

## Whalen v. McMullen

(9th Cir. 2018) \_\_ F.3d \_\_ [2018 WL 5530736]

### Issue

Was an officer's consensual entry into a suspect's home unlawful because the officer lied about the purpose of his visit?

### Facts

A Washington state patrol detective was assigned to investigate a report that Kathleen Whalen had lied about the extent of a physical handicap in her application for SSI benefits. The detective went to Whalen's home and told her he was investigating a identify theft ring and that she had possibly been a victim. As the result, Whalen allowed the detective to enter her home to discuss the matter. While inside, the detective activated two hidden video devices which recorded several things that were later used in a decision to deny her application. Whalen later filed a federal civil rights lawsuit against the detective alleging that his entry into her home violated the Fourth Amendment because he lied about his reasons for wanting to speak with her.

### Discussion

It is, of course, accepted police practice for undercover officers (and informants working under their direction) to visit suspects and obtain consent to enter their homes for the ostensible purpose of committing or facilitating a crime, such as the purchase of drugs. Although the suspect is unaware of the visitor's true identity and purpose, the courts have consistently ruled that consent given under these circumstances 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. For example, in *Lopez v. United States* the Supreme Court ruled that an IRS agent did not violate the Fourth Amendment when he obtained a suspect's consent to enter his office for the purpose of accepting a bribe.<sup>1</sup>

The situation in *Whalen* was different, however, because the ostensible purpose of detective's visit was to discuss a fictitious identity theft operation, not commit a crime. Did this render Whalen's consent ineffective? Yes, said the court, because her consent was obtained "by invoking the private individual's trust in his government, only to betray that trust." Accordingly, the court ruled that Whalen's consent to enter was ineffective and, as the result, the detective's entry constituted an unreasonable search under the Fourth Amendment.<sup>2</sup>

### Comment

The court's ruling is consistent with several cases in California where consensual entries have been invalidated where, for example, an officer gained entry by claiming to be a deliveryman, building inspector, or property manager; or by falsely stating he had

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<sup>1</sup> (1963) 373 US 427, 438 ["[The IRS agent] was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real."].

<sup>2</sup> NOTE: The court also ruled the detective was entitled to qualified immunity because the investigation in *Whalen* was administrative—not criminal--and until now it was unclear whether this rule applied to noncriminal matters.

received a report that there were bombs on the premises or some other urgent need to enter.<sup>3</sup> POV

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<sup>3</sup> See *Mann v. Superior Court* (1970) 3 C3 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.”]; *P v. Reyes* (2000) 83 CA4 7, 10 [officer identified himself as the driver of a car that had just collided with the suspect’s car outside his home]; *In re Robert T.* (1970) 8 CA3 990, 993-94 [consent invalid when apartment manger and undercover officer obtained consent to enter to “check the apartment”]; *Theofel v. Farley-Jones* (9C 2004) 359 F3 1066, 1073 [“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”].