 ["The fact that Daniel refused consent to search appellant's room shows that he was aware of his right to refuse consent and shows that his consent to search the rest of the home was not the product of police coercion."]; *U.S. v. Mesa-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1125 ["[Defendant] had demonstrated by his prior refusal to consent that he knew that he had such a right—a knowledge that is highly relevant in our analysis of whether consent is voluntary."]; *U.S. v. Welch* (11th Cir. 2012) 683 F.3d 1304, 1309 ["But Welch must not have felt coerced into consenting when they first asked, because he declined to consent."].

[59] (2004) 34 Cal.4th 1, 58-59. Also see *Fare v. Michael C.* (1979) 442 U.S. 707, 726 ["He was a 16½-year-old juvenile with considerable experience with the police."]; *People v. Williams* (1997) 16 Cal.4th 635. 659 ["The [trial] court described defendant as a 'street kid, street man,' in his 'early 20's, big, strong, bright, not intimidated by anybody, in robust good health,' and displaying 'no emotionalism [or signs of] mental weakness'"]; *In re Aven S*. (1991) 1 Cal.App.4th 69, 77 ["The minor, while young, was experienced in the ways of the juvenile justice system."].

[60] (1974) 39 Cal.App.3d 64, 70. Also see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 248 ["the lack of any effective warnings to a person of his rights" is relevant].

Suspect's mental state

So long as the suspect answered the officers' questions in a rational manner, consent is not apt to be involuntary merely because he was under the influence of drugs or alcohol, had a mental disability, was uneducated, or was emotionally upset or distraught. As the Eighth Circuit noted, "Although lack of education and lower-than-average intelligence are factors in the voluntariness analysis, they do not dictate a finding of involuntariness, particularly when the suspect is clearly intelligent enough to understand his constitutional rights."[61] Nevertheless, a suspect's lack of mental clarity may invalidate consent if a court finds that officers obtained authorization by exploiting it.[62]

Scope and Intensity of Search

Before beginning a consensual search, officers must understand what they may search and the permissible intensity of the search. This requirement will be easy to satisfy if the suspect authorized a search of a single and indivisible object, such as a pants pocket or cookie jar. But in most cases they will be searching something (especially a home or car) in which there are containers, compartments, or separate spaces. So, how can officers determine the permissible scope of such a search?

Actually, it is not difficult because the Supreme Court has ruled that, in the absence of an express agreement, the scope and intensity of a consent search is determined by asking: What would a reasonable person have believed the search would encompass?[63] As the Court put it, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[64] In this section, we will discuss how the courts answer this question.

Scope of the search

The "scope" of a search refers to physical boundaries of the search and whether there were any restrictions as to what places and things within these boundaries may be searched.[65] As we will now discuss, scope is usually based on what the officers told the suspect before consent was given.

OFFICERS SPECIFIED THE OBJECT OF SEARCH: If officers obtained consent to search for a specific thing or class of things (e.g., drugs), they may ordinarily search any spaces and containers in which such things may reasonably be found.[66] As the Tenth Circuit put it, "Consent to search for specific items includes consent to search those areas or containers that might reasonably contain those items."[67] For

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[61] *U.S. v. Vinton* (8th Cir. 2011) 631 F.3d 476, 482. Also see *United States v. Mendenhall* (1980) 446 U.S. 544, 558 [consent not involuntary merely because the suspect was a high school dropout]; *U.S. v. Soriano* (9th Cir. 2003) 361 F.3d 494, 502 ["While a court must look at the possibly vulnerable subjective state of the person who consents, the court must also look at the reasonableness of that fear."].

[62] See *Reck v. Pate* (1961) 367 U.S. 433 [officers exploited the mental condition of the defendant who was described as "mentally retarded and deficient"]; *Brewer v. Williams* (1977) 430 U.S. 387, 403 [exploitation of religious beliefs].

[63] See *People v. Tully* (2012) 54 Cal.4th 952, 984 ["The question is what a reasonable person would have understood from his or her exchange with the officer about the scope of the search."]; *People v. Jenkins* (2000) 22 Cal.4th 900, 974 [prosecutors must demonstrate that it was "objectively reasonable … to believe that the scope of the consent given encompassed the item searched."]; *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1409 ["But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization."].

[64] *Florida v. Jimeno* (1991) 500 U.S. 248, 251.

[65] See *People v. Jenkins* (2000) 22 Cal.4th 900, 974 [prosecution must prove "the scope of the consent given encompassed the item searched"]; *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1409 ["A consensual search may not legally exceed the scope of the consent supporting it."]; *People v. Oldham* (2000) 81 Cal.4th 1, 11 ["[I]t is also the People's burden to show the warrantless search was within the scope of the consent given."]; *U.S v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1034 ["It is a violation of a suspect's Fourth Amendment rights for a consensual search to exceed the scope of the consent given."].

[66] See *Florida v. Jimeno* (1991) 500 U.S. 248, 251 ["The scope of a search is generally defined by its expressed object."]; *People v. Jenkins* (2000) 22 Cal.4th 900, 975 ["a general consent to search includes consent to pursue the stated object of the search"]; *U.S. v. Zapata* (11st Cir. 1999) 180 F.3d 1237, 1243 ["A general consent to search for specific items includes consent to search any compartment or container that might reasonably contain those items."].

[67] *U.S. v. Kimoana* (10th Cir. 2004) 383 F.3d 1215, 1223.

example, because drugs, weapons, and indicia can be found in small spaces and containers,[68] the permissible scope of a search for these things in a home would include boxes, briefcases, and the various compartments in household furniture.[69] Or, if officers were searching for such things in a car, the scope would include a paper bag and other containers,[70] the area behind driver's seat and door panels,[71] a side panel compartment,[72] behind the vents,[73] under loose carpeting,[74] the trunk,[75] under the vehicle,[76] the area between the bed liner and the side of the suspect's pickup.[77] Note that if the suspect authorized a search for "anything you're not supposed to have," officers may interpret this as consent to search for drugs.[78]

OFFICERS SPECIFIED THE NATURE OF CRIME: Instead of specifying the type of evidence they wanted to search for, officers will sometimes seek consent to search for evidence pertaining to a certain crime. If the suspect consents, the scope of the search would be quite broad because the evidence pertaining to most crimes frequently includes small things such as documents, clothing, weapons, and ammunition. Thus in *People v. Jenkins* the court ruled that, having obtained consent to search for evidence in a shooting, officers could search a briefcase because it "is obviously a container that readily may contain incriminating evidence, including weapons."[79]

SCOPE NOT SPECIFIED: If neither the officers nor the suspect placed any restrictions on the search, or if they did not discuss the matter, the search must simply be "reasonable" in its scope. As the Eleventh Circuit explained, "When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather it is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass."[80] Officers may, however, infer that a suspect who authorizes an unrestricted search had authorized them to look for evidence of a crime which, as noted, frequently consists of things that are very small.[81]

SEARCHING CONTAINERS IN SEARCHABLE AREAS: While conducting a search that is otherwise lawful in its scope and intensity, officers may ordinarily open and search any containers in which the sought-after evidence might reasonably be found.[82] A container may not, however, be searched if it reasonably appeared to be owned, used, controlled, and accessed exclusively by someone other than the consenting person. This exception is discussed in the accompanying article, "Third Party Consent."

Intensity of the search

The term "intensity" of the search refers to how thorough or painstaking it may be. But if, as is usually the case, the officers and suspect did not discuss the subject, the search must simply be "reasonable" in its intensity, as follows:

A "THOROUGH" SEARCH: Officers may presume that the suspect was aware they would be looking for evidence of a crime and would therefore be conducting a "thorough" search.[83] As the court observed in

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[68] See *People v. Miller* (1999) 69 Cal.App.4th 190, 203 ["The scope of a consensual search for narcotics is very broad and includes closets, drawers, and containers."]; *U.S. v. Anderson* (8th Cir. 2012) 674 F.3d 821, 827.
[69] See *People v. Jenkins* (2000) 22 Cal.4th 900, 976 [briefcase]; *U.S. v. Canipe* (6th Cir. 2009) 569 F.3d 597, 606 [box in a truck].
[70] See *Florida v. Jimeno* (1991) 500 U.S. 248, 251 [closed paper bag on the floor of the suspect's car].
[71] See *People v. Crenshaw* (1992) 9 Cal.App.4th 1402, 1415; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1579.
[72] *U.S. v. Gutierrez-Mederos* (9th Cir. 1992) 965 F.2d 800, 803-804.
[73] See *U.S. v. Torres* (10th Cir. 1981) 664 F.3d 1019 [officers were permitted to remove "the air-vent cover in the side of the door"].
[74] See *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035.
[75] See *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035.
[76] See *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1065; *U.S. v. Perez* (9th Cir. 1994) 37 F.3d 510, 516.
[77] See *People v. $48,715* (1997) 58 Cal.App.4th 1507, 1516.
[78] See *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035; *U.S. v. Canipe* (6th Cir. 2009) 569 F.3d 597, 606.
[79] (2000) 22 Cal.4th 900, 976.
[80] *U.S. v. Strickland* (11th Cir. 1990) 902 F.2d 937, 941.
[81] See *People v. Williams* (1980) 114 Cal.App.3d 67, 74; *U.S. v. Coleman* (4th Cir. 2009) 588 F.3d 816 [unrestricted consent authorized a search under a mattress].
[82] See *Frazier v. Cupp* (1969) 394 U.S. 731, 740; *People v. Schmeck* (2005) 37 Cal.4th 240, 281,
[83] See *U.S. v. Snow* (2nd Cir. 1995) 132 F.3d 133, 135. *U.S. v. Torres* (10th Cir. 1981) 663 F.2d 1019, 1027 ["permission to search contemplates a thorough search. If not thorough it is of little value"].

U.S. v. Snow, "[T]he term 'search' implies something more than a superficial, external examination. It entails looking through, rummaging, probing, scrutiny, and examining internally."[84] But, as noted below in "Length of search," officers may not be permitted to conduct a thorough search if they implied that they only wanted to conduct a quick or cursory one.

NOT DESTRUCTIVE: It would be unreasonable for officers to interpret consent to search something as authorization to destroy or damage it in the process. Thus, in discussing this issue in *Florida v. Jimeno*, the United States Supreme Court said, "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag."[85] Similarly, in *U.S. v. Strickland*[86] a suspect gave officers consent to search "the entire contents" of his car for drugs. During the search, an officer noticed some things about the spare tire that caused him to think it might contain drugs. So he cut it open. His suspicions were confirmed (the tire contained ten kilograms of cocaine), but the court ruled the search was unlawful because "a police officer could not reasonably interpret a general statement of consent to search an individual's vehicle to include the intentional infliction of damage to the vehicle or the property contained within it."

In contrast, in *People v. Crenshaw*[87] the Court of Appeal ruled that an officer did not exceed the permissible intensity of a search for drugs in a vehicle when he unscrewed a plastic vent cover to look inside. This was because the officer "did not rip the vent from the door; he merely loosened a screw with a screwdriver and removed it."

LENGTH OF SEARCH: The permissible length of a consent search depends mainly on how large an area must be searched, the difficulties in searching the area and its contents (e.g. heavily cluttered home), the extent to which the sought-after evidence can be concealed, and whether the officers claimed they would be conducting only a cursory search. For example, in *People v. $48,715*[88] a Kern County sheriff's deputy found almost $80,000 in cash during a consent search of a pickup truck that had broken down near Bakersfield. In the subsequent appeal of a forfeiture order, the driver argued that the search was too lengthy, but the court pointed out that the contents of the pickup included large bags of pasture seed and several suitcases, and that a "typical reasonable person" in the driver's position "would have expected that [the deputy] intended, in some manner, to inspect the contents of the seed bags and the suitcases. Thus, the seizure would be extended and the search would be extensive."

In contrast, in *People v. Cantor*[89] the court ruled that a search of a car took too long because, in obtaining consent, the officer had asked the driver, "Nothing illegal in the car or anything like that? Mind if I check real quick and get you on your way?" The entire search lasted about 30 minutes but court ruled it was excessive because a 30-minute search cannot reasonably be classified as "real quick."

CONDUCTING A PROTECTIVE SWEEP: Officers who have lawfully entered a home to conduct a consent search may conduct a protective sweep of the pre-

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[84] (2nd Cir. 1995) 44 F.3d 133, 135.

[85] (1991) 500 U.S. 248, 251-52. Also see *U.S. v. Osage* (10th Cir. 2000) 235 F.3d 518, 522 ["[B]efore an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other lawful basis upon which to proceed."]. Compare *U.S. v. Gutierrez-Mederos* (9th Cir. 1992) 965 F.2d 800, 804 ["The record indicates that [the officer] did not pry open or break into the side panel, but instead used the key. Nor did [the officer] force the loose cardboard divider apart, but rather pulled it back. Because a reasonable person would believe that appellant had authorized these actions, the search was permissible."].

[86] (11th Cir. 1990) 902 F.2d 937, 941-42.

[87] (1992) 9 Cal.App.4th 1403, 1415.

[88] (1997) 58 Cal.App.4th 1507.

[89] (2007) 149 Cal.App.4th 961. Also see *People v. Cruz* (1964) 61 Cal.2d 861, 866 [The general consent given by Ann and Susan that the officers could 'look around' did not authorize [the officer] to open and search suitcases and boxes"]; *People v. Williams* (1979) 93 Cal.App.3d 40, 58 ["The officer's journey to the back of the home and into a bedroom where they found defendant was a journey beyond the scope of the consent—to enter—extended by [the consenting person]."]; *U.S. v. Wald* (10th Cir. 2000) 216 F.3d 1222, 1228 [where officers asked to "take a quick look" inside the suspect's car, they exceeded the permissible scope when they searched the trunk]; *U.S. v. Quintero* (8th Cir. 2011) 648 F.3d 660, 670 [a "full-scale" search].

mises if (1) they reasonably believed there was someone hiding on the premises who posed a threat to them or the evidence, and (2) this belief materialized *after* they entered; i.e., they must have not entered with the secret intention of conducting an immediate sweep.[90]

CONSENT TO "ENTER" OR "TALK": If officers obtained consent to enter a home ("Can we come inside?"), they have the "latitude of a guest"[91] which generally means they may not wander into other rooms,[92] immediately conduct a protective sweep;[93] or immediately arrest an occupant.[94]

SEARCH BY K-9: Officers who have obtained consent to search a car for drugs or explosives may use a K9 to help with the search unless the suspect objects.[95] As the Ninth Circuit observed, "Using a narcotics dog to carry out a consensual search of an automobile is perhaps the least intrusive means of searching."[96]

CONDUCTING MULTIPLE SEARCHES: When officers have completed their search, they may not ordinarily conduct a second search because, as the Court of Appeal observed, consent to search "usually involves an understanding that the search will be conducted forthwith and that only a single search will be made."[97]

Consent withdrawn

The consenting person may modify the scope of consent or withdraw it altogether at any time before the evidence was discovered.[98] In such cases, the following legal issues may arise.

EXPRESS AND IMPLIED WITHDRAWAL: A withdrawal or restriction of consent may be express or implied. However, neither an express nor implied withdrawal will result unless the suspect's words or actions unambiguously demonstrated an intent to do so. As the Court of Appeal explained, "Although actions inconsistent with consent may act as a withdrawal of it, these actions, if they are to be so construed, must be positive in nature."[99] For example, the courts have ruled that the following words or actions sufficiently demonstrated an unambiguous intent to withdraw or restrict consent:

- After officers had searched the outer pockets of a backpack, and just before they were about to search the inside pockets, the suspect said, "Leave them alone."[100]
- After the suspect consented to a search of his home, an officer went outside to call for backup; while she was on the radio, the suspect shut and locked the front door.[101]

[90] See *U.S. v. Gandia* (2nd Cir. 2005) 424 F.3d 255, 262 ["[T]here is concern that generously construing *Buie* will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home."]; *U.S. v. Scroggins* (5th Cir. 2010) 599 F.3d 433, 443 [protective sweep OK because grounds for search developed upon entry]; *U.S. v. Crisolis-Gonzalez* (8th Cir. 2014) 742 F.3d 830, 836 [protective sweep OK because grounds for search developed upon entry].

[91] *U.S. v. Carter* (6th Cir. en banc 2004) 378 F.3d 584, 589.

[92] See *Lewis v. United States* (1966) 385 U.S. 206, 210 [officers did not "see, hear, or take anything that was not contemplated" by the suspect]; *People v. Williams* (1979) 93 Cal.App.3d 40, 58 ["The officer's journey to the back of the home and into a bedroom where they found defendant was a journey beyond the scope of the consent—to enter—extended by [the consenting person]."].

[93] See *U.S. v. Gandia* (2nd Cir. 2005) 424 F.3d 255, 262 ["[W]hen police have gained access to a suspect's home through his or her consent, there is a concern that generously construing [the protective sweep rules] will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home."].

[94] See *In re Johnny V.* (1978) 85 Cal.App.3d 120, 130 ["A right to enter for the purpose of talking with a suspect is not consent to enter and effect an arrest."]; *U.S. v. Johnson* (9th Cir. 1980) 626 F.2d 753 [arrest after obtaining consent to "talk" with suspect].

[95] See *People v. $48,715* (1997) 58 Cal.App.4th 1507, 1516 ["[U]se of the trained dog to sniff the truck, although not reasonably contemplated by the exchange between the officer and the suspect, did not expand the search to which the [suspect] had consented"]; *People v. Bell* (1996) 43 Cal.App.4th 754, 770-71, fn.5.

[96] *U.S. v. Perez* (9th Cir. 1994) 37 F.3d 510, 516.

[97] *People v. Valencia* (2011) 201 Cal.App.4th 922, 937.

[98] See *U.S. v. Jachimko* (7th Cir. 1994) 19 F.3d 296, 299 ["[I]f Jachimko attempted to withdraw his consent after [the DEA informant] saw the marijuana plants, he could not withdraw his consent."]; *U.S. v. Booker* (8th Cir. 1999) 186 F.3d 1004, 1006 ["[T]he seizure was valid, because at the time the consent was revoked the officers had probable because to believe that the truck was carrying drugs."].

[99] *People v. Botos* (1972) 27 Cal.App.3d 774, 779. Also see *People v. Hamilton* (1985) 168 Cal.App.3d3 1058, 1068l *U.S. v. Lopez-Mendoza* (8th Cir. 2010) 601 F.3d 861, 867 [withdrawal of consent "must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both"].

[100] *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 726.

[101] *In re Christopher B.* (1978) 82 Cal.App.3d 608, 615.

- When asked for the keys to the trunk of his car, a suspect who had consented to a search of it threw the keys into some bushes.[102]
- An officer who was conducting a consent search of a woman's apartment was about to enter her bedroom when the woman "raced in front of the officer and started to close the partially open door."[103]

In contrast, the courts have ruled that the following words or conduct were too ambiguous to constitute a withdrawal of restriction of consent:

- A suspect in a hate crime who had consented to a search of his home initially tried to mislead officers as to the location of his home.[104]
- A person who had consented to a search of his home said he was uncertain as to his address.[105]
- A suspect verbally consented but refused to sign a consent form.[106]
- After the occupants of a car consented to a search of the vehicle, they refused to tell the officers how to open a hidden compartment the officers had discovered.[107]

SECURING THE PREMISES: Even if the suspect withdrew his consent, officers may secure the premises pending issuance of a search warrant if they reasonably believed there was probable cause for a warrant.[108]

Consent By Trickery

Obtaining consent to enter a home by means of a ruse or other misrepresentation is legal—most of the time. That is because consent, unlike a waiver of constitutional rights, need not be "knowing and intelligent."[109] But, as we will discuss, there are limits that seem to be based mainly on whether the courts thought the officers' conduct was unseemly.

CONSENT FOR ILLEGAL PURPOSE: The most common type of consent by trickery occurs when a suspect invites an informant or undercover officer into his home to plan, commit or facilitate a crime; e.g. to buy or sell drugs. Although the suspect is unaware of the visitor's true identity and purpose, the consent is valid because a criminal who invites someone into his home or business for an illicit purpose knows he is taking a chance that the person is an officer or informant. As the Supreme Court explained, "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purpose contemplated by the occupant."[110]

For example, in *Lopez v. United States*[111] a cabaret owner in Massachusetts, German Lopez, tried to bribe an IRS agent who had figured out that Lopez was cheating on his business taxes. One day, the agent came to the cabaret and suggested that he and Lopez meet privately in Lopez's office to discuss the bribe. Lopez agreed and their subsequent conversation was surreptitiously recorded and used against Lopez at his trial. He appealed his conviction to the Supreme Court, arguing that the recording of the conversation should have been suppressed because the agent had "gained access to [his] office by misrepresentation." The Court disagreed, saying that the IRS agent "was not guilty of an unlawful invasion of [Lopez's] office simply because his apparent willingness to accept a bribe was not real. He was in the office with [Lopez's] consent."

Perhaps the most famous of all the trickery cases is *Hoffa v. United States*[112] in which Teamsters boss Jimmy Hoffa was being tried in Nashville on charges of labor racketeering. One of Hoffa's associates was Edward Partin, a federal informant.

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[102] *People v. Escollias* (1968) 264 Cal.App.2d 16, 18.
[103] *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1066.
[104] *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1273-74.
[105] *People v. Garcia* (1964) 227 Cal.App.2d 345, 351.
[106] *People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 451.
[107] See *U.S. v. Barragan* (8th Cir. 2004) 379 F.3d 524.
[108] See *Segura v. United States* (1984) 468 U.S. 796; *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32.
[109] *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 243 ["[I]t would be next to impossible to apply to a consent search the standard of an intentional relinquishment or abandonment of a known right or privilege."].
[110] *Lewis v. United States* (1966) 385 U.S. 206, 211.
[111] (1963) 373 U.S. 427.
[112] (1966) 385 U.S. 293.

While the trial was underway, Hoffa permitted Partin to hang out in a hotel room that Hoffa was using as a command post. Among other things, Partin overheard Hoffa saying that they were "going to get to one juror or try to get to a few scattered jurors and take their chances." The racketeering trial ended with a hung jury, but Hoffa was later convicted of attempting to bribe one of the jurors.

On appeal to the United States Supreme Court, Hoffa argued that Partin's testimony should have been suppressed because, even though Hoffa had consented to Partin's entries into his room, his consent became invalid when Partin misrepresented his true mission. Of course he did, but the Court ruled it didn't matter because "Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence."

Note that some untrusting criminals still think they can protect themselves from such trickery by simply refusing to admit a suspected undercover agent into their homes unless he first expressly denies that he is a cop ("You gotta say it else you ain't comin' in"). This is pure urban legend.[113] As the Ninth Circuit observed, "If a lie in response to such a question made all evidence gathered thereafter the inadmissible fruit of an unlawful entry, all dealers in contraband could insulate themselves from investigation merely by asking every person they contacted in their business to deny that he or she was a law enforcement agent. This is not the law."[114]

CONSENT FOR LEGAL PURPOSE: The rules on trickery are not so permissive if the undercover officer or informant was neither a friend nor associate of the suspect but, instead, had gained admittance by falsely representing that he needed to come inside for some legitimate purpose. As the Ninth Circuit explained, "Not all deceit vitiates consent. The mistake must extend to the essential character of the act itself … rather than to some collateral matter which merely operates as an inducement. . . . Unlike the phony meter reader, the restaurant critic who poses as an ordinary customer is not liable for trespass"[115] For example, consent to enter a suspect's home has been deemed ineffective when undercover officers claimed they were deliverymen, building inspectors, or property managers; or if the officers obtained consent by falsely stating they had received a report that there were bombs on the premises.[116]

There is also a case winding its way through the federal courts in which FBI agents disrupted the internet connection into a villa at Caesar's Palace that had been rented by a suspect in an illegal gambling operation. An agent then gained admittance to the room by posing as a technician who needed to come in and restore the service. While inside, the agent videotaped various instrumentalities of this type of crime, and the video was later used to convict the suspect. In light of the cases discussed earlier, this could be trouble.

There is, however, an exception to this rule: If a house was for sale and the owner or his agent had an open house, an entry by an undercover officer is not invalid merely because the officer was not really interested in buying the house.[117] This is because the whole purpose of an open house is to get people to come in, look around, and maybe become interested. And that's just what the officer did. POV

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[113] See O*n Lee v. United States* (1951) 343 U.S. 747, 752; *Maryland v. Macon* (1985) 472 U.S. 463, 469; *Toubus v. Superior Court* (1981) 114 Cal.App.3d 378, 383 [entry to buy drugs; "There was no ruse."]; *U.S. v. Lyons* (D.C. Cir. 1983) 706 F.2d 321, 329; *U.S. v. Bullock* (5th Cir. 1979) 590 F.2d 117 [undercover ATF agent obtained consent from Bullock, a Ku Klux Klan member, to enter Bullock's house to discuss becoming a member of the Klan].

[114] *U.S. v. Bramble* (9th Cir. 1996) 103 F.3d 1475.

[115] *Theofel v. Farley-Jones* (9th Cir. 2004) 359 F.3d 1066, 1073.

[116] See *Mann v. Superior Court* (1970) 3 Cal.3d 1, 9 ["Cases holding invalid consent to entry obtained by ruse or trick all involve some positive act of misrepresentation on the part of officers, such as claiming to be friends, delivery men, managers, or otherwise misrepresenting or concealing their identity."]; *People v. Reyes* (2000) 83 Cal.App.4th 7, 10 [officer identified himself as the driver of a car that had just collided with the suspect's car outside his home]; *People v. Mesaris* (1970) 14 Cal.App.3d [officer identified himself as a friend of the Sears repairman who was working inside the defendant's home]; *In re Robert T.* (1970) 8 Cal.App.3d 990, 993-94 [apartment manager and undercover officer obtained consent to enter to "check the apartment"]; *U.S. v. Harrison* (10th Cir. 2011) 639 F.3d 1273, 1280 [officer said they needed to investigate a report of bombs on the premises].

[117] See *People v. Lucatero* (2008) 166 Cal.App.4th 1110; *People v. Jaquez* (1985) 163 Cal.App.3d 918, 928.