

# Third Party Consent

“Valid consent may be given not only by the defendant but also by a third party who possessed common authority.”<sup>1</sup>

Obtaining consent to search from a suspect will sometimes be impractical or impossible. For example, he may be a fugitive, or it might be apparent that he would refuse to give it. Still, officers may be able to search his property by obtaining consent from someone else—someone who has sufficient legal authority over the place or thing they want to search.

How can officers determine whether a third party possesses such authority? That is the question we will discuss in this article.

## “COMMON AUTHORITY”

A suspect’s spouse, roommate, parent, or other third party may consent to a search of a place or thing owned or controlled by a suspect if the third party has “common authority” over it.<sup>2</sup> As the Supreme Court explained in *United States v. Matlock*:

[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over [the premises or effects].<sup>3</sup>

What, then, is “common authority?” It exists if the third party has a right to *joint access* or *control* over the place or thing.<sup>4</sup> In the words of the Tenth Circuit, “A third party has actual authority to consent to a search if that third party has either (1) mutual use of

<sup>1</sup> *U.S. v. Morgan* (6<sup>th</sup> Cir. 2006) 435 F.3d 660, 663.

<sup>2</sup> See *Illinois v. Rodriguez* (1990) 497 U.S. 177, 179 [“[A] warrantless entry and search by law enforcement officers does not violate the Fourth Amendment . . . if the officers have obtained the consent of a third party who possesses common authority over the premises.”]; *People v. Woods* (1999) 21 Cal.4<sup>th</sup> 668, 675 [“[A] consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched.”]; *People v. Oldham* (2000) 81 Cal.App.4<sup>th</sup> 1, 9 [“Where the subject property is a premises occupied by more than one person, a search will be reasonable if consent is given by one of the joint occupants who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.”]; *U.S. v. Buckner* (4<sup>th</sup> Cir. 2007) 473 F.3d 551, 554 [“[C]ommon authority over a general area confers actual authority to consent to a search of that general area.”]; *U.S. v. Lewis* (2<sup>nd</sup> Cir. 2004) 386 F.3d 475, 481 [“Once a person gives authority, to be shared in common with another over certain premises, any hopes that a search of those premises based on that other person’s consent will be found a Fourth Amendment violation is slim at best.”].

<sup>3</sup> *United States v. Matlock* (1974) 415 U.S. 164, 171.

<sup>4</sup> See *United States v. Matlock* (1974) 415 U.S. 164, 171, fn.7 [“The authority which justifies third-party consent [rests] on mutual use of the property by persons generally having joint access or control for most purposes.”]; *People v. Jacobs* (1987) 43 Cal.3d 472, 481 [“[T]here must be some objective evidence of joint control or access to the places or items to be searched which would indicate that the person authorizing the search has the authority to do so.”]; *U.S. v. Ruiz* (9<sup>th</sup> Cir. 2005) 428 F.3d 877, 882 [“[I]f Boswell had access to or control over the container, he would have had actual authority to consent to its search.”]. COMPARE *People v. Ortiz* (1969) 276 Cal.App.2d 1, 4 [it is not necessary for officers “to file a quiet title suit to ascertain ownership”].

the property by virtue of joint access, or (2) control for most purposes.”<sup>5</sup> On the other hand, a third party will lack common authority if the suspect had a right to *exclusive* access and control.

It is important to understand that a third party may have common authority over a residence but not every room and container inside it. As the Fourth Circuit explained in *U.S. v. Buckner*, “Although common authority over a general area confers actual authority to consent to a search of that general area, it does not automatically extend to the interiors of every discrete enclosed space capable of search within the area.”<sup>6</sup>

A good illustration of how this rule operates is found in cases where the suspect’s spouse consented to a search of a computer located in the family home. While spouses ordinarily have common authority over most things in the house, they would not have common authority over computer files that had been password protected by the suspect unless the spouse knew the password.<sup>7</sup>

For example, in *Trulock v. Freeh*<sup>8</sup> FBI agents obtained Conrad’s consent to search a computer located in a house she shared with Trulock. The agents were investigating a security leak at the Department of Energy where Conrad and Trulock worked. Conrad said they both used the computer, but that she could not access Trulock’s files because they were password protected. This did not, however, prevent an FBI computer specialist from tapping into them.

Trulock later filed a civil rights lawsuit against the FBI, claiming the search was unlawful. Specifically, he contended that the agents could not have reasonably believed that Conrad had common authority over his files because they knew she could not access them. The court agreed, saying that Conrad’s common authority over the computer “did not extend to Trulock’s password-protected files.”

**“USE” IS NOT REQUIRED:** If the third party has a right to joint access or control over the place or thing it is immaterial that he did not actually use it. While actual use is certainly a strong indication that the third party has common authority,<sup>9</sup> it is not a requirement.<sup>10</sup>

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<sup>5</sup> *U.S. v. Andrus* (10<sup>th</sup> Cir. 2007) 473 F.3d 711, 716. ALSO SEE *U.S. v. Rith* (10<sup>th</sup> Cir. 1999) 164 F.3d 1323, 1329-30 [“[A] third party has authority to consent to a search of property if that third party has either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it.”].

<sup>6</sup> (4<sup>th</sup> Cir. 2007) 473 F.3d 551, 554.

<sup>7</sup> See *U.S. v. Buckner* (4<sup>th</sup> Cir. 2007) 473 F.3d 551, 555 [“[T]he officers knew that the computer was located in a common living area of thee Buckner’s marital home, they observed that the computer was on . . . ¶ the officers did not have any indication from Michelle, or any of the attendant circumstances, that any files were password-protected.”]; *U.S. v. Morgan* (6<sup>th</sup> Cir. 2006) 435 F.3d 660, 663 [suspect’s wife “indicated to the officers who came to her home that she had access to and used the computer and that she and the defendant did not have individual usernames or passwords.”]. ALSO SEE *Frazier v. Cupp* (1969) 394 U.S. 731; *People v. Jenkins* (2000) 22 Cal.4<sup>th</sup> 900, 978 [“[I]t was objectively reasonable to conclude Diane Jenkins had authority to consent to the search of defendant’s briefcase, because it was reasonable for the officers to believe she had exercised control over the briefcase and had not only joint, but at the time of the search, exclusive access to it and control over it.”]; *People v. Schmeck* (2005) 37 Cal.4<sup>th</sup> 240, 281 [because both the consenting person and the defendant placed their belongings inside a bag, the consenting person “had access to defendant’s personal effects sufficient to endow her with authority to consent to the search.”]; *U.S. v. Sealey* (9<sup>th</sup> Cir. 1987) 830 F.2d 1028, 1031 [“[T]he containers were not marked in any way to indicate Sealey’s sole ownership.”]; *People v. Reynolds* (1976) 55 Cal.App.3d 357.

<sup>8</sup> (4<sup>th</sup> Cir. 2001) 275 F.3d 391.

<sup>9</sup> See *Frazier v. Cupp* (1969) 394 U.S. 731, 740 [“Since Rawls was a joint user of the bag, he clearly had authority to consent to its search.”]; *United States v. Matlock* (1974) 415 U.S. 164, 170 [“[In *Frazier v. Cupp*] joint use of the bag rendered the cousin’s authority to consent to its search clear.”]; *People v. Schmeck* (2005) 37 Cal.4<sup>th</sup> 240, 281 [because both the consenting person and the defendant placed their belongings inside a

For example, in *People v. Jenkins*<sup>11</sup> the California Supreme Court ruled that the defendant's sister had common authority over an unlocked briefcase she was keeping for her brother even though it appeared she had never opened it. Said the court:

[A]lthough the searching officer had little reason to suppose that Diane Jenkins herself was using defendant's briefcase, this circumstance does not require us to conclude the officer lacked a reasonable basis for believing she had authority to consent to a search of the briefcase, when the facts known to him indicated she had exercised control over the briefcase . . .

**THE "APPARENT AUTHORITY" RULE:** It is often difficult for officers to determine the extent of a third party's access or control over a place or thing. For this reason, the United States Supreme Court ruled that if they made a mistake—if it turned out the third party did *not* have common authority—their search will be upheld nonetheless if they reasonably believed he did.<sup>12</sup> In other words, the legality of the search depends not on whether the third party had actual authority, but on whether he had apparent authority. As the Court explained:

Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.<sup>13</sup>

Returning to the example of computer searches, a third party with common authority over a shared computer would usually have apparent authority over the suspect's files (unless, as noted, it was reasonably apparent to the officers that the third party could not access them).

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bag, the consenting person "had access to defendant's personal effects sufficient to endow her with authority to consent to the search."]. ALSO SEE *U.S. v. Rith* (10<sup>th</sup> Cir. 1999) 164 F.3d 1323, 1330 ["mutual use" requires a "fact-intensive inquiry"].

<sup>10</sup> See *People v. Catlin* (2001) 26 Cal.4<sup>th</sup> 81, 163 ["Although [the consenting party] stated that he predominantly used one side of the garage/shop, the evidence established that [he] and defendant had common authority over the entire garage, including the cabinet."]; *U.S. v. Duran* (7<sup>th</sup> Cir. 1992) 957 F.2d 499, 505.

<sup>11</sup> (2000) 22 Cal.4<sup>th</sup> 900.

<sup>12</sup> *Illinois v. Rodriguez* (1990) 497 U.S. 177, 186. ALSO SEE *People v. Superior Court (Walker)* (2006) 143 Cal.App.4<sup>th</sup> 1183, 1199 ["The law permits a search based upon consent by a person with apparent authority where the officers conducting the search reasonably believe that the person is empowered to give that consent."]; *People v. MacKenzie* (1995) 34 Cal.App.4<sup>th</sup> 1256, 1273 ["[W]e ask whether the facts available to the officer at the moment would warrant in a person of reasonable caution a belief that the consenting party had authority over the premises."]; *People v. Oldham* (2000) 81 Cal.App.4<sup>th</sup> 1, 10 ["[E]ven if the consenting cotenant, in fact, lacks authority, officers may rely on his or her apparent authority."]; *U.S. v. Davis* (9<sup>th</sup> Cir. 2003) 332 F.3d 1163, 1170 ["[W]e stress that the relevant question is whether the officers reasonably believed that Smith had authority to consent to a search of Davis' bag."]; *U.S. v. Andrus* (10<sup>th</sup> Cir. 2007) 483 F.3d 711, 716 ["Even where actual authority is lacking, a third party has apparent authority to consent to a search when an officer reasonably, even if erroneously, believes the third party possesses authority to consent."]; *U.S. v. Meada* (1<sup>st</sup> Cir. 2005) 408 F.3d 14, 22 ["What matters is whether, based on the information in the officers' possession, they reasonably believed that Bowering had authority to invite them into the apartment."]; *U.S. v. Ruiz* (9<sup>th</sup> Cir. 2005) 428 F.3d 877, 880 ["A third party's consent to the search of another's belongings is valid if the consenting party has either actual or apparent authority to give consent."]; *U.S. v. Jenkins* (6<sup>th</sup> Cir. 1996) 92 F.3d 430, 436 ["The critical facts are not the actual relationship between the consenter and owner, but how that relationship appears to the officer who asked for consent."].

<sup>13</sup> At p. 186.

For example, in *U.S. v. Andrus*<sup>14</sup> ICE agents suspected that Andrus had stored child pornography on a computer located in a house he shared with his father. So they went there and obtained his father's consent to search the hard drive. It turned out the files were password protected, but Andrus's father was unaware of it, or at least he did not tell the agents. In any event, an agent was able to access the files by means of a forensic search program that, as in *Trulock*, gave no indication that it was accessing protected files. In the course of the search, they discovered child pornography and subsequently arrested Andrus.

On appeal, the court ruled the search was lawful because "the facts known to the officers at the time the computer search commenced created an objectively reasonable perception that [Trulock's father] was, at least, *one* user of the computer."

**MUST OFFICERS ASK QUESTIONS?** Unless officers are certain the third party has common authority, they may need to ask him about it.<sup>15</sup> Thus, the Supreme Court in *Rodriguez* warned that "[e]ven when the invitation [to search] is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry."<sup>16</sup>

## CONSENT BY SPOUSES

So far we have been discussing the general principles of common and apparent authority. Now we will look at how those principles are applied in specific situations, starting with spouses.

In most cases it is reasonable for officers to believe that the suspect's spouse has common authority over the entire family home, including containers and outbuildings.<sup>17</sup>

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<sup>14</sup> (10<sup>th</sup> Cir. 2007) 473 F.3d 711. ALSO SEE *U.S. v. Buckner* (4<sup>th</sup> Cir. 2007) 473 F.3d 551, 555 "[T]he officers did not have any indication from Michelle, or any of the attendant circumstances, that any files were password-protected."

<sup>15</sup> See *U.S. v. Goins* (7<sup>th</sup> Cir. 2006) 437 F.3d 644, 648 "[L]aw enforcement officers have a duty to inquire further as to a third party's authority to consent to a search, if the surrounding circumstances make that party's authority questionable."; *U.S. v. Kimoana* (10<sup>th</sup> Cir. 2004) 383 F.3d 1215, 1222 "[W]here an officer is presented with ambiguous facts related to authority, he or she has a duty to investigate further before relying on consent."; *U.S. v. Dearing* (9<sup>th</sup> Cir. 1993) 9 F.3d 1428, 1430 "[T]he police are not allowed to proceed on the theory that ignorance is bliss."; *People v. Jacobs* (1987) 43 Cal.3d 472, 483 ["The potential for abuse would be great if the police were permitted to rely on a young child's consent to enter and search without first expending the little effort required to attempt to ascertain whether the child has the authority to permit such intrusions."; *U.S. v. Whitfield* (D.C. Cir. 1991) 939 F.2d 1071, 1075 "[T]he agents' superficial and cursory questioning of [the third party] did not disclose sufficient information to support a reasonable belief."]. COMPARE *U.S. v. Andrus* (10<sup>th</sup> Cir. 2007) 473 F.3d 711, 720 ["If the circumstances reasonably indicated [the consenting party] had mutual use of or control over the computer, the officers were under no obligation to ask clarifying questions"].

<sup>16</sup> *Illinois v. Rodriguez* (1990) 497 U.S. 177, 188.

<sup>17</sup> See *U.S. v. Sealey* (9<sup>th</sup> Cir. 1987) 830 F.2d 1028, 1031; *U.S. v. Whitfield* (D.C. Cir. 1991) 929 F.2d 1071, 1074-5 "[Officers] may assume that a husband and wife mutually use the living areas in their residence and have joint access to them so that either may consent to a search."; *U.S. v. Duran* (7<sup>th</sup> Cir. 1992) 957 F.2d 499, 505 ["We hold that a spouse presumptively has authority to consent to a search of all areas of the homestead; the nonconsenting spouse may rebut this presumption only by showing that the consenting spouse was denied access to the particular area searched."]; *U.S. v. Rith* (10<sup>th</sup> Cir. 1999) 164 F.3d 1323, 1331 ["Relationships which give rise to a presumption of control of property include . . . husband-wife relationships."]; *U.S. v. Clark* (8<sup>th</sup> Cir. 2005) 409 F.3d 1039, 1044 ["[S]herry's statement that [her husband] hid things in the closet did not establish that she lacked access to the space or that [her husband] had exclusive access to it."].

In the words of the California Supreme Court, “[S]ince a wife normally exercises as much control over the property in the home as the husband, police officers may reasonably assume that she can properly consent to a search thereof . . . .”<sup>18</sup>

Still, there are rare situations in which the suspect will have a right to exclusive access and control, which would mean that his spouse’s consent would not suffice. As the court pointed out in *U.S. v. Rith*, “Not all spouses share everything with their mates, which is another way of saying that spouses do not surrender every quantum of privacy or individuality with respect to one another.”<sup>19</sup>

### **Rooms used exclusively by the suspect**

The suspect’s spouse can ordinarily consent to a search of rooms that are used primarily, or even exclusively, by the suspect. This is because such an arrangement demonstrates only that the suspect’s spouse made it a practice not to enter or use the room—not that she was denied access and control.<sup>20</sup>

For example, in *People v. Reynolds*<sup>21</sup> officers who had arrested Reynolds for kidnapping and molesting a young girl obtained his wife’s consent to search the family home for evidence of the crimes. One of the rooms in the house was a darkroom that was used exclusively by Mr. Reynolds. Although the darkroom was locked, Ms. Reynolds provided the officers with a key. They then searched the room and found pornographic photographs of Reynolds’ stepdaughters.

In ruling that Mrs. Reynolds had common authority over the darkroom, the court noted that, although the room was Reynolds’ “work area,” he did not have exclusive control over it. Said the court, “This type of arrangement is not uncommon in a family home, but does not lead to the conclusion, as between a husband and wife, that such areas are beyond either spouse’s control.”

Similarly, in *U.S. v. Duran*<sup>22</sup> officers obtained Karen Duran’s consent to search the family home and several outbuildings for drugs. One of the outbuildings was an old farmhouse her husband was using as a “private gym.” While searching it, the officers found 28 pounds of marijuana. On appeal, Duran claimed that his wife did not have common authority over the farmhouse because she “never went into or used” it. The court responded:

[T]he mere fact that Karen neither used the old farmhouse nor left any of her personal effects there does not bear on whether [the defendant] maintained exclusive dominion over the structure. One can have access to a building or a room but choose not to enter.

### **Spouses hostile**

The fact that the suspect and the consenting spouse were hostile toward each other does not eliminate the spouse’s common authority over the premises. As the Court of

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<sup>18</sup> *People v. Duren* (1973) 9 Cal.3d 218, 241.

<sup>19</sup> (10<sup>th</sup> Cir. 1999) 164 F.3d 1323, 1331.

<sup>20</sup> See *U.S. v. Sealey* (9<sup>th</sup> Cir. 1987) 830 F.2d 1028, 1031 [wife had common authority over the family garage even though she told the officers that she “needed her husband’s permission to go into the garage”].

<sup>21</sup> (1976) 55 Cal.App.3d 357.

<sup>22</sup> (7<sup>th</sup> Cir. 1992) 957 F.2d 499.

Appeal observed, “While they are both living in the premises the equal authority does not lapse and revive with the lapse and revival of amicable relations between spouses.”<sup>23</sup>

In fact, the consenting spouse may retain common authority over the family home even if she had moved out temporarily, and maybe even permanently.<sup>24</sup> This is because the test is whether she retained the *right* to access or control the property.

For example, in *People v. Bishop*<sup>25</sup> the defendant killed a woman while robbing the Los Angeles Parking Violations Bureau. His wife, Heather, was not present during the robbery but she might have been an accessory. After the robbery, Bishop became “violent and physically abusive” toward her; so she moved into a battered women’s shelter, taking as much furniture and clothing as she and her parents could carry. A few weeks later, she went to the police and told them what she knew about the murder.

Officers arrested Bishop the next day. Five days later, Heather consented to a search of the house. Although Bishop had changed the locks on the doors after she moved out, Heather crawled in through a window and admitted the officers. During the search, they found evidence linking Bishop to the crimes.

Bishop claimed that because the officers knew that Heather had moved out of the house, they could not have reasonably believed she still had common authority. The court disagreed, pointing out that Bishop “did not have exclusive right of possession of the house. They were still married and, at least at that point, appellant had no legal right to exclude [Heather].”

On the other hand, a spouse will not have common authority over the family home if the marriage had been dissolved and the suspect had been awarded sole possession.<sup>26</sup>

### **If the suspect objects**

In the past, officers could search even if the suspect objected. This was because each spouse was deemed to have assumed the risk that the other would consent. But in 2006, the United States Supreme Court departed from this principle in the case of *Georgia v. Randolph*.<sup>27</sup> In *Randolph*, the Court ruled that when the occupants have roughly equal authority over the premises such as spouses, officers could not enter or search the suspect’s residence based on the consent of his spouse if all of the following circumstances existed:

- (1) **Express objection:** The suspect must have affirmatively voiced this objection.<sup>28</sup> (Officers need not, however, ask him if he objects.<sup>29</sup> Furthermore, it is immaterial that he would have refused to consent if he had been asked.)

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<sup>23</sup> *People v. Bishop* (1996) 44 Cal.App.4<sup>th</sup> 220, 237 [quoting *Commonwealth v. Martin* (1970) 358 Mass. 282, 289-90]. ALSO SEE *People v. Wilkins* (1993) 14 Cal.App.4<sup>th</sup> 761, 775 [“We conclude the victim had the authority to consent to police entry into the premises to arrest defendant.”].

<sup>24</sup> See *U.S. v. Long* (9<sup>th</sup> Cir. 1975) 524 F.2d 660, 661 [“Her husband was not her lessee who had the exclusive right of possession of the house. They had shared it until Mrs. Long was forced to leave due to her fear of her husband.”]; *U.S. v. Weston* (8<sup>th</sup> Cir. 2006) 443 F.3d 661, 668 [although occupant and consenting person were divorced, the officer knew they had “remained close despite their divorce,” he had seen the consenting spouse at the house three times in four years, and the consenting spouse was home alone when he consented].

<sup>25</sup> (1996) 44 Cal.App.4<sup>th</sup> 220.

<sup>26</sup> See *People v. Bishop* (1996) 44 Cal.App.4<sup>th</sup> 220, 238.

<sup>27</sup> (2006) 547 U.S. \_\_.

<sup>28</sup> See *Georgia v. Randolph* (2006) 547 U.S. 103, \_\_ [the ruling requires “an express refusal”].

<sup>29</sup> See *Georgia v. Randolph* (2006) 547 U.S. 103, \_\_ [officers are not required to “take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received.”]; *U.S. v. Parker* (7<sup>th</sup> Cir. 2006) 469 F.3d 1074, 1079[“That Parker was not asked for his consent and did not have an opportunity to object to the search does not render invalid Johnson’s voluntary consent.”].

- (2) **Objection in officers' presence:** The suspect must have objected in the officers' presence.<sup>30</sup> This means that the suspect must ordinarily be, in the words of the Court, "standing at the door."<sup>31</sup> Although officers may not remove the suspect from the scene to prevent him from objecting,<sup>32</sup> they may remove him for any lawful purpose; e.g., to confine him inside a patrol car after he was arrested.<sup>33</sup>
- (3) **Objective to obtain evidence:** The purpose of the officer's entry or search must have been to obtain evidence against the suspect. Consequently, officers may enter despite the suspect's objection if their purpose was to, for example, conduct a domestic violence investigation, interview the spouse, keep the peace, arrest the suspect, or render emergency aid.<sup>34</sup>

### CONSENT BY DOMESTIC PARTNERS

It appears that the rules pertaining to consenting spouses will also be applied to people who are living together in an informal domestic relationship.<sup>35</sup> For example, in *U.S. v. Goins*<sup>36</sup> a woman named Kalina Bratton reported to police in Wisconsin that Goins had kicked her, and that she was willing to authorize a search of his apartment for his

<sup>30</sup> See *Georgia v. Randolph* (2006) 547 U.S. 103, \_\_\_ [objecting spouse must be "physically present"]; *People v. Ledesma* (2006) 39 Cal.4th 641, 704, fn.16 ["*Randolph* does not change the legal standards applicable to the present case, in which defendant was not present when the police received consent"].

<sup>31</sup> See *U.S. v. DiModica* (7th Cir. 2006) 468 F.3d 495, 500 [unlike the situation in *Randolph*, "DiModica and his wife were not standing together at the doorway . . . [and the] officers never asked DiModica for permission to search his house"].

<sup>32</sup> See *Georgia v. Randolph* (2006) 547 U.S. 103, \_\_\_ ["So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding possible objection . . ."].

<sup>33</sup> See *U.S. v. DiModica* (7th Cir. 2006) 468 F.3d 495, 500 ["The officers did not remove DiModica to avoid his objection; they legally arrested DiModica based on probable cause that he had committed domestic abuse."]; *U.S. v. Parker* (7th Cir. 2006) 469 F.3d 1074, 1078 ["There was no evidence] that the police had taken [defendant] into custody as a mechanism for coercing Johnson's consent. So Johnson's consent to the search was valid as against Parker."]; *U.S. v. Wilburn* (7th Cir. 2007) 473 F.3d 742, 745 ["Wilburn was validly arrested and he was lawfully kept in a place—the back seat of a squad car—where people under arrest are usually held."].

<sup>34</sup> See *U.S. v. Parker* (7th Cir. 2006) 469 F.3d 1074, 1077 ["There is no evidence that Parker was asked for his consent to search the house and that he refused of that he objected . . . . The absence of such evidence removes this case from the purview of [*Randolph*]."]; *U.S. v. Uscanga-Ramirez* (8th Cir. 2007) 475 F.3d 1024, 1028 ["There is no evidence that [defendant] expressly refused to officers' entry into the home at any time."]; *U.S. v. Uscanga-Ramirez* (8th Cir. 2007) 475 F.3d 1024, 1028 ["*Randolph* is clearly distinguishable. There is no evidence that Uscanga-Ramirez expressly refused the officers' entry into the home at any time."]; *Casteel v. State* (Nevada Supreme Court 2006) 131 P.3d 1, 4 ["Casteel never expressly or impliedly protested the search or denied the mother's authority to consent to the search."]; *Starks v. State* (Ind.App. 2006) 846 N.E.2d 673, 682, fn.1 [*Randolph* is distinguishable because the suspect "was not physically present," "nor did he express his refusal to consent"].

<sup>35</sup> See *United States v. Matlock* (1974) 415 U.S. 164; *People v. Boyer* (1989) 48 Cal.3d 247, 276-7; *People v. Engel* (1980) 105 Cal.App.3d 489, 504 [woman had common authority over a box she controlled jointly with defendant]; *People v. Frye* (1998) 18 Cal.4th 894, 990 ["It may be inferred from the fact Warsing and defendant resided together in the apartment that she possessed authority to consent to the officers' entry."]; *U.S. v. Robinson* (7th Cir. 1973) 479 F.2d 300, 302 ["A defendant's paramour may give valid consent to the search of premises they jointly occupy. The rule is not based on principles of agency but rather on the reasonableness, under all the circumstances, of a search consented to by a person having immediate control and authority over the premises or property searched."]; *U.S. v. Rodriguez* (8th Cir. 2005) 414 F.3d 837, 844 [a woman who was the only person present in a motel room could consent to a search of it]; *U.S. v. Morning* (9th Cir. 1995) 64 F.3d 531, 534 [defendant and consenting person, who lived together in house, "had an at least equal interest in the use and possession of the house"].

<sup>36</sup> (7th Cir. 2006) 437 F.3d 644.

drugs and a handgun. She also provided officers with several details about their living arrangement: although she was not currently living there, she had been living with Goins “on-and-off for several months;” her name was not on the lease and she did not pay rent, but she had a key to the apartment; she still kept personal belongings there; she continued to perform “household chores” for Goins, such as cleaning, cooking, and doing laundry; and she had “free rein of the house except the attic.” Based on these representations, the officers entered the apartment and seized a bag of cocaine base in plain view.

On appeal, Goins argued that the officers could not have reasonably believed that Bratton had common authority over the premises, but the court noting:

[Bratton] had a key to the apartment, possessions within the apartment, and represented that she lived there on-and-off and frequently cleaned and did household chores in the home. She also claimed that she was allowed into Goins’ residence when he was not home. These representations paint a believable and reasonably complete picture of Bratton’s actual authority to search.

Similarly, in *U.S. v. Meada*<sup>37</sup> a woman named Carol Bowering had been living with Meada in his apartment for about two months when he became violent toward her. Having decided to move out, Carol requested that officers stand by while she removed some of her possessions. She also mentioned that Meada had several weapons in the apartment. The officers knew that Meada was a convicted felon so, when they arrived, they obtained Carol’s permission to enter and seize the guns. They found two: one in a kitchen cabinet, the other in a gun case in the bedroom they shared.

In rejecting Meada’s contention that the officers could not have reasonably believed that Carol had joint access or control over the apartment, the court noted that they knew she kept personal possessions there (including several changes of clothing), and that she could enter the apartment in Meada’s absence. Thus, said the court, “the officers were not merely acting on an unsubstantiated assertion that Bowering had joint access to the apartment, but rather on the totality of the circumstances that supported such an assertion.”

**IF THE SUSPECT OBJECTS:** It is likely that the rules pertaining to objecting spouses, discussed above, will apply if the suspect objects to the search.<sup>38</sup>

### **CONSENT BY ROOMMATES**

The common authority of roommates who share a house or apartment with a suspect is usually much less extensive than that of spouses and domestic partners. Still, roommates can usually consent to searches of some things.

**CONSENT TO ENTER:** It is reasonable for officers to believe that a suspect’s roommate may admit them into the residence.<sup>39</sup>

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<sup>37</sup> (1<sup>st</sup> Cir. 2005) 408 F.3d 14, 21-2.

<sup>38</sup> **NOTE:** In *Georgia v. Randolph* (2006) 547 U.S. \_\_\_ the Court indicated that its ruling would apply “[u]nless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades” Elsewhere, the Court said, “[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant’s invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, ‘stay out.’ Without some very good reason, no sensible person would go inside under those conditions.”

<sup>39</sup> See *People v. Ledesma* (2006) 39 Cal.4th 641, 705 “[T]he police may assume, without further inquiry, that a person who answers the door in response to their knock has the authority to let them enter.”]; *People v.*



**COMMON AREAS:** In most cases, the roommate will have authority over the common areas in the residence, such as the living room, kitchen, and garage.<sup>40</sup>

**SUSPECT’S BEDROOM:** A suspect’s roommate will not have common authority over a bedroom used solely by the suspect.<sup>41</sup> As the court observed in *U.S. v. Duran*, “Two friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms, without explicitly making this expectation clear to one another.”<sup>42</sup>

For example, in *Beach v. Superior Court*<sup>43</sup> two brothers who were suspected of possessing marijuana lived in a house with their sister, Mrs. Nichols. So officers went there and obtained her consent to search her brothers’ bedroom. The search netted a large quantity of drugs, but the court suppressed them on grounds the officers should have known that Mrs. Nichols did not have common authority over the bedroom. Said the court, “Nothing Mrs. Nichols said led the police to believe she shared the bedroom in common with her brothers, nor had she led the officers to think she had authority to allow a search of her brothers’ room and personal effects.”

**SEARCHING CONTAINERS:** If a roommate consents to a search of a room over which he has common authority, officers may ordinarily assume that he also has common authority over all the containers in the room, unless there was reason to believe otherwise.<sup>44</sup> For example, it would be unreasonable to believe that a roommate could consent to a search of the suspect’s clothing.<sup>45</sup>

**IF THE SUSPECT OBJECTS:** See “Domestic partners,” above.

*Frye* (1998) 18 Cal.4<sup>th</sup> 894, 990; *People v. Engel* (1980) 105 Cal.App.3d 489, 499. ALSO SEE *People v. Santiago* (1997) 55 Cal.App.4<sup>th</sup> 1540, 1544 [person who authorized officers to enter the premises had authority to do so because her duties “involved more than occasional babysitting; she was in charge of the household approximately 40 hours per week, albeit as a servant.”].

<sup>40</sup> See *People v. Reed* (1967) 252 Cal.App.2d 994, 995-6 [consenting co-occupant had authority to permit a search under a sofa]; *People v. McClelland* (1982) 136 Cal.App.3d 503, 507 [renter of apartment could consent to a search of a closet in a common area in which a temporary occupant kept his clothing]; *U.S. v. Ruiz* (9<sup>th</sup> Cir. 2005) 428 F.3d 877, 881 [officers reasonably believed the consenting person had common authority over a container in a common area]; *U.S. v. Rodriguez-Preciado* (9<sup>th</sup> Cir. 2005) 399 F.3d 1118, 1126 [officers reasonably believed that the only person in a motel room could consent to a search of it]; *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1067 [renter of apartment could consent to a search of a bedroom in which the defendant was temporarily present]; *U.S. v. Kimoana* (10<sup>th</sup> Cir. 2004) 383 F.3d 1215, 1223 [man who had a key to a motel room and who was staying there, could consent to an entry even though he was not registered]; *People v. Linke* (1968) 265 Cal.App.2d 297, 314-5.

<sup>41</sup> See *U.S. v. Davis* (9<sup>th</sup> Cir. 2003) 332 F.3d 1163, 1169 [roommate lacked common authority over suspect’s separate bedroom]; *U.S. v. Jimenez* (1<sup>st</sup> Cir. 2005) 419 F.3d 34, 40 [Rodriguez did not have the common authority over Jimenez’s bedroom” which was “his space”; the door was locked and Rodriguez did not have a key.”].

<sup>42</sup> (7<sup>th</sup> Cir. 1992) 957 F.2d 499, 504-5.

<sup>43</sup> (1970) 11 Cal.App.3d 1032.

<sup>44</sup> See *People v. Catlin* (2001) 26 Cal.4<sup>th</sup> 81, 163 [“Emery and defendant had common authority over the entire garage, including the cabinet.”]; *People v. Schmeck* (2005) 37 Cal.4<sup>th</sup> 240, 281 [co-occupant consented to a search of three bags containing clothing that defendant had left there, knowing that the consenting person also stored clothing in the bags].

<sup>45</sup> See *Beach v. Superior Court* (1970) 11 Cal.App.3d 1032, 1035-6 [officers could not reasonably believe that the defendants’ sister had common authority over his room and personal effects]; *People v. Cruz* (1964) 61 Cal.2d 861, 867 [consenting roommate could not authorize a search of defendant’s suitcase]; *People v. Stage* (1970) 7 Cal.App.3d 681, 684 [consenting occupant of a vehicle could not authorize a search of a jacket belonging to another]; *U.S. v. Davis* (9<sup>th</sup> Cir. 2003) 332 F.3d 1163, 1169, fn.4 [“[N]othing in the record her indicates that [the consenting roommate] had mutual use of and joint access to or control over Davis’ bag, the bed under which it was stored, or even the bedroom in which it was discovered.”].

## CONSENT BY PARENTS

If the suspect lives with his parents, either parent may authorize a search of his bedroom and property unless he has exclusive control over it. While there is nothing under the exclusive control of a young child, that may change when he reaches adulthood.

**PROPERTY OF MINORS:** If the child is a minor, the parents' authority to consent is usually unlimited because parents seldom relinquish total access or control of their children's rooms and things. As the court observed in *Vandenberg v. Superior Court*:

[A] father has the responsibility and authority for the discipline, training and control of his children. In the exercise of his parental authority, a father has full access to the room set aside for his son for purposes of fulfilling his right and duty to control his son's social behavior and to obtain obedience.<sup>46</sup>

For these reasons, officers may search a minor's property based on the consent of a parent,<sup>47</sup> even if he objects.<sup>48</sup>

**PROPERTY OF ADULTS:** If the suspect is an adult who lives at his parents' home, the parents' common authority is less clear because these types of living arrangements will differ. For this reason, officers who have obtained the parents' consent may need to ask some questions before they begin.<sup>49</sup>

For example, if the parties' relationship is tantamount to that of a landlord-tenant, the suspect might have a right to exclusive access and control over his room. As the D.C. Circuit observed, "A landlord-tenant type of arrangement between a parent and an older child might indicate that the child has been given greater autonomy in the house, that his room is his private enclave, a place no one else may enter without his permission."<sup>50</sup>

Still, in most cases the parents ought to be able to permit officers to enter the suspect's room and, without searching, seize any evidence in plain view. This is because parents will almost always retain some control over the rooms in their home.<sup>51</sup> Taking note of this, the Court of Appeal said:

Parents with whom a son is living, on premises owned by them, do not ipso facto relinquish exclusive control over that portion thereof used by the son. To the contrary, the mere fact the son is permitted to use a particular bedroom, as such, does not confer upon him exclusive control thereof.<sup>52</sup>

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<sup>46</sup> (1970) 8 Cal.App.3d 1048, 1055.

<sup>47</sup> See *In re Robert H.* (1978) 78 Cal.App.3d 894, 898 ["Where the police search a minor's home, the courts uphold parental consent on the premise of either the parents' right to control over the minor, or their exercise of control over the premises."]: *People v. Daniels* (1971) 16 Cal.App.3d 36, 42; *People v. Egan* (1967) 250 Cal.App.2d 433, 436; *U.S. v. Whitfield* (D.C. Cir. 1991) 939 F.2d 1071, 1075 ["When a minor child's room is involved, agents might reasonably assume that the child's mother, in the performance of parental duties, would not only be able to enter her child's bedroom but also would regularly do so."].

<sup>48</sup> See *Georgia v. Randolph* (2006) 547 U.S. 103, \_\_\_ ["Unless the people living together fall within some hierarchy, like a household of *parent and child* . . . there is not societal understanding of superior and inferior . . ." Emphasis added.].

<sup>49</sup> See *U.S. v. Whitfield* (D.C. Cir. 1991) 939 F.2d 1071, 1072 ["The [government's] burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry."].

<sup>50</sup> *U.S. v. Whitfield* (D.C. Cir. 1991) 939 F.2d 1071, 1075.

<sup>51</sup> See *People v. Oldham* (2000) 81 Cal.App.4th 1, 10 ["[T]here was nothing to show Oldham had exclusive control over the bedroom he used or its contents."]; *U.S. v. Block* (4th Cir. 1978) 590 F.2d 535, 541 ["[Block's] mother had the normal free access that heads of household commonly exercise in respect of the rooms of family member occupants. She therefore clearly had authority to permit inspection of this room."].

<sup>52</sup> *People v. Daniels* (1971) 16 Cal.App.3d 36, 44.

For example, in *U.S. v. Lewis* the court ruled that the suspect's mother could permit officers to enter her adult son's unlocked bedroom where they saw a bulletproof vest in plain view. The court pointed out that the suspect's mother "had permission to access his room, and had actually entered it a number of times to clean it."<sup>53</sup>

Parents may also have common authority over drawers and other storage spaces unless they were locked by the suspect or otherwise inaccessible to the parents. For example, in *People v. Daniels*<sup>54</sup> the defendant, who lived with his mother, was suspected of planting a bomb that severely injured his estranged wife. Officers went to the house and obtained his mother's consent to search his bedroom, where they found bomb-making paraphernalia on top of the dresser, in the dresser drawers, and under the mattress. In ruling that the mother had common authority over these places, the court pointed out that the defendant "did not have exclusive possession or control over the bedroom which he was permitted to use," and that his mother "had the right to enter and search the bedroom at will."

Parents would not, however, have common authority over containers to which they did not have a right to joint access or control. Thus, while the court in *Daniels* upheld the search of the dresser drawers, it ruled that the officers' search of a suitcase belonging to Daniels was unlawful because his mother lacked common authority over it.

Similarly, in *People v. Egan*<sup>55</sup> officers were investigating the death of a woman from a drug overdose. Having reason to believe that Egan was involved, they went to the home of his stepfather, with whom he lived. After they explained the situation, Egan's stepfather consented to a search of, among other things, a small "kit" that belonged to Egan. Inside the kit, they found a handgun. Egan was charged with being a felon in possession of a weapon, but the court ruled the search was unlawful because the officers had no reason to believe that Egan's stepfather had common authority over the kit. Said the court:

[The stepfather] claimed no right, title, or interest in the kit bag. He made it abundantly clear that it was not his, and that Egan had left it there. The officers were under no misapprehension as to the limit of [the stepfather's] authority to consent.

**IF AN ADULT SUSPECT OBJECTS:** It appears that officers would not be permitted to search a place or thing based on the consenting parent's common authority if son or daughter was present and objected.<sup>56</sup>

#### **CONSENT BY MINOR CHILDREN**

Minors can never authorize a search of the family home or its contents. As the Supreme Court observed in *Georgia v. Randolph*, "[N]o one would reasonably expect [an 8-year old] to be in a position to authorize anyone to rummage through his parents' bedroom."<sup>57</sup>

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<sup>53</sup> (2<sup>nd</sup> Cir. 2004) 386 F.3d 475, 481.

<sup>54</sup> (1971) 16 Cal.App.3d 36.

<sup>55</sup> (1967) 250 Cal.App.2d 433.

<sup>56</sup> See *Georgia v. Randolph* (2006) 547 U.S. 103, \_\_ [Court indicated that its ruling would not apply if the consenting party had "superior" authority over the places and things; viz. "Unless the people living together fall within some hierarchy, like a household of parent and child . . . there is no societal understanding of superior and inferior"].

<sup>57</sup> (2006) 547 U.S. 103, \_\_.

For example, in *People v. Jacobs*<sup>58</sup> officers went to Jacobs' house to arrest him for burglary. His 11-year old stepdaughter opened the door and gave them permission to conduct a "quick tour" of the house. While touring, they seized a TV set that had been taken in a burglary. But the court ruled the search was unlawful because it was unreasonable for the officers to believe that an 11-year old could authorize it. Said the court, "[The evidence] does not support a finding that [the daughter] had the actual or apparent authority to permit even a superficial survey of the rooms of the house."

A minor may, however, have sufficient authority to permit officers to enter the home (but not roam around) if he appeared to have temporary control of the premises.<sup>59</sup> For example, in *People v. Hoxter*<sup>60</sup> officers in Laguna Beach went to Hoxter's home to arrest him on a bench warrant. When they knocked, they heard Hoxter's 16-year old daughter instructing her younger sister to open the door. As she did so, the 16-year old said told the officers to "come on in." They did, and while they were in the living room they arrested Hoxter on the warrant and seized drug paraphernalia in plain view.

On appeal, Hoxter argued that the evidence should have been suppressed because it was unreasonable for the officers to believe that his daughter had the authority to admit them. The court disagreed, pointing out that "many California 16-year olds are mature enough to be left in charge of their homes."

#### **CONSENT BY PROPERTY MANAGERS**

Property managers seldom have common authority over leased premises, which means they cannot usually consent to a police entry or search.<sup>61</sup> As used here, the term

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<sup>58</sup> (1987) 43 Cal.3d 472. ALSO SEE *Raymond v. Superior Court* (1971) 19 Cal.App.3d 321, 326 ["Here the policeman could not in good faith believe that the boy had authority to fetch a sample of his father's [marijuana]."].

<sup>59</sup> See *People v. Jacobs* (1987) 43 Cal.3d 472, 483 ["As a child advances in age she acquires greater discretion to admit visitors on her own authority. In some circumstances, a teenager may possess sufficient authority to allow the police to enter and look about common areas."]; *Fare v. Reginald B.* (1977) 71 Cal.App.3d 398, 403 [officer reasonably believed a boy 14-15 years old who answered the door had the authority to permit him to enter]; *U.S. v. Gutierrez-Hermosillo* (10<sup>th</sup> Cir. 1998) 142 F.3d 1225, 1231 [officers reasonably believed that a 14-year old who answered the door of a motel room had the authority to admit them].

<sup>60</sup> (1999) 75 Cal.App.4<sup>th</sup> 406.

<sup>61</sup> See *Stoner v. California* (1964) 376 U.S. 483, 489 ["[T]he police had [no] basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room."]; *Georgia v. Randolph* (2006) 547 U.S. 103, \_\_ ["A person on the scene who identifies himself, say, as a landlord or a hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant."]; *Chapman v. United States* (1961) 365 U.S. 610, 612 ["[T]he landlord and the officers forced open a window to gain entry to the premises . . . to search for distilling equipment."]; *People v. Superior Court (Walker)* (2006) 143 Cal.App.4<sup>th</sup> 1183, 1200 ["But a landlord may not give valid third-party consent to a police search of a house rented to another."]; *People v. Joubert* (1981) 118 Cal.App.3d 637, 648 ["Although a hotel guest should reasonably expect that maids, janitors and repairmen might enter his room in the performance of their duties, he would not reasonably anticipate that the police would enter to search."]; *Krauss v. Superior Court* (1971) 5 Cal.3d 418, 422 ["By registering as a guest petitioner impliedly consented to motel employees entering his room in the performance of their duties. He did not consent, however, impliedly or otherwise to those employees allowing police officers to enter his room to search for contraband."]; *People v. Verbiesen* (1970) 6 Cal.App.3d 938, 942 ["The garage doors were locked and the landlord had no key, indicating that the defendant had the exclusive right to the possession"]; *People v. Superior Court (York)* (1970) 3 Cal.App.3d 648, 657 ["[R]eliance on a landlord's consent to enter and search premises known by the officer to be in the possession of the tenant is not reasonable."]; *People v. Burke* (1962) 208 Cal.App.2d 149, 160 ["The mere fact that a person is a hotel manager does not import an authority to permit the police to enter and search the rooms of her guests."]; *People v. Brown* (1989) 210 Cal.App.3d 849, 855 [man who sublet the back bedroom did not have common authority over it]; *People v.*

“property manager” includes building owners, landlords, apartment managers, real estate agents, motel managers, and hotel desk clerks.

It is true, of course, that property managers almost always have a right to some degree of access and control over the premises. As the United States Supreme Court pointed out in *Stoner v. California*,<sup>62</sup> “[W]hen a person engages a hotel room he undoubtedly gives implied or express permission to such persons as maids, janitors or repairmen to enter his room in the performance of their duties.” But the Court added that it would be a stretch to infer that a hotel guest, by giving such permission, also grants the property manager the authority to allow officers to enter or search his room.

The same holds true for real estate agents. For example, in *People v. Jacquez*<sup>63</sup> an agent was showing a home to some prospective buyers when she saw what she thought was stolen property. She notified the police and permitted an officer to enter to determine whether the item was, in fact, stolen. It was. But the court ruled that, although the real estate agent had some control over the house while the owners were away, it was limited authority—not “common authority.” Said the court:

While policemen are not required to be experts in the law of landlord and tenant, we do not believe an experienced policeman could reasonably believe a multiple listing broker or agent is authorized to permit entry and inspection by anyone known to the agent or broker not to be interested in the purchase of the property.

Another example is found in *People v. Roman*<sup>64</sup> where the owner of a garage suspected that his lessee, Roman, was using it to strip stolen cars. So he phoned the CHP and consented to a search of the premises. On appeal, the court ruled that the evidence discovered during the search should have been suppressed because, even though the owner unlocked the door with a key, there was no showing that he had common authority over the premises. Said the court, “The officer’s assumption that an owner had the right to have law enforcement inspect his property was not reasonable.”

**EXCEPTIONS: ABANDONMENT AND EVICTION:** A property manager may consent to an entry or search if the suspect abandoned the premises or had been evicted.<sup>65</sup> But because

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*Baker* (1970) 12 Cal.App.3d 826, 836 [“The officers could not rely upon the consent of the manager of the bowling alley as authorizing the search of the locker or the handbag.”]; *People v. Escudero* (1979) 23 Cal.3d 800, 807-8 [“[T]he tenant is generally deemed to give implied consent to reasonable entries by the owner or his agents, but only for certain narrowly limited purposes relating to the owner’s interest in the property.”]; *People v. Ingram* (1981) 122 Cal.App.3d 673; *People v. Baker* (1970) 12 Cal.App.3d 826 [manager of bowling alley could not consent to search of a handbag inside a locker]; *U.S. v. Warner* (9<sup>th</sup> Cir. 1988) 843 F.2d 401, 403 [“[A]t best, the landlord had permission to enter the property for the limited purpose of making specified repairs”].

<sup>62</sup> (1964) 376 U.S. 483, 489.

<sup>63</sup> (1985) 163 Cal.App.3d 918. ALSO SEE *People v. De Caro* (1981) 123 Cal.App.3d 454, 466 [person who lists home for sale consents only to “the entry of a real estate agent accompanied by bona fide potential purchasers”].

<sup>64</sup> (1991) 227 Cal.App.3d 674, 680.

<sup>65</sup> See *People v. Bennett* (1998) 17 Cal.4<sup>th</sup> 373, 391, fn.6 [“Ordinarily, a suspect has no expectation of privacy with regard to items left in a motel room after a tenancy has expired, and the police may search such items with the consent of the owner of the motel.”]; *People v. Superior Court (Walker)* (2006) 143 Cal.App.4<sup>th</sup> 1183,

the terms “abandonment” and “eviction” are technical legal terms, officers must not assume that someone who uses them has correctly determined that the premises or property had been abandoned or that eviction proceedings had been completed. Instead, they must inquire and try to determine whether the circumstances seem to support the property manager’s contention.

For example, in *People v. Superior Court (York)*<sup>66</sup> an apartment manager told a Covina police officer that, while “evicting” the Yorks from their apartment, she found some marijuana. Rather than assume that the manager had the authority to admit him into the apartment, the officer first determined that the Yorks had left the premises, and that the manager had already removed the furniture from the furnished apartment. While it turned out the eviction process had not been concluded, the court ruled the search was lawful because the officer had obtained enough information to reasonably believe that the Yorks had been evicted.

Similarly, in *People v. Ingram*<sup>67</sup> the court ruled that an officer reasonably believed that a suspect had abandoned his hotel room—even though it was 90 minutes before checkout—because he had seen that the door to the room was open and that a housekeeper had already begun to clean it for the next guest.

#### **CONSENT BY CAR OWNERS**

The owner of a vehicle, or a person who has the owner’s permission to drive it, may ordinarily permit officers to search it because he has a right to joint access and control. For example, in *People v. Clark*<sup>68</sup> officers in Ukiah who were investigating a murder learned that, on the night of the killing, the suspect had slept in a car belonging to Smith. So they obtained Smith’s consent to search the car “for anything that might help out” in the investigation. During the search, officers found Clark’s clothing, and it was spattered with blood. In ruling that Smith could consent to the search, the California Supreme Court said, “As the owner of the searched car, Smith unquestionably had a possessory interest in it.”

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1200 [“[T]he owners of property may consent to a police search thereof as long as no other persons are legitimately occupying that property.”]; *People v. Superior Court (York)* (1970) 3 Cal.App.3d 648, 657 [“[A] landlord who has evicted his tenant for nonpayment of rent has the authority to consent to an entry by the police into the premises in order to seize contraband discovered by the landlord in the course of the eviction.”]; *People v. Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 80 [“The manager apparently believed the shed had been abandoned and, in reliance upon that belief, placed his own padlock on the door. When Officer Pendleton arrived, the manager took him to the shed, unlocked the door, and let him enter to examine the interior. . . Officer Pendleton could reasonably have believed that he had authority from the manager to enter.”]; *People v. Roman* (1991) 227 Cal.App.3d 674, 680 [“no evidence of eviction or abandonment that would give the landlord the authority to consent to entry”]; *People v. Superior Court (Evans)* (1970) 3 Cal.App.3d 648, 652-7 [officers reasonably believed a lawful eviction of the tenants was underway and the premises were now in the possession of the landlord]; *De Conti v. Superior Court* (1971) 18 Cal.App.3d 907, 910; *People v. Robinson* (1974) 41 Cal.App.3d 658, 666 [landlady handed a jacket containing a gun to an officer saying “she had put defendant’s belongings on the porch because he had not paid her for staying at her home as he had promised.”]; *People v. Remiro* (1979) 89 Cal.App.3d 809, 834 [reasonable belief in abandonment was sufficient]; *People v. Ingram* (1981) 122 Cal.App.3d 673, 678 [“A landlord may consent to a search of premises abandoned by a tenant.”].

<sup>66</sup> (1970) 3 Cal.App.3d 648.

<sup>67</sup> (1981) 122 Cal.App.3d 673.

<sup>68</sup> (1993) 5 Cal.4<sup>th</sup> 950.

Officers may not, however, search a closed container in the vehicle if it apparently belonged to someone other than the consenting person.<sup>69</sup> For example, in *U.S. v. Welch*<sup>70</sup> security officers at the Circus Circus hotel in Las Vegas detained Sharon Welch and David McGee who were suspected of passing counterfeit \$20 bills. McGee consented to a search of his car which contained, among other things, a woman's purse. The officers, who at this point were acting under the direction of local police, searched the purse and found Welch's driver's license and \$500 in counterfeit twenties. But the court ruled that, although McGee could authorize a general search of his car, he could not authorize a search of property that reasonably appeared to belong to Welch. Said the court, "[T]here is simply nothing in the record demonstrating that McGee had use of, let alone joint access to or shared control over, Welch's purse."

### CONSENT BY EMPLOYERS

Most employers have a right to access and control virtually everything in the workplace. So if the usual rules were applied, employers could consent to searches of places and things that were used exclusively by employee-suspects, such as their desks, file cabinets, lockers, and computers.

But the courts have determined that, despite the employers' common authority, employees may reasonably expect privacy as to places and things they use exclusively. As the Ninth Circuit pointed out, "[An employee] may have an objectively reasonable expectation of privacy in private work areas given over to [his] exclusive use."<sup>71</sup>

Consequently, the courts have ruled that employers may consent to police searches of property that is used exclusively by employees only if both of the following circumstances existed:

- (1) **Right to joint access or control:** The employer must have had a right to joint access or control over the place or thing.
- (2) **Employer exercised the right:** The employer must have openly exercised that right on a regular basis, or at least so frequently that the employee-suspect could not have reasonably expected privacy in the place or thing that was searched.<sup>72</sup>

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<sup>69</sup> See *U.S. v. Jenkins* (6<sup>th</sup> Cir. 1996) 92 F.3d 430, 438 ["The generic relationship between the owner of a rig and its driver is characterized by a considerable grant of authority to the driver. The driver had complete control of the tractor part of the rig, and almost always has keys to the trailer. The driver is typically allowed to enter the trailer on the occurrence of any of a certain number of conditions . . ."]; *U.S. v. Booker* (8<sup>th</sup> Cir. 1999) 186 F.3d 1004, 1006 ["The case would be otherwise if [the consenting person] had given permission to search [the defendant's] luggage"].

<sup>70</sup> (9<sup>th</sup> Cir. 1993) 4 F.3d 761.

<sup>71</sup> *U.S. v. Gonzalez* (9<sup>th</sup> Cir. 2003) 328 F.3d 543, 548. ALSO SEE *O'Connor v. Ortega* (1987) 480 U.S. 709, 718 [state hospital physician had standing to challenge a search by hospital officials of the desk and files in his office]; *Mancusi v. DeForte* (1968) 392 U.S. 364, 368-9 [union official could challenge search of union office he shared with others].

<sup>72</sup> See *O'Connor v. Ortega* (1987) 480 U.S. 709, 717 ["Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation."]; *Vega-Rodriguez v. Puerto Rico Telephone Co.* (1<sup>st</sup> Cir. 1997) 110 F.3d 174, 180 ["PRTC notified its work force in advance that video cameras would be installed and disclosed the cameras' field of vision. Hence, the affected workers were on clear notice from the outset that any movements they might make and any objects they might display within the work area would be exposed to the employer's sight."]; *TBG Insurance Services Corp. v. Superior Court* (2002) 96 Cal.App.4<sup>th</sup> 443, 452 ["TBG's advance notice to Zieminski (the company's policy statement) gave Zieminski the opportunity to consent to or reject the very thing that he now complains about, and that notice, combined with his written consent to the policy, defeats his claim that he had a reasonable expectation of

For example, in *United States v. Taketa*<sup>73</sup> a DEA administrator authorized agents to search the office of an agent who was suspected of illegal wiretapping. On appeal, the DEA contended that the agent could not have reasonably expected privacy in his office because a DEA regulation required employees “to maintain clean desks,” which meant that the agent’s office “was subject to inspection at any time.” But the Ninth Circuit rejected the argument because the DEA did not enforce the regulation. Said the court, “[S]uch a regulation, unenforced by a practice of inspections, cannot reasonably serve as an after-the-fact rationalization of the DEA’s entry.”

Similarly, in *Quon v. Arch Wireless*<sup>74</sup> it was argued that administrators of the Ontario Police Department could consent to searches of department pagers for text messages because of a departmental policy by which it “reserved the right to audit the contents of the text messages sent and received by the pager.” But the court rejected the argument because the department had made a “conscious decision not to enforce this policy.”

In contrast, in *U.S. v. Ziegler*<sup>75</sup> the defendant’s employer permitted FBI agents to search Ziegler’s office computer for files containing child pornography and for cache information that would show whether he had utilized search engines to find child pornography. The court ruled that Ziegler’s employer could consent to these searches because, (1) the employer routinely monitored the office computers, and the IT department reviewed the log created by the firewall “on a regular basis, sometimes daily if Internet traffic was high enough to warrant it”; and (2) the company’s orientation process included a warning that office computers were monitored. POV

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privacy.”]; *U.S. v. Gonzalez* (9<sup>th</sup> Cir. 2002) 300 F.3d 1048 [random search of backpack belonging to an employee of an Air Force exchange as he was leaving work]; *U.S. v. Bunker* (9<sup>th</sup> Cir. 1975) 521 F.2d 1217; *Biby v. Board of Regents* (8<sup>th</sup> Cir. 2005) 419 F.3d 845, 850 [search of university employee’s computer]; *U.S. v. Simons* (4<sup>th</sup> Cir. 2000) 206 F.3d 392, 395, 398; *U.S. v. Thorn* (8<sup>th</sup> Cir. 2004) 375 F.3d 679, 683; *U.S. v. Angevine* (10<sup>th</sup> Cir. 2002) 281 F.3d 1130, 1133-5; *Muick v. Glenayre Electronics* (7<sup>th</sup> Cir. 2002) 280 F.3d 741, 743.

<sup>73</sup> (9<sup>th</sup> Cir. 1991) 923 F.2d 665.

<sup>74</sup> (C.D. Cal. 2006) 445 F.Supp.2d 1116.

<sup>75</sup> (9<sup>th</sup> Cir. 2007) 474 F.3d 1184.