

Consent Searches

“Sure you can look. I don’t have any drugs.”¹

Many years ago, a wise Greek philosopher proclaimed, “There’s no harm in asking.” Or perhaps it was a Greek playboy. Well, whoever it was, he was wise. And, while these words of wisdom are relevant in many endeavors, they are especially pertinent to police work where seeking consent to search for evidence is not only harmless, it’s often smart. After all, when officers lack probable cause for a warrant, a consent search may be their only option.²

Newer officers may discount the benefits of consent searches because they cannot imagine that suspects would actually consent to searches of places or things in which they had hidden their drugs, firearms, stolen property, or other things that could land them in jail. But, like those misguided moths who keep flying into hot lightbulbs, they do.³ Why? The California Supreme Court noted three reasons:

THEY’LL NEVER FIND IT: Many criminals think they have hidden the evidence so cleverly that the officers won’t be able to find it. For example in *People v. Wheeler*⁴ a cocky murder suspect told an LAPD homicide detective, “Let’s go search my apartment. You can search the shit out of it. I’ll even help you.” The detective accepted the invitation and found the murder weapon hidden behind a stereo speaker.

THEY’RE JUST TESTING ME: Other suspects think that if they consent the officers will figure they must be innocent and not bother searching, or at least they will conduct a superficial search.

IT’S NOT MINE: The thought process goes something like this: “If they find it, I’ll just say, ‘What’s *that*?’ or ‘That’s not mine,’ or ‘Gee, I wonder how *that* got there.’”⁵

¹ *People v. Meredith* (1992) 11 Cal.App.4th 1548, 1553.

² See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227 [“[W]here the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.”].

³ See *People v. Meredith* (1992) 11 Cal.App.4th 1548, 1562 [“[A]ny number of rational, if not particularly wise, reasons might have motivated Meredith to consent to the search of his luggage, despite his knowledge that incriminating evidence was inside.”].

⁴ (1971) 23 Cal.App.3d 290.

⁵ **NOTE:** These reasons for consenting were discussed in *People v. James* (1977) 19 Cal.3d 99, 114. ALSO SEE *United States v. Mendenhall* (1980) 446 U.S. 544, 559, fn.7 [suspect may have consented “in the hope of receiving more lenient treatment”]; *U.S. v. Kim* (9th Cir. 1994) 25 F.3d 1426, 1432, fn.4 [suspect may have figured that giving consent was a “sound strategy”]; *U.S. v. Torres* (10th Cir. 1981) 663 F.2d 1019, 1027 [“[T]he defendant may have thought that the officers might overlook that money.”]; *People v. Munoz* (1972) 24 Cal.App.3d 900, 906 [the suspects may have “forgotten the small amount of [amphetamine and hashish] in their bedroom.”]; *People v. Tremayne* (1971) 20 Cal.App.3d 1006, 1017 [“[T]he defendant] assumed the role of the interested husband seeking to assist the police to find the murderer of his wife in the hope this tactic would divert suspicion from him.”]; *People v. Linke* (1968) 265 Cal.App.2d 297, 306 [the suspect might have been trying to “bluff or beguile” the officers]; *People v. Wheeler* (1971) 23 Cal.App.3d 290, 305 [a “clumsy bluff”]. **NOTE:** Another explanation is that the suspect might not be very bright. But, as the court said in *State v. McKnight*, “It is consonant with good morals, and the Constitution, to exploit a criminal’s ignorance or stupidity in the detectional process.” (1968) 52 N.J. 35, 53.

Despite their usefulness in bringing criminals to justice, consent searches are not without their critics. Some of them claim that people naturally feel intimidated whenever officers ask for consent. Others complain that officers who have probable cause and plenty of time to obtain a warrant should not be permitted to take the “easy way” by seeking consent.⁶ Currently, the most vocal critics are those who contend that officers should not be allowed to ask motorists for consent during routine traffic stops, especially if they have nothing but a hunch that the driver is up to something.⁷

Although the courts continue view consent searches as a “wholly legitimate aspect of effective police activity,”⁸ that could change someday if they conclude that officers are abusing the practice. In fact, it has already happened in New Jersey where its Supreme Court ruled that certain types of consent searches cannot be conducted unless officers have reasonable suspicion.⁹

For this reason and, of more immediate concern, to prevent the suppression of evidence, it is important that officers understand and satisfy the four requirements for conducting consent searches:

- (1) **Consented given:** The suspect must have expressly or impliedly given his consent.
- (2) **Voluntary consent:** His consent must have been given voluntarily.
- (3) **Scope of search:** Officers must have inspected only those places and things the suspect expressly or impliedly authorized them to search.
- (4) **Intensity of search:** The search must not have been unreasonably intense or rigorous.¹⁰

There is a related subject that can be tricky. It involves consent to search a suspect's property given by someone other than the suspect; e.g., his spouse, roommate, or employer. While the rules discussed in this article also apply to those types of searches, the issue of how to determine whether a third party has the authority to consent is covered in the separate article entitled “Third Party Consent.”

CONSENT GIVEN

The first requirement is that the suspect must have communicated his decision to consent. In the words of the California Supreme Court, “[E]vidence must be presented that will enable the court to determine for itself whether consent was in fact given.”¹¹ As

⁶ See *People v. Currier* (1965) 232 Cal.App.2d 103, 111 [court describes consent searches as “the easier way,” and warranted searches “the safer one”]; *U.S. v. Dichiarinte* (7th Cir. 1971) 445 F.2d 126, 129 [“Courts have not looked with favor on the practice of substituting consent for the authorization of a search warrant.”]; *U.S. v. Arrington* (7th Cir. 1954) 215 F.2d 630, 637 [“It is high time that courts place their stamp of disapproval upon this increasing practice of federal officers searching a home without a warrant on the theory of consent, particularly where no reason is shown why a search warrant was not obtained.”].

⁷ See *Rodriguez v. CHP* (N.D. Cal. 2000) 89 F.Supp.2d 1131; *Minnesota v. Fort* (2003) 660 N.W. 2d 415.

⁸ *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228, 231-2. ALSO SEE *Florida v. Jimeno* (1991) 500 U.S. 248, 250-1 [“[W]e have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so.”]; *U.S. v. Ruiz* (9th Cir. 2005) 428 F.3d 877, 882 [consent searches do not occupy “second-class status in the hierarchy of law enforcement practices”].

⁹ *New Jersey v. Carty* (2002) 790 A.2d 903.

¹⁰ **NOTE:** Prosecutors have the burden of proving—by a preponderance of the evidence—that officers complied with these requirements. See *United States v. Matlock* (1974) 415 U.S. 164, 178; *People v. James* (1977) 19 Cal.3d 99, 106, fn.4.

¹¹ *People v. Gorg* (1955) 45 Cal.2d 776, 782. ALSO SEE *U.S. v. Guerrero* (10th Cir. 2007) 472 F.3d 784, 789 [“There must be clear and positive testimony that consent was unequivocal and specific”]; *U.S. v. Worley* (6th

we will now explain, a declaration of consent may be given expressly or implied by conduct.

EXPRESS CONSENT: A suspect expressly consents to a search if, upon being asked for it, he responds in the affirmative; e.g., “Yeah,” “Go ahead,” “Be my guest.” Expressions of consent that are indifferent may also suffice, such as “I don’t care” and “I guess, if you want to.”¹² In addition, express consent results if the idea for the search came from the suspect; e.g., “I don’t have a gun, and if you don’t believe me, go ahead and look.”¹³

The point is that express consent may be given in many ways. Again quoting the California Supreme Court, “[T]here is no talismanic phrase which must be uttered by a suspect in order to authorize a search.”¹⁴ Or, as the Sixth Circuit put it, “[T]rumpets need not herald an invitation [to search].”¹⁵

IMPLIED CONSENT: Consent will be implied if the suspect said or did something that was reasonably interpreted by officers as authorization to search, even though his words or conduct were somewhat ambiguous.¹⁶ For example, consent to search a vehicle has been found when the suspect, when asked for permission, handed over the keys.¹⁷

Similarly, consent to enter a house may be implied if, after officers asked if they could come in, the suspect stepped aside or made some other motion indicating assent. Some examples:

- An officer knocked on the door of a suspected drug house. When a woman opened the door, he “displayed his badge and said he was a police officer.” The woman “stepped back” and the officer entered.¹⁸
- Responding to a report of domestic violence in an apartment, an officer knocked on the door. A woman answered; her face was “bruised and swollen.” When he asked who had injured her, she “stepped back and pointed to defendant lying on the couch inside.” The officer entered.¹⁹
- Officers went to the suspect’s home to question him about a complaint that he had brandished a gun. When he opened the door slightly, the officers said they wanted

Cir. 1999) 193 F.3d 380, 386 [“[W]e must examine the content of that statement to ensure that it unequivocally (and specifically) indicates that the defendant consented.”].

¹² See *U.S. v. Faruolo* (2nd Cir. 1974) 506 F.2d 490, 495 [“No person, even the most innocent, will welcome with glee and enthusiasm the search of his home by law enforcement agents.”]; *People v. Perillo* (1969) 275 Cal.App.2d 778, 782 [“I don’t care”]; *U.S. v. \$117,920* (8th Cir. 2005) 413 F.3d 826, 828 [“I guess if you want to”].

¹³ See *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1265, 1273.

¹⁴ See *People v. James* (1977) 19 Cal.3d 99, 113.

¹⁵ *U.S. v. Carter* (6th Cir. 2004) 378 F.3d 584, 589.

¹⁶ See *U.S. v. Sanchez* (8th Cir. 1998) 156 F.3d 875, 878 [“[W]hether or not the suspect has actually consented to a search, the Fourth Amendment requires only that the police reasonably believe the search to be consensual.”]; *U.S. v. Guerrero* (10th Cir. 2007) 472 F.3d 784, 789-90 [“Consent may instead be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer.”]; *People v. Perillo* (1969) 275 Cal.App.2d 778, 782 [“No particular words are required to establish a consent to search; rather consent is established by words or conduct which import that it has been given.”]; *U.S. v. Carter* (6th Cir. 2004) 378 F.3d 584, 587 [“Consent to a search may be in the form of words, gesture, or conduct.”].

¹⁷ See *People v. Carvajal* (1988) 202 Cal.App.3d 487, 497; *U.S. v. Zapata* (1st Cir. 1994) 18 F.3d 971, 977 [“[T]he act of handing over one’s car keys, if uncoerced, may in itself support an inference of consent to search the vehicle.”].

¹⁸ *People v. Quinn* (1961) 194 Cal.App.2d 172, 175.

¹⁹ *People v. Frye* (1998) 18 Cal.4th 894, 990.

to talk to him about a disturbance. At that point, he opened the door fully, stepped back and said, “Does it look like there’s a disturbance going on?”²⁰

Implied consent to search a certain place or thing may also result if, after officers told the suspect what they were looking for, he told them it was located there. For example:

- A woman shot and killed a man inside her apartment. An officer asked her, “Where’s the gun?” She said it was in a dresser in her bedroom.²¹
- An officer asked an arrestee, “Where’s the vehicle registration?” He replied, “It should be in the glove compartment.”²²

VOLUNTARY CONSENT

In addition to showing that the suspect expressly or impliedly consented, officers must be able to prove that his consent was given voluntarily, meaning it was not motivated by threats, promises, pressure, or any other form of coercion.²³ In the words of the United States Supreme Court, “Where there is coercion there cannot be consent.”²⁴

Suspects occasionally argue that their consent must have been coerced because no self-respecting perpetrator would voluntarily consent to a search of the place where he’d put incriminating evidence.²⁵ But, as noted earlier, there are several good reasons—other than coercion—that might account for such a decision. Thus, in responding to this argument in *U.S. v. Carter*, the court pointed out that consent is not involuntarily merely because it might have been “rash and ill-considered.”²⁶

As we will now explain, the circumstances that are relevant in determining whether consent was voluntary generally fall into four categories: (1) direct evidence of coercion,

²⁰ *People v. Cove* (1964) 228 Cal.App.2d 466, 468, 470. ALSO SEE *People v. Superior Court (Arketa)* (1970) 10 Cal.App.3d 122, 127 [“Implied consent has frequently been found in the overt conduct of a defendant which permits entry into the subject premises such as where the defendant stands back from a doorway or otherwise beckons or nods to officers who wish to enter.”]; *People v. Panah* (2005) 35 Cal.4th 395, 467; *People v. Martino* (1985) 166 Cal.App.3d 777, 791 [“Martino’s nonverbal gesture of opening the door wider and stepping back for Detective Girt to enter constituted substantial evidence to support the trial court’s conclusion that Martino consented to the initial entry.”].

²¹ *People v. Superior Court (Henry)* (1974) 41 Cal.App.3d 636, 639 [“[W]e think it clear that Henry’s statement about the location of the gun amounted to an implied consent to look for it.”].

²² *People v. Smith* (1962) 210 Cal.App.2d 252, 254. ALSO SEE *Nerell v. Superior Court* (1971) 20 Cal.App.3d 593, 598-9 [“All right, you’ve got me. It’s in the case.”]

²³ See *Florida v. Royer* (1983) 460 U.S. 491, 497 [“[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given”]; *Florida v. Bostick* (1991) 501 U.S. 429, 438 [“‘Consent’ that is the product of official intimidation or harassment is not consent at all.”]; *Schneekloth v. Bustamonte* (1973) 412 U.S. 218, 228 [“[Consent must] not be coerced, by explicit or implicit means, by implied threat or covert force.”]; *Mann v. Superior Court* (1970) 3 Cal.3d 1, 8 [consent is involuntary if it was induced by “compulsion, intimidation, oppressive circumstances”]; *U.S. v. Cruz-Mendez* (10th Cir. 2006) 467 F.3d 1260, 1265 [“But consent is valid only if it is freely and voluntarily given.”]; *U.S. v. Carter* (6th Cir. 2004) 378 F.3d 584, 587 [“In whatever form, consent has effect only if it is given freely and voluntarily.”].

²⁴ *Bumper v. North Carolina* (1968) 391 U.S. 543, 550.

²⁵ See *People v. Ibarra* (1980) 114 Cal.App.3d 60, 65 [“Defendant claims evidence of coercion from the fact that he consented to the search when he knew that the car contained heroin. This point has never been dispositive of the issue of consent.”]; *People v. Munoz* (1972) 24 Cal.App.3d 900, 906 [court notes that it has been argued that “no sane person would voluntarily consent to a search knowing that contraband can be easily found”]. ALSO SEE *U.S. v. Gorman* (2nd Cir. 1965) 355 F.2d 151, 159 [“Acceptance of this contention would mean that expressions of consent could relieve officers of the need of obtaining a warrant only when the speak was not aware that the search would disclose damaging evidence”].

²⁶ (6th Cir. en banc 2004) 378 F.3d 584, 588-9.

(2) circumstantial evidence of coercion, (3) circumstantial evidence of voluntariness, and (4) circumstances bearing on the suspect's state of mind.²⁷

Direct evidence of coercion

Consent to search is involuntary if it resulted from a threat or command, intimidation, or an assertion that officers had a legal right to conduct an immediate search.

THREATS: Overt threats such as the following have been deemed direct evidence of coercion:

- Your welfare benefits will be terminated if you refuse.²⁸
- If you make us wait for a warrant to search your suitcase, we won't let you board your airline flight.²⁹
- If you don't consent, we're going to take your children from you.³⁰

In contrast to blatant and gratuitous threats such as these, officers will sometimes tell the suspect that they will take certain investigative action if he refuses to consent. This should not render his consent involuntary if, (1) the officers had a legal right to take such action, and (2) they explained the situation in an informative—not a threatening—manner.

For example, in *U.S. v. Faruolo*³¹ an FBI agent told the suspect that if he refused to consent to a search of his house, agents would secure the premises and apply for a warrant. In rejecting the argument that this comment was coercive, the court said it was “a fair and sensible appraisal of the realities facing the defendant Faruolo.”

On the other hand, a threat to search or arrest a suspect would likely render his consent involuntary if they lacked legal grounds to do so. For example, in *Hayes v. Florida*³² officers told a burglary suspect they would arrest him if he refused to accompany them to the police station for fingerprinting. On appeal, the United States Supreme Court ruled his consent was involuntary largely because “there was no probable cause to arrest.”

DEMANDS: A suspect's consent is involuntary if officers implied that he did not have a choice.³³ As the court observed in *U.S. v. Winsor*, “[C]ompliance with a police command is

²⁷ **NOTE: The Five-Factor Test:** In determining whether consent was voluntary, the courts occasionally apply the so-called “five-factor test” of *U.S. v. Carbajal* (9th Cir. 1992) 956 F.2d 924. It would be better to disregard this “test” because limiting the inquiry to five factors or any other fixed set of circumstances is contrary to the U.S. Supreme Court's instructions that all relevant circumstances be considered. See *Ohio v. Robinette* (1996) 519 U.S. 33, 40; *United States v. Drayton* (2002) 536 U.S. 194, 207; *U.S. v. Soriano* (9th Cir. 2004) 361 F.3d 494, 502 [“[T]hese factors are only guideposts, not a mechanized formula to resolve the voluntariness inquiry.”].

²⁸ See *Parrish v. Civil Service Commission* (1967) 66 Cal.2d 260, 270-5.

²⁹ See *U.S. v. Ocheltree* (9th Cir. 1980) 622 F.2d 992, 994.

³⁰ See *U.S. v. Soriano* (9th Cir. 2003) 361 F.3d 494 502 [“It was the threat to take away Mukai's children which provides the most serious basis for questioning the voluntariness of Mukai's consent to search.”].

³¹ (2nd Cir. 1974) 506 F.2d 490. ALSO SEE *Davis v. Novy* (7th Cir. 2006) 433 F.3d 926, 930. COMPARE *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1069 [officers repeatedly threatened to arrest the suspect].

³² (1985) 470 U.S. 811, 814.

³³ See *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666 [“[A]n unconstitutional search occurs when officers gain visual or physical access to a motel room after an occupant opens the door not voluntarily, but in response to a demand under color of authority.”]; *People v. Engel* (1980) 105 Cal.App.3d 489, 499 [“Anita only yielded the key to the front door after Deputy Spinner had directed her to do so—a submission to apparent authority, and a negation of consent.”]; *People v. Poole* (1986) 182 Cal.App.3d 1004, 1012 [“Police Department, open the door”; entry not consensual]; *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1070.

not consent.”³⁴ For example, in *People v. Fields*³⁵ an officer told the suspect, “I would like [you] to open the trunk.” He complied, but the marijuana discovered in the trunk was suppressed because, as the court pointed out, “There is a world of difference between requesting one to open a trunk and asking one’s permission to look in a trunk.”

CLAIMING A LEGAL RIGHT TO SEARCH: Consent will also be deemed involuntary if officers said or implied that, even though they were asking for permission, they had a legal right to search.³⁶ This would occur, for example if officers said they had a search warrant, or that one was en route.³⁷ Thus, the United States Supreme Court cautioned, “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.”³⁸

Officers will sometimes tell a suspect that, if he refuses to consent, they would “get” or “obtain” a warrant. The courts used to rule that such a statement rendered consent involuntary because it implied that a warrant would be issued automatically. In other words, it was tantamount to saying that a refusal to consent would merely delay the inevitable.

Now, however, the courts look to see whether probable cause for a warrant did, in fact, exist. If so, they tend to rule there was no coercion because the officer was merely making “a statement of what [he] had a legal right to do.”³⁹ As the Ninth Circuit explained out, “[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.”⁴⁰ Or, as the Seventh Circuit said 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.”⁴¹

Officers may, of course, safely tell suspects that they would “apply for,” “seek,” or “try to obtain” a warrant if they refused to consent.⁴² Statements such as these are not

³⁴ (9th Cir. en banc 1988) 846 F.2d 1569, 1573, fn.3.

³⁵ (1979) 95 Cal.App.3d 972.

³⁶ See *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.”]; *Florida v. Royer* (1983) 460 U.S. 491, 497 [consent is involuntary when it is “a mere submission to a claim of lawful authority”]; *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, or if any suggestion is made to the suspect that it would be unwise or fruitless to resist, the search cannot stand.”]; *People v. Linke* (1968) 265 Cal.App.2d 297, 304 [“[A]cquiescence to a claim of authority is not free and voluntary consent to a search”]; *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 726 [“Because the purported consent was given under legal compulsion, it is deemed in law to be involuntary”]; *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1651 [“[The consenting person] must not merely be submitting to a claim of lawful authority”]; *Parrish v. Civil Service Commission* (1967) 66 Cal.2d 260, 268 [“With increasing frequency the courts have denied the efficacy of any consent to a search obtained by covert threats of official sanction or by implied assertions of superior authority.”]; *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 500 [“[T]here can be no effective consent to a search or seizure if that consent follows a law enforcement officer’s assertion of an independent right to engage in such conduct.”].

³⁷ 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”].

³⁸ *Bumper v. North Carolina* (1968) 391 U.S. 543, 550.

³⁹ *People v. Ward* (1972) 27 Cal.App.3d 218, 225.

⁴⁰ *U.S. v. Kaplan* (9th Cir. 1990) 895 F.2d 618, 622.

⁴¹ (7th Cir. 1992) 957 F.2d 499, 502.

⁴² See *People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 450 [officer’s statement that “he would go down and apply for a search warrant” was not coercive because he “was merely telling the defendant what he had a

coercive because they do not imply that officers have a legal right to conduct an immediate search; nor do they suggest that a warrant would be issued automatically.

CONSENT DURING AN ILLEGAL DETENTION: Courts occasionally say that consent given during an illegal detention is “involuntary.”⁴³ This might be true if the detention was illegal on grounds that the officers acted in a threatening or overbearing manner. But if it resulted from the absence of reasonable suspicion, the suspect could not have known the detention was unlawful and, therefore, the illegality could not have constituted coercion.⁴⁴

This does not mean the resulting evidence is necessarily admissible. But at least the courts should apply the “fruit of the poisonous tree” rule by which it would be admitted if the taint from the violation had been sufficiently attenuated.⁴⁵

Circumstantial evidence of coercion

Even if officers made no explicit threats or demands, consent may be invalidated if it was given under circumstances that were coercive in nature. Before we look at those circumstances, it is important to note that the existence of one or more of them will not necessarily render the consent involuntary. This is because the courts must consider the totality of existing conditions.⁴⁶ Thus, the effect of a few mildly coercive circumstances might be offset by other circumstances that would have reasonably indicated to the suspect that he was free to decline the officers’ request for consent.

INTIMIDATION: Consent may be deemed involuntary if officers created an intimidating situation in which to seek it.⁴⁷ An example (though an extreme one) is found in *People v.*

legal right to do.”]; *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. Larson* (8th Cir. 1992) 978 F.3d 1021, 1023 [“When a person consents to a search after officers state they will attempt to obtain a warrant if the person does not consent, the consent is not necessarily coerced.”]; *U.S. v. Faruolo* (2nd Cir. 1974) 506 F.2d 490, 494 [officers told the suspect they would apply for a warrant, plus “there were grounds for the issuance of a search warrant”]; *U.S. v. Whitworth* (9th Cir. 1988) 856 F.2d 1268, 1279 [“McElwee’s statement indicating that a search warrant would likely be sought and the mobile home secured could not have, by itself, rendered Whitworth’s consent involuntary as a matter of law.”].

⁴³ See, for example, *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 251; *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 833; *People v. Bailey* (1985) 176 Cal.App.3d 402, 405.

⁴⁴ See *People v. Llamas* (1991) 235 Cal.App.3d 441, 447 [“The illegality of the detention is immaterial in this context, since [the suspect] was unaware that the officer had no valid ground for stopping the car”]; *People v. Linke* (1968) 265 Cal.App.2d 297, 307. ALSO SEE *Colorado v. Connelly* (1986) 479 U.S. 157 163 [consent is involuntary only if there was police coercion].

⁴⁵ See *Hudson v. Michigan* (2006) 547 U.S. ___ [“[E]xclusion may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression.”].

⁴⁶ 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. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches.”].

⁴⁷ See *People v. Poole* (1986) 182 Cal.App.3d 1004, 1012 [“Six or seven officers strode into Poole’s apartment in order to ‘talk’ to him, without so much as a by-your-leave.”]; *People v. Dickson* (1983) 144 Cal.App.3d 1046, 1051-2 [“A ‘request’ from a half dozen uniformed police officers moving up one’s stairs with pistols drawn hardly invites the expression of free will. Yielding to that ‘request’ cannot qualify as consent”]; *Estes v. Rowland* (1993) 14 Cal.App.4th 508, 527 [consent to search a prison visitor was intimidating when it was

*Reyes*⁴⁸ where an officer induced Reyes to leave his house by claiming that Reyes' parked car had been damaged in a traffic accident. As Reyes stepped outside, he encountered five officers, three of whom were "attired in full ninja-style raid gear, including black masks and bulletproof vests emblazoned with POLICE markings." The officers asked Reyes if he would consent to a search of his house, and he said sure. But the court ruled his consent was involuntary because of the intimidating manner in which the officers had confronted him.

Similarly, in *People v. McKelvy*⁴⁹ the court ruled that the defendant's consent was involuntary because he was "standing in a police spotlight, surrounded by four officers all armed with shotguns or carbines." Under those circumstances said the court, "no matter how politely the officer may have phrased his request for the object, it is apparent that defendant's compliance was in fact under compulsion."

DRAWN WEAPONS: Consent given to an officer whose gun is drawn is considered dubious and will usually be deemed involuntary.⁵⁰ On the other hand, the courts have ruled that consent was not involuntary when, (1) the officer was justified in drawing his gun, (2) he reholstered it before he requested consent, and (3) the circumstances were not otherwise coercive.⁵¹

HANDCUFFS: The fact that the suspect was handcuffed when consent was given is relevant, but unimportant.⁵²

obtained "in a coercive atmosphere, with guards wearing 'combat gear' and restraining chained dogs.>"; *People v. Challoner* (1982) 136 Cal.App.3d 779, 782 [circumstances indicating involuntariness included the "number of officers present, the arrest of [the suspect's] common law husband and the others at gunpoint just moments prior to the request for permission to search the house; the failure of [the officer] to knock before requesting permission to search"]; *U.S. v. Gillespie* (7th Cir. 1981) 650 F.2d 127, 128-9 ["heavily armed" agents approached defendant's house in "ready" position"].

⁴⁸ (2000) 83 Cal.App.4th 7.

⁴⁹ (1972) 23 Cal.App.3d 1027.

⁵⁰ See *People v. Challoner* (1982) 136 Cal.App.3d 779, 782 ["Consent to search given in response to a request by an armed officer who gun is drawn is suspect."]; *People v. Fields* (1979) 95 Cal.App.3d 972, 976 [an assertion of authority is especially likely when "the police have shown their weapons"].

⁵¹ See *People v. Parker* (1975) 45 Cal.App.3d 24, 31 ["[W]hile the officers had entered the room with guns drawn, they had holstered their arms before interrogating [the suspect]. Their request for permission to search was phrased in terms indicating [the suspect] could deny them permission and not in terminology indicating that absent that consent they would search anyway."]; *People v. Challoner* (1982) 136 Cal.App.3d 779, 782 ["Evidence of the drawn gun is not itself sufficient to establish that her consent was the product of coercion, but there was insufficient evidence to establish that Ms. Eiseman's consent was voluntary."]; *People v. Ratliff* (1986) 41 Cal.3d 675, 686 ["Assuming that the officers initially drew their weapons, the evidence did not indicate that any of them kept their guns drawn when, in the living room, the actual request for consent to search was made."]; *People v. Williams* (1980) 114 Cal.App.3d 67, 71 [officer "replaced his revolver in his holster when he handcuffed defendant."]; *People v. Aguilar* (1996) 48 Cal.App.4th 632, 640 [it appears the officers' guns were drawn but consent was deemed voluntary]; *People v. Martino* (1985) 166 Cal.App.3d 777, 791 [consent is not involuntary merely because an officer had drawn his gun but had concealed it behind his leg]; *U.S. v. Faruolo* (2nd Cir. 1974) 506 F.2d 490, 495, fn.9 [drawn gun "had no lasting effect."]; *U.S. v. Kimoana* (10th Cir. 2004) 383 F.3d 1215, 1225 [the atmosphere in the room was "calm" after the officers reholstered their weapons].

⁵² See *People v. Monterroso* (2004) 34 Cal.4th 743, 758 ["[T]he fact that a defendant is under arrest and in handcuffs at the time of giving consent is but one of the factors"]; *People v. James* (1977) 19 Cal.3d 99, 110; *People v. Ratliff* (1986) 41 Cal.3d 675, 686 ["[T]he fact that defendant was handcuffed when his consent was sought does not demonstrate that his consent to a search was involuntary."]; *People v. Williams* (1980) 114 Cal.App.3d 67, 71 ["[T]he fact that a defendant is under arrest and in handcuffs at

SUSPECT UNDER ARREST: Consent is not involuntary merely because the suspect was under arrest.⁵³ As the United States Supreme Court explained, “[C]ustody alone has never been enough to demonstrate a coerced confession or consent to search.”⁵⁴

NUMBER OF OFFICERS: The presence of several officers at the scene is somewhat coercive. But unless they had surrounded the suspect or were otherwise in close proximity, this circumstance is not considered a strong indication of coercion.⁵⁵

PERSISTENCE: If the suspect initially refused to consent, additional requests will not necessarily be deemed coercive unless a court finds that they amounted to badgering.⁵⁶

LATE NIGHT SEARCHES: A request to search a residence is considered more coercive if it was made late at night, especially if it appeared the occupants had been asleep when the officers arrived.⁵⁷

A REFUSAL PROVES YOU’RE GUILTY: Consent may be deemed involuntary if officers said or implied that a refusal to consent was tantamount to an admission of guilt.⁵⁸ For

the time a consent is given does not make a consent to search involuntary as a matter of law. It is but one factor to be considered”]; *People v. Martino* (1985) 166 Cal.App.3d 777, 791; *People v. Aguilar* (1996) 48 Cal.App.4th 632, **SUSPECT IN CUSTODY:** Consent is not involuntary merely because the suspect was under arrest.⁵² As the United States Supreme Court explained, “[C]ustody alone has never been enough to demonstrate a coerced confession or consent to search.”⁵²

640; *People v. McClure* (1974) 39 Cal.App.3d 64, 70; *People v. Ward* (1972) 27 Cal.App.3d 218, 224.

⁵³ See *People v. James* (1977) 19 Cal.3d 99, 109 [“custody” is of “particular significance” but “not conclusive”]; *People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1559 [“[C]ustody in itself has never been held sufficient to demonstrate appellant’s consent was not voluntary.”]; *U.S. v. Salvo* (6th Cir. 1998) 133 F.3d 943, 953 [“But, even if Salvo was in custody, that by itself would not be enough to vitiate an otherwise valid consent to search.”].

⁵⁴ *United States v. Watson* (1976) 423 U.S. 411, 424.

⁵⁵ See *People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 451 [“The record shows that Officer Stanley was the only officer who spoke to defendant about a search.”]; *People v. Munoz* (1972) 24 Cal.App.3d 900, 905 [“The fact there were four officers does not in itself carry an implied assertion of authority that the occupants should not be expected to resist.”]; *People v. Weaver* (2001) 26 Cal.4th 876, 924 [consent was voluntary despite “[s]ix or seven officers presented themselves at [defendant’s] home”]; *People v. Ibarra* (1980) 114 Cal.App.3d 60, 65 [“[P]olice domination does not necessarily vitiate consent.”]; *U.S. v. Cruz-Mendez* (10th Cir. 2006) 467 F.3d 1260, 1265 [“The presence of several officers is not dispositive.”].

⁵⁶ See *Bailey v. Newland* (9th Cir. 2001) 263 F.3d 1022, 1030 [the officer knocked “for one and a half to two minutes, while identifying himself as a police officer.”]; *U.S. v. Jerez* (7th Cir. 1997) 108 F.3d 684, 692 [“The deputies’ persistence, in the face of the refusal to admit, transformed what began as an attempt to engage in a consensual encounter into an investigatory stop.”]; *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2 [“[The officers] knocked on the door longer and more vigorously than would an ordinary member of the public.”]. COMPARE *Tidwell v. Superior Court* (1971) 17 Cal.App.3d 780, 786 [“The initial refusal did not vitiate the subsequent consent. After the refusal the officers gave reason for their desire to come inside—the heat.”]; *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. Guerrero* (10th Cir. 2007) 472 F.3d 784, 790 [an officer is not required “to refrain from renewing his request for consent after a defendant has at first denied it.”]; *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1109 [“[The officer] was not unreasonably persistent in her attempt to obtain access to Cormier’s motel room”].

⁵⁷ See *U.S. v. Jerez* (7th Cir. 1997) 108 F.3d 684, 690 [court notes the “special vulnerability” of people “awakened in the night by a police intrusion at their dwelling place”]; *U.S. v. Ravich* (2nd Cir. 1970) 421 F.2d 1196, 1201 [court notes the “peculiar abrasiveness” of intrusions by officers at night]. COMPARE *Bailey v. Newland* (9th Cir. 2001) 263 F.3d 1022, 1026 [although the knock and talk occurred at 2:15 A.M., “the lights were on in the room”]; *U.S. v. Ray* (D. Kansas 2002) 199 F.Supp.2d 1104, 1113 [“Admittedly, [the knock and talk] occurred during the early morning hours, but the officers determined that several persons were inside and awake before knocking.”].

example, in *Crofoot v. Superior Court*⁵⁹ an officer told the suspect, “[Y]ou shouldn’t have any objections to my looking in the backpack if [you] weren’t doing anything.” In ruling the resulting consent was involuntary, the court said, “We believe implicit in the officer’s statement is the threat that by exercising his right to refuse the search, [defendant] would be incriminating himself or admitting participation in illegal activity (that is, that he had been ‘doing something’).”

In contrast, the courts have ruled that consent was not involuntary merely because the officers said they wanted to search to confirm the suspect’s story that he was not carrying drugs, weapons, or other evidence of a crime. Even though the suspect might think that a refusal would be viewed as proof that he was lying, the courts seem to permit it if the officers did not conduct themselves in an intimidating manner. As the Second Circuit put it, “[W]e see no reason why a court should disregard a suspect’s expression of consent simply because his own attempt to avoid apprehension had produced a situation where he could hardly avoid giving it.”⁶⁰ Or, in the words of the First Circuit, consent is not involuntary merely because the suspect faced a dilemma: if he consents, the evidence might be found; while a refusal “would harden the suspicion [of guilt] that he was trying to dispel.”⁶¹

For example, in *U.S. v. Ledesma*⁶² an officer asked the defendant if she had “anything, uh, weapons or any type of illegal stuff in the [car].” When she said no, he asked, “Could we look, could we take a minute to look back there? Just your bag and stuff?” In rejecting Ledesma’s argument that her consent was involuntary, the court said, “The request was phrased as a question and spoken in an ordinary tone of voice. Nothing about this line of questioning . . . suggests coercion or intimidation.”

Similarly, in *U.S. v. Erwin*⁶³ an officer asked Erwin if he “had anything in his car that he should not have such as weapons or drugs.” When Erwin said no, the officer said, “Well, then, you don’t mind if I look around in the car then, do you, or would you?” Erwin consented, and the officer found a kilogram of cocaine. On appeal, Erwin objected to the form of the officer’s question—“then, you don’t mind”—on grounds that it “was really a statement.” The court responded, “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.”

SUSPECT THINKS HE MUST CONSENT: Consent may be deemed involuntary if it was apparent that the suspect was under the impression that officers have a legal right to search anyone they want; e.g., “You’ve got the badge, I guess you can.”⁶⁴

SUSPECT NOT JOYFUL: Consent is not involuntary merely because the suspect was not happy or enthusiastic about giving it.⁶⁵ As the court observed in *Robbins v. MacKenzie*,

⁵⁸ **NOTE:** A refusal to consent does not convert reasonable suspicion into probable cause. See *Tompkins v. Superior Court* (1963) 59 Cal.2d 65, 68.

⁵⁹ (1981) 121 Cal.App.3d 717.

⁶⁰ *U.S. v. Gorman* (2nd Cir. 1965) 355 F.2d 151.

⁶¹ *Gorman v. U.S.* (1st Cir. 1967) 380 F.2d 158, 165.

⁶² (10th Cir. 2006) 447 F.3d 1307. ALSO SEE *U.S. v. Randall* (6th Cir. 2003) 62 Fed. Appx. 96, 102, fn.3 [“We have previously concluded that a request for consent that is not phrased in a neutral manner [officer asked the defendant “if he wouldn’t mind taking it out for me”] is sufficient to obtain consent.” Citing *Erwin*]; *U.S. v. Pena* (10th Cir. 1998) 143 F.3d 1363.

⁶³ (6th Cir. 1998) 155 F.3d 818.

⁶⁴ *U.S. v. Worley* (6th Cir. 1999) 193 F.3d 380, 386.

“Bowing to events, even if one is not happy about them, is not the same thing as being coerced.”⁶⁶

“DO YOU HAVE A WARRANT?” A suspect does not demonstrate he was under pressure by asking the officers, “Do you have a warrant?”⁶⁷ It is, however, a circumstance that may indicate an initial unwillingness to consent.⁶⁸

REFUSAL TO SIGN A CONSENT FORM: A suspect’s refusal to sign a consent form is a factor, but not a significant one if it otherwise appeared his consent was voluntary.⁶⁹

Circumstantial evidence of voluntariness

In addition to considering evidence of coercion, the courts will take into account any circumstances that tend to demonstrate the absence of it. The following are especially pertinent.

A REQUEST FOR PERMISSION: The fact that officers made it plain they were seeking the suspect’s consent to search is, in itself, an indication he must have known that he could refuse.⁷⁰ As the court observed in *People v. Chaddock*, “The mere asking of permission to enter and make a search carries with it the implication that the person can withhold permission for such an entry or search.”⁷¹

OFFICERS’ MANNER: A courteous attitude toward the suspect is important, as it may communicate to him that the officers were seeking his assistance, not demanding it.⁷² “It is not the nature of the question or request made by the authorities,” said the Court of Appeal, “but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not.”⁷³

⁶⁵ See *U.S. v. Faruolo* (2nd Cir. 1974) 506 F.2d 490, 495 [“No person, even the most innocent, will welcome with glee and enthusiasm the search of his home by law enforcement agents.”]; *U.S. v. Gorman* (1st Cir. 1967) 380 F.2d 158, 165 [“[T]he pressure exerted on a criminal by the realization that the jig is up is far different from the deliberate or ignorant violation of personal right that renders apparent consent ineffective.”].

⁶⁶ (1st Cir. 1966) 364 F.2d 45, 50.

⁶⁷ See *People v. Munoz* (1972) 24 Cal.App.3d 900, 906 [“[A]sked by Munoz if he had a search warrant he answered he had not. This, in light of Munoz’ subsequent consent to search did not, as a matter of law, require the trial court to draw an inference that the consent was involuntary.”].

⁶⁸ See *People v. Crofoot* (1981) 121 Cal.App.3d 717, 725; *Lane v. Superior Court* (1969) 271 Cal.App.2d 821, 825; *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 500.

⁶⁹ See *North Carolina v. Butler* (1979) 441 U.S. 369, 373; *People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558; *U.S. v. Castillo* (9th Cir. 1989) 866 F.2d 1071, 1082 [*Butler* analysis applies to consent searches].

⁷⁰ See *United States v. Drayton* (2002) 536 U.S. 194, 206 [officer asked the suspect’s “if they objected” to the search, “thus indicating to a reasonable person that he or she was free to refuse.”]; *People v. James* (1977) 19 Cal.3d 99, 116 “[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.”]; *People v. Fields* (1979) 95 Cal.App.3d 972, 976 [“[A]sking permission [is] an indicia of voluntariness”].

⁷¹ (1967) 249 Cal.App.2d 297, 306-7.

⁷² See *People v. Epperson* (1986) 187 Cal.App.3d 115, 120 [“There was nothing in the officer’s attitude . . . that would indicate to a reasonable person that compliance with the officer’s request might be compelled”]; *People v. Linke* (1968) 265 Cal.App.2d 297, 302 [“the officers were polite and courteous”]; *U.S. v. Duran* (7th Cir. 1992) 957 F.2d 499, 503 [officer was “gentlemanly”]; *U.S. v. Ledesma* (10th Cir. 2006) 447 F.3d 1307, 1314 [relevant circumstances include “an officer’s pleasant manner and tone of voice that is not insisting”].

COMPARE *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.”]; *Orhorhaghe v. INS* (9th Cir. 1994) 38 F.3d 488, 495 [“[The officer] acted in an officious and authoritative manner that indicated that Orhorhaghe was not free to decline his requests.”]; *U.S. v. Tobin* (11th Cir. 1991) 923 F.2d 1506, 1512 [“[C]ases in which police have used their position to demand entry have held that consent was not voluntary”].

⁷³ *People v. Franklin* (1987) 192 Cal.App.3d 935, 941.

SUSPECT SIGNED CONSENT FORM: It is relevant that the suspect acknowledged in writing that his consent was voluntary.⁷⁴ But an acknowledgment will have little or no weight if it appeared the acknowledgement, itself, was coerced; or if there were other circumstances that cast doubt on the voluntariness of consent.⁷⁵

SUSPECT WAS COOPERATIVE: That the suspect was generally cooperating with the officers suggests that his consent was voluntary.⁷⁶ For example, a suspect who consents while assuming the role of a concerned witness who is eager to assist in the investigation would probably have a hard time convincing a judge that his consent was involuntary.⁷⁷

SUSPECT WANTED TO TALK: The suspect's willingness or eagerness to talk with officers, and whether he took an active role in an interview, are circumstances that indicate he felt confident and able to deal with some pressure.⁷⁸

SUSPECT OFFERED TO CONSENT: A strong indication of voluntariness is that the suspect, himself, suggested that officers search his property.⁷⁹

"YOU CAN REFUSE": Officers are not *required* to notify the suspect that he has a right to refuse to consent.⁸⁰ But such a warning is a factor that tends to indicate consent was

⁷⁴ See *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 ["[E]xecution of a consent form is one factor that indicates that consent was voluntary."]; *U.S. v. Duran* (7th Cir. 1992) 957 F.2d 499, 502 ["The form Karen signed informed her that she had a right to withhold consent."]. ALSO SEE *People v. Jackson* (1980) 28 Cal.3d 264, 299 ["It is also noteworthy that defendant himself expressly acknowledged at the conclusion of his statement that no tangible or official benefits were promised him."].

⁷⁵ 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."]; *People v. Andersen* (1980) 101 Cal.App.3d 563, 579 ["[A]n assertion that no promises are being made may be contradicted by subsequent conversation."].

⁷⁶ See *People v. Rugar* (1966) 244 Cal.App.2d 292, 298; *U.S. v. Morning* (9th Cir. 1995) 64 F.3d 531, 533 ["[T]he evidence showed that he had actually decided to cooperate even before any request was made."]; *U.S. v. Sandoval-Vasquez* (7th Cir. 2006) 435 F.3d 739, 744-5 [court noted the defendant's "additional cooperation with law enforcement beyond merely signing the consent form"]. ALSO SEE *People v. Thompson* (1990) 50 Cal.3d 134, 169-70 [suspect's willingness to continue the interview after officers offered to end it indicates he did not feel coerced].

⁷⁷ See *People v. Guerra* (2006) 37 Cal.4th 1067, 1094.

⁷⁸ See *People v. Thompson* (1990) 50 Cal.3d 134, 169-70 [suspect's willingness to continue the interview after officers offered to end it indicates he did not feel coerced]; *People v. Holloway* (2004) 33 Cal.4th 96, 114 ["When detained at his house, defendant was in the process of seeking out the detectives. Aware his alibi had collapsed, he wanted to tell the detectives why he had asked Cruz to lie about his whereabouts."]; *People v. Neal* (2003) 31 Cal.4th 63, 85; *People v. Bradford* (1997) 14 Cal.4th 1005, 1041 ["The tapes clearly indicate an eagerness to talk all right, and just tell everything that probably could be told, so from that standpoint of voluntariness, there isn't any question about that."]; *People v. Mickey* (1991) 54 Cal.3d 612, 650 ["[I]t was generally defendant who was active and [the officers] who were passive: he opened the discussion and directed its course; they essentially responded."]; *People v. Andersen* (1980) 101 Cal.App.3d 563, 581 ["the suspect sought out the police to talk to them, rather than vice versa, as is usually the case"]; *In re Brian W.* (1981) 125 Cal.App.3d 590, 601 [suspect gave "three prior statements that he wanted to talk to the officers"]; *People v. Maury* (2003) 30 Cal.4th 342, 412.

⁷⁹ See *People v. Ramos* (1972) 25 Cal.App.3d 529, 536 ["[D]efendant suggested that the police officers search his home for weapons before any actual request was made by the officers to do so."]; *People v. Wheeler* (1971) 23 Cal.App.3d 290, 304; *U.S. v. Sealey* (9th Cir. 1987) 830 F.2d 1028, 1032 ["[Defendant] requested that [the officer] find the gun, wherever it might be."].

⁸⁰ 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."]; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227 ["While

voluntary.⁸¹ As the Supreme Court explained in *United States v. Mendenhall*, “[T]he 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.”⁸²

For this reason, the California Supreme Court has recommended that officers give such a warning in situations where there may be some indication of coercion. Said the court, “[T]he police would be well advised in close cases to ‘make a record’ by expressly giving the admonition.”⁸³

INITIAL OR LIMITED REFUSAL: The fact that the suspect initially refused the officers’ request, or permitted them to search only *some* things, has a tendency to prove his consent was voluntary because it indicates he knew he could not be compelled to consent.⁸⁴

PRIOR REFUSAL: A suspect’s refusal to consent to a search in another case also tends to show he knew he could decline the officer’s request, and was therefore not apt to feel pressured.⁸⁵

EXPERIENCE WITH POLICE, COURTS: Suspects who have had some experience with officers and the criminal justice system may be viewed as being less susceptible to coercive influences than novices.⁸⁶

MIRANDA WAIVER: Giving the suspect a *Miranda* warning before seeking consent has some slight tendency to indicate the consent was voluntary.⁸⁷ But it is not required even if the suspect is in custody.⁸⁸

knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as a sine qua non of an effective consent.”]; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40; *People v. Monterroso* (2004) 34 Cal.4th 743, 758.

⁸¹ See *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.”]; *U.S. v. Duran* (7th Cir. 1992) 957 F.2d 499, 503 [such notice was “particularly” important].

⁸² (1980) 446 U.S. 544, 559. ALSO 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”].

⁸³ *People v. James* (1977) 19 Cal.3d 99, 118.

⁸⁴ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 229 [“There might be rare cases where it could be proved from the record that a person in fact affirmatively knew of his right to refuse”]; *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. Zubia-Melendez* (10th Cir. 2001) 263 F.3d 1155, 1163 [“The fact that Appellant initial told [the officer] he could not search the car does not, however, render his subsequent consent involuntary.”].

⁸⁵ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 230 [voluntariness might be proven “whereby prior experience and training a person had clearly and convincingly demonstrated such knowledge”]; *Tidwell v. Superior Court* (1971) 17 Cal.App.3d 780, 786; *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.”]; *People v. Tremayne* (1971) 20 Cal.App.3d 1006, 1019; *U.S. v. Sandoval-Vasquez* (7th Cir. 2006) 435 F.3d 739, 744 [“[Defendant] initially declined to consent to a search, indicating he knew of his right to refuse.”].

⁸⁶ See *Fare v. Michael C.* (1979) 442 U.S. 707, 726 [“He was a 16½-year-old juvenile with considerable experience with the police. He had a record of several arrests”]; *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’”]; *People v. Coffman* (2004) 34 Cal.4th 1, 58-9 [“[G]iven 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.”]; *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.”].

Also note that, because a request for consent does not call for a response that is “testimonial” in nature, officers may seek consent from a suspect in custody who had previously invoked his *Miranda* rights.⁸⁹

Suspect’s state of mind

If there were some coercive circumstances, the suspect’s mental state may become relevant if it made him more or less susceptible to coercion.⁹⁰ A vulnerable state of mind is especially likely to result in a finding of involuntariness if a court determines that officers deliberately exploited it to obtain his consent.⁹¹ Thus, the following circumstances may be relevant:

ILLNESS, INJURIES: Suspects who are seriously ill or severely injured may be more vulnerable.⁹²

INTELLIGENCE, MENTAL DISORDER: A suspect’s mental incapacity or disorder might be relevant to the extent it caused him to view the surrounding circumstances as coercive.⁹³

⁸⁷ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 248; *People v. McClure* (1974) 39 Cal.App.3d 64, 70 [“[A *Miranda* warning] was an additional factor tending to show the voluntariness of appellant’s consent.”].

⁸⁸ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 246 [“The considerations that informed the Court’s holding in *Miranda* are simply inapplicable in the present case.”]; *People v. James* (1977) 19 Cal.3d 99, 115 [“[W]e reject as unpersuasive defendant’s proposed distinction in this connection between custodial and noncustodial requests. Inasmuch as the request to search is not intended to produce testimonial evidence, the setting in which it is made is irrelevant to this issue.”]; *People v. Brewer* (2000) 81 Cal.App.4th 442, 458 [“[C]onsent to search is not an incriminating statement that invokes the protections of *Miranda*”]; *People v. Epperson* (1986) 187 Cal.App.3d 115, 120 [“[G]iving *Miranda* warnings is not a prerequisite to demonstrating voluntary consent to search.”]; *People v. Williams* (1980) 114 Cal.App.3d 67, 70 [“*Miranda* warnings are not necessarily required of a defendant in custody before a consent may be deemed voluntarily given.”].

⁸⁹ See *People v. Ruster* (1976) 16 Cal.3d 690, 700 [“Seeking his consent to search after defendant invoked his privilege against self-incrimination did not violate the privilege. A consent to search, as such, is neither testimonial, nor communicative in the Fifth Amendment sense.”]; *People v. Shegog* (1986) 184 Cal.App.3d 899, 905 [“[S]eeking a defendant’s consent to search after he had invoked his privilege against self-incrimination does not violate the privilege.”].

⁹⁰ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 229 [“[A]ccount must be taken of . . . the possibly vulnerable subjective state of the person who consents.”]; *People v. Smith* (2007) 40 Cal.4th 483, 502 [“[M]ental condition is relevant to an individual’s susceptibility to police coercion”]; *In re Aven S.* (1991) 1 Cal.App.4th 69, 75 [“Threats, promises, confinement, lack of food or sleep, are all likely to have a more coercive effect on a child than on an adult.”]. ALSO SEE *People v. Duren* (1973) 9 Cal.3d 218, 241 [consent is not involuntary merely because the suspect was “at a disadvantage psychologically”].

⁹¹ See *Reck v. Pate* (1961) 367 U.S. 433 [officers exploited the mental condition of the defendant who was described as “mentally retarded”]; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1485 [“Esqueda was emotionally distraught and exhausted, yet [the interrogating officers] unremittingly pressured their prey until he finally yielded.”].

⁹² See *Mincey v. Arizona* (1978) 437 U.S. 385, 398 [“[Mincey] complained to [the officer] that the pain in his leg was ‘unbearable.’”]; *People v. Adams* (1983) 143 Cal.App.3d 970, 985 [suspect was “feeling very weak and her chest was very tight”]. COMPARE *People v. Perdomo* (2007) 147 Cal.App.4th 605, 615 [statement not involuntary merely because defendant, who had been severely injured in a fatal car accident four days earlier, was in “obvious pain” and was possibly under the influence of morphine]; *In re Walker* (1974) 10 Cal.3d 764, 777 [“such pain does not appear from the officers’ testimony to have reflected on his competency”].

⁹³ See *Mincey v. Arizona* (1978) 437 U.S. 385, 398-9 [suspect was “depressed almost to the point of coma”]; *Blackburn v. Alabama* (1960) 361 U.S. 199, 207 [suspect was “insane”]; *Arizona v. Fulminante* (1991) 499 U.S. 279, 286, fn.2 [fourth grade dropout with “low average to average intelligence”]; COMPARE *Colorado v. Connelly* (1986) 479 U.S. 157 160-2 [suspect suffered from “chronic schizophrenia and was in a psychotic state . . . but, on the day he confessed, his answers were intelligible and there was no police coercion”]; *People v. Smith* (2007) 40 Cal.4th 483, 502 [“The record does not convince us that the interrogating officers were

DRUGS AND ALCOHOL: While a suspect's consumption of drugs, alcohol, or both will affect his mental alertness, it is not a significant circumstance unless he was severely impaired.⁹⁴

EDUCATION: The suspect's lack of education is insignificant but sometimes noted.⁹⁵

NOT FLUENT IN ENGLISH: In the absence of an interpreter, it is significant that the suspect did not understand the nature of the officers' request.⁹⁶

MENTAL FATIGUE: Just as a suspect's intelligence or mental disorder might make the surrounding circumstances appear more coercive, so might more temporary mental and physical conditions such as depression, exhaustion, and extreme nervousness.⁹⁷

SUSPECT WAS COMPOSED: That the suspect was calm and composed tends to disprove his allegation that he was psychologically vulnerable.⁹⁸

aware of, or exploited, defendant's claimed psychological vulnerabilities"]; *People v. Kelly* (1990) 51 Cal.3d 931, 951-4 ["[D]efendant's low intelligence and psychiatric symptoms, standing alone, do not render his waiver of *Miranda* rights involuntary."].

⁹⁴ See *People v. Garcia* (1964) 227 Cal.App.2d 345, 350-1 ["[T]he fact that the defendant was under the influence of a narcotic did not necessarily preclude the giving of a voluntary consent."]. ALSO SEE *People v. Cox* (1990) 221 Cal.App.3d 980 [suspect was apparently under the influence of meth but the questioning was "short and simple."]; *People v. Weaver* (2001) 26 Cal.4th 876, 921 ["[T]he mere fact defendant was taking medication prescribed by the prison medical staff is insufficient to establish a claim of involuntariness."]; *People v. Brewer* (2000) 81 Cal.App.4th 442, 456 [suspect was under the influence of marijuana; no coercion].

⁹⁵ See *People v. Williams* (1984) 157 Cal.App.3d 145, 152 ["Although undereducated and virtually illiterate . . . Williams was neither insane nor incompetent when questioned."]; *Yarborough v. Alvarado* (2004) 541 U.S. 652, 668 [relevant circumstances include the suspect's education] *Davis v. North Carolina* (1966) 384 U.S. 737, 742 ["a third of fourth grade education."]; *Reck v. Pate* (1961) 367 U.S. 433, 435 ["He dropped out of school at the age of 16, never having completed the 7th grade"]; *Spano v. New York* (1959) 360 U.S. 315, 322 ["He had progressed only one-half year into high school"].

⁹⁶ See *U.S. v. Zubia-Melendez* (10th Cir. 2001) 263 F.3d 1155, 1163 ["Appellant and [the officer] could converse sufficiently to understand one another"]; *U.S. v. Zapata* (11th Cir. 1999) 180 F.3d 1237, 1242 ["There is no evidence that [defendant] was confused by, or did not understand, any of [the officer's] questions."]; *U.S. v. Garcia* (7th Cir. 1990) 897 F.2d 1413, 1419 ["his ability to speak and understand English was clearly proven as he conversed with different troopers for considerable periods of times and translated the trooper's questions to Jose"]; *U.S. v. Gutierrez-Mederos* (9th Cir. 1992) 965 F.2d 800, 803 ["[The officer] testified that he never had to repeat any questions"].

⁹⁷ See *Spano v. New York* (1959) 360 U.S. 315, 322 ["[S]lowly mounting fatigue does, and is calculated to, play its part."]; *Schneekloth v. Bustamonte* (1973) 412 U.S. 218, 226 [courts consider "the repeated and prolonged nature of the questioning"]; *People v. Montano* (1991) 226 Cal.App.3d 914, 936 ["his pleas of fatigue and lack of sleep [were] ignored"]. COMPARE *People v. Spears* (1991) 228 Cal.App.3d 1, 27-8 [suspect was "emotionally distraught" but no evidence of coercion]; *Frazier v. Cupp* (1969) 394 U.S. 731, 739 ["The questioning was of short duration, and petitioner was a mature individual of normal intelligence."]; *People v. Storm* (2002) 28 Cal.4th 1007, 1038 ["But defendant's lack of rest was not the result of state compulsion."]; *People v. Perdomo* (2007) __ Cal.App.4th __ [2007 WL 404000] ["The interview in the presence case was relatively short. It lasted a maximum of 20 minutes"]; *People v. Andersen*, (1980) 101 Cal.App.3d 563, 577-8 ["[T]here is no evidence that defendant was overcome by exhaustion or worn down by physical pressures or physical deprivations which would exert a coercive effect on her will to resist."]; *People v. Simpson* (1991) 2 Cal.App.4th 228, 233 [suspect was "freshly rested"]; *People v. Anderson* (1990) 52 Cal.3d 453, 470 ["Although he testified that he had been awake for 30 hours prior to confessing, other facts support a finding of voluntariness, including his age at the time of the offense (27), his high IQ (136), and his reflective actions during the course of the offenses charged"].

⁹⁸ See *In re Jessie L.* (1982) 131 Cal.App.3d 202, 216 [suspect "appeared very calm and showed no emotion regarding the murder"]; *People v. Higareda* (1994) 24 Cal.App.4th 1399, 1409 ["Throughout the interview appellant 'appeared calm,' not frightened or scared."]; *People v. Johns* (1983) 145 Cal.App.3d 281, 293 ["Defendant did not become confused, break down or lose his general composure under the detectives' close questioning."]; *In re Aven S.* (1991) 1 Cal.App.4th 69, 77 [the minor "remained calm and in control of himself throughout the interview process."]. COMPARE *People v. Hogan* (1982) 31 Cal.3d 815, 839 ["Appellant was

LYING, CRAFTY SUSPECT: A suspect who lied to officers before or after giving consent, or who was crafty in the way he handled their questions, is not apt to be deemed vulnerable.⁹⁹ As the California Court of Appeal pointed out, “[Lying] is not the behavior of one whose free will has been overborne.”¹⁰⁰

MATURITY: Seldom pivotal but sometimes noted, especially when the suspect was a minor.¹⁰¹

AGE: May be a factor, especially if the suspect was very young.¹⁰²

After obtaining voluntary consent from the suspect or other person, officers must make sure they know exactly what places and things they are authorized to search, and how thorough their search may be. In other words, they must know the permissible *scope* and *intensity* of the search. This is important because consent searches are always limited in some way; and unless officers know the limits, they risk the suppression of evidence. As the court noted in *People v. Harwood*, “[D]espite initial authorization, police officers may exceed the boundaries of the power conferred upon them and create illegality for their actions.”¹⁰³

We will start with scope, followed by intensity, withdrawal of consent, and consensual entry by trick.

SCOPE OF CONSENT

A search is within the permissible “scope” of consent if officers examined only those places and things that the suspect expressly or impliedly authorized them to search.¹⁰⁴ As the court explained it in *U.S. v. Strickland*, “A consensual search is confined to the terms

sobbing uncontrollably throughout his statement and vomited.”]; *People v. Hinds* (1984) 154 Cal.App.3d 222, 238 [suspect was “distraught and remorseful; on several occasions during the interrogation he broke down and sobbed . . . [he testified] he was ‘deathly scared’ while making statements to the officers.”].

⁹⁹ See *People v. Perdomo* (2007) __ Cal.App.4th __ [2007 WL 404000] [“[I]t appears appellant was even alert enough to attempt to deceive the officers.”]; *People v. Coffman* (2004) 34 Cal.4th 1, 59 [“His resistance, far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information.”].

¹⁰⁰ *People v. Johns* (1983) 145 Cal.App.3d 281, 293.

¹⁰¹ See *People v. Hinds* (1984) 154 Cal.App.3d 222, 238 [“The record shows appellant was 19 year old, immature and relatively unsophisticated”];

¹⁰² See *In re Aven S.* (1991) 1 Cal.App.4th 69, 75 [coercion is more likely “to have a more coercive effect on a child than on an adult.”]; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 212 [suspect “was described as ‘unsophisticated’ and ‘naïve’ in the probation report”]; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *Yarborough v. Alvarado* (2004) 541 U.S. 652, 668 [relevant circumstances include the suspect’s age]; *Fare v. Michael C.* (1979) 442 U.S. 707, 725. BUT ALSO SEE *In re Jessie L.* (1982) 131 Cal.App.3d 202, 215 [“A minor has the capacity to make a voluntary confession. The admissibility of such a statement depends not upon his age alone but a combination of that factor with other circumstances such as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement.”]; *People v. Johnson* (1969) 70 Cal.2d 469, 479 [“The evidence shows that defendant was a minor. This fact alone would not invalidate a confession knowingly and intelligently made but it is relevant to the question of his maturity and awareness of rights.”].

¹⁰³ (1977) 74 Cal.App.3d 460, 466. Edited.

¹⁰⁴ 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.”]; *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.”].

of its authorization. The scope of the actual consent restricts the permissible boundaries of the search in the same manner as the specifications in a warrant.”¹⁰⁵

To determine the permissible scope of consent, the courts apply the “reasonable officer” test, which means that officers may search every place and thing they reasonably believed the suspect authorized them to search.¹⁰⁶ As the United States Supreme Court explained, “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?”¹⁰⁷

How do the courts determine what a reasonable officer would have understood? As we will discuss, they look to see whether the suspect or the officer said anything that would have expanded, restricted, or otherwise defined the scope of the search.¹⁰⁸

Scope limited by suspect

The suspect may expressly limit the search by telling officers what he will permit them search (e.g., his bedroom, his shirt pocket, the trunk of his car), or by telling them what places or things are off-limits.¹⁰⁹

The suspect may also impliedly limit the search if he tells them where the evidence they are seeking is located, in which case he would have authorized a search of *that* location only. For example, if officers told the suspect they were looking for drugs, and the suspect told them that his drugs were in a container located in a certain room, it may be reasonable for them to infer that he authorized them to go into that room and search that container, but nothing more.¹¹⁰

Scope limited by officers

It often happens that officers will intentionally or inadvertently limit the scope of consent by telling the suspect where they want to search, what they are looking for, or the nature of the crime they are investigating.

IF OFFICERS SAID WHERE THEY WANTED TO SEARCH: If officers specified the places or things they wanted to search, the permissible scope of the search will be limited to those places and things.¹¹¹

¹⁰⁵ (11th Cir. 1990) 902 F.2d 937, 941.

¹⁰⁶ See *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.”]; *U.S. v. Kimoana* (10th Cir. 2004) 383 F.3d 1215, 1223 [“We apply an objective reasonableness test to measure the scope of a person’s consent.”]; *U.S. v. Zapata* (11th Cir. 1999) 180 F.3d 1237, 1242 [“When an individual provides a general consent to search, without expressly limiting the terms of his consent, the search is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass.”].

¹⁰⁷ *Florida v. Jimeno* (1991) 500 U.S. 248, 251.

¹⁰⁸ See *People v. \$48,715* (1997) 58 Cal.App.4th 1507, 1515 [scope “is a question of fact to be determined from the totality of circumstances.”]; *People v. Engel* (1980) 105 Cal.App.3d 489, 504 [scope “may be determined equally from reasonable *implications* derived from a person’s express words and conduct”]; *U.S. v. Turner* (1st Cir. 1999) 169 F.3d 84, 87 [“We therefore look beyond the language of the consent itself, to the overall context, which necessarily encompasses contemporaneous police statements and actions.”].

¹⁰⁹ See *Florida v. Jimeno* (1991) 500 U.S. 248, 252 [“A suspect may of course delimit as he chooses the scope of the search to which he consents.”]; *U.S. v. Zapata* (11th Cir. 1999) 180 F.3d 1237, 1242 [“[A] search is impermissible when an officer does not conform to the limitations imposed by the person giving consent.”].

¹¹⁰ See *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1131 [“When an individual gives general consent to search a vehicle, and thereafter volunteers that evidence may be found in a specific area inside it, he thereby indicates that a search for that evidence would be within the scope of the original consent.”].

¹¹¹ See *People v. Williams* (1979) 93 Cal.App.3d 40, 57.

IF OFFICERS SPECIFIED THE OBJECT OF SEARCH: If officers told the suspect what they wanted to look for, they may search only places and things in which such items may reasonably be found.¹¹² As the Court explained in *Florida v. Jimeno*, “The scope of a search is generally defined by its expressed object.”¹¹³

For example, in *U.S. v. Turner*¹¹⁴ police in Bangor, Maine were in an apartment in which an assault had just occurred when they learned that the assailant might have gone inside a nearby apartment occupied by Turner. So they obtained Turner’s consent to search for “any signs the [assailant] had been inside the apartment,” and for any evidence he might have left behind. During the search, one of the officers sat down at Turner’s computer and discovered that it contained child pornography. But the court ruled the search was unlawful because “an objectively reasonable person assessing in context the exchange between Turner and these detectives would have understood that the police intended to search only in places where an intruder hastily might have disposed of any physical evidence”

Note that in determining whether it is reasonable to believe that evidence is located in a certain container, officers are not required to believe that any labels or markings accurately disclose its contents. For example, officers who are searching for crack cocaine would not be prohibited from searching a box merely because it was labeled, “My Dear Old Mother’s Favorite Recipes.”¹¹⁵

Searches for drugs: If officers told the suspect that they wanted to search for drugs, the scope of the search would be quite broad because drugs can be found virtually anywhere.¹¹⁶ For example, the courts have ruled that officers who were looking for drugs could search the following:

- Closed containers¹¹⁷
- Suitcases, including all compartments and containers therein¹¹⁸
- Drawers and other compartments in household furniture and furnishings¹¹⁹
- Under the suspect’s car¹²⁰

¹¹² See *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. Kimoana* (10th Cir. 2004) 383 F.3d 1215, 1223 [“Consent to search for specific items includes consent to search those areas or containers that might reasonably contain those items.”]; *U.S. v. Zapata* (11th 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.”]; *U.S. v. Dichiarinte* (7th Cir. 1971) 445 F.2d 126, 129 [“Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search.”].

¹¹³ (1991) 500 U.S. 248, 251.

¹¹⁴ (1st Cir. 1999) 169 F.3d 84.

¹¹⁵ See *U.S. v. Turner* (1st Cir. 1999) 169 F.3d 84, 86, fn.2 [“we doubt seriously whether his deceptive labeling of an individual container (e.g., ‘Flour’) would preclude a consensual search”].

¹¹⁶ 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.”]; *People v. Crenshaw* (1992) 9 Cal.App.4th 1402, 1415 [“No reasonable person would expect narcotics to be scattered loosely throughout the vehicle”].

¹¹⁷ See *Florida v. Jimeno* (1991) 500 U.S. 248, 251 [closed paper bag]; *People v. Egan* (1967) 250 Cal.App.2d 433, 436 [“small kit bag”]; *People v. Carvajal* (1988) 202 Cal.App.3d 487, 497 [boxes]; *U.S. v. Gutierrez-Mederos* (9th Cir. 1992) 965 F.2d 800, 803-4 [locked compartment in suspect’s car]; *U.S. v. Springs* (D.C. Cir. 1991) 936 F.2d 1330, 1331-2 [container of baby powder]. COMPARE *People v. Harwood* (1977) 74 Cal.App.3d 460, 468 [search for drugs in a residence did not permit officers to intercept phone calls to the premises].

¹¹⁸ *People v. Shandloff* (1985) 170 Cal.App.3d 372.

¹¹⁹ *People v. Egan* (1967) 250 Cal.App.2d 433, 436.

- Behind the driver's seat,¹²¹ and under loose carpeting in a vehicle¹²²
- Behind the bed liner or the suspect's pickup truck¹²³
- Inside vents and interior door panels¹²⁴
- Inside a false compartment in the cargo area¹²⁵

Searches for weapons: The scope of consent to conduct a general search for weapons is also extensive. For example, the courts have ruled that officers could search a travel bag,¹²⁶ a cloth case,¹²⁷ a briefcase,¹²⁸ and the trunk of a car.¹²⁹ On the other hand, a search for a certain type of weapon, such as a shotgun or a club, might be more limited.

Searches for "anything you're not supposed to have": Although the phrase is somewhat ambiguous, consent to search for such things has been interpreted as authorization to search for drugs and weapons, and would therefore permit an far-reaching search.¹³⁰

IF OFFICERS STATED THE CRIME UNDER INVESTIGATION: Instead of specifying the type of evidence they want to look for, officers will sometimes ask to search for evidence pertaining to a certain crime. If the suspect consents, he would usually have authorized an expansive search because the evidence pertaining to most crimes includes things that are quite small, such as documents, clothing, masks, weapons, ammunition, and sometimes even newspaper clippings.

For example, in *People v. Jenkins*¹³¹ LAPD homicide detectives who were investigating the murder of an officer received information that Jenkins might have been involved. While interviewing his sister at her home, and after explaining the nature of their investigation, they obtained her consent to "look around." One of the things they searched was a briefcase in which they found evidence that was later used against Jenkins at his murder trial. In ruling that the search of the briefcase was within the permissible scope of the consent, the California Supreme Court said, "[T]he announced object of the search was evidence connected with the murder of a police officer," and "[a] briefcase obviously is a container that readily may contain incriminating evidence, including weapons."

¹²⁰ *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1065; *U.S. v. Perez* (9th Cir. 1994) 37 F.3d 510, 516.

¹²¹ *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1579.

¹²² *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035.

¹²³ *People v. \$48,715* (1997) 58 Cal.App.4th 1507, 1516.

¹²⁴ *People v. Crenshaw* (1992) 9 Cal.App.4th 1402, 1415 ["Crenshaw knew the object of the officer's search, to wit, drugs. . . . Here, to an experienced officer the suspicious door panel was not an unlikely repository of narcotics."]; *U.S. v. Ferrer-Montoya* (8th Cir. 2007) __ F.3d __ [2007 WL 1147339] ["[The officer] opened the compartment [below the vehicle's console] in a minimally intrusive manner by removing the screws, and he did not damage to the vehicle in the process."]; *People v. Zapata* (11th Cir. 1999) 180 F.3d 1237, 1243; *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"]; *People v. Gutierrez-Mederos* (9th Cir. 1992) 965 F.3d 800, 804 [behind a cardboard divider in the cargo area of the suspect's hatchback].

¹²⁵ *People v. Barragan* (8th Cir. 2004) 379 F.3d 524, 530.

¹²⁶ *U.S. v. Sealey* (9th Cir. 1987) 830 F.2d 1028, 1032.

¹²⁷ *U.S. v. Ruiz* (9th Cir. 2005) 428 F.3d 877, 882.

¹²⁸ *People v. Jenkins* (2000) 22 Cal.4th 900, 976. ALSO SEE *U.S. v. Gutierrez-Mederos* (9th Cir. 1991) 965 F.2d 800, 804 [consent to search for weapons authorized a search of "any container within the car that reasonably could contain contraband"].

¹²⁹ *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035.

¹³⁰ See *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035 ["[O]ne can reasonably assume [that a search for anything you were not supposed to have] concerned a search for weapons and narcotics."].

¹³¹ (2000) 22 Cal.4th 900.

Unrestricted consent

If officers obtained unrestricted consent to search, they may assume that the suspect was aware that they were looking for evidence of criminal activity. “It is self-evident,” said the court in *U.S. v. Snow*, “that a police officer seeking general permission to search a vehicle is looking for evidence of illegal activity.”¹³²

Thus, the scope of such a search is broad and would permit, for example, a search of containers.¹³³ In fact, in one case the court ruled that officers who obtained unrestricted consent to search a car could search the memory of a pager found inside.¹³⁴

Other “scope” issues

CONSENT TO “ENTER”: When officers obtain the suspect’s consent to enter his home—“Can we come inside?”—the permissible scope of the consent is essentially limited to crossing the threshold and remaining in that general area. Consequently, they may not walk into other rooms, open closets or drawers, or inspect containers.¹³⁵ They would also exceed the permissible scope of consent if, upon entering, they immediately arrested the suspect.¹³⁶

SEARCHING CONTAINERS: When a suspect consents to a search of his home, car, or other place or thing, it is usually reasonable for officers to believe he has consented to a search of the various containers therein. Accordingly, officers are not required to stop before opening each container to confirm with the suspect that they may search it.¹³⁷ They may not, however, search a container if it apparently belongs to someone else. For example, if a male suspect consented to a search of his home, it is unlikely that officers would be permitted to look inside a woman’s purse.¹³⁸

SEARCHING COMPUTERS: More and more, the question arises: If the suspect consents to a search of his home, may officers search any computers on the premises? Although there is not much law on the subject, it appears they may not. While a court might rule that a computer is nothing but a sophisticated file cabinet that is not entitled to any special protection, some courts have rejected the “file cabinet” analogy mainly because, as one of them put it, “electronic storage is likely to contain a greater quantity and variety of information than any previous storage method.”¹³⁹ Furthermore, even a cursory

¹³² (2nd Cir. 1995) 44 F.3d 133, 135.

¹³³ See *U.S. v. Snow* (2nd Cir. 1995) 44 F.3d 133, 135.

¹³⁴ *U.S. v. Reyes* (S.D.N.Y. 1996) 922 F.Supp. 818.

¹³⁵ See *Gouled v. United States* (1921) 255 U.S. 298, 306 [“[A]ny search and seizure subsequently and secretly made in [the consenting person’s] absence [violates the Fourth Amendment].”].

¹³⁶ See *People v. Superior Court (Kenner)* (1977) 73 Cal.App.3d 65, 69 [“A person may willingly consent to admit police officers for the purpose of discussion, with the opportunity, thus suggested, of explaining away any suspicions, but not be willing to permit a warrantless and nonemergent entry that affords him no right of explanation or justification.”]; *People v. Johnny V.* (1978) 85 Cal.App.3d 120, 130 [“A consent for the purpose of talking with a suspect is not a consent to enter for the purpose of making an arrest of the suspect.”].

¹³⁷ See *U.S. v. Gandia* (2nd Cir. 2005) 424 F.3d 255, 262.

¹³⁸ See *People v. Stage* (1970) 7 Cal.App.3d 681, 683 [“Mullen’s consent to search the car was not consent to search Stage’s jacket. This is particularly so where the officer knew the jacket belonged to Stage rather than Mullen.”]; *Raymond v. Superior Court* (1971) 19 Cal.App.3d 321, 326 [“[R]eliance upon the third party’s consent is not justified where it is clear that the property belongs to another.”]; *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 officers] to open and search suitcases and boxes that he had been informed were the property of third persons.”]; *U.S. v. Welch* (9th Cir. 1993) 4 F.3d 761, 763-5.

¹³⁹ See *U.S. v. Carey* (10th Cir. 1999) 172 F.3d 1268, 1275 [“Relying on analogies to closed containers or file cabinets may lead courts to oversimplify a complex area of Fourth Amendment doctrines and ignore the

inspection of the files in a typical hard drive would significantly prolong the search. So, until the issue is resolved, officers who want to search the suspect's computer should seek express authorization to do so.

SUSPECT CAN WATCH: If the suspect asks to watch the search, officers must permit it. This is because his request constitutes a condition upon which consent was given. Furthermore, by refusing his request, officers would have made it difficult or impossible for him to withdraw his consent.¹⁴⁰

PROTECTIVE SWEEPS: If a suspect permitted officers to enter his home, and if they knew when they entered that they had grounds to conduct a protective sweep, it is possible that any evidence discovered during the sweep will be suppressed. This is because, as the Second Circuit observed, “[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.”¹⁴¹

INTENSITY OF THE SEARCH

The term “intensity” of the search refers to how painstaking or thorough it may be. If, as is usually the case, the officers and suspect did not discuss the matter, the courts will infer that they agreed it would be “constrained by the bounds of reasonableness,”¹⁴² as follows.

A “THOROUGH” SEARCH: Officers may infer that the suspect authorized a *thorough* search. As the court explained, “[P]ermission to search contemplates a thorough search. If not thorough it is of little value.”¹⁴³ Or, as the court pointed out in *U.S. v. Snow*, a suspect who authorizes a “search” should expect “something more than a superficial, external examination. It entails looking through, rummaging, probing, scrutiny, and examining internally.”¹⁴⁴

For example, in *People v. Crenshaw*¹⁴⁵ the court 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. The court noted that the officer “did not rip the vent from the door; he merely loosened a screw with a screwdriver and removed it.”

NO DESTRUCTION: It would be unreasonable for officers to interpret consent to search as authorization to destroy or damage property in the process. As the court explained in *U.S. v. Osage*,¹⁴⁶ “[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

realities of massive modern computer storage.”]. ALSO SEE *U.S. v. Andrus* (10th Cir. 2007) __ F.3d __ [2007 WL 1207081]; Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L.Rev. 531, 569 (2005) [“Because intimate information is commonly stored on computers, it seems natural that computers should fall into the same category as suitcases, footlockers, or other personal items that command a high degree of privacy.”].

¹⁴⁰ See *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1036 [“[When the suspects] turned around to watch the search, they may have been asserting their right to delimit or withdraw their consent”]; *U.S. v. Turner* (1st Cir. 1999) 169 F.3d 84, 89 [“Turner had no meaningful opportunity to object before the computer search was completed.”].

¹⁴¹ *U.S. v. Gandia* (2nd Cir. 2005) 424 F.3d 255, 262.

¹⁴² *U.S. v. Strickland* (11th Cir. 1990) 902 F.2d 937, 941.

¹⁴³ *U.S. v. Torres* (10th Cir. 1981) 663 F.2d 1019, 1027.

¹⁴⁴ (2nd Cir. 1995) 44 F.3d 133, 135.

¹⁴⁵ (1992) 9 Cal.App.4th 1403.

¹⁴⁶ (10th Cir. 2000) 235 F.3d 518, 522.

must obtain explicit authorization, or have some other lawful basis upon which to proceed.”

For example, in *U.S. v. Strickland*¹⁴⁷ a suspect gave officers consent to search “the entire contents” of his car for drugs. During the course of 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 when he saw that it contained ten kilograms of cocaine, plus an automatic weapon, a silencer, and a 30-round ammunition clip. 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.”

LENGTH OF SEARCH: The permissible length of a consent search depends on what the officers will be searching, what they will be looking for, whether they represented they would be conducting only a cursory search, and whether they should have anticipated any time-consuming difficulties.

For example, in *People v. \$48,715*¹⁴⁸ officers obtained consent to search for drugs in a pickup truck filled with large bags of seed and several suitcases. In discussing the length of the search, the court said the suspect should have known that it would take some time for the officers to “inspect the contents of the seed bags and the suitcases. Thus, said the court, he should also have known that “the seizure would be extended and the search would be extensive.”

As noted, the permissible length of the search will also depend on whether officers said or implied it would be completed quickly. For example, in *People v. Cantor*¹⁴⁹ an officer who had stopped Cantor’s car smelled marijuana in the interior. So he asked, “Nothing illegal in the car or anything like that? Mind if I check real quick and get you on your way?” Cantor said, “yeah.” When the officer was unable to find marijuana in the passenger compartment, he opened the trunk. Nothing there, so he checked under the hood, then “rechecked” the interior “several times.” Then he went back into the trunk where he saw a wooden box which Cantor said was a “record-cleaning machine.” At this point—now almost 15 minutes into the search—he unscrewed the back of the machine and discovered a bag of cocaine.

The court ruled the search was unlawful because it wasn’t “quick” enough. Said the court, “A typically reasonable person would not have understood defendant’s consent to a ‘real quick’ search to extend beyond [15 minutes].”

SEARCHES CONDUCTED BY DOGS: Officers who have obtained a suspect’s consent to search for drugs or explosives may use a trained dog to assist them unless the suspect

¹⁴⁷ (11th Cir. 1990) 902 F.2d 937. ALSO SEE *People v. Cantor* (2007) 149 Cal.App.4th 961 [consent to conduct a “real quick” search did not constitute authorization to dismantle sealed containers in the car]. COMPARE *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1416 [officer “did not rip the vent from the door; he merely loosened a screw with a screwdriver and removed it.”]; *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.”].

¹⁴⁸ (1997) 58 Cal.App.4th 1507, 1515.

¹⁴⁹ (2007) 149 Cal.App.4th 961. ALSO SEE *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].

objects.¹⁵⁰ While the suspect might not have anticipated that a dog would be helping out, it doesn't matter because a dog's sniffing does not materially increase the intensity of the search and is, therefore, permitted.

SEIZING EVIDENCE IN PLAIN VIEW: During the course of a consent search, officers may seize any item in plain view if they have probable cause to believe it is evidence of a crime—any crime.¹⁵¹

CONSENT WITHDRAWN

A suspect may withdraw or restrict his consent to search at any time before evidence is discovered.¹⁵² To do so, however, he must make his intentions clear. As the court explained in *People v. Botos*,¹⁵³ “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.”

An example of a positive restriction is found in *People v. Hamilton*¹⁵⁴ where a woman consented to a search of her home. But when she noticed that an officer was opening her bedroom door, she “raced” in front of him and tried to shut it. Said the court, “The attempt to shut the door of the bedroom by [the woman] was direct, positive and capable of only one interpretation. She did not want the officers to enter the bedroom.”

In contrast, the courts considered the following actions too ambiguous to constitute withdrawal of consent:

- After consenting to a search of his home, the suspect tried to mislead officers as to its location,¹⁵⁵ or said he wasn't sure of his address.¹⁵⁶
- The suspect consented to a search of a suitcase, but then denied it was his.¹⁵⁷
- The suspect refused to sign a consent form.¹⁵⁸
- The driver of a car who had consented to a search of it claimed he had lost his keys,¹⁵⁹ or he did not immediately hand the keys to the officer,¹⁶⁰ or said he did not want his car “torn apart.”¹⁶¹

¹⁵⁰ 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 . . . Accordingly, no consent is needed for participation of the dog.”]; *People v. Bell* (1996) 43 Cal.App.4th 754, 770-1, fn.5; *U.S. v. Perez* (9th Cir. 1994) 37 F.3d 510, 516 [“Using a narcotics dog to carry out a consensual search of an automobile is perhaps the least intrusive means of searching because it involves no unnecessary opening or forcing of closed containers or sealed areas of the car unless the dog alerts.”].

¹⁵¹ See *Arizona v. Hicks* (1987) 480 U.S. 321; *California v. Greenwood* (1988) 486 U.S. 35, 41; *People v. Bradford* (1997) 15 Cal.4th 1229, 1293.

¹⁵² See *U.S. v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1035 [“[The suspects] had a constitutional right to modify or withdraw their general consent at anytime”]; *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 cause to believe that the truck was carrying drugs.”]; *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.”].

¹⁵³ (1972) 27 Cal.App.3d 774, 779.

¹⁵⁴ (1985) 168 Cal.App.3d 1058. ALSO SEE *In re Christopher B.* (1978) 82 Cal.App.3d 608, 615 [while standing outside his home, the suspect consented to a search of it; but before the search began, the shut and locked the front door].

¹⁵⁵ *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1273-4.

¹⁵⁶ *People v. Garcia* (1964) 227 Cal.App.2d 345, 351.

¹⁵⁷ *People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 451 [“[D]efendant did not refuse to help the officer open the suitcase. Defendant only told the officer that the suitcase was not his. He did not refuse to let the officer open it up himself.”].

¹⁵⁸ *People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 451.

- After the occupants of a car consented to a search of it, they refused to tell the officers how to open a hidden compartment.¹⁶²

There are some older cases in which the courts invalidated consent searches when the suspect, after consenting, did something ambiguous that might be interpreted as withdrawal. For example, in *Castaneda v. Superior Court*¹⁶³ the defendant consented to a search of his home, but then tried to fool the officers into thinking he lived in a house across the street. The court said it did “not condone petitioner’s efforts to mislead the officers,” but it rewarded him nonetheless by ruling that his deception constituted a withdrawal of consent. Fortunately, *Castaneda* appears to have been an aberration. And, while such conduct may be considered in the totality of circumstances, the courts today are much less tolerant of artifice and game-playing.¹⁶⁴

CONSENSUAL ENTRY BY TRICK

Undercover officers will frequently utilize deception to obtain the suspect’s consent to enter his home. Although there is one exception, the general rule is that deception will not invalidate an entry or search because, unlike waivers of constitutional rights, a suspect’s consent need not be “knowing and intelligent.”¹⁶⁵

ENTRY FOR “GUILTY” PURPOSE: Undercover officers and agents may misrepresent their identity and purpose when obtaining consent to enter a residence if their stated purpose was to engage in illegal conduct, such as buying or selling drugs.¹⁶⁶ For example, in *Lopez v. United States*¹⁶⁷ the defendant was trying to bribe an IRS agent named Davis. One day, Lopez admitted Davis into his office to discuss the bribe. Davis, however, was working with federal authorities on the case, and he reported his conversation to them. On appeal, Lopez argued that Davis’s consensual entry should have been deemed invalid because he misrepresented his true motive. The United States Supreme Court disagreed, saying, “Davis was not guilty of an unlawful invasion of [Lopez’s] office simply because his

¹⁵⁹ *People v. Nelson* (1985) 166 Cal.App.3d 1209, 1214; *People v. Botos* (1972) 27 Cal.App.3d 774, 779.

¹⁶⁰ *People v. Carvajal* (1988) 202 Cal.App.3d 487, 496.

¹⁶¹ *U.S. v. Torres* (10th Cir. 1981) 663 F.2d 1019, 1026-7.

¹⁶² *U.S. v. Barragan* (8th Cir. 2004) 379 F.3d 524.

¹⁶³ (1963) 59 Cal.2d 439. ALSO SEE *People v. Shelton* (1964) 60 Cal.2d 740, 745; *People v. Faris* (1965) 63 Cal.2d 541, 545 [“His attempt to mislead the officers with a false address clearly demonstrates that he did not consent to a search of the South Ellendale Street apartment.”].

¹⁶⁴ See *People v. Ibarra* (1980) 114 Cal.App.3d 60, 65 [“Efforts to mislead the police do not necessarily vitiate consent freely given.”]; *People v. Garcia* (1964) 227 Cal.App.3d 345. **NOTE:** An analogy is found in the *Miranda* cases, where the courts now rule that an invocation does not occur unless the suspect states his intent clearly and unambiguously. See *Davis v. United States* (1994) 512 U.S. 452, 459; *People v. Stitely* (2005) 35 Cal.4th 514, 535.

¹⁶⁵ See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 246; *Illinois v. Rodriguez* (1990) 497 U.S. 177, 183; *People v. James* (1977) 19 Cal.3d 99, 117.

¹⁶⁶ See *Lewis v. United States* (1967) 385 U.S. 206, 211 [“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 purposes contemplated by the occupant”]; *United States v. White* (1971) 401 U.S. 745, 749; *Maryland v. Macon* (1985) 472 U.S. 463, 470 [undercover officer was admitted into defendant’s store, open for business, to inspect pornographic magazines]; *People v. Metzger* (1971) 22 Cal.App.3d 338, 343 [at the request of Customs agents, informant was admitted by the defendant into his home (they were friends) where he observed marijuana]; *U.S. v. Bramble* (9th Cir. 1997) 103 F.3d 1475, 1478 [no Fourth Amendment violation if the officer flatly denies he is an officer].

¹⁶⁷ (1963) 373 U.S. 427.

apparent willingness to accept a bribe was not real. He was in the office with [Lopez's] consent . . . ”

FALSE FRIENDS: If the suspect knows the true identity of the person who sought entry, his consent will not be invalid merely because he was unaware that the person's motive was to obtain incriminating evidence. For example, in *Hoffa v. United States*,¹⁶⁸ a man named Partin was assisting federal agents in obtaining evidence against Jimmy Hoffa. Because Partin was a friend of Hoffa's, he was routinely permitted to enter Hoffa's hotel room and listen to incriminating conversations, and some of these conversations were used against Hoffa at his trial.

On appeal, Hoffa argued that, even though he had consented to Partin's entries, the consent should be invalidated because Partin misrepresented his objective in wanting to enter. The Court disagreed, pointing out that “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.”

ENTRY FOR AN “INNOCENT” PURPOSE: This is the exception to the rule: Consent to enter is invalid if an undercover officer not only misrepresented his identity but claimed he wanted to enter for an “innocent” purpose; e.g., officer obtained entry by claiming he was a deliveryman, the landlord, a prospective home buyer, or a building inspector.¹⁶⁹ POV

¹⁶⁸ (1966) 385 U.S. 293. ALSO SEE *On Lee v. United States* (1952) 343 U.S. 747, 751-2 [undercover agent entered defendant's store (open for business) and engaged him in conversation].

¹⁶⁹ 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 71 [officer identified himself as a friend of the Sears repairman who was working inside the defendant's home]; *People v. Robert T.* (1970) 8 Cal.App.3d 990, 993-4 [consent invalid when apartment manger and undercover officer obtained consent to enter to “check the apartment”]; *People v. Miller* (1967) 248 Cal.App.2d 731 [consent to open door invalid when apartment manager knocked on defendant's door and said, “You have a caller,” at which point the defendant opened the door and officers (the “caller”) saw evidence in plain view]; *People v. Hodson* (1964) 225 Cal.App.2d 554 [officer knocked on defendant's apartment door and, when defendant said “Who is it?” said he was the manager, at which point defendant opened the door]; *People v. De Caro* (1981) 123 Cal.App.3d 454, 466 [a police agent posed as potential buyer of defendant's home and was admitted by a real estate agent”].