

“Consent Once Removed”

“[T]here is nothing inherently unlawful in the use of police deceit for the purpose of suppressing crime and apprehending criminals.”¹

Undercover officers routinely obtain consent from suspects to enter their homes to buy drugs or to give them an opportunity to commit some other crime. When probable cause to arrest develops, the officers will usually leave the premises and seek a warrant or otherwise continue their investigation. Sometimes, however, they want to make an immediate arrest. If so, there is a legal theory that may make this possible. It is known by the moniker “consent once removed.”

This catchy (but misleading) term refers to a legal theory that allows officers stationed outside to enter the premises without a warrant for the purpose of arresting the suspect. While it is usually best to seek a warrant,² in some situations this can be a useful alternative.

The legal issue

Under the *Ramey-Payton* rule, officers may not forcibly enter a home to arrest an occupant unless they have a warrant or there were exigent circumstances.³ *Ramey-Payton* does not, however, prohibit entries by undercover officers for two reasons.

First, the officers’ objective is not to make an arrest. Even though an arrest might or will result, the immediate objective is to give the suspect an opportunity to commit a crime or otherwise provide officers with probable cause. Second, the entry is consensual. Although the consent was based on deception, undercover officers and informants have no duty to reveal their true identity and purpose.⁴ Furthermore, they may freely lie about who they are and what they want. “It is well-settled,” said the Ninth Circuit, “that undercover agents may misrepresent their identity to obtain consent to entry.”⁴

So, the entry by the undercover officer does not violate *Ramey-Payton*. But what about the entry by the arresting officers? At first glance, it would appear they would need

¹ *People v. Metzger* (1971) 22 Cal.App.3d 338,341. ALSO SEE *Sorrells v. United States* (1932) 287 U.S. 435, 441-2 [“Artifice and stratagem may be employed to catch those engaged in criminal enterprises”].

² See *U.S. v. Diaz* (7th Cir. 1987) 814 F.2d 454, 457 [“[W]e are at a loss to understand why the police did not obtain at least a search warrant in this case.”].

³ *Payton v. New York* (1980) 445 U.S. 573; *People v. Ramey* (1976) 16 Cal.3d 263.

⁴ *U.S. v. Bramble* (9th Cir. 1997) 103 F.3d 1475, 1478. ALSO SEE *Lewis v. United States* (1966) 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.”]; *Lopez v. United States* (1963) 373 U.S. 427, 438 [“[The IRS agent] was not guilty of an unlawful invasion of petitioner’s office simply because his apparent willingness to accept a bribe was not real.”]; *Hoffa v. United States* (1966) 385 U.S. 293.

a warrant because, unlike the undercover officer, their objective is to arrest an occupant and they don't have consent to enter.

It has been argued that the undercover officer can take the consent he was given by the suspect and pass it along to the arresting officers; and that he automatically does so when he notifies them that probable cause now exists (thus, the term "consent once removed"). But this is a stretch. After all, when one person permits another person to enter his home, he does not impliedly grant his guest the authority to admit his various associates. As noted in *U.S. v. Yoon*, "[S]imply because the government informant received consent to enter the suspect's home does not mean that the government informant himself thereby has authority to consent to the entry of the agents with whom he is working."⁵

Consequently, for the arresting officers to enter without a warrant, they need some other legal theory.

Entry to assist in the arrest

A suspect who invites someone to enter his home to commit or plot a crime is gambling that the person is not an officer or an informant. Under the "consent once removed" theory, there are consequences if he loses the bet. Specifically, he loses his right to challenge a warrantless entry by other officers if their purpose was to assist the undercover officer in making the arrest. As Senior Judge Cornelia Kennedy explained in her concurring opinion in *Yoon*:

["The 'consent once removed' doctrine] is based upon the theory that, because an undercover agent or informant who establishes probable cause to arrest the suspect may in fact arrest him then and there, he should be entitled to call in the agents with whom he is working to assist in the arrest because, once the suspect invites the agent or informant into his house and displays his illegal activity to him, the suspect's Fourth Amendment expectation of privacy has been fatally compromised."⁶

What circumstances must exist for the "consent once removed" rule to apply? The courts seem to require the following:

- (1) **CONSENSUAL ENTRY:** The undercover officer entered at the express invitation of the suspect.
- (2) **PROBABLE CAUSE:** After entering, the undercover officer developed probable cause to arrest the suspect.
- (3) **NOTIFICATION:** The undercover officer signaled or otherwise notified the arresting officers that probable cause now exists.

⁵ (6th Cir. 2005) 398 F.3d 802, 809 [conc. opn. of Kennedy, J.]. ALSO SEE *U.S. v. Ogbuh* (6th Cir. 1993) 982 F.2d 1000, 1005 [[court describes the consent theory as "pure legal fiction."]. **NOTE:** Some courts have expanded the rule to cover situations in which the notification is made by a police informant. See *U.S. v. Paul* (7th Cir. 1986) 808 F.2d 645; *U.S. v. Yoon* (6th Cir. 2005) 398 F.3d 802, 807-8; *U.S. v. Jachimko* (7th Cir. 1994) 19 F.3d 296, 299 ["It does not matter that Hendrickson was a confidential informant and not a police officer"].

⁶ (6th Cir. 2005) 398 F.3d 802, 809-10 [conc. opn. of Kennedy, J.]. ALSO SEE *U.S. v. Rubio* (9th Cir. 1983) 727 F.2d 786, 797 ["Once consent has been obtained from one with authority to give it, any expectation of privacy has been lost. We seriously doubt that the entry of additional officers would further diminish the consenter's expectation of privacy"].

- (4) **DILIGENCE:** The notification was made immediately after probable cause developed, or at least without unnecessary delay.⁷
- (5) **ENTRY TO ARREST:** The officers stationed outside entered for the purpose of arresting the suspect or assisting in the arrest. (Thus, for example, they could not enter if the arrest occurred on the front porch or anywhere else outside the premises.⁹)
- (6) **ENTRY WHILE UNDERCOVER IS INSIDE:** The arresting officers entered while the undercover officer was on the premises, or at least so quickly after he left that there existed an implied right to reenter.⁸ As the Court of Special Appeals of Maryland observed, “[I]n nearly all the cases discussing the doctrine of ‘consent once removed,’ the confidential informant or undercover agent either remained on the premises while the officers entered or, if not, they maintained an express or implied right of reentry.”⁹

A good example of an entry based on “consent once removed” is found in *U.S. v. Pollard*.¹⁰ In *Pollard*, a police informant and an undercover officer went to Howard’s home to buy cocaine from Pollard and Rodriguez. A transmitter was hidden on the informant and six backup officers waited outside. When the cocaine was brought out, the informant gave a “takedown” signal to the backup officers who entered without knocking or announcing. Pollard and Rodriguez were arrested.

At the outset, the court noted there were no exigent circumstances, pointing out, “No threats were made to [the undercover officer] or the informant. Before the officers entered the house, there were no indications that Pollard or Rodriguez was planning to destroy the drugs.” Nevertheless, the court ruled the officers’ entry was lawful under the “consent once removed” theory because:

[T]he officer obtained probable cause for an arrest when Rodriguez displayed the cocaine on the bed; and the informant accompanying the officer immediately summoned the other officers for assistance. Moreover, the backup officers were acting within constitutional limits when they entered to assist him since no further invasion of privacy was involved once the undercover officer made the initial entry.

It is important to understand that the “consent once removed” rule does not apply merely because an undercover officer or informant happens to be inside. For example, in

⁷ See *U.S. v. Diaz* (7th Cir. 1987) 814 F.2d 454, 459 [“We emphasize that we have applied this doctrine of ‘consent once removed’ only where the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officer.”].

⁸ See *U.S. v. Akinsanya* (7th Cir. 1995) 53 F.3d 852, 856 [“That consent was not withdrawn simply because [the informant] stepped out of the apartment moments before, or at the same time, the agents entered.”]; *People v. Cespedes* (1987) 191 Cal.App.3d 768, 774 [arresting officers entered within seconds after the undercover officer left]; *People v. Justin* (1983) 140 Cal.App.3d 729, 738; *U.S. v. Diaz* (7th Cir. 1987) 814 F.2d 454, 459 [“Agent Mueller was in the hotel room with Diaz’s consent, and the fact that Mueller momentarily stepped out to obtain help from other officers in making the arrest did not violate this consent.”]; *Williams v. Texas* (1996 En Banc) 937 S.W. 2d 23, 27 [arrest team entered within 30 seconds after undercover left]. ALSO SEE *People v. Toubus* (1981) 114 Cal.App.3d 378, 383.

⁹ *Smith v. Maryland* (2004) 857 A.2d 1224, 1231.

¹⁰ (6th Cir. 2000) 215 F.3d 643.

*U.S. v. Ogbuh*¹¹ DEA agents at Detroit Metropolitan Airport arrested a heroin courier who was about to deliver 52 grams to two men who were staying at a nearby hotel. Having agreed to cooperate with the agents, the courier went to the hotel room, knocked, and was admitted. About one minute later, the agents forced their way in, arrested the two buyers, and discovered heroin during a search incident to the arrest. In ruling the agents' entry did not fall within the "consent once removed" rule, the court noted that the informant "did not summon the agents; they entered forcibly of their own volition less than a minute after sending [the courier] into the room."

As noted, the arresting officers must have entered while the undercover officer was on the premises or so soon after he left that there existed an implied right of reentry. This issue was addressed in *People v. Cespedes*¹² where an undercover narcotics officer went to the defendant's home in Berkeley to buy cocaine. When the sale was completed, the officer gave the "bingo" signal over a hidden transmitter, then "left the building." The arresting officers entered "immediately" thereafter and arrested the defendant.

On appeal, Cespedes argued the arrest was unlawful because, once the undercover officer left the building, he did not have a right to reenter. The court responded, "The Fourth Amendment is not violated by the facts here because defendant Cespedes consented to the initial entry, and the reentry and arrest were simultaneous not only to this fact but to the crime committed in the officer's presence."¹³

Knock-notice

Officers must ordinarily comply with the knock-notice rules before forcibly entering a house for the purpose of making an arrest.¹⁴ In "consent once removed" cases, however, there are usually two circumstances that will excuse compliance.

First, officers are not required to knock and announce if there were exigent circumstances that justified an immediate, unannounced entry.¹⁵ And in situations where an undercover officer or police agent is inside when backup officers are attempting to enter, an exigent circumstance would seem to exist automatically. This is because any reasonably intelligent criminal who had just committed a crime in the presence of a casual and disreputable acquaintance, and who soon thereafter heard police officers at the door demanding entry, would probably figure he had been "set up."¹⁶ Thus, a quick, unannounced entry by the arresting officers would be reasonably necessary to minimize the threat.

Second, compliance may be excused because there is simply no need for it when an undercover officer is already on the premises. For example, in *People v. Toubus*¹⁷ the defendant admitted an undercover officer and an informant into his apartment in Larkspur to sell them some cocaine. When the officer tested it and confirmed it was cocaine, he signaled the backup officers who entered the apartment through an open

¹¹ (6th Cir. 1993) 982 F.2d 1000.

¹² (1987) 191 Cal.App.3d 768.

¹³ **NOTE:** The court said the arresting officers entered at about the same time as other officers were arresting a suspect who had fled out the back door. Thus, it appears the court's use of the word "simultaneously" should not be taken to mean the arresting officers must be entering simultaneously as the undercover is exiting.

¹⁴ See Penal Code § 844; *Wilson v. Arkansas* (1995) 514 U.S. 927, 934.

¹⁵ See *United States v. Banks* (2003) 540 U.S. 31, __ ["[I]f circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in."].

¹⁶ See *U.S. v. Pollard* (6th Cir. 2000) 215 F.3d 643, 646.

¹⁷ (1981) 114 Cal.App.3d 378, 384.

door. Toubus argued their entry violated the knock-notice statute but the Court of Appeal disagreed:

Here, there was no occasion to protect the privacy of petitioner in his home since a peace officer who already possessed probable cause to arrest was already in that home; there were no innocent persons on the premises who needed protecting; it was unlikely the entry without notice would provoke a violent confrontation; and with two officers already on the premises it is highly unlikely that the police would be in any danger from actions taken by a fearful defendant.

Withdrawal of consent

It is settled that a person who gives officers consent to enter his home may withdraw that consent. As noted, however, the “consent once removed” theory is not really about consent— it’s about reduced privacy expectations when a suspect permits an undercover officer to enter his home for the purpose of committing a crime. Still, because the word “consent” appears in the title, defendants sometimes argue that they can withdraw their consent when they realize they have been duped. To date, the courts have rejected these arguments when the attempted withdrawal occurred after the undercover officer or informant developed probable cause.

For example, in *U.S. v. Jachimko*¹⁸ the defendant admitted a police informant into his home to buy marijuana. When the informant activated the “alert button” (which meant he had seen more than 100 marijuana plants), the backup officers went up to the house and knocked on the door. Jachimko opened the door but, when the agents identified themselves, he attempted to close it. They then forced their way in.

On appeal, Jachimko argued that his attempt to close the door constituted a withdrawal of the consent he had given to the informant and, thus, to the officers. The court acknowledged that a person may withdraw consent, but pointed out, “[W]here a suspect does not withdraw his valid consent to search for illegal substances *before* they are discovered, the consent remains valid and the substances are admissible as evidence.”

What the arresting officers may do

Because the sole purpose of the officers’ entry is to arrest the suspect, they may do only those things that are reasonably necessary to accomplish this.¹⁹ Thus, in most cases, they may do only the following:

LOCATE ARRESTEE: If they do not see the suspect as they enter, they may look for him in places in which they reasonably might expect to find him.

SEARCH INCIDENT TO ARREST: After arresting the suspect, they may, as an incident to the arrest, search him and the area within his immediate control.²⁰

PROTECTIVE SWEEP: Officers may conduct a protective sweep of the premises if they reasonably believe there is a person on the premises (other than the arrestee) who poses a threat to them.²¹

¹⁸ (7th Cir. 1994) 19 F.3d 296.

¹⁹ See *Mincey v. Arizona* (1978) 437 U.S. 385, 393 [“[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation.”].

²⁰ See *Chimel v. California* (1969) 395 U.S. 752, 763; *United States v. Chadwick* (1977) 433 U.S. 1, 14-5.

²¹ See *Maryland v. Buie* (1990) 494 U.S. 325, 333.

PLAIN VIEW SEIZURE: Officers may seize any evidence they see in plain view if they have probable cause to believe it is, in fact, evidence of a crime.²²

SECURE PREMISES: If officers decide to seek a search warrant, they may secure the premises pending issuance of the warrant.²³

It is especially important to understand that the officers may not conduct a warrantless search for evidence, nor may they come and go as they please. As the Seventh Circuit noted in *U.S. v. Diaz*, “We do not intend to suggest by our analysis that one consensual entry means that law enforcement agents may thereafter enter and exit a home at will.”²⁴ POV

²² See *Arizona v. Hicks* (1987) 480 U.S. 321.

²³ See *Illinois v. McArthur* (2001) 531 U.S. 326, 332; *Mincey v. Arizona* (1978) 437 U.S. 385, 394 [“Indeed, the police guard at the apartment minimized [the possibility that evidence would be lost, destroyed, or removed].”].

²⁴ (7th Cir. 1987) 814 F.2d 454. ALSO SEE *U.S. v. Bramble* (9th Cir. 1996) 103 F.3d 1475, 1478.